STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
BOARD OF RISK AND INSURANCE MANAGEMENT

Jim Justice
Governor

John A. Myers
Cabinet Secretary

Mary Jane Pickens
Executive Director
Deputy Cabinet Secretary

December 29, 2017

Mr. Aaron Allred
Legislative Manager
West Virginia Legislature
E-132 Kanawha Blvd., East
Charleston, WV 25305-0610

RE: Report on Patient Injury Compensation Fund

Dear Mr. Allred:

On behalf of the West Virginia Board of Risk and Insurance Mangement, the attached report is hereby submitted pursuant to West Virginia Code Section 29-12D-1a(d).

Sincerely,

Mary Jane Pickens
Executive Director

MJP/ldm

Attachment

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West Virginia
Board of Risk
&
Insurance Management

Patient Injury Compensation Fund
Report to Joint Committee
On Government & Finance

January 1, 2018

West Virginia Board of Risk and Insurance Management

Patient Injury Compensation Fund - Report to Joint Committee on Government and Finance

January 1, 2018

The West Virginia Board of Risk and Insurance Management ("BRIM") is the administrator of the Patient Injury Compensation Fund ("PICF"), a fund created pursuant to W. Va. Code § 29-12D-1, *et seq.*, enacted in 2004. During the regular 2016 legislative session, Senate Bill 602 was passed, which closed the PICF to new claims filed after June 30, 2016, and established funding sources for the claims filed as of that date. The bill requires BRIM to submit a report to the Joint Committee on Government and Finance annually beginning on January 1, 2018 giving recommendations based on actuarial analysis of the fund's liability[1] which must include but not be limited to discontinuance of the assessments provided in the bill, closure of the fund, and transfer of the fund's liability. BRIM hereby submits this report pursuant to that directive.

A) History of the Patient Injury Compensation Fund

The PICF was created by the Legislature following a 2003 study prepared by the Patient Injury Compensation Study Board. In 2004, the Legislature enacted article 12D, chapter 29, and the PICF was created. A copy of W. Va. Code § 29-12D-1, *et seq.* is attached as Exhibit 1. The purpose of the PICF was to provide fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectible as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles set forth in the Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-1, *et seq.*

Amendments to the MPLA over a decade ago included a cap of $500,000 for economic and non-economic damages resulting from care received at a designated trauma center, and the elimination of joint liability among multiple defendants in medical professional liability cases. Therefore, the Legislature created the PICF so that a qualified claimant who could show that he or she had exhausted recovery from all applicable liability insurance in an underlying MPLA claim could petition the PICF for an award for uncollected economic damages resulting from the application of either of the two tort reform measures mentioned above. Awards from the PICF are limited to $1 million dollars. BRIM is charged with administration of the PICF pursuant to applicable statutes as well as a Legislative rule found at 115CSR7 and a procedural rule found at 115CSR8. Copies of Series 7 and Series 8 are attached hereto collectively as Exhibit 2.

B) Funding of the PICF

The 2004 legislation creating the PICF also directed initial funding. It is often stated that the PICF was initially funded by tobacco settlement money; however, the initial funding came from money

[1] Actuarial analysis of the fund's liability is not needed for this report, given closure of the fund to new claims as directed by Senate Bill 602. The ultimate potential liability of the fund is currently discernable. It should further be noted that pursuant to W. Va. Code § 29-12D-2(e), the state is not liable for the liabilities of the fund, and the claims or expenses against the fund are not a charge against the state's general revenue.

that was flowing into the tobacco settlement account, not from it. The Initial funding source was a three-year diversion of premium taxes collected by the Insurance Commissioner from medical malpractice policies that would otherwise have gone toward repayment to the tobacco settlement account of a loan to capitalize the Physicians Mutual Insurance Company. Pursuant to W. Va. Code § 29-12D-1(b), initial funding of the PICF during fiscal years 2005, 2006 and 2007 was directed in the amount of $2,200,000 for each of those years from revenues that would otherwise be transferred to the tobacco settlement account established in W. Va. Code § 4-11A-2(b), pursuant to W. Va. Code §33-3-14. To the extent additional funding was required to maintain the actuarial soundness of the PICF, the enabling statutes stated that such funding would be provided by further act of the Legislature, either from the same revenue source or otherwise. However, the PICF did not receive all the initial funding for those three years, and an ongoing funding source was never designated. [2]

In 2013 it became apparent to BRIM management that the fund was inadequately funded for claims that were expected to be filed. In response to inquiry from the Joint Committee on Government and Finance, Executive Director Chuck Jones wrote a letter to the Senate President and House Speaker dated August 2, 2013 stating that the balance then remaining in the fund was insufficient to fully satisfy the awards that had been made and were expected to be made. In 2014, the Legislature directed $2 million into the fund pursuant to House Bill 4621. Claims continued to be received, and BRIM management continued to be concerned that the funding remained inadequate. This concern lead to the introduction of Senate Bill 602 during the regular 2016 legislative session. The bill closed the fund to new claims and identified new sources of funding, discussed later in this report, to satisfy the amount awarded but unpaid.

C) Financial Status of the PICF as of November 30, 2017

An analysis of all financial activity in the fund from its inception is attached hereto as Exhibit 3. Below is the financial activity in the fund from July 1, 2016 (the effective date of Senate Bill 602) and November 30, 2017:

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[2] W. Va. Code §33-3-14 makes no mention of the PICF, but states that $1,667,000 of the premium tax money collected from medical malpractice insurance policies shall be temporarily dedicated to replenishing moneys appropriated from the tobacco settlement account pursuant to §4-11A-2(c). The Legislature also directed another $833,000 from the premium tax fund, pursuant to §33-3-14a, to replenish moneys appropriated from the tobacco settlement account. Together, the two code sections, §§33-3-14 and 33-3-14a, take a total of $2,500,000 annually from the premium tax fund to replenish the tobacco settlement account. Although W. Va. Code §29-12D-1(b) states that $2,200,000 shall be redirected to the PICF for three years from moneys set aside to replenish the tobacco settlement account, it states that the transfer will occur as a result of §33-3-14 only, not from §33-3-14 and §33-3-14a. If money had been redirected by reference to each statute, there would have been enough money to allow funding of the PICF in the amount of $2,200,000 for each of the three years. Since the Legislature referenced §33-3-14 and not §33-3-14a, only $1,667,000 was available each year to be redirected to the PICF. It should also be noted that in FY 2007 the amount transferred into the fund was only $1,580,412.01 due to a lower amount of money being available for transfer from the premium tax fund.

West Virginia Board of Risk and Insurance Management Patient Injury Compensation Fund (PICF) Activity for the Period 7-1-16 thru 11-30-17 (After SB602)		
Fund Balance 7-1-16		$ 936,876.00
Cash received resulting from SB602:		
Transfer of BRIM funds from HB601 Program	$ 2,810,250.91	
1% Court/Settlement Fees	890,706.40	
Trauma Fees	514,700.00	
Physicians' Licensing Fees	533,273.43	
Court Filing Fees	128,210.00	4,877,140.74
PICF Claims and Claims Related Disbursements:		
Claims Payments	(4,524,108.46)	
Contractual and Professional	(147,414.87)	(4,671,523.33)
Other:		
Interest Earned		28,781.44
Fund Balance 11-30-17		$ 1,171,274.85

D) Claim Payment Methodology and Status of Claim Activity in the PICF

Pursuant to the 115CSR7, it is within BRIM's discretion to determine whether payment from the PICF is in the best interests of the fund. The actuarial soundness of the PICF, among other factors, must be considered by BRIM in making its determination that payment is appropriate. BRIM has broad discretion to protect the interests of the fund.

The Legislature has recognized that funding could be inadequate to pay all claims in full as they become final. West Virginia Code § 29-12D-3(g) states that if any payment to one or more claimants would deplete the fund during any fiscal year, payments may be prorated, may be made in the form of periodic payments, or claims may be placed in non-payment status until funds become available, according to rules promulgated by BRIM. Any amounts due but not paid in a fiscal year will then be paid in subsequent fiscal years from available funds, to the extent funds are available, under the rules. It is further within BRIM's discretion to make payment of an award in a lump sum or via structured settlement. W. Va. Code § 29-12D-3(e). Series 7 attached hereto as part of Exhibit 2 further outlines the process for paying claims in the event of insufficient funds.

A total of thirty-four claims have been filed against the PICF since its inception. As of November 30, 2017, sixteen claimants have been fully paid for their claims. Two claims have been denied

without appeal, and one denied claim is on appeal and should become final in the coming months. There are fifteen claimants with claims currently in the payment phase who are receiving or will receive pro-rated annual payments. Attached as Exhibit 4 is a schedule that estimates the projected PICF balance at June 30, 2020, along with an estimate of the remaining outstanding unpaid claim balance on that date. To prepare this projection, BRIM assumed revenue collections from the current funding streams to remain flat at $1,880,000 per year, which is an annualized figure based on the amounts received for the first fifteen months following passage of Senate Bill 602 (7-1-16 thru 9-30-17), excluding the one-time transfer of $2.8 million from the Medical Liability Fund in fiscal year 2017.

Paying out a pro-rated $2.7 million per year for both fiscal years 2019 and 2020 on the remaining claims balances will substantially deplete the fund, leaving cash of approximately $75,000 and an estimated $2.1 million outstanding in unpaid claims at June 30, 2020.

Pro-rated annual claim payments will continue as long as funding is available. Attached hereto as Exhibit 5 is a spreadsheet showing all claims received since the inception of the fund and the payment status of each claim. Names of claimants have been redacted.

E) Senate Bill 602

In addition to closing the PICF to claims filed after June 30, 2016, Senate Bill 602 designated new funding streams to satisfy outstanding PICF claims. The bill provided the following funding sources for the PICF for claims filed on or before June 30, 2016:

1) Transfer of the Medical Liability Fund at BRIM into the PICF and closure of the Medical Liability Fund;

2) An assessment of $125 on each license issuance or renewal by the Board of Medicine and Board of Osteopathic Medicine during calendar years 2016 through 2019;

3) An assessment of $25 on designated trauma centers for each trauma patient treated in calendar years 2016 through 2019 as reported to the WV Trauma Registry;

4) An assessment of 1% on the gross amount of settlements and judgments in claims arising under the MPLA from July 1, 2016 through June 30, 2020; and

5) An increase (from $280 to $400) in filing fees for medical malpractice law suits, with an increase in the amount sent by circuit clerks to BRIM for each filing fee received (from $165 to $285).

Pursuant to W. Va. Code § 29-12D-1a(d), the assessments are to terminate at the times set forth in the bill or sooner if the liability of the PICF has been paid or fully funded. At the time Senate Bill 602 was passed, the goal was that the funding sources received into the fund over the time

periods specified would be adequate to satisfy all claims received through June 30, 2016. However, it was recognized that the number of claims to be filed through June 30, 2016 could not be projected with absolute certainty, nor could the amount ultimately received by the fund from the designated funding streams. For this reason, the Legislature required this report.

F) Issues Relating to Funding Sources Following Effective Date of Senate Bill 602

Since the effective date of Senate Bill 602, several challenges have arisen around provisions setting forth the new funding sources. They are outlined below.

1) Assessments on licensed Medical Doctors and Osteopathic Doctors – The State Medical Board and Board of Osteopathic Medicine have both reported that they have been unable to collect the assessment on licenses for the first half of calendar year 2016, as the statute seems to contemplate. The language in W. Va. Code § 29-12D-1a(a)(1) states:

> *"The Board of Medicine and the Board of Osteopathic Medicine shall collect a biennial assessment in the amount of $125 from every physician licensed by each board for the privilege of practicing medicine in this state. The assessment is to be imposed and collected on forms prescribed by each licensing board. The assessment shall be collected as part of licensure or license renewal beginning July 1, 2016, for licenses issued or renewed in calendar year 2016 through calendar year 2019..."* (emphasis added).

The intent of the statute is believed to be that the $125 assessments be applied to all licenses issued or renewed during the calendar year 2016, however the collection of the assessments wasn't directed to commence until July 1, 2016. Upon information and belief, the Board of Medicine and the Board of Osteopathic Medicine are without a method to collect the assessments on licenses issued or renewed from January 1, 2016 through June 30, 2016. This revenue was anticipated to be available to pay claims through the end of calendar year 2019; therefore, the inability to collect it will be a contributing factor in the event that insufficient funds come in to pay all claims in full.

2) Assessments on trauma centers – The language in W. Va. Code § 29-12D-1a(b) states:

> *"From July 1, 2016 through June 30, 2020, an assessment of $25 shall be levied by the Board of Risk and Insurance Management on trauma centers for each trauma patient treated at a health care facility designated by the Office of Emergency Medical Services as a trauma center, as reported to the West Virginia Trauma Registry. Beginning July 1, 2016, and annually thereafter until June 30, 2020, the Board of Risk and Insurance Management shall assess each trauma center for trauma patients treated from January 1 to December 31 of the previous year: Provided, That the assessment to be collected by the Board*

of Risk and Insurance Management on June 30, 2017, shall be based on each trauma patient treated from January 1, 2016, to December 31, 2016."

On May 9, 2017, BRIM mailed invoices to all designated trauma centers requesting payment in the amount of $25 for each trauma patient treated by the trauma center as reported to the West Virginia Trauma Registry. BRIM obtained the Trauma Registry from Office of Emergency Medical Services in the Bureau for Public Health for calendar year 2016. Each trauma center made payment in full for the calendar year 2016 assessment.

BRIM has been notified by four lawyers representing PICF claimants that they intend to file lawsuits against BRIM based on BRIM's method for determining the amount of the trauma center assessments. Copies of the Notices of Intent to Sue are attached hereto collectively as Exhibit 6. Upon information and belief, not every patient treated at a designated trauma center is reported to the Trauma Registry. As BRIM understands the claimant counsels' allegations, the claimants interpret the statute to require a $25 payment for each patient treated at a designated trauma center, regardless of whether the treatment is reported to the trauma registry. As of the date of this report, no lawsuits have been filed.

3) Assessments on settlements and judgments in claims or lawsuits filed under MPLA – This funding mechanism has been the most challenging aspect of BRIM's administration of the PICF since the passage of Senate Bill 602.

   i) Ambiguity Around Remittance of 1% Assessments:

   West Virginia Code § 29-12D-1a(c) requires the levy of an assessment in the amount of 1% of the gross amount of any settlement or judgement in a qualifying claim from July 1, 2016 through June 30, 2020. The obligation to remit the 1% assessment is on the defendant or defendants when a judgment is entered by the court, and on the claimant or his/her counsel if the claim is settled before a lawsuit is filed. However, the Legislature did not clearly specify the party responsible for remitting the assessment when a lawsuit is filed but it is settled prior to trial. Subsection (c) states:

   (c) Assessment on claims filed under the Medical Professional Liability Act - From July 1, 2016, through June 30, 2020, an assessment of one percent of the gross amount of any settlement or judgment in a qualifying claim shall be levied.

