

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

Senate Bill 691

BY SENATOR TAKUBO

[Introduced March 22, 2021; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §55-7B-6 of the Code of West Virginia, 1931, as amended, relating
 2 to the prerequisites for filing suit against a health care provider under the Medical
 3 Professional Liability Act; modifying the time frame for providing a statement of intent to
 4 provide a screening certificate of merit; updating the tolling of the statute of limitations
 5 applicable to a cause of action against a nursing home, assisted living facility, or their
 6 related entities or employees; and clarifying that a health care provider who executes a
 7 screening certificate of merit may be subject to deposition upon request.

Be it enacted by the Legislature of West Virginia:

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

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

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

4 (b) At least 30 days prior to the filing of a medical professional liability action against a
 5 health care provider, the claimant shall serve by certified mail, return receipt requested, a notice
 6 of claim on each health care provider the claimant will join in litigation. For the purposes of this
 7 section, where the medical professional liability claim against a health care facility is premised
 8 upon the act or failure to act of agents, servants, employees, or officers of the health care facility,
 9 such agents, servants, employees, or officers shall be identified by area of professional practice
 10 or role in the health care at issue. The notice of claim shall include a statement of the theory or
 11 theories of liability upon which a cause of action may be based, and a list of all health care
 12 providers and health care facilities to whom notices of claim are being sent, together with a
 13 screening certificate of merit. The screening certificate of merit shall be executed under oath by
 14 a health care provider who:

15 (1) Is qualified as an expert under the West Virginia rules of evidence;

16 (2) Meets the requirements of §55-7B-7(a)(5) and §55-7B-7(a)(6) of this code; and

17 (3) Devoted, at the time of medical injury, 60 percent of his or her professional time
18 annually to the active clinical practice in his or her medical field or specialty, or to teaching in his
19 or her medical field or specialty in an accredited university.

20 If the health care provider executing the screening certificate of merit meets the
21 qualifications of subdivisions (1), (2), and (3) of this subsection, there shall be a presumption that
22 the health care provider is qualified as an expert for the purpose of executing a screening
23 certificate of merit. The screening certificate of merit shall state with particularity, and include: (A)
24 The basis for the expert's familiarity with the applicable standard of care at issue; (B) the expert's
25 qualifications; (C) the expert's opinion as to how the applicable standard of care was breached;
26 (D) the expert's opinion as to how the breach of the applicable standard of care resulted in injury
27 or death; and (E) a list of all medical records and other information reviewed by the expert
28 executing the screening certificate of merit. A separate screening certificate of merit must be
29 provided for each health care provider against whom a claim is asserted. The health care provider
30 signing the screening certificate of merit shall have no financial interest in the underlying claim,
31 but may participate as an expert witness in any judicial proceeding. Nothing in this subsection
32 limits the application of Rule 15 of the Rules of Civil Procedure. No challenge to the notice of
33 claim may be raised prior to receipt of the notice of claim and the executed screening certificate
34 of merit.

35 (c) Notwithstanding any provision of this code, if a claimant or his or her counsel believes
36 that no screening certificate of merit is necessary because the cause of action is based upon a
37 well-established legal theory of liability which does not require expert testimony supporting a
38 breach of the applicable standard of care, the claimant or his or her counsel shall file a statement
39 specifically setting forth the basis of the alleged liability of the health care provider in lieu of a
40 screening certificate of merit. The statement shall be accompanied by the list of medical records
41 and other information otherwise required to be provided pursuant to subsection (b) of this section.

42 (d) Except for medical professional liability actions against a nursing home, assisted living
43 facility, their related entities or employees, or a distinct part of an acute care hospital providing
44 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
45 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
46 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
47 except that the claimant or his or her counsel shall furnish the health care provider with a
48 statement of intent to provide a screening certificate of merit within 60 days of the date the health
49 care provider receives the notice of claim. The screening certificate of merit shall be accompanied
50 by a list of the medical records otherwise required to be provided pursuant to subsection (b) of
51 this section.

