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SB 596

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
Regular Session, 2004



ENROLLED

Committee Substitute for

SENATE BILL NO. 596

(By Senators Tomblin, Mr. President, and Kessler)



PASSED March 13, 2004

In Effect 90 days from Passage

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 596

(SENATORS TOMBLIN, MR. PRESIDENT,
AND KESSLER, *original sponsors*)

[Passed March 13, 2004; in effect ninety days from passage.]

AN ACT to amend and reenact §29-12-5 of the code of West Virginia, 1931, as amended, relating to the powers and duties of the board of directors of the state board of risk and insurance management with respect to the purchase of or contracting for insurance on state properties, activities and responsibilities; clarifying the power of the board to reasonably limit the amount, kind and types of insurance and the conditions, limitations and exclusions of such insurance covering state property, activities and responsibilities; and giving the board of risk and insurance management general powers to determine under what conditions an offer of property or liability insurance coverage should be made to a political subdivision, charitable or public service organization or an emergency medical services agency.

Be it enacted by the Legislature of West Virginia:

That §29-12-5 of the code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

ARTICLE 12. STATE INSURANCE.

§29-12-5. Powers and duties of board.

1 (a) (1) The board has, without limitation and in its
2 discretion as it seems necessary for the benefit of the
3 insurance program, general supervision and control over
4 the insurance of state property, activities and responsibili-
5 ties, including:

6 (A) The acquisition and cancellation of state insurance;

7 (B) Determination of the kind or kinds of coverage;

8 (C) Determination of the amount or limits for each kind
9 of coverage;

10 (D) Determination of the conditions, limitations, exclu-
11 sions, endorsements, amendments and deductible forms of
12 insurance coverage;

13 (E) Inspections or examinations relating to insurance
14 coverage of state property, activities and responsibilities;

15 (F) Reinsurance; and,

16 (G) Any and all matters, factors and considerations
17 entering into negotiations for advantageous rates on and
18 coverage of such state property, activities and responsibili-
19 ties.

20 (2) The board shall endeavor to secure reasonably broad
21 protection against loss, damage or liability to state prop-
22 erty and on account of state activities and responsibilities
23 by proper, adequate, available and affordable insurance
24 coverage and through the introduction and employment of
25 sound and accepted principles of insurance, methods of
26 protection and principles of loss control and risk.

27 (3) The board is not required to provide insurance for
28 every state property, activity or responsibility.

29 (4) Any policy of insurance purchased or contracted for
30 by the board shall provide that the insurer shall be barred
31 and estopped from relying upon the constitutional immu-
32 nity of the state of West Virginia against claims or suits:
33 *Provided*, That nothing herein shall bar a state agency or
34 state instrumentality from relying on the constitutional
35 immunity granted the state of West Virginia against claims
36 or suits arising from or out of any state property, activity
37 or responsibility not covered by a policy or policies of
38 insurance: *Provided, however*, That nothing herein shall
39 bar the insurer of political subdivisions from relying upon
40 any statutory immunity granted such political subdivisions
41 against claims or suits.

42 (5) The board shall make a complete survey of all
43 presently owned and subsequently acquired state property
44 subject to insurance coverage by any form of insurance,
45 which survey shall include and reflect inspections, ap-
46 praisals, exposures, fire hazards, construction and any
47 other objectives or factors affecting or which might affect
48 the insurance protection and coverage required.

49 (6) The board shall keep itself currently informed on new
50 and continuing state activities and responsibilities within
51 the insurance coverage herein contemplated. The board
52 shall work closely in cooperation with the state fire
53 marshal's office in applying the rules of that office insofar
54 as the appropriations and other factors peculiar to state
55 property will permit.

56 (7) The board may negotiate and effect settlement of any
57 and all insurance claims arising on or incident to losses of
58 and damages to covered state properties, activities and
59 responsibilities hereunder and shall have authority to
60 execute and deliver proper releases of all such claims when
61 settled. The board may adopt rules and procedures for
62 handling, negotiating and settlement of all such claims.
63 Any discussion or consideration of the financial or per-
64 sonal information of an insured may be held by the board

65 in executive session closed to the public, notwithstanding
66 the provisions of article nine-a, chapter six of this code.

67 (8) The board may employ an executive director for an
68 annual salary of seventy thousand dollars and such other
69 employees, including legal counsel, as may be necessary to
70 carry out its duties. The legal counsel may represent the
71 board before any judicial or administrative tribunal and
72 perform such other duties as may be requested by the
73 board.