   (1) For purposes of this subsection, a qualifying claim is any claim for which a screening certificate of merit, as that term is defined in section six, article seven-b, chapter fifty-five of this code, is required.

   (2) For any assessment levied pursuant to this subsection for which a judgment is entered by a court, the date of the entry of judgment shall be used to

> *determine applicability of this provision. The defendant or defendants shall remit the assessment to the clerk of the court in which the qualified claim was filed. The clerk of the court shall then remit the assessment monthly to the State Treasury to be deposited in the fund.*
>
> *(3) For any assessment levied pursuant to this subsection on a settlement entered into by the parties, the date on which the agreement is formalized in writing by the parties shall be used to determine applicability of this provision. At the time that an action alleging a qualified claim is dismissed by the parties, the assessment shall be paid to the clerk of the court, who shall then remit the assessment to the State Treasury to be deposited in the fund. Collected assessments shall be remitted no less often than monthly. If a qualifying claim is settled prior to the filing of an action, the claimant, or his or her counsel, shall remit the payment to the Board of Risk and Insurance Management within sixty days of the date of the settlement agreement to be paid into the fund. (emphasis added).*

In response to inquiries as to who must remit the assessment when a lawsuit is settled prior to trial, BRIM issued an Advisory Bulletin in November 2016, which was replaced with an Amended Advisory Bulletin dated January 19, 2017. A copy of the Amended Advisory Bulletin is attached hereto as Exhibit 7. The bulletin provides the following interpretation and guidance:

> *"Reviewing the language at issue as a whole it is BRIM's interpretation that by not designating the party responsible for remitting payment of the 1% assessment to the Clerk, the Legislature intended that plaintiff(s) and defendant(s) share this responsibility; and that the party or parties responsible for remittance must be determined in connection with settlement of the civil action so that remittance can be made to the Clerk at the time the civil action is dismissed, in accordance with the statute.*
>
> *It is BRIM's interpretation that the term "remittance" is the administrative act of sending the assessment to the clerk of the court at the time the civil action is dismissed, and does not refer to underlying financial responsibility for the payment itself. Any language herein referring to shared responsibility is intended only to address responsibility for remittance, i.e. sending the assessment to the clerk at the time of dismissal. In accordance with the clear language of W. Va. Code § 29-12D-1a that the assessment be levied on the gross amount of the settlement or judgment, it is further BRIM's interpretation that the 1% assessment is not a payment in addition to the amount of the settlement*

or judgment; rather, it is part of the gross amount of the settlement or judgment."

As an example of this issue, attached as Exhibit 8 is BRIM's response to a motion filed in a civil action in the Circuit Court of Wood County, West Virginia asking the Court to determine that no party is responsible for the 1% assessment when a lawsuit is settled, along with BRIM's motion to intervene in that civil action to protect the interests of the PICF.

ii) Difficulty in Tracking and Reconciling Payments into Fund:

It should be noted that the responsibility for paying the 1% assessments in MPLA claims and lawsuits is on the claimant, litigants, or their counsel. While BRIM has no statutory duty to ensure that parties to MPLA claims or lawsuits are doing as they should, as administrator of the fund BRIM has made a good faith effort to track payments into the fund and spread awareness that the 1% assessments must be paid. There is no requirement in the statute to notify BRIM when remittance is made to the Circuit Clerk, and no requirement that the Circuit Clerks provide information to BRIM about the assessments being sent to the State Treasury; therefore, there is no way for BRIM to determine with certainty who is making the remittance and who isn't. BRIM has attempted to confirm remittances through data comparison with the Insurance Commissioner, and the Supreme Court has assisted by directing Circuit Clerks to provide some information relating to the assessments. However, no method thus far has provided truly reliable information showing that an assessment of 1% of the gross amount of a particular MPLA claim settlement or judgment has been deposited into the fund. Without this information, it is not possible for BRIM to effectively follow up to ensure the fund is receiving these payments as expected and needed, if that is the intent of the Legislature.

iii) Federal Court Cases:

Another issue relating to the 1% assessments on settlements and judgments relates to lawsuits filed in federal court. The statute does not outline a process for remittance of the 1% assessment when a lawsuit is filed in federal court; however, federal courts are required to apply the law of the state where the injury occurred under the Federal Tort Claims Act and under general diversity jurisdiction principles, which consequently requires federal courts to apply and follow the PICF statutes. Accordingly, it is BRIM's position that the 1% assessments are due in federal court cases. In some of these cases, the United States is a party and has resisted payment of the assessment on the basis that it is a tax. BRIM has engaged counsel on this issue, and to follow up with all counsel and seek payments owed to the fund in the federal court cases that have been reported to BRIM which should be subject to the 1% assessment.

iv) Definition of "Qualifying Claim":

BRIM is also aware that some counsel in MPLA claims or lawsuits have questioned the impact of the definition of "qualifying claim" in W. Va. Code § 29-12D-1a(c) on the 1% assessments. For purposes of that subsection, "qualifying claim" is defined as any claim for which a screening certificate of merit, as that term is defined in W. Va. Code § 55-7B-6, is required. The term is significant because the 1% assessments on claims and lawsuits under the MPLA are due to the fund in "qualifying claims". Under W. Va. Code § 55-7B-6, screening certificates of merit are required to be served on every health care provider at least thirty days before a medical malpractice action is filed, however a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit may be provided if the claimant or his or her counsel believes that no screening certificate of merit is necessary because the cause of action is based on a well-established legal theory of liability that does not require expert testimony supporting a breach of the applicable standard of care. BRIM is not aware of any specific instances where the assessment has not been paid based on this language, but the issue has been raised.

v) General Resistance to the Assessment:

Some attorneys representing parties in MPLA claims or lawsuits have questioned the legality of the 1% assessment as well as their responsibility for remittance of the assessment, and it is believed that some may continue to do so. Attached collectively for illustrative purposes as Exhibit 9 are letters setting forth arguments that have been made in response to BRIM's efforts to spread awareness of the 1% assessment requirement. BRIM has engaged counsel to help identify state court cases in which counsel may not be remitting the assessment and to assist with collection. This is challenging because several counties do not make their files available electronically and may necessitate visits to file-rooms and Circuit Clerks' offices for in-person research to determine whether the assessment is owed.

In fairness, BRIM believes that the great majority of counsel make every effort to comply with the 1% assessment, however a few may not. Not being staffed to undertake collection activities involving legal research and legal work of this nature, BRIM has engaged outside counsel to address these issues and advise as to avenues for collection and resolution of outstanding legal issues relating to the 1% assessments. The legal costs associated with this work is an administrative expense of the fund, and paid from the fund. However, BRIM's goal is to preserve the fund for payment to claimants, and we hope for expeditious resolution of these issues.

G) Recommendations

1) This report is required to include recommendations relating to discontinuance of the assessments provided in Senate Bill 602, closure of the fund, and transfer of the fund's liability.

   i) BRIM does not recommend discontinuance of the assessments provided in Senate Bill 602 because all final claims have not been paid.

   ii) Closure of the fund has already occurred as to new claims filed after June 30, 2016; however, if the intent was to seek a recommendation on closure of the fund following payment on claims, it is premature to make such a recommendation.

   iii) Transfer of the fund's liability is not a good fit for this type of closed fund with a known claim amount that is simply being paid as money is available.

2) BRIM suggests considering an injection of sufficient money into the fund from a source identified by the Legislature to enable prompt payment in full of all final claims with releases from the claimants, with the funding source repaid from continuation of the funding streams designated by Senate Bill 602.

3) BRIM recommends amendment of W. Va. Code § 29-12D-1a(a) to clarify the period for collection of license assessments by the Board of Medicine and the Board of Osteopathic Medicine. The language should be amended as follows:

   ~~The assessment shall be collected as part of licensure or license renewal beginning July 1, 2016 for licenses issued or renewed in calendar year 2016 through calendar year 2019:~~ From July 1, 2016 through June 30, 2020, the assessment shall be collected when licenses are issued or renewed; *Provided,* That the following physicians shall be exempt from the assessment...

4) BRIM recommends amendment of the definition of "qualifying claim" in W. Va. Code § 29-12D-1a(c) as follows:

   For purposes of this subsection, a qualifying claim is any claim for which a screening certificate of merit~~, as that term is defined in section six, article seven-b, chapter fifty-five of this code, is required.~~ is required, or for which a statement setting forth the basis of the alleged liability of the health care provider is allowed in lieu of the screening certificate of merit, as defined in §55-7B-6 of this code.

5) BRIM recommends amendments relating to the filing fee for medical malpractice civil actions. There is no current statutory requirement to reduce these filing fees and terminate the transfer of the portion designated to flow into the fund when PICF claims have been fully paid. The termination of funding provision in W. Va. Code § 29-12D-1a(d) applies only to the

funding streams in that section and doesn't touch the fees for filing medical malpractice civil actions. BRIM therefore recommends amendments to W. Va. Code §§ 59-1-11(a)(2) and 59-1-28a(f) to return the filing fee for medical professional liability civil actions to $280 and to terminate the transfer by the Circuit Court Clerks of the portion of the filing fee used for payment of PICF claims, following certification by BRIM to the West Virginia Supreme Court of Appeals that all administrative expenses of the PICF and all final claims have been fully paid.

6) BRIM recommends amendment of W. Va. Code § 29-12D-1a(d) to require continuance of the assessments created by subsections (a), (b), and (c) of that section until all administrative expenses and claim liability of the fund have been fully paid from the moneys collected. The amendments should further authorize BRIM to certify to the Joint Committee on Government and Finance, the West Virginia Board of Medicine, the West Virginia Board of Osteopathic Medicine, each designated Trauma Center, The West Virginia Supreme Court of Appeals, and the West Virginia State Bar that all administrative expenses of the PICF and all final claims have been fully paid with releases obtained and that the assessments created by subsections (a), (b) and (c) of the section may be discontinued.

7) BRIM recommends amendment of W. Va. Code § 29-12D-1(a)(c) to clarify whether it designates the party bearing financial responsibility for the assessment or whether it designates the responsibility for remitting the payment, and to further clarify these responsibilities in non-litigated claims, lawsuits settled before trial, and judgments. In addition, if the Legislature envisions BRIM as the entity responsible for ensuring collection, it is further recommended that the amendments require the 1% assessments be sent directly to BRIM for deposit into the fund as opposed to the Circuit Clerks for transfer to the State Treasury. Along with payment of the assessment directly to BRIM, BRIM suggests a requirement that a party or his/her counsel responsible for payment of the assessment under subsection (c) also provide the following information for each assessment:

- The name of the claimant/plaintiff and of his/her counsel;
- The name of the defendant and of the defendant's counsel;
- The civil action number if lawsuit is filed;
- The county in which a civil action was filed;
- If settled, the date of the settlement or dismissal of lawsuit following settlement;

- The gross amount of the judgment or settlement; and
- The amount of the 1% assessment due to the PICF.

Without a mechanism to allow reconciliation of all settled claims and lawsuits with the deposits into the fund, BRIM recognizes that this information will still fall short of proving that the assessments are paid from all settlements and judgments. Therefore, BRIM welcomes other suggestions on how best to ensure that the 1% assessments are being paid from each settlement or judgment, and any other ideas for reconciling the assessments remitted with the deposits into the fund.

Respectfully Submitted,

Mary Jane Pickens
Executive Director
West Virginia Board of Risk and Insurance Management

MJP/cjn

Attachments

EXHIBIT

1

W. Va. Code § 29-12D-1

Current through the Regular Session, First Extraordinary Session, and Chapters 1, 3-6 of the Second Extraordinary Session of the 2017 Legislature.

Michie's ™ West Virginia Code > Chapter 29. Miscellaneous Boards and Officers. > Article 12D. West Virginia Patient Injury Compensation Fund.

§ 29-12D-1. Creation of the Patient Injury Compensation Fund; purpose; initial funding of Patient Injury Compensation Fund.

(a) There is created the West Virginia Patient Injury Compensation Fund, for the purpose of providing fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectible as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles and standards, set forth in article seven-b [§§ *55-7B-1* et seq.], chapter fifty-five of this code. The fund shall consist of all contributions, revenues and moneys which may be paid into the fund, from time to time, by the State of West Virginia or from any other source whatsoever, together with any and all interest, earnings, dividends, distributions, moneys or revenues of any nature whatsoever accruing to the fund.

(b) Initial funding for the fund shall be provided as follows: during fiscal year 2005, $2,200,000 of the revenues that would otherwise be transferred to the tobacco account established in subsection (b), section two [§ *4-11A-2*], article eleven-a, chapter four of this code pursuant to the provisions of section fourteen [§ *33-3-14*], article three, chapter thirty-three of this code shall be transferred to the fund; during fiscal year 2006, $2,200,000 of the revenues that would otherwise be transferred to the tobacco account established in subsection (b), section two, article eleven-a, chapter four of this code pursuant to the provisions of section fourteen, article three, chapter thirty-three of this code shall be transferred to the fund; and during fiscal year 2007, $2,200,000 of the revenues that would otherwise be transferred to the tobacco account established in subsection (b), section two, article eleven-a, chapter four of this code pursuant to the provisions of section fourteen, article three, chapter thirty-three of this code shall be transferred to the fund.

(2) Beginning fiscal year 2008, if and to the extent additional funding for the fund is required, from time to time, to maintain the actuarial soundness of the fund, the additional funding may be provided by further act of the Legislature, either from the revenue stream identified in this subsection or otherwise. Payments to the tobacco fund shall be extended until the tobacco fund is repaid in full.

(c) The fund is not and shall not be considered a defendant in any civil action arising under article seven-b, chapter fifty-five of this code.

(d) The fund is not and shall not be considered an insurance company or insurer for any purpose under this code.

(e) Legal fees of claimants may not be recovered directly from the fund.

(f) The fund shall not provide compensation to claimants who file a claim with the Patient Injury Compensation Fund on or after July 1, 2016.

History

2004, c. 192; *2016, c. 155*.

Mary Jane Pickens

Annotations

Notes

Effect of amendment of 2016. —

Acts *2016, c. 155*, effective July 1, 2016, added (e) and (f); and made stylistic changes.

Research References & Practice Aids

Hierarchy Notes:

W. Va. Code Ch. 29

W. Va. Code Ch. 29, Art. 12D

End of Document

W. Va. Code § 29-12D-1a

Current through the Regular Session, First Extraordinary Session, and Chapters 1, 3-6 of the Second Extraordinary Session of the 2017 Legislature.

