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SB 755

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WEST VIRGINIA
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WEST VIRGINIA LEGISLATURE
Regular Session, 2006

ENROLLED

Committee Substitute For

SENATE BILL NO. 755

(By Senator McCABE, ET AL)

PASSED MARCH 11, 2006

In Effect 90 Days From Passage

FILED

2006 APR -3 P 4: 18

OFFICE WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 755

(SENATORS McCABE, OLIVERIO AND MINARD, *original sponsors*)

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

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

Be it enacted by the Legislature of West Virginia:

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

CHAPTER 33. INSURANCE.

ARTICLE 20F. PHYSICIANS' MUTUAL INSURANCE COMPANY.

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

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

8 (b) On the transfer date:

9 (1) The company shall accept from the Board of Risk and
10 Insurance Management the transfer of any and all medical
11 liability insurance obligations and risks of existing or in-
12 force contracts of insurance covering physicians, physician
13 corporations and physician-operated clinics issued by the
14 board pursuant to article twelve-b, chapter twenty-nine of
15 this code: *Provided*, That the company may decline or
16 refuse to renew any and all such contracts of insurance
17 transferred to the company from the Board of Risk and
18 Insurance Management upon the expiration of the respec-
19 tive terms of each contract of insurance so transferred and
20 nothing in this section is intended to or shall be construed
21 to otherwise obligate the company to accept, underwrite or
22 renew any contract of insurance whatsoever. The transfer

23 shall not include medical liability insurance obligations
24 and risks of existing or in-force contracts of insurance
25 covering hospitals and nonphysician providers;

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

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

41 (4) The Board of Risk and Insurance Management shall
42 disburse and pay to the company any funds in the Board
43 of Risk and Insurance Management Physicians' Mutual
44 Insurance Company account created by section seven of
45 this article. All funds in this account shall be transferred
46 pursuant to terms of a surplus note or other loan arrange-
47 ment satisfactory to the Board of Risk and Insurance
48 Management and the Insurance Commissioner.

49 (c) The Board of Risk and Insurance Management shall
50 cause an independent actuarial study to be performed to
51 determine the amount of all paid losses, expenses and
52 assets associated with the policies the board has in force
53 pursuant to article twelve-b, chapter twenty-nine of this
54 code. The actuarial study shall determine the paid losses,
55 expenses and assets associated with the policies to be
56 transferred to the company pursuant to subsection (b) of
57 this section and the paid losses, expenses and assets
58 associated with those policies retained by the board. The

59 determination shall not include liabilities created by
60 issuance of new tail insurance policies for nonphysician
61 providers authorized by subsection (n), section six, article
62 twelve-b, chapter twenty-nine of this code.

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

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

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

74 (1) Establish reasonable classifications of physicians,
75 insured activities and exposures based on a good faith
76 determination of relative exposures and hazards among
77 classifications;

78 (2) Vary the limits, coverages, exclusions, conditions and
79 loss-sharing provisions among classifications;

80 (3) Establish, for an individual physician within a
81 classification, reasonable variations in the terms of
82 coverage, including rates, deductibles and loss-sharing
83 provisions, based on underwriting criteria established by
84 the company, from time to time, which underwriting
85 criteria may take into account factors considered by other
86 medical malpractice insurance companies, from time to
87 time, in underwriting similar risks and which factors may
88 include, but are not limited to, the insured's prior loss
89 experience; current professional training and capability;
90 disciplinary action taken against the physician by the
91 Board of Medicine or Board of Osteopathy; felonies or
92 other criminal offenses committed by the physician;
93 evidence of alcohol or chemical dependency or abuse;

94 evidence of sexual misconduct; and other factors relevant
95 to the liability risk profile of the physician.

96 (4) Refuse to provide insurance coverage for individual
97 physicians who do not meet underwriting criteria estab-
98 lished by the company, from time to time, which under-
99 writing criteria may take into account factors considered
100 by other medical malpractice insurance companies, from
101 time to time, in underwriting or declining to underwrite
102 similar risks and which factors may include, but are not
103 limited to, prior loss experience, current professional
104 training and capability, disciplinary action taken against
105 the physician by the Board of Medicine or Board of
106 Osteopathy; felonies or other criminal offenses committed
107 by the physician; evidence of alcohol or chemical depend-
108 ency or abuse; evidence of sexual misconduct; and other
109 factors relevant to the liability risk profile of the physician
110 and which do or may indicate that the physician repre-
111 sents an unacceptable risk of loss if coverage is provided.

112 (g) The company shall establish reasonable risk manage-
113 ment and continuing education requirements which
114 policyholders must meet in order to be and remain eligible
115 for coverage.

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

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

§55-7B-2. Definitions.

