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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2002



ENROLLED

House Bill No. 4581

(By Delegates Michael, Doyle, Frederick,
Warner and Stalnaker)



Passed March 7, 2002

In Effect from Passage

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E N R O L L E D

H. B. 4581

(BY DELEGATES MICHAEL, DOYLE, FREDERICK,
WARNER AND STALNAKER)

[Passed March 7, 2002; in effect from passage.]

AN ACT to repeal section five-c, article twelve, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections two and five, article twelve of said chapter; and to amend and reenact sections six and ten, article twelve-b, of said chapter, all relating to repealing the section relating to coverage of obstetricians providing Medicaid coverage, redefining certain terms, including emergency services agencies as an entity eligible for board of risk and insurance management coverage, removing the payment of money into the guarantee fund by the medical liability program, allowing general liability coverage to be provided through the medical liability program, allowing audits to be done according to generally accepted accounting principles and allowing the medical liability program to capitalize its program through a loan from the liability insurance trust fund.

Be it enacted by the Legislature of West Virginia:

That section five-c, article twelve, chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; and that sections two and five, article twelve of said chapter be amended and reenacted; and that sections six and ten, article twelve-b, of said chapter, be amended and reenacted, all to read as follows:

ARTICLE 12. STATE INSURANCE.

§29-12-2. Definitions.

1 As used in this article, unless the context otherwise clearly
2 requires:

3 (a) "Board" means the state board of risk and insurance
4 management.

5 (b) "Company" means and includes corporations, associa-
6 tions, partnerships and individuals.

7 (c) "Insurance" means all forms of insurance and bonding
8 services available for protection and indemnification of the
9 state and its officials, employees, properties, activities and
10 responsibilities against loss or damage or liability, including
11 fire, marine, casualty, and surety insurance.

12 (d) "Insurance company" means all insurers or insurance
13 carriers, including, but not limited to, stock insurance compa-
14 nies, mutual insurance companies, reciprocal and interinsurance
15 exchanges, and all other types of insurers and insurance
16 carriers, including life, accident, health, fidelity, indemnity,
17 casualty, hospitalization and other types and kinds of insurance
18 companies, organizations and associations, but excepting and
19 excluding workers' compensation coverage.

20 (e) "State property activities" and "state responsibilities"
21 means and includes all operations, boards, commission, works,

22 projects and functions of the state, its properties, officials,
23 agents and employees which, within the scope and in the course
24 of governmental employment, may be subject to liability, loss,
25 damage, risks and hazards recognized to be and normally
26 included within insurance and bond coverages.

27 (f) "State property" means all property belonging to the
28 state of West Virginia and any boards or commissions thereof
29 wherever situated and which is the subject of risk or reasonably
30 considered to be subject to loss or damage or liability by any
31 single occurrence of any event insured against.

§29-12-5. Powers and duties of board.

1 (a) The board shall have general supervision and control
2 over the insurance of all state property, activities and responsi-
3 bilities, including the acquisition and cancellation thereof;
4 determination of amount and kind of coverage, including, but
5 not limited to, deductible forms of insurance coverage, inspec-
6 tions or examinations relating thereto, reinsurance, and any and
7 all matters, factors and considerations entering into negotiations
8 for advantageous rates on and coverage of all such state
9 property, activities and responsibilities. The board shall have
10 the authority to employ an executive director for an annual
11 salary of seventy thousand dollars and such other employees,
12 including legal counsel, as may be necessary to carry out its
13 duties. The legal counsel may represent the board before any
14 judicial or administrative tribunal and perform such other duties
15 as may be requested by the board. Any policy of insurance
16 purchased or contracted for by the board shall provide that the
17 insurer shall be barred and estopped from relying upon the
18 constitutional immunity of the state of West Virginia against
19 claims or suits: *Provided*, That nothing herein shall bar the
20 insurer of political subdivisions from relying upon any statutory
21 immunity granted such political subdivisions against claims or
22 suits. The board may enter into any contracts necessary to the