52 (e) In medical professional liability actions against a nursing home, assisted living facility,
53 their related entities or employees, or a distinct part of an acute care hospital providing
54 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
55 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
56 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
57 except that the claimant or his or her counsel shall furnish the health care provider with a
58 statement of intent to provide a screening certificate of merit within ~~480~~ 60 days of the date the
59 health care provider receives the notice of claim.

60 (f) Any health care provider who receives a notice of claim pursuant to the provisions of
61 this section may respond, in writing, to the claimant or his or her counsel within 30 days of receipt
62 of the claim or within 30 days of receipt of the screening certificate of merit if the claimant is
63 proceeding pursuant to the provisions of subsection (d) or (e) of this section. The response may
64 state that the health care provider has a bona fide defense and the name of the health care
65 provider's counsel, if any.

66 (g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant
67 is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care

68 provider is entitled to prelitigation mediation before a qualified mediator upon written demand to
69 the claimant.

70 (h) If the health care provider demands mediation pursuant to the provisions of subsection
71 (g) of this section, the mediation shall be concluded within 45 days of the date of the written
72 demand. The mediation shall otherwise be conducted pursuant to Rule 25 of the Trial Court Rules,
73 unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of
74 a complaint or unless the Supreme Court of Appeals promulgates rules governing mediation prior
75 to the filing of a complaint. If mediation is conducted, the claimant may depose the health care
76 provider before mediation or take the testimony of the health care provider during the mediation.

77 (i)(1) Except for medical professional liability actions against a nursing home, assisted
78 living facility, their related entities or employees, or a distinct part of an acute care hospital
79 providing intermediate care or skilled nursing care or its employees, and except as otherwise
80 provided in this subsection, any statute of limitations applicable to a cause of action against a
81 health care provider upon whom notice was served for alleged medical professional liability shall
82 be tolled from the date of mail of a notice of claim to 30 days following receipt of a response to
83 the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30
84 days from the receipt by the claimant of written notice from the mediator that the mediation has
85 not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last
86 occurs.

87 (2) In medical professional liability actions against a nursing home, assisted living facility,
88 their related entities or employees, or a distinct part of an acute care hospital providing
89 intermediate care or skilled nursing care or its employees, except as otherwise provided in this
90 subsection, any statute of limitations applicable to a cause of action against a health care provider
91 upon whom notice was served for alleged medical professional liability shall be tolled ~~180~~ 30 days
92 from the date of mail of a notice of claim to 30 days following receipt of a response to the notice
93 of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from

94 the receipt by the claimant of written notice from the mediator that the mediation has not resulted
95 in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

96 (3) If a claimant has sent a notice of claim relating to any injury or death to more than one
97 health care provider, any one of whom has demanded mediation, then the statute of limitations
98 shall be tolled with respect to, and only with respect to, those health care providers to whom the
99 claimant sent a notice of claim to 30 days from the receipt of the claimant of written notice from
100 the mediator that the mediation has not resulted in a settlement of the alleged claim and that
101 mediation is concluded.

102 (j) Notwithstanding any other provision of this code, a notice of claim, a health care
103 provider's response to any notice claim, a screening certificate of merit, and the results of any
104 mediation conducted pursuant to the provisions of this section are confidential and are not
105 admissible as evidence in any court proceeding unless the court, upon hearing, determines that
106 failure to disclose the contents would cause a miscarriage of justice: Provided, That the health
107 care provider who executes a screening certificate of merit shall be subject to a deposition
108 pursuant to the West Virginia Rules of Civil Procedure if requested by the health care provider or
109 providers whose care is the subject of the notice of claim. A court may, upon a motion of the
110 health care provider or providers whose care is subject of the notice of a claim, require testimony
111 from the health care provider who executes a screening certificate of merit, subject to cross-
112 examination and the rules of evidence.

NOTE: The purpose of this bill is to update provisions of the Medical Professional Liability Act to clarify that a health care provider who executes a screening certificate of merit may be subject to a deposition and that the certain time frames applicable to most health care providers shall be the same for a nursing home, assisted living facility, and their related entities.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.