Michie's ™ West Virginia Code > Chapter 29. Miscellaneous Boards and Officers. > Article 12D. West Virginia Patient Injury Compensation Fund.

§ 29-12D-1a. Additional funding for Patient Injury Compensation Fund; assessment on licensed physicians; assessment on hospitals; assessment on certain awards.

(a) Annual assessment on licensed physicians. —

(1) The Board of Medicine and the Board of Osteopathic Medicine shall collect a biennial assessment in the amount of $125 from every physician licensed by each board for the privilege of practicing medicine in this state. The assessment is to be imposed and collected on forms prescribed by each licensing board. The assessment shall be collected as part of licensure or license renewal beginning July 1, 2016, for licenses issued or renewed in calendar year 2016 through calendar year 2019: Provided, That the following physicians shall be exempt from the assessment:

(A) A resident physician who is a graduate of a medical school or college of osteopathic medicine enrolled and who is participating in an accredited full-time program of post-graduate medical education in this state;

(B) A physician who has presented suitable proof that he or she is on active duty in the armed forces of the United States and who will not be reimbursed by the armed forces for the assessment;

(C) A physician who practices solely under a special volunteer medical license authorized by section ten-a [§ 30-3-10a], article three, chapter thirty of this code or section twelve-b [§ 30-14-12b], article fourteen of said chapter;

(D) A physician who holds an inactive license pursuant to subsection (j), section twelve [§ 30-3-12], article three, chapter thirty of this code or section ten [§ 30-14-10], article fourteen of said chapter, or a physician who voluntarily surrenders his or her license: Provided, That a retired osteopathic physician who submits to the Board of Osteopathic Medicine an affidavit asserting that he or she receives no monetary remuneration for any medical services provided, executed under the penalty of perjury and if executed outside the State of West Virginia, verified, may be considered to be licensed on an inactive basis: Provided, however, That if a physician or osteopathic physician elects to resume an active license to practice in the state and the physician or osteopathic physician has not paid the assessments during his or her inactive status, then as a condition of receiving an active status license, the physician or osteopathic physician shall pay the assessment due in the year in which physicians or the osteopathic physician resumes an active license; and

(E) A physician who practices less than forty hours a year providing medical genetic services to patients within this state.

(2) The entire proceeds of the annual assessment collected pursuant to subsection (a) of this section shall be dedicated to the Patient Injury Compensation Fund. The Board of Medicine and the Board of Osteopathic Medicine shall promptly pay over to the Board of Risk and Insurance Management all amounts collected pursuant to this subsection for deposit in the fund.

(3) Notwithstanding any provision of the code to the contrary, a physician required to pay the annual assessment who fails to do so shall not be granted a license or renewal of an existing license by the

Board of Medicine or the Board of Osteopathic Medicine. Any license which expires as a result of a failure to pay the required assessment shall not be reinstated or reactivated until the assessment is paid in full.

(b) Assessment on trauma centers. — From July 1, 2016 through June 30, 2020, an assessment of $25 shall be levied by the Board of Risk and Insurance Management on trauma centers for each trauma patient treated at a health care facility designated by the Office of Emergency Medical Services as a trauma center, as reported to the West Virginia Trauma Registry. Beginning July 1, 2016, and annually thereafter until June 30, 2020, the Board of Risk and Insurance Management shall assess each trauma center for trauma patients treated from January 1 to December 31 of the previous year: Provided, That the assessment to be collected by the Board of Risk and Insurance Management on June 30, 2017, shall be based on each trauma patient treated from January 1, 2016, to December 31, 2016.

(c) Assessment on claims filed under the Medical Professional Liability Act. — From July 1, 2016, through June 30, 2020, an assessment of one percent of the gross amount of any settlement or judgment in a qualifying claim shall be levied.

(1) For purposes of this subsection, a qualifying claim is any claim for which a screening certificate of merit, as that term is defined in section six [*§ 55-7B-6*], article seven-b, chapter fifty-five of this code, is required.

(2) For any assessment levied pursuant to this subsection for which a judgment is entered by a court, the date of the entry of judgment shall be used to determine applicability of this provision. The defendant or defendants shall remit the assessment to the clerk of the court in which the qualified claim was filed. The clerk of the court shall then remit the assessment monthly to the State Treasury to be deposited in the fund.

(3) For any assessment levied pursuant to this subsection on a settlement entered into by the parties, the date on which the agreement is formalized in writing by the parties shall be used to determine applicability of this provision. At the time that an action alleging a qualified claim is dismissed by the parties, the assessment shall be paid to the clerk of the court, who shall then remit the assessment to the State Treasury to be deposited in the fund. Collected assessments shall be remitted no less often than monthly. If a qualifying claim is settled prior to the filing of an action, the claimant, or his or her counsel, shall remit the payment to the Board of Risk and Insurance Management within sixty days of the date of the settlement agreement to be paid into the fund.

(d) Termination of assessments. — The requirements of this section shall terminate on the dates set forth in this section or sooner if the liability of the Patient Injury Compensation Fund has been paid or has been funded in its entirety. The Board of Risk and Insurance Management shall submit a report to the Joint Committee of Government and Finance each year beginning January 1, 2018, giving recommendations based on actuarial analysis of the fund's liability. The recommendations shall include, but not be limited to, discontinuance of the assessments provided for in this section, closure of the fund and transfer of the fund's liability.

History

2016, c. 155; 2017, c. 98.

Annotations

Notes

Effective dates. —

Acts *2016, c. 155*, provided that the act take effect January 7, 2016.

Effect of amendment of 2017. —

Acts 2017, c. 98, effective July 5, 2017, in (c), substituted "monthly to the State Treasury" for "quarterly to the Board of Risk and Insurance Management", "State Treasury" for "Board of Risk and Insurance Management", "monthly" for "quarterly", and "claimnant" for "plaintiff"; and made stylistic changes.

Research References & Practice Aids

Hierarchy Notes:

W. Va. Code Ch. 29

W. Va. Code Ch. 29, Art. 12D

End of Document

W. Va. Code § 29-12D-2

Current through the Regular Session, First Extraordinary Session, and Chapters 1, 3-6 of the Second Extraordinary Session of the 2017 Legislature.

Michie's ™ West Virginia Code > Chapter 29. Miscellaneous Boards and Officers. > Article 12D. West Virginia Patient Injury Compensation Fund.

§ 29-12D-2. Administration of fund; investment of fund assets; annual actuarial review and audit; fund assets and liabilities not assets and liabilities of the state.

(a) The Patient Injury Compensation Fund shall be implemented, administered and operated by the Board of Risk and Insurance Management. In addition to any other powers and authority expressly or impliedly conferred on the Board of Risk and Insurance Management in this code, the board may:

(1) Receive, collect and deposit all revenues and moneys due the fund;

(2) Employ, or in accordance with the provisions of law applicable contract for personal, professional or consulting services, retain the services of a qualified competent actuary to perform the annual actuarial study of the fund required by this section and advise the board on all aspects of the fund's administration, operation and defense which require application of the actuarial science;

(3) Contract for any services necessary or advisable to implement the authority and discharge the responsibilities conferred and imposed on the board by this article;

(4) Employ, or contract with, legal counsel of the board's choosing to advise and represent the board and represent the fund in respect of any and all matters relating to the operation of the fund and payments out of the fund;

(5) Employ necessary or appropriate clerical personnel to carry out the responsibilities of the board under this part; and

(6) Promulgate rules, in accordance with article three [§§ *29A-3-1* et seq.], chapter twenty-nine-a of this code as it considers necessary or advisable to implement the authority of and discharge the responsibilities conferred and imposed on the board by this article.

(b) The assets of the fund, and any and all income, dividends, distributions or other income or moneys earned by or accruing to the benefit of the fund, shall be held in trust for the purposes contemplated by this article, and shall not be spent for any other purpose: Provided, That the assets of the fund may be used to pay for all reasonable costs and expenses of any nature whatsoever associated with the ongoing administration and operation of the fund. All assets of the fund from time to time shall be deposited with, held and invested by, and accounted for separately by the Investment Management Board. All moneys and assets of the fund shall be invested and reinvested by the Investment Management Board in the same manner as provided by law for the investment of other trust fund assets held and invested by the Investment Management Board.

(c) The board shall cause an annual review of the assets and liabilities of the fund to be conducted on an annual basis by a qualified, independent actuary.

(d) The board shall cause an audit of the fund to be conducted on an annual basis by a qualified, independent auditor.

(e) The State of West Virginia is not liable for any liabilities of the fund. Claims or expenses against the fund are not a debt of the State of West Virginia or a charge against the General Revenue Fund of the State of West Virginia.

History

2004, c. 192.

Annotations

Research References & Practice Aids

Hierarchy Notes:

W. Va. Code Ch. 29

W. Va. Code Ch. 29, Art. 12D

End of Document

W. Va. Code § 29-12D-3

Current through the Regular Session, First Extraordinary Session, and Chapters 1, 3-6 of the Second Extraordinary Session of the 2017 Legislature.

Michie's ™ West Virginia Code > Chapter 29. Miscellaneous Boards and Officers. > Article 12D. West Virginia Patient Injury Compensation Fund.

§ 29-12D-3. Payments from the Patient Injury Compensation Fund.

(a) Other than payments in connection with the ongoing operation and administration of the fund, no payments may be made from the fund other than in satisfaction of claims for economic damages to qualified claimants who would have collected economic damages but for the operation of the limits on economic damages set forth in article seven-b [§§ *55-7B-1* et seq.], chapter fifty-five of this code.

(b) For purposes of this article, a qualified claimant must be both a "patient" and a "plaintiff" as those terms are defined in article seven-b, chapter fifty-five of this code.

(c) Any qualified claimant seeking payment from the fund must establish to the satisfaction of the board that he or she has exhausted all reasonable means to recover from all applicable liability insurance an award of economic damages, following procedures prescribed by the board by legislative rule.

(d) Upon a determination by the board that a qualified claimant to the fund for compensation has exhausted all reasonable means to recover from all applicable liability insurance an award of economic damages arising under article seven-b, chapter fifty-five of this code, the board shall make a payment or payments to the claimant for economic damages. The economic damages must have been awarded but be uncollectible after the exhaustion of all reasonable means of recovery of applicable insurance proceeds. In no event shall the amount paid by the board in respect to any one occurrence exceed $1 million or the maximum amount of money that could have been collected from all applicable insurance prior to the creation of the patient injury compensation fund under this article, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees.

(e) The board, in its discretion, may make payments to a qualified claimant in a lump sum amount or in the form of periodic payments. Periodic payments are to be based upon the present value of the total amount to be paid by the fund to the claimant by using federally approved qualified assignments.

(f) In its discretion, the board may make a payment or payments out of the fund to a qualified claimant in connection with the settlement of claims arising under article seven-b, chapter fifty-five of this code all according to rules promulgated by the board. The board shall prior to making payment determine that payment from the fund to a qualified claimant is in the best interests of the fund. When the claimant and the board agree upon a settlement amount, the following procedure shall be followed:

(1) A petition shall be filed by the claimant with the court in which the action is pending, or if none is pending, in a court of appropriate jurisdiction, for approval of the agreement between the claimant and the board.

(2) The court shall set the petition for hearing as soon as the court's calendar permits. Notice of the time, date and place of hearing shall be given to the claimant and to the board.

(3) The authority of the court is limited to denial of the final proposed settlement or, if the court finds it to be valid, just and equitable, approval of the proposed settlement.

(g) If and to the extent that any payment to one or more qualified claimants under this section would deplete the fund during any fiscal year, payments to and among qualified claimant's shall, at the discretion of the board, be prorated, made in periodic installments during the fiscal year according to the rules promulgated

by the board or be placed in a nonpayment status until such time as sufficient moneys are received by the fund to initiate or resume payments. Any amounts due and unpaid to qualified claimants in any fiscal year shall be paid in subsequent fiscal years from available funds, but only to the extent funds are available in any fiscal year, according to the board's rules.

(h) The claimant may appeal a final decision made by the board pursuant to the provisions of article five [§§ 29A-5-1 et seq.], chapter twenty-nine-a of this code.

History

2004, c. 192; 2016, c. 155.

Annotations

Notes

Effect of amendment of 2016. —

Acts 2016, c. 155, effective July 1, 2016, in (f)(3), substituted "The authority of the court is limited to denial of the final" for "At the hearing the court shall approve the," inserted "or," and added "approval of the proposed settlement" to the end; in (g), in the first sentence, substituted "at the discretion of the board, be prorated, made in periodic installments" for "be prorated" and added "or be placed in a nonpayment status until such time as sufficient moneys are received by the fund to initiate or resume payments" to the end and inserted "in any fiscal year" following "claimants" in the second sentence; deleted former (h), which read: "Payments out of the fund may be used to pay reasonable attorney fees of attorneys representing qualified claimants receiving compensation in respect of economic damages as established by the Board of Risk and Insurance Management"; redesignated former (i) as (h); and made stylistic changes.

Research References & Practice Aids

Hierarchy Notes:

W. Va. Code Ch. 29

W. Va. Code Ch. 29, Art. 12D

End of Document

EXHIBIT

2

TITLE 115
LEGISLATIVE RULE
STATE BOARD OF RISK AND INSURANCE MANAGEMENT

SERIES 7
PATIENT INJURY COMPENSATION FUND

§115-7-1. General.

1.1. Scope -- This rule governs the implementation, administration and operation of the patient injury compensation fund, established by W. Va. Code § 29-12D-1 et seq. by the state board of risk and insurance management.

1.2. Authority. -- W. Va. Code §29-12D-2(a)(6).

1.3. Filing Date. -- April 24, 2017.

1.4. Effective Date. -- May 1, 2017.

1.5. Sunset Provision: This rule shall terminate and have no further force or effect on May 1, 2022.

§115-7-2. Purpose.

Subject to applicable limitations, the purpose of the patient injury compensation fund is to provide fair and reasonable compensation to qualified claimants in medical professional liability actions for economic damage awards that are uncollectible because of statutory limitations on the recovery of economic damages.

§115-7-3. Definitions.

3.1. For purposes of this rule, the following words or terms shall have the same meanings as set forth in W. Va. Code §55-7B-2: "collateral source", "emergency condition", "health care", "health care facility", "health care provider", "medical injury", "medical professional liability", "medical professional liability insurance", "non-economic loss", "patient", "plaintiff" and "representative".

3.2. "Act" means W. Va. Code §29-12D-1 *et seq.*,W. Va. Code establishing the patient injury compensation fund.

3.3. "Actuarially sound" means funding sufficient to pay those claims for economic damages and all administrative or operational costs of the fund which are known or which are projected from analyses of claims, loss experience and other relevant factors.