23 execution of the powers granted to it by this article. It shall
24 endeavor to secure the maximum of protection against loss,
25 damage or liability to state property and on account of state
26 activities and responsibilities by proper and adequate insurance
27 coverage through the introduction and employment of sound
28 and accepted methods of protection and principles of insurance.
29 It is empowered and directed to make a complete survey of all
30 presently owned and subsequently acquired state property
31 subject to insurance coverage by any form of insurance, which
32 survey shall include and reflect inspections, appraisals, expo-
33 sures, fire hazards, construction, and any other objectives or
34 factors affecting or which might affect the insurance protection
35 and coverage required. It shall keep itself currently informed on
36 new and continuing state activities and responsibilities within
37 the insurance coverage herein contemplated. The board shall
38 work closely in cooperation with the state fire marshal's office
39 in applying the rules of that office insofar as the appropriations
40 and other factors peculiar to state property will permit. The
41 board is given power and authority to make rules governing its
42 functions and operations and the procurement of state insur-
43 ance.

44 The board is hereby authorized and empowered to negotiate
45 and effect settlement of any and all insurance claims arising on
46 or incident to losses of and damages to state properties,
47 activities and responsibilities hereunder and shall have authority
48 to execute and deliver proper releases of all such claims when
49 settled. The board may adopt rules and procedures for handling,
50 negotiating and settlement of all such claims. Any discussion
51 or consideration of the financial or personal information of an
52 insured may be held by the board in executive session closed to
53 the public, notwithstanding the provisions of article nine-a,
54 chapter six of this code.

55 (b) If requested by a political subdivision, a charitable or
56 public service organization, or an emergency medical services

57 agency, the board is authorized to provide property and liability
58 insurance to insure their property, activities and responsibilities.
59 The board is authorized to enter into any necessary contract of
60 insurance to further the intent of this subsection.

61 The property insurance provided by the board, pursuant to
62 this subsection, may also include insurance on property leased
63 to or loaned to the political subdivision, a charitable or public
64 service organization or an emergency medical services agency
65 which is required to be insured under a written agreement.

66 The cost of this insurance, as determined by the board, shall
67 be paid by the political subdivision, the charitable or public
68 service organization or the emergency medical services agency
69 and may include administrative expenses. For purposes of this
70 section: *Provided*, That if an emergency medical services
71 agency is a for-profit entity its claims history may not adversely
72 affect other participants rates in the same class. All funds
73 received by the board, (including, but not limited to, state
74 agency premiums, mine subsidence premiums, and political
75 subdivision premiums) shall be deposited with the West
76 Virginia investment management board with the interest
77 income and returns on investment a proper credit to such
78 property insurance trust fund or liability insurance trust fund, as
79 applicable.

80 “Political subdivision” as used in this subsection shall have
81 the same meaning as in section three, article twelve-a of this
82 chapter.

83 Charitable or public service organization as used in this
84 subsection means a bona fide, not-for-profit, tax-exempt,
85 benevolent, educational, philanthropic, humane, patriotic, civic,
86 religious, eleemosynary, incorporated or unincorporated
87 association or organization or a rescue unit or other similar
88 volunteer community service organization or association, but

89 does not include any nonprofit association or organization,
90 whether incorporated or not, which is organized primarily for
91 the purposes of influencing legislation or supporting or promot-
92 ing the campaign of any candidate for public office.

93 “Emergency medical service agency” as used in this
94 subsection shall have the same meaning as in section three,
95 article four-c, chapter sixteen of this code.

96 (c) (1) The board shall have general supervision and control
97 over the optional medical liability insurance programs provid-
98 ing coverage to health care providers as authorized by the
99 provisions of article twelve-b of this chapter. The board is
100 hereby granted and may exercise all powers necessary or
101 appropriate to carry out and effectuate the purposes of this
102 article.

