WEST VIRGINIA LEGISLATURE
Regular Session, 2006

ENROLLED
Committee Substitute For
SENATE BILL NO. 755

(By Senator McCabe, et al.)

PASSED March 11, 2006

In Effect 90 Days From Passage
ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 755
(SENATORS MCCABE, OLIVERIO AND MINARD, original sponsors)

[Passed March 11, 2006; in effect ninety days from passage.]

AN ACT to amend and reenact §33-20F-9 of the Code of West Virginia, 1931, as amended; to amend and reenact §55-7B-2 of said code; and to amend said code by adding thereto a new section, designated §55-7B-12, all relating to medical professional liability insurance; authorizing the West Virginia Physicians' Mutual Insurance Company to decline or refuse to renew insurance policies transferred to the company from the Board of Risk and Insurance Management upon the expiration of the terms of the policies so transferred; describing the criteria according to which the company may classify, rate and price policies of insurance; describing the criteria according to which the company may elect to underwrite or decline to underwrite insurance coverage; and establishing basic requirements and minimum standards for physician self-funded insurance arrangements to qualify as medical professional liability insurance for purposes of article seven-b, chapter fifty-five of said code.
Be it enacted by the Legislature of West Virginia:

That §33-20F-9 of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §55-7B-2 of said code be amended and reenacted; and that said code be amended by adding thereto a new section, designated §55-7B-12, all to read as follows:

CHAPTER 33. INSURANCE.

ARTICLE 20F. PHYSICIANS' MUTUAL INSURANCE COMPANY.

§33-20F-9. Kinds of coverage authorized; transfer of policies from the State Board of Risk and Insurance Management; risk management practices authorized.

(a) Upon approval by the commissioner for a license to transact insurance in this state, the company may issue nonassessable policies of malpractice insurance, as defined in subdivision (9), subsection (e), section ten, article one of this chapter, insuring a physician. Additionally, the company may issue other types of casualty or liability insurance as may be approved by the commissioner.

(b) On the transfer date:

(1) The company shall accept from the Board of Risk and Insurance Management the transfer of any and all medical liability insurance obligations and risks of existing or in-force contracts of insurance covering physicians, physician corporations and physician-operated clinics issued by the board pursuant to article twelve-b, chapter twenty-nine of this code: Provided, That the company may decline or refuse to renew any and all such contracts of insurance transferred to the company from the Board of Risk and Insurance Management upon the expiration of the respective terms of each contract of insurance so transferred and nothing in this section is intended to or shall be construed to otherwise obligate the company to accept, underwrite or renew any contract of insurance whatsoever. The transfer
shall not include medical liability insurance obligations and risks of existing or in-force contracts of insurance covering hospitals and nonphysician providers;

(2) The company shall assume all responsibility for and defend, indemnify and hold harmless the Board of Risk and Insurance Management and the state with respect to any and all liabilities and duties arising from the assets and responsibilities transferred to the company pursuant to article twelve-b, chapter twenty-nine of this code;

(3) The Board of Risk and Insurance Management shall disburse and pay to the company any funds attributable to premiums paid for the insurance obligations transferred to the company pursuant to subdivision (1) of this subsection, with earnings thereon, less paid losses and expenses, and deposited in the medical liability fund created by section ten, article twelve-b, chapter twenty-nine of this code as reflected on the ledgers of the Board of Risk and Insurance Management;

(4) The Board of Risk and Insurance Management shall disburse and pay to the company any funds in the Board of Risk and Insurance Management Physicians' Mutual Insurance Company account created by section seven of this article. All funds in this account shall be transferred pursuant to terms of a surplus note or other loan arrangement satisfactory to the Board of Risk and Insurance Management and the Insurance Commissioner.

(c) The Board of Risk and Insurance Management shall cause an independent actuarial study to be performed to determine the amount of all paid losses, expenses and assets associated with the policies the board has in force pursuant to article twelve-b, chapter twenty-nine of this code. The actuarial study shall determine the paid losses, expenses and assets associated with the policies to be transferred to the company pursuant to subsection (b) of this section and the paid losses, expenses and assets associated with those policies retained by the board. The
determination shall not include liabilities created by issuance of new tail insurance policies for nonphysician providers authorized by subsection (n), section six, article twelve-b, chapter twenty-nine of this code.