74 (9) The board may enter into any contracts necessary to
75 the execution of the powers granted to it by this article or
76 to further the intent of this article.

77 (10) The board may make rules governing its functions
78 and operations and the procurement of state insurance.
79 Except where otherwise provided by statute, rules of the
80 board are subject to the provisions of article three, chapter
81 twenty-nine-a of this code.

82 (11) The funds received by the board, including, but not
83 limited to, state agency premiums, mine subsidence
84 premiums and political subdivision premiums, shall be
85 deposited with the West Virginia investment management
86 board with the interest income and returns on investment
87 a proper credit to such property insurance trust fund or
88 liability insurance trust fund as applicable.

89 (b) (1) *Definitions.* – The following words and phrases
90 when used in this subsection, for the purposes of this
91 subsection, have the meanings respectively ascribed to
92 them in this subsection;

93 (A) “Political subdivision” has the same meaning as in
94 section three, article twelve-a of this chapter;

95 (B) “Charitable” or “public service organization” means
96 any hospital in this state which has been certified as a
97 critical access hospital by the federal centers for medicare
98 and medicaid upon the designation of the state office of

99 rural health policy, the office of community and rural
100 health services, the bureau for public health or the depart-
101 ment of health and human resources and any bona fide,
102 not-for-profit, tax-exempt, benevolent, educational,
103 philanthropic, humane, patriotic, civic, religious, eleemo-
104 synary, incorporated or unincorporated association or
105 organization or a rescue unit or other similar volunteer
106 community service organization or association, but does
107 not include any nonprofit association or organization,
108 whether incorporated or not, which is organized primarily
109 for the purposes of influencing legislation or supporting or
110 promoting the campaign of any candidate for public office;
111 and,

112 (C) "Emergency medical service agency" has the same
113 meaning as in section three, article four-c, chapter sixteen
114 of this code.

115 (2) If requested by a political subdivision, a charitable or
116 public service organization or an emergency medical
117 services agency, the board may, but is not required to,
118 provide property and liability insurance to insure the
119 property, activities and responsibilities of the political
120 subdivision, charitable or public service organization or
121 emergency medical services agency. The board may enter
122 into any contract necessary to the execution of the powers
123 granted by this article or to further the intent of this
124 article.

125 (A) Property insurance provided by the board pursuant
126 to this subsection may also include insurance on property
127 leased to or loaned to the political subdivision, a charita-
128 ble or public service organization or an emergency medical
129 services agency which is required to be insured under a
130 written agreement.

131 (B) The cost of insurance, as determined by the board,
132 shall be paid by the political subdivision, the charitable or
133 public service organization or the emergency medical
134 services agency and may include administrative expenses.

135 For purposes of this section, if an emergency medical
136 services agency is a for-profit entity, its claims history
137 may not adversely affect other participants' rates in the
138 same class.

139 (c) (1) The board has general supervision and control
140 over the optional medical liability insurance programs
141 providing coverage to health care providers as authorized
142 by the provisions of article twelve-b of this chapter. The
143 board is hereby granted and may exercise all powers
144 necessary or appropriate to carry out and effectuate the
145 purposes of this article.

146 (2) The board shall:

147 (A) Administer the preferred medical liability program
148 and the high risk medical liability program and exercise
149 and perform other powers, duties and functions specified
150 in this article;

151 (B) Obtain and implement, at least annually, from an
152 independent outside source, such as a medical liability
153 actuary or a rating organization experienced with the
154 medical liability line of insurance, written rating plans for
155 the preferred medical liability program and high-risk
156 medical liability program on which premiums shall be
157 based;

158 (C) Prepare and annually review written underwriting
159 criteria for the preferred medical liability program and the
160 high-risk medical liability program. The board may utilize
161 review panels, including, but not limited to, the same
162 specialty review panels to assist in establishing criteria;

163 (D) Prepare and publish, before each regular session of
164 the Legislature, separate summaries for the preferred
165 medical liability program and high-risk medical liability
166 program activity during the preceding fiscal year, each
167 summary to be included in the board of risk and insurance
168 management audited financial statements as "other
169 financial information" and which shall include a balance

170 sheet, income statement and cash flow statement, an
171 actuarial opinion addressing adequacy of reserves, the
172 highest and lowest premiums assessed, the number of
173 claims filed with the program by provider type, the
174 number of judgments and amounts paid from the program,
175 the number of settlements and amounts paid from the
176 program and the number of dismissals without payment;

177 (E) Determine and annually review the claims history
178 debit or surcharge for the high-risk medical liability
179 program;