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

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

6 (1) Any federal or state act, public program or insurance
7 which provides payments for medical expenses, disability
8 benefits, including workers' compensation benefits, or

9 other similar benefits. Benefits payable under the Social
10 Security Act are not considered payments from collateral
11 sources except for Social Security disability benefits
12 directly attributable to the medical injury in question;

13 (2) Any contract or agreement of any group, organiza-
14 tion, partnership or corporation to provide, pay for or
15 reimburse the cost of medical, hospital, dental, nursing,
16 rehabilitation, therapy or other health care services or
17 provide similar benefits;

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

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

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

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

40 (e) "Health care" means any act or treatment performed
41 or furnished, or which should have been performed or
42 furnished, by any health care provider for, to or on behalf

43 of a patient during the patient's medical care, treatment or
44 confinement.

45 (f) "Health care facility" means any clinic, hospital,
46 nursing home or assisted living facility, including personal
47 care home, residential care community and residential
48 board and care home, or behavioral health care facility or
49 comprehensive community mental health/mental retarda-
50 tion center, in and licensed by the State of West Virginia
51 and any state-operated institution or clinic providing
52 health care.

53 (g) "Health care provider" means a person, partnership,
54 corporation, professional limited liability company, health
55 care facility or institution licensed by, or certified in, this
56 state or another state, to provide health care or profes-
57 sional health care services, including, but not limited to, a
58 physician, osteopathic physician, hospital, dentist, regis-
59 tered or licensed practical nurse, optometrist, podiatrist,
60 chiropractor, physical therapist, psychologist, emergency
61 medical services authority or agency, or an officer, em-
62 ployee or agent thereof acting in the course and scope of
63 such officer's, employee's or agent's employment.

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

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

72 (j) "Medical professional liability insurance" means a
73 contract of insurance or any actuarially sound self-funding
74 program that pays for the legal liability of a health care
75 facility or health care provider arising from a claim of
76 medical professional liability. In order to qualify as
77 medical professional liability insurance for purposes of

78 this article, a self-funding program for an individual
79 physician must meet the requirements and minimum
80 standards set forth in section twelve of this article.

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

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

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

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

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

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

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

20 professional liability insurance coverage or twelve years,
21 which ever is shorter.

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

31 (d) The trustee for the trust must be an independent
32 professional, bank or other qualified institutional fidu-
33 ciary. The trustee has all necessary and appropriate
34 powers to fulfill the purposes of the trust, including, but
35 not limited to, the powers to:

36 (1) Disburse funds for the maintenance and administra-
37 tion of the trust, and for defense costs, judgments, arbitra-
38 tion indemnity awards and settlements;

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

46 (3) Hire a qualified, third-party claims manager experi-
47 enced in handling medical professional liability claims,
48 with the power and authority to set reserves and adminis-
49 ter and oversee the defense of all claims; and

50 (4) Require that the physician replenish the trust so as to
51 maintain at all times a funding level of no less than one
52 million dollars or such greater amount as set forth in the
53 most current actuarial opinion as described in subdivision

54 (2) of this subsection, exclusive of funds needed for
55 maintenance, administration, defense or other costs.

56 (e) The trustee, acting directly or through its hired
57 professionals, as appropriate, shall periodically, but not
58 less frequently than annually, evaluate and set required
59 trust funding levels for the trust; make assessments against
60 the physician for payments into the trust, in order to
61 replenish and maintain the trust at levels required by this
62 subsection and required to render the trust actuarially
63 sound from time to time; and otherwise take such actions
64 as may appear necessary, desirable or appropriate to fulfill
65 the purposes and integrity of the trust. Should the physi-
66 cian fail to timely meet any of the requests or requirements
67 of the trustee with regard to funding of the trust or
68 otherwise, or should the trust at any time fail to meet all
69 the requirements of this subsection, thereupon the trust
70 arrangement will conclusively no longer qualify under this
71 article as an actuarially sound self-funding program:
72 *Provided*, That all assets of the trust at the time of any
73 such disqualifying event or circumstance will remain trust
74 assets and may not be distributed to the physician settlor
75 of the trust until the latter of the date on which any and all
76 medical professional liability claims asserted or pending
77 against the physician at the time of such disqualifying
78 event or circumstance or within the applicable statute of
79 limitations for medical malpractice liability thereafter
80 have been finally adjudicated or otherwise resolved and
81 fully satisfied to the extent of trust assets available for
82 such purpose.

83 (f) In the event that more than one claim arises within
84 the period since the last annual evaluation, a new evalua-
85 tion will be performed within sixty days or at the time of
86 the next annual audit, whichever is shorter, in order to
87 evaluate the trust and replenish funds to ensure that its
88 assets total not less than one million dollars, or such other
89 amount that is actuarially determined necessary to satisfy
90 the aggregate outstanding claims, which ever is greater,

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91 exclusive of funds needed for maintenance, administra-
92 tion, legal defense or other costs.

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

Randy White
.....
Chairman Senate Committee

R. Beer
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Darrell E. Johns
.....
Clerk of the Senate

Bugs M. Sawyer
.....
Clerk of the House of Delegates

Carl Ray Tomblin
.....
President of the Senate

Robert R. Anderson
.....
Speaker House of Delegates

The within *is approved* this the *3rd*
Day of *April*, 2006.

Paul M. Hancock
.....
Governor

PRESENTED TO THE
GOVERNOR

APR 03 2006

Time 2:15 pm