(d) The Board of Risk and Insurance Management may enter into such agreements, including loan agreements, with the company that are necessary to accomplish the transfers addressed in this section.

(e) The company shall make policies of insurance available to physicians in this state, regardless of practice type or specialty. Policies issued by the company to each class of physicians are to be essentially uniform in terms and conditions of coverage.

(f) Notwithstanding the provisions of subsection (b), (c) or (e) of this section, the company may:

1. Establish reasonable classifications of physicians, insured activities and exposures based on a good faith determination of relative exposures and hazards among classifications;

2. Vary the limits, coverages, exclusions, conditions and loss-sharing provisions among classifications;

3. Establish, for an individual physician within a classification, reasonable variations in the terms of coverage, including rates, deductibles and loss-sharing provisions, based on underwriting criteria established by the company, from time to time, which underwriting criteria may take into account factors considered by other medical malpractice insurance companies, from time to time, in underwriting similar risks and which factors may include, but are not limited to, the insured's prior loss experience; current professional training and capability; disciplinary action taken against the physician by the Board of Medicine or Board of Osteopathy; felonies or other criminal offenses committed by the physician; evidence of alcohol or chemical dependency or abuse;
evidence of sexual misconduct; and other factors relevant to the liability risk profile of the physician.

(4) Refuse to provide insurance coverage for individual physicians who do not meet underwriting criteria established by the company, from time to time, which underwriting criteria may take into account factors considered by other medical malpractice insurance companies, from time to time, in underwriting or declining to underwrite similar risks and which factors may include, but are not limited to, prior loss experience, current professional training and capability, disciplinary action taken against the physician by the Board of Medicine or Board of Osteopathy; felonies or other criminal offenses committed by the physician; evidence of alcohol or chemical dependency or abuse; evidence of sexual misconduct; and other factors relevant to the liability risk profile of the physician and which do or may indicate that the physician represents an unacceptable risk of loss if coverage is provided.

(g) The company shall establish reasonable risk management and continuing education requirements which policyholders must meet in order to be and remain eligible for coverage.

CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

§55-7B-2. Definitions.

(a) "Board" means the state Board of Risk and Insurance Management.

(b) "Collateral source" means a source of benefits or advantages for economic loss that the claimant has received from:

(1) Any federal or state act, public program or insurance which provides payments for medical expenses, disability benefits, including workers' compensation benefits, or
other similar benefits. Benefits payable under the Social Security Act are not considered payments from collateral sources except for Social Security disability benefits directly attributable to the medical injury in question;

(2) Any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental, nursing, rehabilitation, therapy or other health care services or provide similar benefits;

(3) Any group accident, sickness or income disability insurance, any casualty or property insurance (including automobile and homeowners' insurance) which provides medical benefits, income replacement or disability coverage, or any other similar insurance benefits, except life insurance, to the extent that someone other than the insured, including the insured's employer, has paid all or part of the premium or made an economic contribution on behalf of the plaintiff; or

(4) Any contractual or voluntary wage continuation plan provided by an employer or otherwise or any other system intended to provide wages during a period of disability.

(c) "Consumer price index" means the most recent consumer price index for all consumers published by the United States Department of Labor.

(d) "Emergency condition" means any acute traumatic injury or acute medical condition which, according to standardized criteria for triage, involves a significant risk of death or the precipitation of significant complications or disabilities, impairment of bodily functions, or, with respect to a pregnant woman, a significant risk to the health of the unborn child.

(e) "Health care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf
of a patient during the patient’s medical care, treatment or confinement.

(f) "Health care facility" means any clinic, hospital, nursing home or assisted living facility, including personal care home, residential care community and residential board and care home, or behavioral health care facility or comprehensive community mental health/mental retardation center, in and licensed by the State of West Virginia and any state-operated institution or clinic providing health care.

(g) "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, emergency medical services authority or agency, or an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment.

(h) "Medical injury" means injury or death to a patient arising or resulting from the rendering of or failure to render health care.

(i) "Medical professional liability" means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.

(j) "Medical professional liability insurance" means a contract of insurance or any actuarially sound self-funding program that pays for the legal liability of a health care facility or health care provider arising from a claim of medical professional liability. In order to qualify as medical professional liability insurance for purposes of
this article, a self-funding program for an individual
physician must meet the requirements and minimum
standards set forth in section twelve of this article.