3.4. "Agency" means the state board of risk and insurance management.

3.5. "Applicable Insurance" means all insurance available to provide indemnity coverage for all tortfeasors pursued in the underlying medical malpractice claim.

3.6. "Application for compensation" means the written request to the fund for payment of economic damages.

3.7. "Board" means the governing body of the state board of risk and insurance management as provided in W. Va. Code § 29-12-3.

3.8. "Claimant" means the person submitting an application for compensation to the fund.

3.9. "Code" means the Code of West Virginia of 1931, as amended.

3.10. "Director" means the executive director of the state board of risk and insurance management.

3.11. "Economic damages" means those special damages which are reduced to an actual dollar amount that can be presented to a jury in an action brought under the medical professional liability act to compensate a plaintiff for the monetary costs of a medical injury, such as lost earnings, past and future medical care and rehabilitation services. Economic damages do not include non-economic damages, such as pain and suffering, or hedonic damages, court costs, post-judgment interest, attorneys' fees, extra-contractual damages, or punitive damages.

3.12. "Fund" means the West Virginia Patient Injury Compensation Fund created by W. Va. Code §29-12D-1(a).

3.13. "Medical professional liability act" means the provisions of Article 7B, Chapter 55 of the Code.

3.14. "Occurrence" means any act, series of acts, failure to act, or series of failures to act arising out of the rendering or failure to render medical professional services to any person within West Virginia by a health care provider resulting in a medical injury or injuries.

3.15. "Qualified claimant" means a claimant that is both a "patient" and a "plaintiff" as those terms are defined in the medical professional liability insurance act.

3.16. "Statutory limitations on the recovery of economic damages" means the limitations on recovery of economic damages in a medical malpractice action due to negligent treatment of emergency conditions at a designated trauma care center pursuant to W. Va. Code § 55-7B-9c or by operation of the joint and several liability principles and standards set out in W. Va. Code § 55-7B-9.

3.17. "Uncollectible economic damages" means any portion of an economic damages award or settlement in a medical malpractice action that a qualified claimant is unable to collect from the defendant due to statutory limitations on recovery of economic damages.

3.18. "Year" or "fiscal year" means the twelve (12) consecutive month period beginning the first day of July and ending the last day of June.

§115-7-4. Patient Injury Compensation Fund.

The fund shall be operated as a fund of last resort. Payment by the fund to a qualified claimant for uncollectible economic damages may be made only when all insurance coverages have been exhausted.

§115-7-5. Fund Administration.

5.1. The director may employ or contract for personal, professional or consulting services regarding the administration, operation and defense of the fund and for services necessary or advisable to implement the authority and discharge the responsibilities imposed on the board by the act, including, but not by way of limitation:

5.1.a. Retaining the services of a qualified, competent, independent consulting actuary to advise and consult with the agency on all aspects of the fund's administration, operation, and defense which require application of actuarial science and to perform and submit an annual actuarial study;

5.1.b. Employing or contracting with legal counsel to advise and represent the agency and represent the fund in matters relating to the operation of the fund or payment from the fund. Legal counsel may assist in the investigation of the claim for compensation and whether all applicable insurance in the underlying action has been exhausted;

5.1.c. Retaining the services of a qualified independent auditor to conduct an annual audit of the fund. The annual audit may be conducted as part of the annual fiscal year-end audit of the other programs administered by the agency; and

5.1.d. Retaining the services of qualified experts in the fields of accounting, economics, medicine, life care planning, or other field or fields relevant to one or more claims.

5.2. The agency may establish a reasonable contingency reserve for unexpected contingencies, consistent with generally accepted accounting principles.

§115-7-6. Payment of Compensation.

6.1. If the agency's fund's actuary determines that the fund is actuarially sound and fully funded, or otherwise sufficiently funded to make payments to eligible claimants using any of the methods set forth in this section, the agency may, but is not required to, make a payment or payments out of the fund to a qualified claimant following a judgment or settlement of a claim arising under the medical professional liability act.

6.2. The agency, in exercising its discretion regarding payments to eligible claimants following judgment or settlement of a claim, shall determine whether a payment from the fund to a qualified claimant is in the best interests of the fund and other claimants. In making this determination the agency may consider the following:

6.2.a. The current actuarial soundness of the fund;

6.2.b. The sufficiency and strength of the proof in the claim settlement or the underlying medical professional liability civil action establishing the following:

6.2.b.1. Legal liability under the medical professional liability act;

6.2.b.2. The fault of the respective responsible persons;

6.2..b.3. The exhaustion of all reasonable means to recover from all available insurance and collateral sources;

6.2.c. Any other matter deemed relevant by the agency, including but not limited to the total amount of awards that become final in a fiscal year. The agency reserves the right to fully investigate all relevant issues prior to reaching a determination.

6.3. Upon a final determination approving payment to a qualified claimant as provided in these rules, the agency shall, to the extent funds are available, make a payment in satisfaction or partial satisfaction of the claim for economic damages. Compensation payments may be made only to qualified claimants who would have collected economic damages but for the statutory limitations on recovery of economic damages.

6.4. Subject to the provisions of section 6.5 of this rule, the amount payable by the fund to a qualified claimant is the amount of uncollectible economic damages. In determining the amount of uncollectible economic damages, payments of available insurance in the underlying professional medical liability action are considered to have been applied first to satisfy any economic damages award.

6.5. The maximum amount payable out of the fund in respect to any one occurrence shall be the lesser of: one million dollars or the maximum amount of money that could have been collected for applicable insurance and collateral sources prior to the creation of the fund. For purposes of this rule, amounts payable by any insurance guaranty funds due to the insolvency of an insurance company are deemed applicable insurance.

6.6. The agency, in its discretion, may make payments to a qualified claimant in a lump sum amount or in the form of periodic payments in the form of a structured payment plan using federally-qualified assignments.

6.7. If, after the payment of all expenses incurred for the administration of the fund during the fiscal year, the available cash and invested assets remaining in the fund are insufficient to pay in full all claims for uncollectible economic damages that have become final during the fiscal year, the board, in its discretion, may do any of the following, alone or in combination:

6.7.a. Make prorated payments on claims in a manner so that each qualified claimant with a final claim receives the same percentage of compensation as his or her amount of approved and outstanding compensation at the end of the fiscal year relates to the total amount of all approved and outstanding compensation at the end of the fiscal year; or

6.7.b. Make payments in the form of periodic installments, which may, but are not required to be in the form of a structured payment plan using federally-qualified assignments. If a structured settlement is used, the final award representing uncollectible economic damages from the PICF shall be the amount received by the claimant via the structured settlement and shall not be the amount used to fund the purchase of the structured payment plan;

6.7.c. Place a claim or claims in nonpayment status until such time as sufficient moneys are received by the fund to initiate or resume payments.

6.8. If claims are prorated, paid in periodic installments other than through a structured payment plan, or placed in nonpayment status in any fiscal year, any amounts due and unpaid to qualified claimants for final awards shall be carried forward and be paid in subsequent fiscal years from available funds using any of the methods set forth in this section. Payment may be made in subsequent fiscal years only to the extent funds are available and sufficient to pay administrative and operating expenses and make claim payments.

6.9. Unpaid claims are not a debt of the state of West Virginia or a charge against the general revenue fund or any other state fund. The state shall not be liable for any of the liabilities of the fund, and payments in future years shall be entirely dependent on the contributions, revenues or moneys paid into the fund by the state or from any other source.

§115-7-7. Application for Compensation.

7.1. A claim for reimbursement of uncollectible economic damages shall be made by filing an original and two (2) copies of a verified written application for compensation. An application for compensation must be signed by the claimant or his or her legal representative.

7.2. As a condition of receiving compensation from the fund, the claimant shall execute appropriate confidentiality or privacy waivers granting the agency access to all of his or her medical records.

7.3. All applications for compensation must be received by the Board or, if mailed, postmarked on or before June 30, 2016, in order to be eligible for review or payment from the fund.

7.4. The verified application for compensation shall set forth and provide the following information:

7.4.a. The name and address of the claimant and other identifying information which the agency may require;

7.4.b. The name and address of the legal representative of the claimant and the basis for his or her representation of the claimant;

7.4.c. The date(s), time(s) and place(s) where the underlying medical injury occurred;

7.4.d. A statement of the facts and circumstances regarding the underlying medical injury leading to and ultimately giving rise to the submission of the application for compensation.

7.4.e. A detailed description of the economic damages for which the claim is made;

7.4.f. Documentation of expenses and services incurred to date, indicating whether such expenses and services have been paid for, and if so, by whom;

7.4.g. Documentation of any applicable private or government source of services or reimbursement relative to the underlying medical injury;

7.4.h. A schedule listing all liability insurance, policy limits, and amounts collected by claimant to date from responsible persons with respect to the medical injury and the underlying medial liability civil action. Copies of all applicable liability insurance policies or policy declaration pages shall be attached to the application;

7.4.i. A detailed statement of the facts and circumstances, including any declaratory judgments or rulings, demonstrating how the claimant exhausted all reasonable means to recover economic damages from all applicable liability insurance coverages;

7.4.j. If the underlying medical injury claim was the subject of a civil action, the court (federal or state) in which it was filed, the docket or civil action number, the parties to such action, and its present status, including certified copies of court documents including complaint, answer, judgment, special jury interrogatories, verdict forms, declaratory rulings and dispositive motion orders;

7.4.k. Appropriate and relevant assessments, evaluations, and prognoses and other records and documents the agency deems reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the claimant.

7.4.l. All available relevant medical records relating to the claimant and the underlying medical injury and an identification of any unavailable medical records known to the claimant and the reasons for the unavailability.

7.5. In addition to the application for compensation, the agency may require the claimant to submit materials substantiating the facts in the application. If the agency finds that an application does not contain the required information or that the facts stated therein have not been adequately explained or documented, it shall notify the claimant or his or her representative in writing the specific additional items of information or materials required and that he or she has thirty (30) days from receipt of the notification in which to supplement the application. Unless a claimant requests and is granted in writing an extension of time by the agency, the agency may reject the claim for failure to file additional information or materials within the specified time.

7.6. The claimant may file an amended application or additional substantiating material to correct inadvertent errors at any time before the agency has completed its consideration of the original application for compensation.

7.7. When a final award is made by the Board, the claimant shall file a petition for approval of the final award with the court in which the underlying civil action is pending or if none is pending, in a court of appropriate jurisdiction. The claimant shall be responsible for all court costs associated with, or relating to, approval of the final award by the court. No award may become final until approval by the court.

7.8. The claimant shall sign a written release which absolves the fund, the agency and the board of any liability or further obligation with respect to the claim, following approval of the final award and before payment.

§115-7-8. Initial Review and Determination.

8.1. The director shall appoint an application review committee, consisting of three individuals, including an agency claims manager or assistant claims manager, and two other managerial or professional employees or contractors.

8.2. Upon receipt of an application for compensation, the application review committee shall undertake an evaluation, investigation and review of the application for compensation.

8.3. Based upon its review, analysis and investigation, the application review committee shall make a written recommendation to the executive review committee whether payment should be made from the fund and the amount of payment to be made from the fund consistent with the award in the underlying medical liability action, the evidence, the applicable law, and the purpose and best interests of the fund.

8.4. The application review committee shall determine on the basis of evidence presented to it or gathered by it, the following matters:

8.4.a. Whether the claimant is a qualified claimant;

8.4.b. Whether the petition for compensation was filed in accordance with the act and these rules;

8.4.c. Whether there has been an award of economic damages as a result of a medical injury in a civil action filed under the medical professional liability act;

8.4.d. Whether the claimant has satisfactorily established that he or she has exhausted all reasonable means to recover economic damages from all applicable liability insurance, including pursuing all available legal means to determine applicability and availability of liability insurance coverages from all responsible persons;

8.4.e. The portion of the economic damages awarded that is uncollectible as a result of the statutory limitations on recovery of economic damage.

§115-7-9. Executive Review Committee.

9.1. The board shall appoint an executive review committee, consisting of three individuals, one of whom shall be the director. The other two individuals shall be a professional and an agency claims manager.

9.2. The executive review committee shall meet upon call of the director or chairperson of the board to review the recommendations of the application review committee.

9.3. The executive review committee may adopt, modify, remand or reject the recommendations of the application review committee. The executive review committee shall provide the reason or reasons for modification, rejection or remand of a recommendation of the application review committee. On remand, the application review committee shall reconsider its recommendation and address the issues identified by the executive review committee.

9.4. If the recommendation of the application review committee is accepted by the executive review committee, notice of the determination shall promptly be sent to the claimant or his or her authorized representative stating with reasonable specificity the grounds for the determination. The notice shall be sent by certified mail, return receipt requested.

§115-7-10. Administrative Appeal.

10.1. Claimant aggrieved by the determination of the executive review committee may appeal the decision to the board within thirty (30) days of receipt of the determination for an administrative hearing as provided in the administrative hearing rules promulgated by the board.

10.2. At the hearing, BRIM and the claimant, or their counsel, shall be afforded an opportunity to review the evidence, to cross-examine the witnesses, and present testimony and enter evidence in support of the parties' respective positions.

§115-7-11. Judicial Appeal of Final Decision.

A claimant adversely affected by a final administrative order or decision of the board, pursuant to section 11 of this rule, has the right to appeal the decision to circuit court pursuant to W. Va. Code §29A-5-4, and may request, at his or her expense, a transcript of the administrative hearing.

§115-7-12. Confidentiality of Information.

To the extent required by law or by court order, the agency shall maintain as confidential and exempt from disclosure personal or medical information regarding the claimant. The agency may maintain as exempt from disclosure, to the extent permitted by law, its internal memoranda.

TITLE 115
PROCEDURAL RULE
STATE BOARD OF RISK AND INSURANCE MANAGEMENT

SERIES 8
ADMINISTRATIVE APPEAL HEARING RULES FOR THE PATIENT INJURY COMPENSATION FUND

§115-8-1. General.

1.1. Scope. -- These rules are established for conducting all administrative appeal hearings requested of the Patient Injury Compensation Fund (PICF).

1.2. Authority. -- W. Va. Code §§29-12D-2(a)(6); 29-12D-3(c); 29-12D-3(f); 29-12D-3(g).

1.3. Filing Date. -- March 14, 2011.

1.4. Effective Date. -- April 14, 2011.

1.5. Definitions.

1.5.a. "BRIM" means the state Board of Risk and Insurance Management.

1.5.b. "Claimant" means the person submitting an application for compensation from the patient injury compensation fund created by W. Va. Code §29-12D-1(a), and is both a "patient" and a "plaintiff" as those terms are defined in the medical professional liability insurance act found in W. Va. Code §55-7B as amended.

