Enrolled
Committee Substitute
for
Senate Bill 338

SENATORS TRUMP, SMITH, BLAIR, SWOPE, AZINGER,
MULLINS, FERNS, WELD, GAUNCH
AND CLINE, original sponsors

[Passed March 31, 2017; in effect 90 days from passage]
WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

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AN ACT to amend and reenact §55-7B-2, §55-7B-4, §55-7B-6, §55-7B-10 and §55-7B-11 of the Code of West Virginia, 1931, as amended, all relating to medical professional liability; defining the term “occurrence” in medical professional liability causes of action; providing for statute of limitations on certain actions for medical professional liability; establishing venue in claims against certain health care providers; addressing screening certificates of merit in certain medical professional liability causes of action; tolling the statute of limitations under certain circumstances; establishing the effective date; and providing for severability.

Be it enacted by the Legislature of West Virginia:

That §55-7B-2, §55-7B-4, §55-7B-6, §55-7B-10 and §55-7B-11 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

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 and Medicare 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, but excluding any amount that a group, organization, partnership, corporation or health care provider agrees to reduce, discount or write off of a medical bill;
(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:

(1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;

(2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and

(3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.
(f) "Health care facility" means any clinic, hospital, pharmacy, nursing home, assisted living facility, residential care community, end-stage renal disease facility, home health agency, child welfare agency, group residential facility, behavioral health care facility or comprehensive community mental health center, intellectual/developmental disability center or program, or other ambulatory health care facility, in and licensed, regulated or certified by the State of West Virginia under state or federal law and any state-operated institution or clinic providing health care and any related entity to the health care facility.

(g) "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity 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, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the 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. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.
(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) "Occurrence" means any and all injuries to a patient arising from health care rendered by a health care facility or a health care provider and includes any continuing, additional or follow-up care provided to that patient for reasons relating to the original health care provided, regardless if the injuries arise during a single date or multiple dates of treatment, single or multiple patient encounters, or a single admission or a series of admissions.

(m) "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.

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

(o) "Related entity" means any corporation, foundation, partnership, joint venture, professional limited liability company, limited liability company, trust, affiliate or other entity under common control or ownership, whether directly or indirectly, partially or completely, legally, beneficially or constructively, with a health care provider or health care facility; or which owns directly, indirectly, beneficially or constructively any part of a health care provider or health care facility.

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

§55-7B-4. Health care injuries; limitations of actions; exceptions; venue.
(a) A cause of action for injury to a person alleging medical professional liability against a health care provider, except a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, arises as of the date of injury, except as provided in subsection (c) of this section, and must be commenced within two years of the date of such injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.

(b) A cause of action for injury to a person alleging medical professional liability against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees arises as of the date of injury, except as provided in subsection (c) of this section, and must be commenced within one year of the date of such injury, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: Provided, That in no event shall any such action be commenced more than ten years after the date of injury.

(c) A cause of action for injury to a minor, brought by or on behalf of a minor who was under the age of ten years at the time of such injury, shall be commenced within two years of the date of such injury, or prior to the minor's twelfth birthday, whichever provides the longer period.

(d) The periods of limitation set forth in this section shall be tolled for any period during which the health care provider or its representative has committed fraud or collusion by concealing or misrepresenting material facts about the injury.

(e) Any medical professional liability action against a nursing home, assisted living facility, related entity or employee or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees shall be brought in the circuit court of the county in which the nursing home, assisted living facility or acute care hospital providing intermediate care or
skilled nursing care, at which the alleged act of medical professional liability occurred is located, unless otherwise agreed upon by the nursing home, assisted living facility, related entity or a distinct part of an acute care hospital providing intermediate care or skilled nursing care and the plaintiff. Nothing in this subsection shall prohibit a party from removing the action to federal court.

§55-7B-6. Prerequisites for filing an action against a health care provider; procedures; sanctions.

(a) Notwithstanding any other provision of this code, no person may file a medical professional liability action against any health care provider without complying with the provisions of this section.

(b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) The expert’s familiarity with the applicable standard of care in issue; (2) the expert’s qualifications; (3) the expert’s opinion as to how the applicable standard of care was breached; and (4) the expert’s opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted. The person signing the screening certificate of merit shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in this subsection may be construed to limit the application of Rule 15 of the Rules of Civil Procedure.
(c) Notwithstanding any provision of this code, if a claimant or his or her counsel, believes that no screening certificate of merit is necessary because the cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care, the claimant or his or her counsel shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit.

(d) Except for medical professional liability actions against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim.

(e) In medical professional liability actions against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within one hundred eighty days of the date the health care provider receives the notice of claim.