180 (F) Determine and annually review the criteria for
181 transfer from the preferred medical liability program to
182 the high-risk medical liability program;

183 (G) Determine and annually review the role of independ-
184 ent agents, the amount of commission, if any, to be paid
185 therefor and agent appointment criteria;

186 (H) Study and annually evaluate the operation of the
187 preferred medical liability program and the high-risk
188 medical liability program and make recommendations to
189 the Legislature, as may be appropriate, to ensure their
190 viability, including, but not limited to, recommendations
191 for civil justice reform with an associated cost-benefit
192 analysis, recommendations on the feasibility and desirabil-
193 ity of a plan which would require all health care providers
194 in the state to participate with an associated cost-benefit
195 analysis, recommendations on additional funding of other
196 state run insurance plans with an associated cost-benefit
197 analysis and recommendations on the desirability of
198 ceasing to offer a state plan with an associated analysis of
199 a potential transfer to the private sector with a cost-
200 benefit analysis, including impact on premiums;

201 (I) Establish a five-year financial plan to ensure an
202 adequate premium base to cover the long tail nature of the
203 claims-made coverage provided by the preferred medical
204 liability program and the high risk medical liability

205 program. The plan shall be designed to meet the pro-
206 gram's estimated total financial requirements, taking into
207 account all revenues projected to be made available to the
208 program, and apportioning necessary costs equitably
209 among participating classes of health care providers. For
210 these purposes, the board shall:

211 (i) Retain the services of an impartial, professional
212 actuary, with demonstrated experience in analysis of large
213 group malpractice plans, to estimate the total financial
214 requirements of the program for each fiscal year and to
215 review and render written professional opinions as to
216 financial plans proposed by the board. The actuary shall
217 also assist in the development of alternative financing
218 options and perform any other services requested by the
219 board or the executive director. All reasonable fees and
220 expenses for actuarial services shall be paid by the board.
221 Any financial plan or modifications to a financial plan
222 approved or proposed by the board pursuant to this
223 section shall be submitted to and reviewed by the actuary
224 and may not be finally approved and submitted to the
225 governor and to the Legislature without the actuary's
226 written professional opinion that the plan may be reason-
227 ably expected to generate sufficient revenues to meet all
228 estimated program and administrative costs, including
229 incurred but not reported claims, for the fiscal year for
230 which the plan is proposed. The actuary's opinion for any
231 fiscal year shall include a requirement for establishment
232 of a reserve fund;

233 (ii) Submit its final, approved five-year financial plan,
234 after obtaining the necessary actuary's opinion, to the
235 governor and to the Legislature no later than the first day
236 of January preceding the fiscal year. The financial plan
237 for a fiscal year becomes effective and shall be imple-
238 mented by the executive director on the first day of July of
239 the fiscal year. In addition to each final, approved finan-
240 cial plan required under this section, the board shall also
241 simultaneously submit an audited financial statement

242 based on generally accepted accounting practices (GAAP)
243 and which shall include allowances for incurred but not
244 reported claims: *Provided*, That the financial statement
245 and the accrual-based financial plan restatement shall not
246 affect the approved financial plan. The provisions of
247 chapter twenty-nine-a of this code shall not apply to the
248 preparation, approval and implementation of the financial
249 plans required by this section;

250 (iii) Submit to the governor and the Legislature a
251 prospective five-year financial plan beginning on the first
252 day of January, two thousand three, and every year
253 thereafter, for the programs established by the provisions
254 of article twelve-b of this chapter. Factors that the board
255 shall consider include, but shall not be limited to, the
256 trends for the program and the industry; claims history,
257 number and category of participants in each program;
258 settlements and claims payments; and judicial results;

259 (iv) Obtain annually, certification from participants that
260 they have made a diligent search for comparable coverage
261 in the voluntary insurance market and have been unable
262 to obtain the same;

263 (J) Meet on at least a quarterly basis to review imple-
264 mentation of its current financial plan in light of the
265 actual experience of the medical liability programs
266 established in article twelve-b of this chapter. The board
267 shall review actual costs incurred any revised cost esti-
268 mates provided by the actuary, expenditures and any other
269 factors affecting the fiscal stability of the plan and may
270 make any additional modifications to the plan necessary
271 to ensure that the total financial requirements of these
272 programs for the current fiscal year are met;

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

275 (L) Consider purchasing reinsurance, in the amounts as
276 it may from time to time determine is appropriate, and the

277 cost thereof shall be considered to be an operating expense
278 of the board;

