

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



Mark D. Scott
Cabinet Secretary

Mary Jane Pickens
Executive Director
Deputy Cabinet Secretary
MaryJane.Pickens@wv.gov

January 7, 2022

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 Management, the attached report is hereby submitted pursuant to West Virginia Code Section 29-12D-1a(d).

Sincerely,


Mary Jane Pickens
Executive Director

MJP/ldm

Attachments

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INTRODUCTION

The West Virginia Board of Risk and Insurance Management (“BRIM”) submits this report to the Joint Committee on Government and Finance pursuant to W. Va. Code § 29-12D-1a. It is the fifth such report submitted since the enactment of Senate Bill 602 in 2016, which closed the Patient Injury Compensation Fund (“PICF”) to new claims filed on or after July 1, 2016, and established funding sources that would continue for approximately four years. The time period for the funding streams into the PICF was thereafter amended in SB 576, passed during the 2018 regular session. This report is for the period July 1, 2017, through November 30, 2021 (the period post SB 602).

STATUS OF ALL CLAIMS AS OF NOVEMBER 30, 2021

A report showing all claims as of November 30, 2021, in which pro-rata payments have been made, and the payment status of each claim, is attached as Exhibit A. As shown on Exhibit A, final pro-rata payments were made in August, 2021, and all claims in the PICF are now fully paid. The only liability remaining for the PICF consists of administrative costs, primarily for legal services. While the amount of these costs will be determined upon submission of final invoices to BRIM, it is estimated that the amount will be less than \$5000.

A total of thirty-four claims have been filed against the PICF since its inception. At the end of calendar year 2020, sixteen claimants had been fully paid for their claims. Three claims had been denied. At the start of calendar year 2021, fifteen claimants remained with claims still in the payment phase. Those claims were all paid in full in August, 2021.

HISTORY OF FUND COLLECTIONS FOR FY 2017 THROUGH NOVEMBER 30, 2021

See Exhibit B, attached, for a summary of collections into the PICF for the period July 1, 2017, through November 30, 2021, as well as claim and claim-related disbursements from the PICF for that period.

ISSUES REMAINING

W. Va. Code § 29-12D-1a, as amended by SB 576 enacted during the 2018 regular Legislative session, extended the funding streams into the PICF to better ensure that claims would be paid in full. Subsection (d) of this section states:

(d) Annual Report; transfer of fund balance. — 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. Any funds remaining in the fund

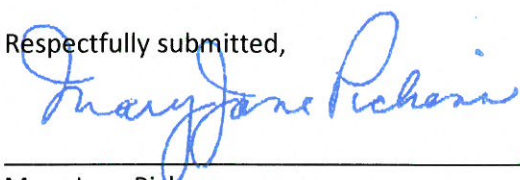
on June 30, 2022, and determined by the Board of Risk and Insurance Management to not be necessary for claim payments or administrative costs of the fund, shall be transferred to the General Revenue Fund.

The funding streams were scheduled in W. Va. Code Section 29-12D-1a to terminate on December 31, 2021, unless the liability of the fund had been paid or had been funded in its entirety under subsection (d). On or about July 9, 2021, the PICF had adequate funding to pay the final pro-rata payments on claims; however, the liability of the fund also includes any administrative costs associated with the fund's operation and management. These costs have been primarily legal fees associated with PICF-related litigation. On or about August 12, 2021, the BRIM Executive Director notified the interest groups associated with the funding streams that claims were fully funded and that no further payments into the PICF were needed. Notice was provided to the Association for Justice, the WV Hospital Association, the State Medical Association, the Medical and Osteopathic licensing boards, the State Treasurer's Office, and included in the WV State Bar's "Bar Blast" for 3 consecutive weeks. In addition, the Executive Director fielded numerous calls and emails regarding the termination of the funding streams.