1.5.c. "Economic damages" means those special damages which are reduced to an actual dollar amount that can be presented to a jury in an action brought under the medical professional liability act to compensate a plaintiff for the monetary costs of a medical injury, such as lost earning, past and future medical care and rehabilitation services. Economic damages do not include non-economic damages, such as pain and suffering, or hedonic damages, court costs, post-judgment interest, attorneys' fees, extra-contractual damages, or punitive damages.

1.6. Amendments To Rules. -- Amendments to these rules may be made at any meeting of the Board, by vote of a majority of the quorum, provided that the requirements of W. Va. Code §29-A-3-2 are met.

1.7. Interpretation Of Rules. -- Interpretation of these rules is the responsibility of the Board and any necessary changes may be acted upon by amendment in accordance with Section 1.6 above.

§115-8-2. Administration.

2.1. The administrative appeal hearing shall be conducted in accordance with the provisions of W. Va. Code §29A-5-1, et seq. The hearing may be conducted by the Executive Director of BRIM or a hearing officer appointed by the Executive Director.

2.2. The Executive Director of BRIM or his designee shall provide the claimant with written notice stating the time and place of a hearing. The claimant shall appear to show cause why the claimant is entitled to his/her claims of economic damages. At the hearing, BRIM and the claimant shall be afforded an opportunity to review the evidence, to cross-examine the witnesses, and present testimony and enter evidence in support of the parties' respective position.

2.3. The Executive Director or hearing officer has the power to subpoena witnesses, papers, records, documents and other data and things in connection with the proceeding under this subsection and to administer oaths or affirmations in the hearing.

2.4. If the Executive Director appoints a hearing officer to conduct an administrative appeal hearing, upon conclusion of the hearing, the hearing officer shall provide a Recommended Decision of findings of fact and conclusions of law to the Executive Director. Subsequently, the Executive Director shall determine whether the claimant is entitled to his/her claims of economic damages by issuing a final order. The Executive Director may adopt, approve, modify, revise, reject, or remand the hearing examiner's Recommended Decision of findings of fact and conclusions of law. The final order shall be mailed to the claimant by certified mail, return receipt requested.

2.5. If the Executive Director conducts the administrative appeal hearing, after reviewing the record of the hearing, the Executive Director shall determine whether the claimant is entitled to his/her claims of economic damages. The Executive Director shall issue a final order setting forth findings of fact and conclusions of law in support of the decision. The final order shall be mailed to the claimant by certified mail, return receipt requested.

2.6. Any appeal by the claimant shall be brought in accordance with the provisions of W. Va. Code §29A-5-4. The scope of the court's review of the final order shall be as provided in W. Va. Code §29A-5-4. If the claimant does not appeal the final order within thirty days, it is final.

EXHIBIT

3

West Virginia Board of Risk and Insurance Management
Patient Injury Compensation Fund (PICF)
Activity for the Period 5-25-05 thru 11-30-17 (Since Inception)

Fund Balance 5-25-05		$ -
Cash Received:		
Transfers of funds per 33-14 (A) (B); 33-3-14A, 29-12 D-1 and 11B22 0 (F)	6,914,412.01	
Transfer of BRIM funds from HB601 Program	2,810,250.91	
1% Court/Settlement Fees	890,706.40	
Trauma Fees	514,700.00	
Physicians' Licensing Fees	533,273.43	
Court Filing Fees	128,210.00	11,791,552.75
PICF Claims and Claims Related Disbursements:		
Claims Payments	(10,791,380.23)	
Contractual and Professional	(397,586.43)	(11,188,966.66)
Other:		
Interest Earned		568,688.76
Fund Balance 11-30-17		$ 1,171,274.85

EXHIBIT

4

Board of Risk and Insurance Management
PICF for the Period 7-1-17 thru 6-30-20 (Projected)
Including Unfunded Claims Balance at 6-30-20

	FY'18		FY'19		FY'20	
Fund Balance 7-1		$ 3,147,146		$ 1,905,903		$ 993,103
Cash Received:						
1% Court/Settlement Fees	$ 770,000		$ 770,000		$ 770,000	
Trauma Fees	510,000		510,000		510,000	
Physicians' Licensing Fees	500,000		500,000		500,000	
Court Filing Fees	100,000	1,880,000	100,000	1,880,000	100,000	1,880,000
PICF Claims and Claims Related Disbursements:						
Claims Payments	(3,033,843)		(2,700,000)		(2,700,000)	
Contractual and Professional	(100,000)	(3,133,843)	(100,000)	(2,800,000)	(100,000)	(2,800,000)
Other:						
Interest Earned		12,600		7,200		2,700
Fund Balance 6-30		$ 1,905,903		$ 993,103		$ 75,803

Claims O/S 7-1-17		$ 10,523,392
Payments:		
FY'18	$ (3,033,843)	
FY'19	(2,700,000)	
FY'20	(2,700,000)	(8,433,843)
Unfunded Claims Outstanding 6-30-20		$ 2,089,549

EXHIBIT

5

Award Amount	Payment Date	Status 11-30-17
900,000.00	11/24/2009	Paid in Full
Denied	Denied	Denied
470,000.00	2/8/2011	Paid in Full
261,726.36	11/17/2011	Paid in Full
272,853.31	3/14/2013	Paid in Full
39,846.10	10/29/2013	Paid in Full
1,000,000.00	10/22/2013	Paid in Full
841,254.00	10/30/2013	Paid in Full
1,000,000.00	10/30/2013	Paid in Full
363,428.00	1/28/2014	Paid in Full
1,000,000.00	9/3/2014	Paid in Full
118,164.00	7/25/2015	Paid in Full
938,594.89	7/18/2015	Paid in Full
1,000,000.00	8/1/2016	Paid in Full
Denied	Denied	Denied
621,044.92	3/21/2017	Paid in Full
78,712.00	9/19/2016	Paid in Full
374,888.59	FY 18	Pro Rata Paid
1,000,000.00	3/1/2017	Paid in Full
550,000.00	pending payment FY 19 Pro Rata	No Payment Made
228,562.46	FY 18	Pro Rata Paid
210,910.92	FY 18	Pro Rata Paid
1,000,000.00	pending payment FY 18 Pro Rata	No Payment Made
1,000,000.00	pending payment FY 18 Pro Rata	No Payment Made
373,533.00	pending payment FY 18 Pro Rata	No Payment Made
1,000,000.00	pending payment FY 18 Pro Rata	No Payment Made
1,000,000.00	FY 18	Pro Rata Paid
63,521.00	pending payment FY 18 Pro Rata	No Payment Made
564,569.16	pending payment FY 18 Pro Rata	No Payment Made
1,000,000.00	FY 18	Pro Rata Paid
923,564.00	pending payment FY 18 Pro Rata	No Payment Made
Denied	Denied	On appeal
1,000,000.00	FY 18	Pro Rata Paid
1,000,000.00	FY 18	Pro Rata Paid
20,195,172.71		

EXHIBIT

6

PAULEY CURRY, PLLC
ATTORNEYS AT LAW

ARDEN J. CURRY, II ‡
DAVID K. SCHWIRIAN
SUSAN CURRY BRASSELLE ‡

THOMAS H. VANDERFORD, IV
OF COUNSEL

ARDEN J. CURRY
(RETIRED)

KELLY R. CURRY
OF COUNSEL

KELLUM D. PAULEY
(1920 – 2014)

‡ ADMITTED IN KENTUCKY

100 KANAWHA BOULEVARD WEST
CHARLESTON, WV 25302

P. O. BOX 2786
CHARLESTON, WV 25330-2786
TEL: (304) 342-6000
FAX: (304) 342-6007

E-MAIL ADDRESS: JOHN@PAULEYCURRY.COM

May 23, 2017

Sent Via Certified U.S. Mail Return Receipt Requested
Mary Jane Pickens, Director
WV State Board of Risk & Insurance Management
Patient Injury Compensation Fund
1124 Smith Street
Suite 4300
Charleston, WV 25301

Patrick A. Morrisey, Attorney General
Office of the West Virginia Attorney General
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305

RE: Victoria Fitts, Individually and on Behalf of Kenneth Fitts

Correna Hypes, Administratrix of the Estate of Manford Hypes

Brent Morgan, Administrator of the Estate of Carolyn Strobel

Josh Walker as Guardian and Next Friend of Samuel C. Walker, a minor

The undersigned represents each of the above-referenced individuals who currently have claims pending before the West Virginia State Board of Risk and Insurance Management, Patient Injury Compensation Fund. This letter constitutes the Notice required under the provisions of W.Va. Code §55-17-1 *et seq.* that must be provided at least thirty (30) days prior to the institution of an action against a government agency in the State of West Virginia. One or more of the above individuals intend to institute litigation against the West Virginia State Board of Risk and Insurance Management, Patient Injury Compensation Fund which claims may include

but are not limited to a Writ of Prohibition or a Writ of Mandamus requiring the Fund to appropriately collect the assessments against trauma centers provided for in W.Va. Code §29-12D-1a(b) as well as relief seeking to preclude the Fund from forcing applicants to accept payments under W.Va. Code §29-12D-3 in any manner beyond that permitted in sub-section (e) of that Code Section.

The purpose of the West Virginia Patient Injury Compensation Fund is to provide fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectable as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles and standards set forth in Article 7-b, Chapter 55 of the W.Va. Code. As a result of its statutory purpose, the Fund has a fiduciary obligation to exercise its powers in a manner that, to the extent possible, will protect the interests of those making application to the Fund. As part of its obligations, the Fund is required to collect an assessment of $25.00 which is to be levied by the Board of Risk and Insurance Management on trauma centers for each trauma patient treated at a healthcare facility designated by the Office of Emergency Medical Services as trauma center, as reported to the West Virginia Trauma Registry. The provisions of the Code Section providing for the assessment must be interpreted by the Fund in a manner that is most consistent with assuring that adequate funds will be available to applicants. Based upon representations made by the Fund, it intends to artificially limit the assessments that are to be made by trauma centers to the direct detriment of applicants such as the individuals the undersigned represents. Instead of levying an assessment of $25.00 for each patient treated at a trauma center the agency intends to limit the assessment only to those patients for which an actual trauma call has been made even though each trauma center claims that it is entitled to the immunities under W.Va. Code §55-7B-9c for every patient who was seen at a trauma center regardless of whether a trauma call is instituted.

W.Va. Code §29-12D-3(e) provides that:

> "The board, in its discretion, may make payments to a qualified claimant in a lump sum amount or in the form of periodic payments. Periodic payments are to be based upon the present value of the total amount to be paid by the fund to the claimant by using federally approved qualified assignments."

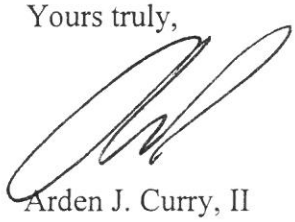
In direct contravention of this statutory provision, the Fund has promulgated Regulation 6.7.b which provides that the Fund may:

> "Make payments in the form of periodic installments, which may, but are not required to be in the form of a structured payment plan using federally-qualified assignments. If a structured settlement is used, the final award representing uncollectible economic damages from the PICF shall be the amount received by the claimant via the structured settlement and shall not be the amount used to fund the purchase of the structured payment plan."

Regulation 6.7.b exceeds or alters the statutory provision set forth above that limits the Board's discretion to make payments in the form of a periodic payment to periodic payments that

are based upon the present value of the total amount to be paid by the Fund. Contrary to the statutory provision, the regulation provides directly the opposite allowing the Fund to make an award, structure it out for some unlimited time, and then claim that the total payout versus the present value is the amount of the award. The Fund's regulation is in direct conflict with the statutory provision and may not be enforced.

Yours truly,



Arden J. Curry, II

AJC,II/ljw

THE LAW OFFICES OF
DRUCKMAN & ESTEP

MADONNA C. ESTEP, Esquire
606 Virginia Street East, Suite 100
Charleston, WV 25301
Tel: 304.342.0367
Fax: 304.343.0099
madonna@druckmanlaw.com

May 24, 2017

Sent Via Certified U.S. Mail Return Receipt Requested
Mary Jane Pickens, Director
WV State Board of Risk & Insurance Management
Patient Injury Compensation Fund
1124 Smith Street
Suite 4300
Charleston, WV 25301

Patrick A. Morrisey, Attorney General
Office of the West Virginia Attorney General
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305

RE: Michelle Bailey, administrator of the estate of Carol Robinson

The undersigned represents Michelle Bailey, who has received an award from the West Virginia State Board of Risk and Insurance Management, Patient Injury Compensation Fund. The award has been approved by the Circuit Court of Kanawha County. Ms. Bailey is awaiting payment at the close of the current fiscal year.

The purpose of the West Virginia Patient Injury Compensation Fund is to provide fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectable as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles and standards set forth in Article 7-b, Chapter 55 of the W.Va. Code. As a result of its statutory purpose, the Fund has a fiduciary obligation to exercise its powers in a manner that, to the extent possible, will protect the interests of those making application to the Fund.

As part of its obligations, the Fund is required to collect an assessment of $25.00 which is to be levied by the Board of Risk and Insurance Management on trauma centers for each trauma patient treated at a healthcare facility designated by the Office of Emergency Medical Services as trauma center, as reported to the West Virginia Trauma Registry. The provisions of the Code Section providing for the assessment must be interpreted by the Fund in a manner that is most consistent with assuring that adequate funds will be available to applicants.

Based on representations made by the Fund, it intends to artificially limit the assessments that are to be made by trauma centers to the direct detriment of applicants such as Ms. Bailey. Instead of levying an assessment of $25.00 for each patient treated at a trauma center the agency intends to limit the assessment only to those patients for which an actual trauma call has been made even though each trauma center claims that it is entitled to the immunities under W.Va. Code §55-7B-9c for every patient who was seen at a trauma center regardless of whether a trauma call is instituted.

If the Fund follows through with its intention to collect only for patients for whom an actual trauma call has been made, Ms. Bailey believes there will be insufficient funds to satisfy her award at the close of the fiscal year.

As such, Ms. Bailey intends to institute litigation against the West Virginia State Board of Risk and Insurance Management, Patient Injury Compensation Fund which may include but is not necessarily limited to a Writ of Prohibition or a Writ of Mandamus requiring the Fund to appropriately collect the assessments against trauma centers provided for in W.Va. Code §29-12D-1a(b) as well as relief seeking to preclude the Fund from forcing applicants to accept payments under W.Va. Code §29-12D-3 in any manner beyond that permitted in sub-section (e) of that Code Section.

This letter constitutes the Notice required under the provisions of W.Va. Code §55-17-1 *et seq*. that must be provided at least thirty (30) days prior to the institution of an action against a government agency in the State of West Virginia.