(f) Any health care provider who receives a notice of claim pursuant to the provisions of this section may respond, in writing, to the claimant or his or her counsel within thirty days of receipt of the claim or within thirty days of receipt of the screening certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) or (e) of this section. The response may
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state that the health care provider has a bona fide defense and the name of the health care
provider’s counsel, if any.

(g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant
is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care
provider is entitled to prelitigation mediation before a qualified mediator upon written demand to
the claimant.

(h) If the health care provider demands mediation pursuant to the provisions of subsection
(g) of this section, the mediation shall be concluded within forty-five days of the date of the written
demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial court rules,
unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of
a complaint or unless the Supreme Court of Appeals promulgates rules governing mediation prior
to the filing of a complaint. If mediation is conducted, the claimant may depose the health care
provider before mediation or take the testimony of the health care provider during the mediation.

(i)(1) Except for medical professional liability actions against a nursing home, assisted
living facility, their related entities or employees or a distinct part of an acute care hospital
providing intermediate care or skilled nursing care or its employees, and except as otherwise
provided in this subsection, any statute of limitations applicable to a cause of action against a
health care provider upon whom notice was served for alleged medical professional liability shall
be tolled from the date of mail of a notice of claim to thirty days following receipt of a response to
the notice of claim, thirty days from the date a response to the notice of claim would be due, or
thirty days from the receipt by the claimant of written notice from the mediator that the mediation
has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever
last occurs.

(2) In medical professional liability actions against a nursing home, assisted living facility,
their related entities or employees or a distinct part of an acute care hospital providing
intermediate care or skilled nursing care or its employees, except as otherwise provided in this
subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled one hundred eighty days from the date of mail of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

(3) If a claimant has sent a notice of claim relating to any injury or death to more than one health care provider, any one of whom has demanded mediation, then the statute of limitations shall be tolled with respect to, and only with respect to, those health care providers to whom the claimant sent a notice of claim to thirty days from the receipt of the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded.

(j) Notwithstanding any other provision of this code, a notice of claim, a health care provider’s response to any notice claim, a screening certificate of merit and the results of any mediation conducted pursuant to the provisions of this section are confidential and are not admissible as evidence in any court proceeding unless the court, upon hearing, determines that failure to disclose the contents would cause a miscarriage of justice.

§55-7B-10. Effective date; applicability of provisions.

(a) The provisions of House Bill 149, enacted during the first extraordinary session of the Legislature, 1986, shall be effective at the same time that the provisions of Enrolled Senate Bill 714, enacted during the regular session of the Legislature, 1986, become effective, and the provisions of said House Bill 149 shall be deemed to amend the provisions of Enrolled Senate Bill 714. The provisions of this article shall not apply to injuries which occur before the effective date of said Enrolled Senate Bill 714.
The amendments to this article as provided in House Bill 601, enacted during the sixth extraordinary session of the Legislature, 2001, apply to all causes of action alleging medical professional liability which are filed on or after March 1, 2002.

The amendments to this article provided in Enrolled Committee Substitute for House Bill 2122 during the regular session of the Legislature, 2003, apply to all causes of action alleging medical professional liability which are filed on or after July 1, 2003.

(b) The amendments to this article provided in Enrolled Committee Substitute for Senate Bill 6 during the regular session of the Legislature, 2015, apply to all causes of action alleging medical professional liability which are filed on or after July 1, 2015.

(c) The amendments to this article provided in Enrolled Committee Substitute for Senate Bill 338 during the regular session of the Legislature, 2017, apply to all causes of action alleging medical professional liability which arise or accrue on or after July 1, 2017.


(a) If any provision of this article as enacted during the first extraordinary session of the Legislature, 1986, in House Bill 149, or as enacted during the regular session of the Legislature, 1986, in Senate Bill 714, or as enacted during the regular session of the Legislature, 2015, or in Senate Bill 338, as enacted during the regular session of the Legislature, 2017, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article, and to this end, the provisions of this article are declared to be severable.

(b) If any provision of the amendments to section five of this article, any provision of section six-d of this article or any provision of the amendments to section eleven, article six, chapter fifty-six of this code as provided in House Bill 601, enacted during the sixth extraordinary session of the Legislature, 2001, is held invalid, or the application thereof to any person is held invalid, then, notwithstanding any other provision of law, every other provision of said House Bill 601 shall be deemed invalid and of no further force and effect.
(c) If any provision of the amendments to section six or ten of this article or any provision of section six-a, six-b or six-c of this article as provided in House Bill 601, enacted during the sixth extraordinary session of the Legislature, 2001, is held invalid, the invalidity does not affect other provisions or applications of this article, and to this end, such provisions are deemed severable.
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 90 days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within bill, approved this the 8th Day of April, 2017.

Governor
PRESENTED TO THE GOVERNOR

APR 03 2017

Time 1:59 pm