Despite notification attempts, some funds did continue to come into the PICF. Current funding is sufficient to pay remaining administrative costs and BRIM desires to refund payments that were made to the fund following termination of the funding streams under the statute. These payments were not needed to retire the fund's liability and were made after the obligation to make such payments had ended. Attached hereto as Exhibit C is a legal opinion obtained by BRIM in support of BRIM's authority to refund these excess and improperly paid assessments received by the fund. Out of an abundance of caution, however, BRIM plans to seek introduction of a bill in the regular 2022 Legislative session that provides specific authority to process these refunds.

It should be noted that one of the funding streams has not been terminated by the fully funded status of the PICF and will remain in the fund until June 30, 2022, after which time it will be transferred to general revenue. Under W. Va. Code Section 59-1-28a(f), Circuit Clerks must remit \$285 of each filing fee received for filing a medical malpractice lawsuit into the PICF until December 31, 2021. These payments are not related to the funding status of the PICF (there is a corresponding statute at W. Va. Code section 59-1-11(a)(2) reducing the filing fee for these lawsuits to \$280 after December 31, 2021).

Respectfully submitted,



Mary Jane Pickens
Executive Director

MJP/ldm

Attachments

Exhibit A**PATIENT INJURY COMPENSATION FUND FINAL PAYMENTS-AUGUST 2021**

Claimant	Original Amount Due	Award Amount Paid
Robinson, Carol	\$ 374,888.59	\$ 374,888.59
Small, Lincoln	\$ 550,000.00	\$ 550,000.00
Strobel, Carolyn	\$ 228,562.46	\$ 228,562.46
Hypes, Estate of Manford	\$ 210,910.92	\$ 210,910.92
Mathes, Cameron J., Infant	\$ 1,000,000.00	\$ 1,000,000.00
Fitts, Kenneth	\$ 1,000,000.00	\$ 1,000,000.00
Putman, Estate of Daniel	\$ 373,533.00	\$ 373,533.00
Walker, Samuel, infant	\$ 1,000,000.00	\$ 1,000,000.00
Kois, Dallas	\$ 1,000,000.00	\$ 1,000,000.00
Robinson, Estate of Angela A.	\$ 63,521.00	\$ 63,521.00
Taylor, Estate of Johnny	\$ 564,569.16	\$ 564,569.16
Haught, Jr., James W.	\$ 1,000,000.00	\$ 1,000,000.00
Halsey, Estate of Tamara	\$ 923,564.00	\$ 923,564.00
Riggle, Jacob Ryan	\$ 1,000,000.00	\$ 1,000,000.00
Richmond, Carolyn	\$ 1,000,000.00	\$ 1,000,000.00
Devores, Sheila	\$ 783,843.00	\$ 783,843.00
TOTAL	\$ 11,073,392.13	\$ 11,073,392.13

Exhibit B

West Virginia Board of Risk and Insurance Management
Patient Injury Compensation Fund (PICF)
Analysis for the Period 7-1-17 thru 11-30-21 (After SB602)

Fund Balance 7-1-17			\$ 3,147,146.25
Cash received resulting from SB602:			
1% Court/Settlement Fees	\$ 3,860,704.97		
Trauma Fees	1,966,225.00		
Physicians' Licensing Fees	2,276,799.36		
Court Filing Fees	<u>331,950.00</u>	8,435,679.33	
PICF Claims and Claims Related Disbursements:			
Claims Payments	\$ (11,073,392.13)		
Contractual and Professional	<u>(141,070.61)</u>	(11,214,462.74)	
Other:			
Interest Earned		63,415.59	
Fund Balance 11-30-21			<u><u>\$ 431,778.43</u></u>
Claims O/S 7-1-17			\$ 11,073,392.13
Payments thru 11-30-21			<u>\$ (11,073,392.13)</u>
Unfunded Claims Outstanding 11-30-21			<u><u>\$ -</u></u>

Exhibit C



PULLIN, FOWLER
FLANAGAN,
& BROWN & POE PLLC

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REPLY TO: Charleston
SENDERS E-MAIL: gcullop@pffwv.com
www.pffwv.com

November 1, 2021

Mary Jane Pickens, Director
WV Board of Risk & Insurance Management
Claims and Loss Control
1124 Smith Street, Suite 4300
Charleston, WV 25301