Additionally, W.Va. Code §29-12D-3(e) provides that:

> "The board, in its discretion, may make payments to a qualified claimant in a lump sum amount or in the form of periodic payments. Periodic payments are to be based upon the present value of the total amount to be paid by the fund to the claimant by using federally approved qualified assignments."

In direct contravention of this statutory provision, the Fund has promulgated Regulation 6.7.b which provides that the Fund may:

> "Make payments in the form of periodic installments, which may, but are not required to be in the form of a structured payment plan using federally-qualified assignments. If a structured settlement is used, the final award representing uncollectible economic damages from the PICF shall be the amount received by the claimant via the structured settlement and shall not be the amount used to fund the purchase of the structured payment plan."

Regulation 6.7.b exceeds or alters the statutory provision set forth above that limits the Board's discretion to make payments in the form of a periodic payment to periodic payments that are based upon the present value of the total amount to be paid by the Fund. Contrary to the statutory provision, the regulation provides directly the opposite allowing the Fund to make an award, structure it out for some unlimited time, and then claim that the total payout versus the present value is the amount of the award. The Fund's regulation is in direct conflict with the statutory provision and may not be enforced.

Very truly yours,

Madonna C. Estep

MCE/s

TIANO O'DELL PLLC
Experience you want. Results you need.

info@tolawfirm.com | tolawfirm.com | p 304.720.6700 | f 304.720.5800 | 118 Capitol Street | PO Box 11830 | Charleston, WV 25339

August 16, 2017

Via Certified Mail #7016 3010 0000 9010 5690
Patrick Morrisey
Office of the WV Attorney General
1900 Kanawha Blvd. E
Bldg. 1, Room E-26
Charleston, WV 25305

Via Certified Mail #7016 3010 0000 9010 5706
State of West Virginia
Board of Risk & Insurance Management
1124 Smith Street
Suite 4300
Charleston, WV 25301

NOTICE OF CLAIM

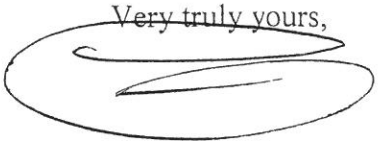
RE: Daniel T. Halsey, Administrator of the Estate of Tamara Halsey

Dear Sir or Madam:

We represent Dan Halsey as Administrator of the Estate of Tamara Halsey, and currently have claims pending before the West Virginia Board of Risk and Insurance Management, Patient Injury Compensation Fund. This letter constitutes notice required under the provisions of West Virginia Code 55-17-1 *et seq.* that must be provided at least 30 days prior to the institution of an action against a government agency in the State of West Virginia. We will be instituting a case against the West Virginia Board of Risk and Insurance Management, Patient Injury Compensation Fund, and all state agencies responsible for collecting the assessment of $25.00 for each trauma patient treated at a healthcare facility designated by the Office of Emergency Medical Services as a trauma center, as reported to the West Virginia Trauma Registry. Based on our investigation, the West Virginia Board of Risk and Insurance Management has not been collecting the $25.00 assessment per trauma patient at a designated trauma center. This has left the Patient Injury Compensation Fund underfunded. Accordingly, we will be asking that the State of West Virginia, West Virginia Board of Risk and Insurance Management, make up any deficiencies as it relates to payment of Dan Halsey's claim before the Patient Injury Compensation Fund and/or enforce the applicable statute to collect the deficiencies. This may include a mandamus, writ of prohibition, or injunctive relief.

Please contact me if you have any questions; otherwise, I will assume this letter will suffice as required pre-suit notice.

Very truly yours,



William M. Tiano

WMT:ghm

The Bell Law Firm PLLC

Jeff D. Stewart | Andrew L. Paternostro| Shayla M. Rigsby

Harry F. Bell, Jr., Of Counsel | M. Carter Borman, Of Counsel*

30 Capitol Street	*Phone*	*304/345-1700*
P. O. Box 1723	*Facsimile*	*304/345-1715*
Charleston WV 25326-1723	*Facsimile*	*304/344-1956*

Sender: hdharrison@belllaw.com *www.belllaw.com*

August 28, 2017

VIA Certified Mail 7008 0150 0003 5361 0357
Mary Jane Perkins, Director
WV State Board of Risk & Insurance Management
Patient Injury Compensation Fund
1124 Smith Street, Suite 4300
Charleston, WV 25301

RECEIVED
AUG 30 2017
BOARD OF RISK AND
INSURANCE MANAGEMENT

Via Certified Mail 7008 0150 003 5361 0364
Patrick A. Morrisey, Attorney General
Office of the West Virginia Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305

Re: **Cathy A. Robinson, as Administratrix of the Estate of Angela A. Robinson v. Boone Memorial**

Dear Ms. Perkins and Mr. Morrisey:

We represent Cathy A. Robinson who currently has a Patient Injury Compensation Fund (PICF) award pending before the West Virginia State Board of Risk and Insurance Management. Ms. Robinson was awarded $63,521.00 on May 30, 2017. However, we were advised by letter dated August 15, 2017, the PICF was not adequately funded to allow for full payment based upon this award and our client would only be receiving a pro rata share of $14,674.42 (equal to .007% of the fund).

In that regard, this letter will constitute as Notice required under the provisions of W.Va. Code § 55-17-1 *et seq.* that must be provided at least (30) thirty days prior to the institution of an action against a government agency in the State of West Virginia. Cathy A. Robinson intends to institute a litigation against the West Virginia Board of Risk and Insurance Management, Patient Injury

Compensation Fund which claims may include but are not limited to a Writ of Prohibition or a Writ of Mandamus requiring the Fund to appropriately collect the assessments against trauma centers provided for in W.Va. Code § 29-12D-1a(b) as well as relief seeking to preclude the Fund from forcing applications to accept payments under W.Va. Code §29-12D-3 in any manner beyond that permitted in sub-section (e) of that Code Section.

Sincerely,

Jeff D. Stewart

JDS/hdh

EXHIBIT

7

West Virginia Board of Risk and Insurance Management

Amended Advisory Bulletin Regarding Interpretation of West Virginia Code § 29-12D-1a

January 19, 2017

The West Virginia Board of Risk and Insurance Management ("BRIM") is charged with administration of the Patient Injury Compensation Fund ("PICF"). The PICF was created in 2004 pursuant to West Virginia Code § 20-12D-1, *et seq*. as a fund to compensate claimants who are unable to collect all economic damages as a result of the cap in the Medical Professional Liability Act ("MPLA") on all civil damages arising from acts or omissions in a trauma center, or resulting from elimination of joint liability in medical negligence claims. Because a permanent funding stream for the PICF was not established in the enabling legislation, Senate Bill 602 was enacted during the regular session of the Legislature in 2016, amending article 12D of chapter 29, as well as other sections of the West Virginia Code. [1] The bill can be accessed here.

This Advisory Bulletin provides BRIM's interpretation of a new section added by the bill, and guidance for compliance with that new section. The section at issue is West Virginia Code § 29-12D-1a, entitled "*Additional funding for Patient Injury Compensation Fund; assessment on licensed physicians; assessment on hospitals; assessment on certain awards*". This code section requires that beginning July 1, 2016, an assessment shall be levied in the amount of one percent of the gross amount of any settlement or judgment in a qualifying claim. The specific language addressed by this Advisory Bulletin is found in subdivisions (2) and (3), subsection (c) of the new section:

> (2) For any assessment levied pursuant to this subsection for which a judgment is entered by a court, the date of the entry of judgment shall be used to determine applicability of this provision. The defendant or defendants shall remit the assessment to the clerk of the court in which the qualified claim was filed. The clerk of the court shall then remit the assessment quarterly to the Board of Risk and Insurance Management to be deposited in the fund.

---

[1] The bill closes the PICF to claims filed after June 30, 2016. It provides the following funding sources for the PICF for claims filed on or before June 30, 2016: 1) transfer of the Medical Liability Fund at BRIM into the PICF and closure of the Medical Liability Fund; 2) an assessment of $125 on each license issuance or renewal by the Board of Medicine and Board of Osteopathy during calendar years 2016 through 2019; 3) an assessment of $25 on designated trauma centers for each trauma patient treated in calendar years 2016 through 2019 as reported to the WV Trauma Registry; 4) an assessment of 1% on gross amount of settlements and judgments in claims arising under the MPLA from July 1, 2016 through June 30, 2020, to be remitted by court clerks or plaintiff/plaintiff's counsel to BRIM; and 5) an increase (from $280 to $400) in filing fees for medical malpractice law suits, with an increase in the amount sent by court clerks to BRIM (from $165 to $285) to be placed into the PICF. The assessments will terminate at the times set forth in the bill or sooner if the liability of the PICF has been paid or fully funded. The bill also amends the cap on all civil damages in trauma claims by retaining the current $500,000 hard cap, but allowing a claimant who has suffered or suffers economic damages in excess of that hard cap to seek up to an additional $1 million in economic damages beginning July 1, 2016. This essentially mirrors the pre-amendment cap structure in trauma cases, but removes (as of July 1, 2016) the PICF as a source of money for the additional $1 million in economic damages.

West Virginia Board of Risk and Insurance Management
Advisory Bulletin

> (3) For any assessment levied pursuant to this subsection on a settlement entered into by the parties, the date on which the agreement is formalized in writing by the parties shall be used to determine applicability of this provision. At the time that an action alleging a qualified claim is dismissed by the parties, the assessment shall be paid to the clerk of the court, who shall then remit the assessment to the Board of Risk and Insurance Management to be deposited in the fund. Collected assessments shall be remitted no less often than quarterly. If a qualifying claim is settled prior to the filing of an action, the plaintiff, or his or her counsel, shall remit the payment to the Board of Risk and Insurance Management within sixty days of the date of the settlement agreement to be paid into the fund.
> (emphasis added)

The above subdivisions address three different scenarios for remittance of the 1% assessment on the gross amount paid in resolution of the MPLA claim. In two of these scenarios, the statute identifies the party or parties responsible for remitting the assessment to the Clerk or to BRIM. Specifically, if a judgment is entered by a court the defendant or defendants are responsible for remitting the assessment. If a claim is settled before a civil action is filed, the plaintiff or his/her counsel are responsible for paying the assessment directly to BRIM. However, the section is silent as to the party or parties responsible for remitting payment to the Clerk if a civil action is filed but settled prior to judgement.

As the administrator of the PICF, BRIM has received a request for guidance as to the responsibility for ensuring remittance of the 1% assessment to the Clerk in this third scenario, i.e. a civil action is filed but settled prior to judgment. There is no doubt as to the Legislature's intent that the 1% assessment be remitted to the Clerk in this scenario; there is a clear statutory requirement to do so even though the Legislature chose not to designate the party to make the remittance. Reviewing the language at issue as a whole it is BRIM's interpretation that by not designating the party responsible for remitting payment of the 1% assessment to the Clerk, the Legislature intended that plaintiff(s) and defendant(s) share this responsibility; and that the party or parties responsible for remittance must be determined in connection with settlement of the civil action so that remittance can be made to the Clerk at the time the civil action is dismissed, in accordance with the statute.

It is BRIM's interpretation that the term "remittance" is the administrative act of sending the assessment to the clerk of the court at the time the civil action is dismissed, and does not refer to underlying financial responsibility for the payment itself. Any language herein referring to shared responsibility is intended only to address responsibility for remittance, i.e. sending the assessment to the clerk at the time of dismissal. In accordance with the clear language of W. Va. Code § 29-12D-1a that the assessment be levied on the gross amount of the settlement or judgment, it is further BRIM's interpretation that the 1% assessment is not a payment in addition to the amount of the settlement or judgment; rather, it is part of the gross amount of the settlement or judgment.

Questions concerning this Advisory Bulletin may be addressed by contacting Mary Jane Pickens, Executive Director or Robert Fisher, Deputy Director.

EXHIBIT

8

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CARMEN L. RUNNION, as Administratrix of the Estate of David Charles Runnion, deceased,

Plaintiff,

v.

Civil Action No. 14-C-102
Honorable Robert A. Waters

ADAM J. KAPLAN, M.D., DAVID C. STASTNY, D.O., and CAMDEN CLARK MEMORIAL HOSPITAL CORPORATION, a West Virginia Corporation,

Defendants.

WEST VIRGINIA BOARD OF RISK AND INSURANCE MANAGEMENT'S MOTION TO INTERVENE AND MOTION FOR TRANSFER OF VENUE

COMES NOW, West Virginia Board of Risk and Insurance Management ("BRIM"), a State Agency, by and through Charles R. Bailey and David E. Schumacher of the law firm of Bailey & Wyant, PLLC, pursuant to Rule 24 of the *West Virginia Rules of Civil Procedure* and W. Va. Code §14-2-2(a)(1), and for its Motion to Intervene and Motion for Transfer of Venue hereby states the following:

I. FACTUAL BACKGROUND

BRIM petitions this Court to enter an Order allowing it to intervene in this Action as a Defendant, either as a matter of right or permission. BRIM's interest is in opposition to Plaintiff's. BRIM's request to intervene is not a matter of BRIM's discretion but is based on its statutory duty to protect the public interest in ensuring that the Patient Injury Compensation Fund ("Fund") is financially viable so that the interests of the beneficiaries of the Fund, qualified plaintiffs, are

protected. As the result of a motion filed by Plaintiff, the financial viability of the Fund and, therefore, the interests of the intended beneficiaries of the Fund are being directly threatened.

This lawsuit arose when Plaintiff Carmen L. Runnion, as Administratrix of the Estate of David Charles Runnion, sued Adam J. Kaplan, M.D., David C. Stastny, D.O., and Camden Clark Memorial Hospital Corporation for wrongful death arising out of medical malpractice claims brought pursuant to the Medical Professional Liability Act (MPLA), W. Va. Code § 55-7B-1, *et seq.* (Ann. 2016). The Fund was created for the sole purpose of providing additional compensation to qualified Plaintiffs who settle a medical negligence claim but whose settlement is specifically limited by the MPLA due to changes the legislature created in "joint and several" liability under the MPLA or because of the "Trauma Cap," also legislatively created by the MPLA. The Fund provides a Plaintiff with the opportunity to seek additional compensation beyond the settlement if the Plaintiff meets the qualifications established including proof that the settlement reached in a medical negligence claim was for an amount that didn't completely compensate the plaintiff for "economic losses" incurred as the result of injury or death. *See* W. Va. Code § 29-12D-1, *et seq.* (Ann. 2016), and W. Va. CSR § 115-7-1, *et seq.*

After Plaintiff filed this action, but prior to a judgment being entered, the current parties entered into a settlement agreement and petitioned this Court to approve it. This Court held a hearing on the petition to approve the wrongful death settlement on November 7, 2016. Because this lawsuit involves claims of medical malpractice brought pursuant to the MPLA, the settlement is subject to a 1% assessment levied by and remitted to BRIM to be deposited into the Fund pursuant to W. Va. Code § 29-12D-1a. The 1% assessment is intended to ensure financial viability of the Fund. During the hearing to approve the wrongful death settlement, Plaintiff's counsel asserted that W. Va. Code § 29-12D-1a was silent as to whether the Plaintiff or Defendant was

responsible for the 1% assessment and requested direction from the Court regarding who should be responsible to pay it. (See, Hearing Transcript, 18:9-14, attached hereto as **Exhibit A**). Plaintiff's counsel also stated to this Court that the 1% assessment was to be placed in escrow for the specific purpose of assuring that funds would be available to pay the 1% assessment. (*Id.* at 18:14-22.) Plaintiff thereafter filed with this Court, without serving a copy on BRIM, a "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***." Plaintiff recognizes that the 1% assessment is the responsibility of one or the other party (or parties) depending on whether a settlement is reached before an action is filed or a judgment is entered. However, Plaintiff argues that neither the Plaintiff nor any of the Defendants is obligated to pay any assessment pursuant to W. Va. Code § 29-12D-1a, under a settlement like the one entered in this action which is entered after a civil action has been filed. (See generally, "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***," attached hereto as **Exhibit B**.)