279 (M) Make available to participants, optional extended
280 reporting coverage or tail coverage: *Provided*, That, at
281 least five working days prior to offering such coverage to
282 a participant or participants, the board shall notify the
283 president of the Senate and the speaker of the House of
284 Delegates in writing of its intention to do so and such
285 notice shall include the terms and conditions of the
286 coverage proposed;

287 (N) Review and approve, reject or modify rules that are
288 proposed by the executive director to implement, clarify or
289 explain administration of the preferred medical liability
290 program and the high risk medical liability program.
291 Notwithstanding any provisions in this code to the con-
292 trary, rules promulgated pursuant to this paragraph are
293 not subject to the provisions of sections nine through
294 sixteen, inclusive, article three, chapter twenty-nine-a of
295 this code. The board shall comply with the remaining
296 provisions of article three and shall hold hearings or
297 receive public comments before promulgating any pro-
298 posed rule filed with the secretary of state: *Provided*, That
299 the initial rules proposed by the executive director and
300 promulgated by the board shall become effective upon
301 approval by the board notwithstanding any provision of
302 this code;

303 (O) Enter into settlements and structured settlement
304 agreements whenever appropriate. The policy may not
305 require as a condition precedent to settlement or compro-
306 mise of any claim the consent or acquiescence of the policy
307 holder. The board may own or assign any annuity pur-
308 chased by the board to a company licensed to do business
309 in the state;

310 (P) Refuse to provide insurance coverage for individual
311 physicians whose prior loss experience or current profes-
312 sional training and capability are such that the physician

313 represents an unacceptable risk of loss if coverage is
314 provided;

315 (Q) Terminate coverage for nonpayment of premiums
316 upon written notice of the termination forwarded to the
317 health care provider not less than thirty days prior to
318 termination of coverage;

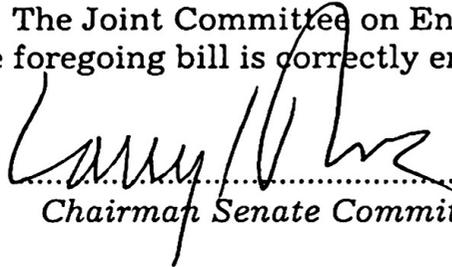
319 (R) Assign coverage or transfer insurance obligations
320 and/or risks of existing or in-force contracts of insurance
321 to a third-party medical professional liability insurance
322 carrier with the comparable coverage conditions as
323 determined by the board. Any transfer of obligation or
324 risk shall effect a novation of the transferred contract of
325 insurance and if the terms of the assumption reinsurance
326 agreement extinguish all liability of the board and the
327 state of West Virginia such extinguishment shall be
328 absolute as to any and all parties; and

329 (S) Meet and consult with and consider recommenda-
330 tions from the medical malpractice advisory panel estab-
331 lished by the provisions of article twelve-b of this chapter.

332 (d) If, after the first day of September, two thousand
333 two, the board has assigned coverages or transferred all
334 insurance obligations and/or risks of existing or in-force
335 contracts of insurance to a third-party medical profes-
336 sional liability insurance carrier, and the board otherwise
337 has no covered participants, then the board shall not
338 thereafter offer or provide professional liability insurance
339 to any health care provider pursuant to the provisions of
340 subsection (c) of this section or the provisions of article
341 twelve-b of this chapter unless the Legislature adopts a
342 concurrent resolution authorizing the board to reestablish
343 medical liability insurance programs.

Enr. Com. Sub. for S. B. No. 596] 12

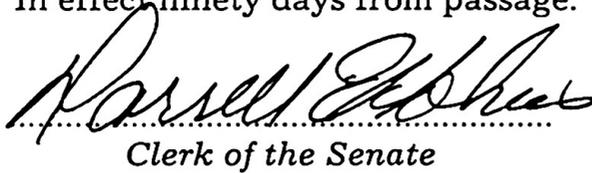
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


.....
Chairman Senate Committee

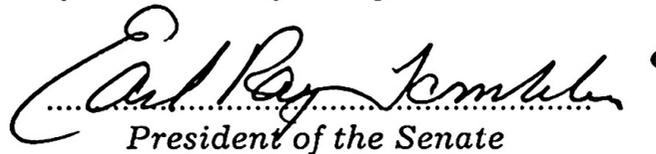

.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.


.....
Clerk of the Senate


.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within is approved this the 2nd
Day of April, 2004.

.....
Governor

PRESENTED TO THE

GOVERNOR

DATE 3/25/04

TIME 10:50 am