103 (2) The board shall:

104 (A) Administer the preferred medical liability program and
105 the high risk medical liability program and exercise and
106 perform other powers, duties and functions specified in this
107 article;

108 (B) Obtain and implement, at least annually, from an
109 independent outside source, such as a medical liability actuary
110 or a rating organization experienced with the medical liability
111 line of insurance, written rating plans for the preferred medical
112 liability program and high risk medical liability program on
113 which premiums shall be based;

114 (C) Prepare and annually review written underwriting
115 criteria for the preferred medical liability program and the high
116 risk medical liability program. The board may utilize review
117 panels, including but not limited to, the same specialty review
118 panels to assist in establishing criteria;

119 (D) Prepare and publish, before each regular session of the
120 Legislature, separate summaries for the preferred medical
121 liability program and high risk medical liability program
122 activity during the preceding fiscal year, each summary to be
123 included in the Board of Risk and Insurance Management
124 audited financial statements as “other financial information”,
125 and which shall include a balance sheet, income statement and
126 cash flow statement, an actuarial opinion addressing adequacy
127 of reserves, the highest and lowest premiums assessed, the
128 number of claims filed with the program by provider type, the
129 number of judgments and amounts paid from the program, the
130 number of settlements and amounts paid from the program and
131 the number of dismissals without payment;

132 (E) Determine and annually review the claims history debit
133 or surcharge for the high risk medical liability program;

134 (F) Determine and annually review the criteria for transfer
135 from the preferred medical liability program to the high risk
136 medical liability program;

137 (G) Determine and annually review the role of independent
138 agents, the amount of commission, if any, to be paid therefor,
139 and agent appointment criteria;

140 (H) Study and annually evaluate the operation of the
141 preferred medical liability program and the high risk medical
142 liability program, and make recommendations to the Legisla-
143 ture, as may be appropriate, to ensure their viability, including
144 but not limited to, recommendations for civil justice reform
145 with an associated cost-benefit analysis, recommendations on
146 the feasibility and desirability of a plan which would require all
147 health care providers in the state to participate with an associ-
148 ated cost-benefit analysis, recommendations on additional
149 funding of other state run insurance plans with an associated
150 cost-benefit analysis and recommendations on the desirability

151 of ceasing to offer a state plan with an associated analysis of a
152 potential transfer to the private sector with a cost-benefit
153 analysis, including impact on premiums;

154 (I) Establish a five-year financial plan to ensure an adequate
155 premium base to cover the long tail nature of the claims-made
156 coverage provided by the preferred medical liability program
157 and the high risk medical liability program. The plan shall be
158 designed to meet the program's estimated total financial
159 requirements, taking into account all revenues projected to be
160 made available to the program, and apportioning necessary
161 costs equitably among participating classes of health care
162 providers. For these purposes, the board shall:

163 (i) Retain the services of an impartial, professional actuary,
164 with demonstrated experience in analysis of large group
165 malpractice plans, to estimate the total financial requirements
166 of the program for each fiscal year and to review and render
167 written professional opinions as to financial plans proposed by
168 the board. The actuary shall also assist in the development of
169 alternative financing options and perform any other services
170 requested by the board or the executive director. All reasonable
171 fees and expenses for actuarial services shall be paid by the
172 board. Any financial plan or modifications to a financial plan
173 approved or proposed by the board pursuant to this section shall
174 be submitted to and reviewed by the actuary and may not be
175 finally approved and submitted to the governor and to the
176 Legislature without the actuary's written professional opinion
177 that the plan may be reasonably expected to generate sufficient
178 revenues to meet all estimated program and administrative
179 costs, including incurred but not reported claims, for the fiscal
180 year for which the plan is proposed. The actuary's opinion for
181 any fiscal year shall include a requirement for establishment of
182 a reserve fund;

183 (ii) Submit its final, approved five-year financial plan, after
184 obtaining the necessary actuary's opinion, to the governor and
185 to the Legislature no later than the first day of January preced-
186 ing the fiscal year. The financial plan for a fiscal year becomes
187 effective and shall be implemented by the executive director on
188 the first day of July of the fiscal year. In addition to each final,
189 approved financial plan required under this section, the board
190 shall also simultaneously submit an audited financial statement
191 based on generally accepted accounting practices (GAAP) and
192 which shall include allowances for incurred but not reported
193 claims: *Provided*, That the financial statement and the accrual-
194 based financial plan restatement shall not affect the approved
195 financial plan. The provisions of chapter twenty-nine-a of this
196 code shall not apply to the preparation, approval and implemen-
197 tation of the financial plans required by this section;