The statutory interpretation suggested by the Plaintiff is clearly wrong. If a Court were to accept Plaintiff's position by granting the pending motion, the 1% assessment would simply cease to exist for any settlement. The ultimate effect would not just be on the legislatively intended 1% assessment from the settlement entered in this Action, but every settlement entered hereafter. Frankly, such a ruling would simply enable every Plaintiff to arrange the timing of every settlement to occur only after the Plaintiff files a civil action, rather than before the civil action is filed, so as to avoid the 1% assessment. In essence, a method to circumvent the intention of the legislature to provide financial stability to the Fund would be created by a Court ruling in favor of Plaintiff's position. Such a ruling would effectively and directly attack the financial viability of the Fund. Plaintiff's Motion, if granted, would adversely affect the rights of every Plaintiff who might qualify to seek compensation from the Fund.

BRIM is charged with implementing, administering, and operating the Fund. (*See* W. Va. Code § 29-12D-2, 2004, *as amended*, and WV CSR § 115-7-1, *et seq.*). BRIM is presently not a party to this lawsuit, nor are its interests or those of the beneficiaries of the Fund represented by the current parties. For these reasons, and in order to properly administer the Fund and ensure that the Fund receives assessments levied pursuant to West Virginia Code and to protect the interests of the potential beneficiaries of the Fund, BRIM seeks to intervene in this action.

II. STANDARD OF LAW

A. Intervention

Rule 24 of the *West Virginia Rules of Civil Procedure* states, in relevant part:

> (a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

W. Va. R. Civ. Pro., Rule 24(a) and (b).

B. Venue

West Virginia Code § 56-1-1(a) defines what proper venue is for civil actions in West Virginia. It states:

> Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
>
> (1) Wherein any of the defendants may reside or the cause of action arose, except that an action of ejectment or unlawful detainer must be brought in the county wherein the land sought to be recovered, or some part thereof, is . . . .

W.Va. Code § 56-1-1(a)(1)-(2) (2012). However, venue for state agencies is only proper in Kanawha County Circuit Court. *West Virginia Code* states:

> (a) The following proceedings shall be brought and prosecuted only in the Circuit Court of Kanawha County:
> (1) Any suit in which the Governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

Id. at §14-2-2(a)(1). The specific provision of §14-2-2(a)(1) as having effect over the more general § 56-1-1(a) is in accord with the maxim *lex specialis derogat lex generalis*: "when two statutes govern a particular scenario, one being specific and one being general, the specific provision prevails." *Bowers v. Wurzburg*, 205 W. Va. 450, 462, 519 S.E.2d 148, 160 (1999).

III. ARGUMENT

A. BRIM should be allowed to intervene as a Defendant as a matter of right in this lawsuit because it has a substantial interest in administering the Fund in order to protect the public interest that cannot be adequately represented by the existing parties.

BRIM has a substantial interest in ensuring monies are deposited into the Fund based upon statutorily required assessments levied by BRIM. West Virginia Code mandates that the Fund be implemented, administered and operated by BRIM. W. Va. Code § 29-12D-2(a). The Fund was created "for the purpose of providing fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectible as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles and standards . . . ." *Id.* at § 29-12D-1(a). Thus the legislature

has determined that the Fund is necessary to provide "fair and reasonable compensation to claimants in medical malpractice actions" and it is BRIM's statutorily required duty to operate and administer the Fund.

Intervention of right is allowed where four conditions are met: "(1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant must show that the interest will not be adequately represented by existing parties." *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 398-99, 540 S.E.2d 917, 922-23 (1999)(citing W. Va. R. Civ. Pro., Rule 24(a)(2)). BRIM meets all of the requirements for intervention and requests that this Court allow it to intervene in the above-captioned matter.

1. BRIM's application for intervention is timely.

The first condition is that the intervention must be timely. W. Va. R. Civ. Pro., Rule 24(a)(2). "[T]he timeliness of any intervention is a matter of discretion with the trial court. *Cummings*, 208 W. Va. at 399, 540 S.E.2d at 923. BRIM's intervention into this matter will not prejudice any party. While BRIM is currently unaware as to when this case settled, Plaintiff's "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***" was filed on November 16, 2016. It was not until recently that BRIM became aware of this lawsuit or the Plaintiff's "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***". Plaintiff failed to notify BRIM of its intention to challenge the 1% assessment and only became aware of this threat and Plaintiff's direct attack on the Fund after the hearing was held.

Plaintiff will not be prejudiced. Plaintiff is obviously aware of the statutorily required 1% assessment that is ultimately to be paid to the Fund, as shown by the "***Motion Regarding***

Responsibility for the W. Va. Code § 29-12D-1a Assessment." Plaintiff's counsel declared to the Court that a certain amount of money was being held in escrow because of the 1% assessment until the Court makes a ruling on the Motion. (See Exhibit A at 18:14-22). Thus, BRIM's Motion to Intervene is timely.

2. BRIM has an interest relating to the property or transaction that is the subject of the action.

The second condition in regard to intervention is that BRIM must have an interest relating to the property or transaction that is the subject of the action. W. Va. R. Civ. Pro., Rule 24(a)(2). The West Virginia Supreme Court has held:

> to justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one that is capable of definition, protectable under some law, and specific to the intervenor.

Cummings, 208 W. Va. at 400, 540 S.E.2d at 924.

BRIM's interest is direct. The subject of the underlying lawsuit is a wrongful death claim brought pursuant to the Medical Professional Liability Act. Any claim brought pursuant to the Medical Professional Liability Act requires 1% of the settlement or judgment to be subject to an assessment levied by and remitted to BRIM to be deposited into the Fund. W. Va. Code § 29-12D-1a(c). BRIM, as an agency of the State of West Virginia has been tasked with implementing, administering and operating the Fund. *Id.* at § 29-12D-2(a). A strong public policy exists in favor of protecting the Fund's assets because the Fund was created to provide compensation to claimants who are unable to fully collect portions of economic damages due to specific limitations imposed by the MPLA. *Id.* at § 29-12D-1(a). BRIM obviously has a direct interest in any judicial decision

that could affect the economic solvency of the Fund or BRIM's ability to administer it. BRIM clearly has an interest relating to the property or transaction that is the subject of the underlying lawsuit.

3. This Court's rulings and the disposition of this action could, as a practical matter, impair or impede BRIM's ability to protect its interest.

The third condition for intervention is that this Court's ruling and disposition of this action may, as a practical matter, impair or impede the BRIM's ability to protect its interest and that of qualified claimants, in the Fund. *See*, W. Va. R. Civ. Pro., Rule 24(a)(2). In analyzing this element, the Court in *Cummings* held:

> in determining whether a proposed intervenor of right under West Virginia Rule of Civil Procedure 24(a)(2) is so situated that the disposition of the action may impair or impede his or her ability to protect that interest, courts must first determine whether the proposed intervenor may be practically disadvantaged by the disposition of the action. Courts then must weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions.

Cummings, 208 W. Va. at 401, 540 S.E.2d at 925.

BRIM's interest in this matter is to protect the public interest by ensuring that the Fund is properly maintained and to ensure that the statutory provisions that establish the assessments are protected and upheld. Currently, Plaintiff seeks to have this Court enter an Order determining that no party be responsible for the statutorily required assessment based upon Plaintiff's erroneous statutory interpretation with regard to settlements entered after a civil action has been filed. A judicial determination that the 1% assessment does not need to be paid without hearing argument from BRIM whose purpose is to administer the Fund, is a denial of due process. Intervention pursuant to Rule 24 is precisely designed to prevent impairment of the interests and activities of

an applicant, such as BRIM. BRIM has a statutory duty to protect the public interest and has an absolute right to protect the appropriate statutory interpretation of W. Va. Code § 29-12D-1a. Therefore, BRIM's statutory duty and interest in administering and protecting the Fund and advocating for the public interest will be impaired by a Court's disposition of the pending motion and this action if BRIM is not permitted to intervene.

4. BRIM's interest cannot be adequately represented by existing parties.

The fourth and final condition regarding intervention is whether BRIM's interest in the Fund can be adequately represented by the existing parties. W. Va. R. Civ. Pro., Rule 24(a)(2); *Cummings*, 208 W. Va. at 398-99, 540 S.E.2d at 922-23. Obviously, it cannot. Counsel for Plaintiff and Defendants each represent their respective clients, solely. Plaintiff's "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***" will go uncontested, without BRIM's intervention. During the hearing on the petition to approve the wrongful death settlement, Plaintiff's counsel stated that the Defendants are not responsible to pay the 1% assessment and that they are released. (Exhibit A at 20:4-19). Because all other parties have been released and have no compelling interest to oppose Plaintiff's "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***," BRIM, as Intervenor, will be the only party advocating on behalf of the Fund and the public interest. Therefore, BRIM's interest is not merely being inadequately represented by the existing parties, it is not being represented at all, and BRIM should be allowed to intervene as a Defendant in this matter as a matter of right under Rule 24(a) of the *West Virginia Rules of Civil Procedure*.

Alternatively, this Court should exercise its discretion under Rule 24(b) of the *West Virginia Rules of Civil Procedure* to permit BRIM to intervene. It is right, fair, and appropriate for BRIM as administrator of the Fund to be involved in determining the interpretation of W. Va.

Code § 29-12D-1a(c) which will have a direct effect on the public interest. The public interest is directly dependent upon the proper administration of the Fund. The funding stream created through the 1% assessment provides financial viability for the Fund and is a primary element to ensure proper administration of the Fund. As previously asserted, a method to circumvent the intention of the legislature to provide financial stability to the Fund would be created by a Court ruling in favor of Plaintiff's position. Such a ruling would effectively and directly attack the financial viability of the Fund. Plaintiff's argument, if granted would adversely affect the rights of every other Plaintiff who might qualify to seek compensation from the Fund.

Therefore, this Court should exercise its discretion and allow BRIM to intervene as a Defendant to protect its legal obligations towards the Fund and to protect the public interest in ensuring the Fund is properly funded and maintained.

B. Should this Court exercise its discretion and allow BRIM to intervene in this lawsuit, then this Court should transfer venue to the Circuit Court of Kanawha County, West Virginia.

BRIM requests that this Court transfer this matter to the Circuit Court of Kanawha County, West Virginia once the Court permits BRIM to intervene. Venue for state agencies as party defendants is only proper in the Circuit Court of Kanawha County, West Virginia. W. Va. Code §14-2-2(a)(1). "[T]he provisions of W. Va. Code, 14-2-2, as amended, are exclusive and controlling as to other general venue provisions." *Vance v. Ritchie*, 178 W. Va. 155, 157, 358 S.E.2d 239, 241 (1987); see also *State ex rel. West Va. Bd. of Educ. v. Perry*, 189 W. Va. 662, 434 S.E.2d 22 (1993) (local citizens had the right to bring a mandamus action against the West Virginia Board of Education to challenge the decision to close senior high grades of school as being an arbitrary, unreasonable, and capricious action; however, such a mandamus action had to be brought in the Circuit Court of Kanawha County because the West Virginia Board of Education and its

members constitute a public agency, and public officials are entitled to the benefit of the venue provisions of this section). Furthermore, BRIM, as an intervenor, has the right after intervention to transfer venue pursuant to § 14-2-2(a)(1). See, *State ex rel. McLaughlin v. West Virginia Court of Claims*, 209 W. Va. 412, 414, 549 S.E.2d 286, 288 n. 7 (2001) (transferring venue from the Circuit Court of Marshall County, West Virginia to the Circuit Court of Kanawha County, West Virginia after intervention by BRIM).

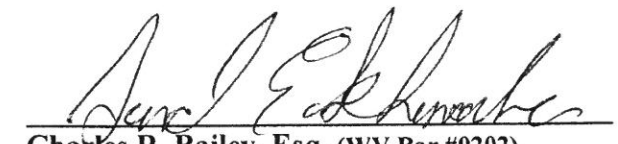
BRIM, therefore moves this Court to allow it to intervene as a defendant in this action and transfer the case to the Circuit Court of Kanawha County, pursuant to W.Va. Code §14-2-2(a)(1).

IV. CONCLUSION

BRIM hereby requests that this Court allow it to intervene in this lawsuit as a matter of right or permission for the purpose of protecting its legal obligations to the Fund and for protecting the public interest in ensuring the Fund is properly funded, maintained and administered. BRIM has a substantial and direct interest in the legislatively created 1% assessment directed to the Fund that the Plaintiff is attempting to avoid. Furthermore, this issue could potentially arise in other actions and a decision made by one Court regarding assessments to the Fund potentially affects how other courts might rule. Should BRIM be allowed to intervene, it will give BRIM the opportunity to present to a Court a statutory interpretation of W. Va. Code § 29-12D-1a(c) that is opposite to that of Plaintiff. BRIM, presently, is the only party, actual or potential, that has an interest in opposing Plaintiff's "***Motion Regarding Responsibility for the W. Va. Code § 29-12D-1a Assessment***." Moreover, this Court has a statutory duty to transfer venue to the Circuit Court of Kanawha County, West Virginia, pursuant to W. Va. Code §14-2-2(a)(1) because BRIM is a state agency.

WHEREFORE, BRIM respectfully moves this Court to enter an Order granting BRIM's Motion to Intervene Venue pursuant to Rule 24 of the *West Virginia Rules of Civil Procedure* and its Motion to Transfer Venue pursuant to W. Va. Code §14-2-2(a)(1), and any other relief this Court deems just and proper.