(k) "Noneconomic loss" means losses, including, but not
limited to, pain, suffering, mental anguish and grief.

(l) "Patient" means a natural person who receives or
should have received health care from a licensed health
care provider under a contract, expressed or implied.

(m) "Plaintiff" means a patient or representative of a
patient who brings an action for medical professional
liability under this article.

(n) "Representative" means the spouse, parent, guardian,
trustee, attorney or other legal agent of another.

§55-7B-12. Self-funding program; requirements; minimum
standards.

(a) An irrevocable trust may be established by or for the
benefit of the physician and funded by conveyance to the
trustee of the sum of not less than one million dollars, in
cash or cash equivalents, subject to disbursement and
replenishment from time to time, as described in this
section, and exclusive of funds needed for maintenance,
administration, legal defense and all other costs.

(b) A physician who has established a trust pursuant to
this section may subsequently terminate the trust and elect
to acquire coverage from a commercial medical profes-
sional liability insurance carrier. The assets of the trust
may not be distributed to the physician settler until the
costs associated with the administration of the trust have
been satisfied and the trustee receives certification that
the physician has acquired medical professional liability
insurance tail coverage or prior acts coverage, whichever
is applicable. The tail coverage or prior acts coverage
must cover the time period from the establishment of the
trust to the effective date of the newly acquired medical
professional liability insurance coverage or twelve years, which ever is shorter.

(c) For a period of not less than the applicable statute of limitations for medical professional liability, a physician who has established an actuarially sound physician self-funding insurance program under this section and has such a program in effect at the time of retirement shall, following his or her retirement, either maintain the trust in effect at funding levels required by this section, or purchase and maintain in force and effect tail insurance as required by article twenty-d, chapter thirty-three of this code.

(d) The trustee for the trust must be an independent professional, bank or other qualified institutional fiduciary. The trustee has all necessary and appropriate powers to fulfill the purposes of the trust, including, but not limited to, the powers to:

(1) Disburse funds for the maintenance and administration of the trust, and for defense costs, judgments, arbitration indemnity awards and settlements;

(2) Hire an actuary who is a member of the Casualty Actuarial Society and experienced in medical professional liability protection programs to provide a periodic opinion, but not less frequently than annually, as to the actuarial soundness of the fund, a copy of which opinion shall be provided upon request to any facility where the physician maintains clinical privileges;

(3) Hire a qualified, third-party claims manager experienced in handling medical professional liability claims, with the power and authority to set reserves and administer and oversee the defense of all claims; and

(4) Require that the physician replenish the trust so as to maintain at all times a funding level of no less than one million dollars or such greater amount as set forth in the most current actuarial opinion as described in subdivision
(2) of this subsection, exclusive of funds needed for maintenance, administration, defense or other costs.

(e) The trustee, acting directly or through its hired professionals, as appropriate, shall periodically, but not less frequently than annually, evaluate and set required trust funding levels for the trust; make assessments against the physician for payments into the trust, in order to replenish and maintain the trust at levels required by this subsection and required to render the trust actuarially sound from time to time; and otherwise take such actions as may appear necessary, desirable or appropriate to fulfill the purposes and integrity of the trust. Should the physician fail to timely meet any of the requests or requirements of the trustee with regard to funding of the trust or otherwise, or should the trust at any time fail to meet all the requirements of this subsection, thereupon the trust arrangement will conclusively no longer qualify under this article as an actuarially sound self-funding program:

Provided, That all assets of the trust at the time of any such disqualifying event or circumstance will remain trust assets and may not be distributed to the physician settlor of the trust until the latter of the date on which any and all medical professional liability claims asserted or pending against the physician at the time of such disqualifying event or circumstance or within the applicable statute of limitations for medical malpractice liability thereafter have been finally adjudicated or otherwise resolved and fully satisfied to the extent of trust assets available for such purpose.

(f) In the event that more than one claim arises within the period since the last annual evaluation, a new evaluation will be performed within sixty days or at the time of the next annual audit, whichever is shorter, in order to evaluate the trust and replenish funds to ensure that its assets total not less than one million dollars, or such other amount that is actuarially determined necessary to satisfy the aggregate outstanding claims, which ever is greater,
exclusive of funds needed for maintenance, administration, legal defense or other costs.
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 ............... this the 3rd Day of April, 2006.

Governor