198 (iii) Submit to the governor and the Legislature a prospec-
199 tive five-year financial plan beginning on the first day of
200 January, two thousand three, and every year thereafter, for the
201 programs established by the provisions of article twelve-b of
202 this chapter. Factors that the board shall consider include, but
203 shall not be limited to, the trends for the program and the
204 industry; claims history, number and category of participants in
205 each program; settlements and claims payments; and judicial
206 results;

207 (iv) Obtain annually, certification from participants that
208 they have made a diligent search for comparable coverage in
209 the voluntary insurance market and have been unable to obtain
210 the same;

211 (J) Meet on at least a quarterly basis to review implementa-
212 tion of its current financial plan in light of the actual experience
213 of the medical liability programs established in article twelve-b
214 of this chapter. The board shall review actual costs incurred,
215 any revised cost estimates provided by the actuary, expendi-

216 tures and any other factors affecting the fiscal stability of the
217 plan and may make any additional modifications to the plan
218 necessary to ensure that the total financial requirements of these
219 programs for the current fiscal year are met;

220 (K) To analyze the benefit of and necessity for excess
221 verdict liability coverage;

222 (L) Consider purchasing reinsurance, in the amounts as it
223 may from time to time determine is appropriate, and the cost
224 thereof shall be considered to be an operating expense of the
225 board;

226 (M) Make available to participants, optional extended
227 reporting coverage or tail coverage: *Provided*, That, at least five
228 working days prior to offering such coverage to a participant or
229 participants, the board shall notify the president of the Senate
230 and the speaker of the House of Delegates in writing of its
231 intention to do so, and such notice shall include the terms and
232 conditions of the coverage proposed;

233 (N) Review and approve, reject or modify rules that are
234 proposed by the executive director to implement, clarify or
235 explain administration of the preferred medical liability
236 program and the high risk medical liability program. Notwith-
237 standing any provisions in this code to the contrary, rules
238 promulgated pursuant to this paragraph are not subject to the
239 provisions of sections nine through sixteen, article three,
240 chapter twenty-nine-a of this code. The board shall comply with
241 the remaining provisions of article three and shall hold hearings
242 or receive public comments before promulgating any proposed
243 rule filed with the secretary of state: *Provided*, That the initial
244 rules proposed by the executive director and promulgated by
245 the board shall become effective upon approval by the board
246 notwithstanding any provision of this code;

247 (O) Enter into settlements and structured settlement
248 agreements whenever appropriate. The policy may not require
249 as a condition precedent to settlement or compromise of any
250 claim the consent or acquiescence of the policy holder. The
251 board may own or assign any annuity purchased by the board to
252 a company licensed to do business in the state;

253 (P) Refuse to provide insurance coverage for individual
254 physicians whose prior loss experience or current professional
255 training and capability are such that the physician represents an
256 unacceptable risk of loss if coverage is provided.

257 (Q) Terminate coverage for nonpayment of premiums upon
258 written notice of the termination forwarded to the health care
259 provider not less than thirty days prior to termination of
260 coverage;

261 (R) Assign coverage or transfer all insurance obligations
262 and/or risks of existing or in-force contracts of insurance to a
263 third party medical professional liability insurance carrier with
264 the comparable coverage conditions as determined by the
265 board. Any transfer of obligation or risk shall effect a novation
266 of the transferred contract of insurance and if the terms of the
267 assumption reinsurance agreement extinguish all liability of the
268 board and the state of West Virginia such extinguishment shall
269 be absolute as to any and all parties; and

270 (S) Meet and consult with and consider recommendations
271 from the medical malpractice advisory panel established by the
272 provisions of article twelve-b of this chapter.