WEST VIRGINIA BOARD OF RISK AND INSURANCE MANAGEMENT,
By Counsel,



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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CARMEN L. RUNNION, as Administratrix of the Estate of David Charles Runnion, deceased,

Plaintiff,

v.

Civil Action No. 14-C-102
Honorable Robert A. Waters

ADAM J. KAPLAN, M.D., DAVID C. STASTNY, D.O., and CAMDEN CLARK MEMORIAL HOSPITAL CORPORATION, a West Virginia Corporation,

Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **"WEST VIRGINIA BOARD OF RISK AND INSURANCE MANAGEMENT'S MOTION TO INTERVENE AND MOTION FOR TRANSFER OF VENUE"** was served upon the following parties by U.S. Mail on this __ day of January, 2017:

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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CARMEN L. RUNNION, as Administratrix of the Estate of David Charles Runnion, deceased,

Plaintiff,

vs. // Case No. 14-C-102

ADAM J. KAPLAN, M.D., DAVID C. STASTNY, D.O., and CAMDEN CLARK MEMORIAL HOSPITAL CORPORATION and DAVID WOODYARD, CRNA,

Defendants.

Transcript of proceedings held in the above styled matter before the Honorable Robert A. Waters, Judge, on the 7th day of November, 2016, in the Wood County Judicial Building, Parkersburg, West Virginia.

LYNDE BAKER, OFFICIAL COURT REPORTER
WOOD COUNTY JUDICIAL BLDG., ROOM 321
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may have been faced with it already, is the issue of the 1% assessment on settlements, in a case that is currently being litigated, obviously we're at the settlement phase now, but who has the obligation to pay that, and I would suggest to your Honor, as I suggested to Plaintiff's counsel, that that 1% assessment be remitted from the gross settlement proceeds to the circuit clerk, as I read the statute.

MR. ZATEZALO: Oh, yeah, your Honor. I mean, it may-- unless the Court has dealt with this issue and has preference, it may benefit the Court to entertain some briefs on this issue. The statute is vague insofar as it doesn't speak directly to the issue of who pays once a case is filed, but resolved before judgment. I had advised Mr. Vallejos-- I mean, we certainly don't have a problem escrowing money out of the settlement. We have a provision in the petition to escrow money to cover any of those taxes if it's ultimately determined we are to pay them. So I don't think it's an issue that necessarily precludes us from consummating the settlement today. The money will be held in escrow specifically for that purpose.

THE COURT: How did you determine the escrow amount since it's not--

THE COURT: All right. So your position is that the estate will pay the assessment if it's due, but you're contesting whether it applies or not?

MR. ZATEZALO: That's correct, your Honor. The statute is ambiguous on that particular set of circumstances. I imagine this is something that will be resolved through the circuit courts over time, but if your Honor hasn't dealt with this or addressed this issue yet, then we would like the opportunity to be heard on it.

THE COURT: Okay. But you're not going to seek that from the Defendants? They're done after today?

MR. ZATEZALO: Oh, yeah, I guess, your Honor, it would either be-- right. We pay it, yeah. They're done.

THE COURT: So they're going to be released?

MR. ZATEZALO: Yes.

THE COURT: Which is what they want.

MR. ZATEZALO: Right.

THE COURT: Actually, that issue hasn't been brought up before, so we'll take a look at that statute and determine--

MR. VALLEJOS: Your Honor, I apologize. Just for clarification for me and my client, and I assume all of

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CARMEN L. RUNNION, as Administratrix
of the Estate of David Charles Runnion,
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Plaintiff,

vs.
NO. 14-C-102

CIVIL ACTION

JUDGE ROBERT

A. WATERS
ADAM J. KAPLAN, M.D., DAVID C.
STASTNY, D.O., and CAMDEN CLARK
MEMORIAL HOSPITAL CORPORATION,
a West Virginia Corporation

Defendants.

MOTION REGARDING RESPONSIBILITY FOR THE W.VA. CODE §29-12D-1a ASSESSMENT

As set forth in the Plaintiff's Petition for Approval of Wrongful Death Settlement, the parties to this Civil Action have reached a private resolution of this case. A new Code section discusses and "assessment" to be collected by the West Virginia Patent Injury Compensation Fund. While the issue of who, if anyone, owes the assessment is between the State of West Virginia and the Parties, the nature of this settlement as a Court-approved one, and the need to craft an appropriate release, may require this Court to express some view on the matter.

The Plaintiff's position, as set forth below, is that the statutory language does not encompass any assessment for a case settled under the circumstances of this case. This Court should so find, and approve the settlement without any determination that either side is obligated to pay any assessment or tax. In the alternative, Plaintiff submits that the Court should determine that liability for any assessment or tax, if it does exist, is a matter between the litigants and the state (like all other taxes) and that the settlement approval is not the forum to address the applicability or amount of the assessment.

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EXHIBIT
tabbies
B

West Virginia Code §29-12D-1a (c) states that an assessment shall be levied against some medical malpractice settlements, putatively to fund the West Virginia Patent Injury Compensation Fund. However, the statute is silent concerning payment of *any* assessment under the circumstances *of this case*.

The relevant portion of the statute reads as follows:

> (c) Assessment on claims filed under the Medical Professional Liability Act. - From July 1, 2016, through June 30, 2020, an assessment of one percent of the gross amount of any settlement or judgment in a qualifying claim shall be levied.
>
> (1) For purposes of this subsection, a qualifying claim is any claim for which a screening certificate of merit, as that term is defined in section six, article seven-b, chapter fifty-five of this code, is required.
>
> (2) For any assessment levied pursuant to this subsection for which a judgment is entered by a court, the date of the entry of judgment shall be used to determine applicability of this provision. The defendant or defendants shall remit the assessment to the clerk of the court in which the qualified claim was filed. The clerk of the court shall then remit the assessment quarterly to the Board of Risk and Insurance Management to be deposited in the fund.
>
> (3) For any assessment levied pursuant to this subsection on a settlement entered into by the parties, the date on which the agreement is formalized in writing by the parties shall be used to determine applicability of this provision. At the time that an action alleging a qualified claim is dismissed by the parties, the assessment shall be paid to the clerk of the court, who shall then remit the assessment to the Board of Risk and Insurance Management to be deposited in the fund. Collected assessments shall be remitted no less often than quarterly. If a qualifying claim is settled prior to the filing of an action, the plaintiff, or his or her counsel, shall remit the payment to the Board of Risk and Insurance Management within sixty days of the date of the settlement agreement to be paid into the fund.
>
> (d) Termination of assessments. - The requirements of this section shall terminate on the dates set forth in this section or sooner if the liability of the Patient Injury Compensation Fund has been paid or has been funded in its entirety. The Board of

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> Risk and Insurance Management shall submit a report to the Joint Committee of Government and Finance each year beginning January 1, 2018, giving recommendations based on actuarial analysis of the fund's liability. The recommendations shall include, but not be limited to, discontinuance of the assessments provided for in this section, closure of the fund and transfer of the fund's liability.

As is clear from the language of the statute, where there is a judgment, the Defendant is responsible for the assessment. W.Va. Code §29-12D-1a (c)(2). As is also clear, the Plaintiff is responsible for the assessment "[i]f a qualifying claim is settled ***prior*** to the filing of an action." *Id.* at §29-12D-1a (c)(3). The statute says absolutely nothing, though, about who pays the assessment if, as is this case here, the case settles, but only ***after*** the case is filed.

Furthermore, the assessment, where it is owed, is fundamentally an issue between the Clerk and the litigants and not between the litigants themselves.

The Plaintiff respectfully takes the position that neither the Plaintiffs nor the Defendants should be responsible for the assessment under these circumstances given the statutory silence. Obviously, the Legislature knew how to fix responsibility for the assessment in specific cases. Indeed, the Legislature was quite clear about responsibility for the assessment when a case is reduced to judgment or settled before filing. The legislature's failure to state what happens when a case settles after filing makes the statute vague and inapplicable.

The assessment set forth in West Virginia Code §29-12D-1a(c) is simply a tax, and West Virginia law is clear that ambiguity in a such a law should be resolved in favor of the taxpayer and construed strictly against the Tax Commissioner. *See* Syl. pt. 1, *State ex rel. Lambert v. Carman*, 145 W.Va. 635, 116 S.E.2d 265 (1960) ("Laws imposing a license or tax are strictly construed and when there is doubt as to the meaning of such laws they are construed in favor of the taxpayer and against the State."); *accord* Syl. pt. 2, *Baton Coal Co. v. Battle*, 151 W.Va. 519, 153 S.E.2d 522 (1967) ("As a general rule, statutes imposing taxes are construed strictly

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against the taxing authority and liberally in favor of the taxpayer."). *Cf.* Syl. pt. 1, *Calhoun County Assessor v. Consolidated Gas Supply Corp.*, 178 W.Va. 230, 358 S.E.2d 791 (1987) ("Statutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer. However, statutes establishing administrative procedures for collection and assessment of taxes will be construed in favor of the government."); *see also Griffith v. Frontier West Virginia, Inc.*, 228 W. Va. 277, 283, 719 S.E.2d 747, 753 (2011) (*quoting Coordinating Council for Indep. Living, Inc. v. Palmer*, 209 W.Va. 274, 281, 546 S.E.2d 454, 461 (2001) ("Where ... the statute to be interpreted concerns taxation, we usually construe the tax law in a manner that is favorable to the subject taxpayer.")).

We must assume that when the statute assigned responsibility for the assessment to Plaintiffs "[i]f [the] claim is settled prior to the filing of an action," that it did so deliberately. *Ringel-William vs. West Virginia Consolidated Public Retirement BD.*, 790 S.E. 2d 806, 811 (2016) (statutes must be read so that effect is given to "every section, clause, word, or part of the statute." "No words may be deemed superfluous."). Accordingly, if the legislature meant for Plaintiffs to pay the assessment any time there is a settlement it could have said so. It did not. Instead, it said that the only time a Plaintiff would have to pay was if the claim was filed "prior to the filing of an action."

For these reasons, the Plaintiffs respectfully ask this Honorable Court for an order that determines that no party be responsible for the assessment because the statute affixes no responsibility in this case. In the alternative, Plaintiffs submit that the Court should enter no order on the issue at all, since each litigant is responsible to pay whatever taxes and assessments they are determined to owe in proceedings that are adapted to that purpose. The approval of a

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wrongful death settlement is not one of them, and therefore the Court need make no decision at all on this matter.

Respectfully submitted,

DAVID G. STEVENS and
AMY NICOLE STEVENS, as Co-Administrators
for the Estate of BRITTANY ANN STEVENS,
deceased, Plaintiffs

By: _____

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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

CARMEN L. RUNNION, as Administratrix
of the Estate of David Charles Runnion,
deceased,

Plaintiff,

vs.

CIVIL ACTION

NO. 14-C-102

JUDGE ROBERT

A. WATERS
ADAM J. KAPLAN, M.D., DAVID C.
STASTNY, D.O., and CAMDEN CLARK
MEMORIAL HOSPITAL CORPORATION,
a West Virginia Corporation

Defendants.

CERTIFICATE OF SERVICE

Service of the foregoing *Motion for a Determination of Responsibility for the W.Va. Code §29-12D-1a Assessment* was had upon the defendants herein by e-mail and by mailing a true copy thereof, by regular United States Mail, postage prepaid, on this 16th day of November, 2016, as follows:

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EXHIBIT

9

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DAVID A. JIVIDEN
CHAD C. GROOME
ANGELA J. CISAR

February 28, 2017

Mary Jane Pickens, Executive Director
State of West Virginia
Department of Administration
Board of Risk & Insurance Management
1124 Smith Street, Suite 4300
Charleston, WV 25301

Re: Docket 13-C-381-W

Dear Ms. Pickens:

The case I believe you are referring to was settled and judgement entered as per an order of the Court.

I would suggest that you re-open the case to determine who the judge feels owes this special or not so special assessment or, in fact, if it's due at all in this situation. Since this involves infants in the eyes of the law, you would need to contact them through the *Guardian ad Litem* to determine what, if any, share of their proceeds should be provided to your government institution.

Would you also advise what success you have had in collecting the same from the insurance company involved in this matter.

I remain

Very Truly Yours,

DAVID A. JIVIDEN

DAJ/slh

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March 8, 2017

State of West Virginia
Department of Administration
Board of Risk and Insurance Management
Attn: Mary Jane Pickens
1124 Smith Street, Suite 4300
Charleston, WV 25301

Re: Klepack v. Weirton Medical Center

Dear Ms. Pickens:

Thank you for your letter of February 22nd, 2017. I reviewed my file to attempt to determine what case you were referencing and I have identified the same. Please be advised that the statute that you reference is unenforceable because it is unconstitutional in two respects. First, it is void for vagueness and second, if it were not void and it could be determined from the plain language of the statute who was responsible for making the payment that it would be an unconstitutional due process taking from the Plaintiff. Therefore, if you wish to attempt to collect the amount set forth in the statute I would recommend that you contact the Weirton Medical Center.

Sincerely,

David F. Cross

DFC/jm

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June 15, 2017

Mary Jane Pickens, Executive Director
Deputy Cabinet Secretary
State of West Virginia
Department of Administration
Board of Risk and Insurance Management
1124 Smith Street, Suite 4300
Charleston, WV 25301

RE: Case No. 14-C-2842

Dear Ms. Pickens:

Thank you for your letter dated May 15, 2017 related to the above-reference docket number. Please be advised that my clients, who had interest in that action dispute the Board of Risk's position and guidance on the subject of West Virginia Code § 29-12D-1A(c).

A tax or assessment, such as the one at issue, must be assessed to a specifically identifiable party. The "advisory bulletin" attempts to do what may not be done under West Virginia law, which is to guess at the Legislature's intent regarding who is required to pay that tax.

> Statutes which impose a tax are strictly construed and where there is a doubt as to the meaning of such statutes they are construed in favor of the taxpayer and against the *State. J. D. Moore, Inc. v. Hardesty*, 147 W.Va. 611, 129 S.E.2d 722; *Glessner's Estate v. Carman*, 146 W.Va. 282, 118 S.E.2d 873; *State ex. rel. Lambert v. Carman*, 145 W.Va. 635, 116 S.E.2d 265; Fry v. City of Ronceverte, 93 W.Va. 388, 117 S.E. 140.

State ex rel. Battle v. Baltimore & O.R. Co., 149 W. Va. 810, 839, 143 S.E.2d 331, 348 (1965)

Obviously, this is an issue that could come up repeatedly, and I welcome your suggestion of a forum to resolve the matter in the event that the Board is not content to withdraw its position that my clients owe money.

A.M.D.G.

I look forward to hearing from you.

Cordially,

CHRISTOPHER J. REGAN
CJR/sdb