RE: One Percent PICF Assessment Refunds

Dear Mary Jane:

Please accept this correspondence as our advice and opinion as to the question regarding the propriety of refunding certain Patient Injury Compensation Fund ("PICF") assessment payments received after PICF was fully funded, on or about July 9, 2021. We reviewed the information supplied by you on the subject, as well as the payment information showing that PICF was fully funded. Additionally, we reviewed PICF statutes and administrative rules. It is our opinion that payments received pursuant to W.Va. Code § 29-12D-1a after PICF was fully funded should be returned as payments made in error. Further, it is our opinion that returning these erroneous payments falls within the broad discretion and authority granted BRIM in administering PICF.

The Question Presented

Does BRIM have authority to issue refunds of section 29-12D-1a payments received after PICF was fully funded?

Analysis

West Virginia Code § 29-12D-1a provides mechanisms through which PICF received additional funding. These mechanisms are: (1) a biannual assessment collected by the Board of Medicine and the Board of Osteopathic Medicine of \$125 from every physician licensed by each board for the privilege of practicing medicine in West Virginia; (2) an assessment of \$25 for each trauma patient treated at a health care facility designated by the Office of Emergency Medical Services as a trauma center; and (3) an assessment of one percent of the gross amount of

any settlement or judgment on claims filed under Medical Professional Liability Act. Pursuant to this section of the code, BRIM has been collecting these required payments.

PICF was fully funded on or about July 9, 2021. W.Va. Code § 29-12D-1a(d) explicitly states that “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.*” W.Va. Code § 29-12D-1a(d) (*emphasis added*). Thus, according to the statutory language, the requirements that these assessments be paid terminated on the date wherein PICF was fully funded, on or about July 9, 2021. It therefore follows that any payments sent to BRIM, pursuant to § 29-12D-1a, after July 9 of this year were sent erroneously, without any requirement to do so.

Our review of the applicable statutes and administrative rules reveals that there is only explicit authority to make payments from PICF to claimants and professional service providers doing work benefitting PICF. It also reveals, however, that BRIM has broad authority in the administration of PICF.

Given BRIM’s broad authority and given the fact that PICF was fully funded on or about July 9, 2021 (thereby terminating any and all requirements for payments under §29-12D-1a), it is our opinion that BRIM should return any monies submitted to it pursuant to §29-12D-1a that were received after July 9, 2021, as those payments were no longer required pursuant to W.Va. Code § 29-12D-1a(d). It is our opinion that refunding such monies should not be considered payments made from PICF and instead should be considered as a simple correction for payments made in error. It is our opinion that this falls within the administrative authority of BRIM to administer PICF.

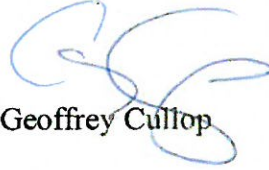
Of note, 29-12D-1a(d) concludes by stating that “any funds remaining in the fund on June 30, 2022, and determined by the Board of Risk Management to not be necessary for claim payments or administrative costs of the fund, shall be transferred to the General Revenue Fund.” There is no indication that the language of the final sentence of this subsection is meant to invalidate the first sentence and such a conclusion is illogical. We do not believe that the Legislature intended to transfer erroneously received funds into the General Revenue Fund. Instead, we believe this language acts as explicit direction of what to do with monies that were properly placed into PICF but were not required to pay claims or administrative costs, including funds that will continue to be received via MPLA filing fees, the receipt of which are not dependent on whether or not PICF is fully funded.

Conclusion

In conclusion, it is our opinion that an interpretation of the applicable statutory language, in concert with reasonable principles of equity, leads to the conclusion that §29-12D-1a assessment monies submitted after July 9, 2021, were not required by statute and should be returned as erroneous payments. It is our opinion that returning such funds is within the broad authority granted to BRIM to administer PICF.

If you have any questions or concerns with this analysis and opinion, please do not hesitate to contact us.

Sincerely yours,

A handwritten signature in blue ink, appearing to be 'GC', with a stylized flourish extending to the right.

Geoffrey Cullop

GAC