273 (d) If, after the first day of September, two thousand two,
274 the board has assigned coverages or transferred all insurance
275 obligations and/or risks of existing or in-force contracts of
276 insurance to a third party medical professional liability insur-
277 ance carrier, and the board otherwise has no covered partici-
278 pants, then the board shall not thereafter offer or provide

279 professional liability insurance to any health care provider
280 pursuant to the provisions of subsection (c) of this section or the
281 provisions of article twelve-b of this chapter unless the Legisla-
282 ture adopts a concurrent resolution authorizing the board to
283 reestablish medical liability insurance programs.

**ARTICLE 12B. WEST VIRGINIA HEALTH CARE PROVIDER PROFES-
SIONAL LIABILITY INSURANCE AVAILABILITY ACT.**

**§29-12B-6. Health care provider professional liability insurance
programs.**

1 (a) There is hereby established through the board of risk
2 and insurance management optional insurance for health care
3 providers consisting of a preferred professional liability
4 insurance program and a high risk professional liability
5 insurance program.

6 (b) Each of the programs described in subsection (a) of this
7 section shall provide claims-made coverage for any covered act
8 or omission resulting in injury or death arising out of medical
9 professional liability as defined in subsection (d), section two,
10 article seven-b, chapter fifty-five of this code.

11 (c) Each of the programs described in subsection (a) of this
12 section shall offer optional prior acts coverage from and after
13 a retroactive date established by the policy declarations. The
14 premium for prior acts coverage may be based upon a five-year
15 maturity schedule depending on the years of prior acts expo-
16 sure, as more specifically set forth in a written rating manual
17 approved by the board.

18 (d) Each of the programs described in subsection (a) of this
19 section shall further provide an option to purchase an extended
20 reporting endorsement or tail coverage.

21 (e) Each of the programs described in subsection (a) of this
22 section shall offer limits for each health care provider in the
23 amount of one million dollars per claim, including repeated
24 exposure to the same event or series of events, and all deriva-
25 tive claims, and three million dollars in the annual aggregate.
26 Health care providers have the option to purchase higher limits
27 of up to two million dollars per claim, including repeated
28 exposure to the same event or series of events, and all deriva-
29 tive claims, and up to four million dollars in the annual aggre-
30 gate. In addition, hospitals covered by the plan shall have
31 available limits of three million dollars per claim, including
32 repeated exposure to the same event or series of events, and all
33 derivative claims, and five million dollars in the annual
34 aggregate. Installment payment plans as established in the
35 rating manual shall be available to all participants.

36 (f) Each of the programs described in subsection (a) of this
37 section shall cover any act or omission resulting in injury or
38 death arising out of medical professional liability as defined in
39 subsection(d), section two, article seven-b, chapter fifty-five of
40 this code. The board shall exclude from coverage sexual acts as
41 defined in subdivision (e), section three of this article, and shall
42 have the authority to exclude other acts or omission from
43 coverage.

44 (g) Each of the programs described in subsection (a) of this
45 section shall apply to damages, except punitive damages, for
46 medical professional liability as defined in subsection (d),
47 section two, article seven-b, chapter fifty-five of this code.

48 (h) The board may, but is not required, to obtain excess
49 verdict liability coverage for the programs described in subsec-
50 tion (a) of this section.

51 (i) Each of the programs shall be liable to the extent of the
52 limits purchased by the health care provider as set forth in

53 subsection (e) of this section. In the event that a claimant and a
54 health care provider are willing to settle within those limits
55 purchased by the health care provider, but the board refuses or
56 declines to settle, and the ultimate verdict is in excess of the
57 purchased limits, the board shall not be liable for the portion of
58 the verdict in excess of the coverage provided in subsection (e)
59 of this section unless the board acts in bad faith, with actual
60 malice, in declining or refusing to settle: *Provided*, That if the
61 board has in effect applicable excess verdict liability insurance,
62 the health care provider shall not be required to prove that the
63 board acted with actual malice in declining or refusing to settle
64 in order to be indemnified for that portion of the verdict in
65 excess of the limits of the purchased policy and within the
66 limits of the excess liability coverage. Notwithstanding any
67 provision of this code to the contrary, the board shall not be
68 liable for any verdict in excess of the combined limit of the
69 purchased policy and any applicable excess liability coverage
70 unless the board acts in bad faith with actual malice.

71 (j) Rates for each of the programs described in subsection
72 (a) of this section may not be excessive, inadequate or unfairly
73 discriminatory: *Provided*, That the rates charged for the
74 preferred professional liability insurance program shall not be
75 less than the highest approved comparable base rate for a
76 licensed carrier providing five percent of the malpractice
77 insurance coverage in this state for the previous calendar year
78 on file with the insurance commissioner: *Provided, however*,
79 That if there is only one licensed carrier providing five percent
80 or more of the malpractice insurance coverage in the state
81 offering comparable coverage, the board shall have discretion
82 to disregard the approved comparable base rate of the licensed
83 carrier.

84 (k) The premiums for each of the programs described in
85 subsection (a) of this section are subject to premium taxes
86 imposed by article three, chapter thirty-three of this code.

87 (l) Nothing in this article shall be construed to preclude a
88 health care provider from obtaining professional liability
89 insurance coverage for claims in excess of the coverage made
90 available by the provisions of this article.

91 (m) General liability coverage that may be required by a
92 health care provider may be offered as determined by the board.

§29-12B-10. Deposit, expenditure and investment of premiums.

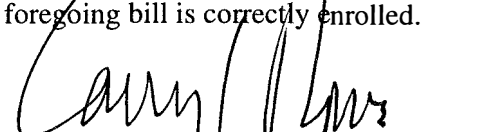
1 (a) The premiums charged and collected by the board under
2 this article shall be deposited into a special revenue account
3 hereby created in the state treasury known as the “Medical
4 Liability Fund”, and shall not be part of the general revenues of
5 the state. Disbursements from the special revenue fund shall be
6 upon requisition of the executive director and in accordance
7 with the provisions of chapter five-a of this code. Disburse-
8 ments shall pay operating expenses of the board attributed to
9 these programs and the board’s share of any judgments or
10 settlements of medical malpractice claims. Funds shall be
11 invested with the consolidated fund managed by the West
12 Virginia investment management board and interest earned
13 shall be used for purposes of this article.

14 (b) Start-up operating expenses of the medical liability
15 fund, not to exceed five hundred thousand dollars, may be
16 transferred to the medical liability fund pursuant to an appropri-
17 ation by the Legislature from any special revenue funds
18 available. The medical liability fund shall reimburse the board
19 within twenty-four months of the date of the transfer.

20 (c) For purposes of establishing a pool from which settle-
21 ments and judgments may be paid, notwithstanding any other
22 provision of this code to the contrary, a portion of the initial
23 capitalization of the pool may be provided through a transfer of
24 no greater than four million dollars from the state special

25 insurance fund established in section five, article twelve of this
26 chapter. All funds transferred pursuant to this section are to be
27 repaid by transfer from the medical liability fund to the state
28 special insurance fund, together with interest that would have
29 accrued in the state special insurance fund, by the first day of
30 July, two thousand six. Funds are to be transferred only as
31 needed for expenditures from the medical liability fund created
32 in this section. The treasurer shall effect these transfers pursu-
33 ant to this section upon written request of the director of the
34 board of risk and insurance management.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



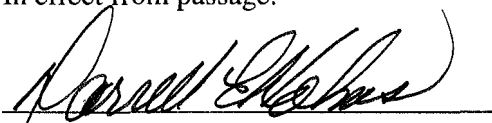
Chairman Senate Committee




Chairman House Committee

Originating in the House.

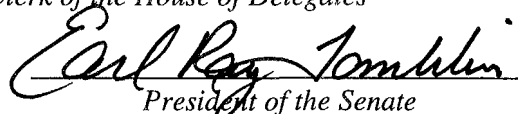
In effect from passage.



Clerk of the Senate



Clerk of the House of Delegates



President of the Senate



Speaker of the House of Delegates

The within is approved this the 18th
day of March, 2002.



Governor

PRELIMINARY TO THE

GOVERNOR

Date 3/12/02

Time 3:20 p