

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

Committee Substitute

for

Senate Bill 25

BY SENATORS TAKUBO AND MARONEY

[Originating in the Committee on the Judiciary;

reported on February 8, 2022]

A BILL to amend and reenact §55-7B-2, §55-7B-4, and §55-7B-6 of the Code of West Virginia, 1931, as amended, all relating to the prerequisites for filing suit against a health care provider under the Medical Professional Liability Act; updating the definitions of “injury” and “medical injury”; clarifying time limitations for bringing a cause of action for medical injury as a result of alleged medical professional liability against a health care provider; modifying time frame for providing a statement of intent to provide a screening certificate of merit in certain actions under the Medical Professional Liability Act; and updating the tolling of the statute of limitations applicable in certain actions under the Medical Professional Liability Act.

Be it enacted by the Legislature of West Virginia:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

§55-7B-2. Definitions.

1 For the purposes of this article, the following words shall have the meanings ascribed to
2 them in this section unless the context clearly indicates a different meaning:

3 (a) “Board” means the State Board of Risk and Insurance Management.

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

6 (1) Any federal or state act, public program, or insurance which provides payments for
7 medical expenses, disability benefits, including workers’ compensation benefits, or other similar
8 benefits. Benefits payable under the Social Security Act and Medicare are not considered
9 payments from collateral sources except for social security disability benefits directly attributable
10 to the medical injury in question;

11 (2) Any contract or agreement of any group, organization, partnership, or corporation to
12 provide, pay for, or reimburse the cost of medical, hospital, dental, nursing, rehabilitation, therapy
13 or other health care services, or provide similar benefits, but excluding any amount that a group,
14 organization, partnership, corporation, or health care provider agrees to reduce, discount, or write

15 off of a medical bill;

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

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

23 (c) "Consumer Price Index" means the most recent Consumer Price Index for All
24 Consumers published by the United States Department of Labor.

25 (d) "Emergency condition" means any acute traumatic injury or acute medical condition
26 which, according to standardized criteria for triage, involves a significant risk of death or the
27 precipitation of significant complications or disabilities, impairment of bodily functions or, with
28 respect to a pregnant woman, a significant risk to the health of the unborn child.

29 (e) "Health care" means:

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

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

38 (3) The process employed by health care providers and health care facilities for the
39 appointment, employment, contracting, credentialing, privileging, and supervision of health care
40 providers.

41 (f) "Health care facility" means any clinic, hospital, pharmacy, nursing home, assisted living
42 facility, residential care community, end-stage renal disease facility, home health agency, child
43 welfare agency, group residential facility, behavioral health care facility or comprehensive
44 community mental health center, intellectual/developmental disability center or program, or other
45 ambulatory health care facility, in and licensed, regulated, or certified by the State of West Virginia
46 under state or federal law and any state-operated institution or clinic providing health care and
47 any related entity to the health care facility.

48 (g) "Health care provider" means a person, partnership, corporation, professional limited
49 liability company, health care facility, entity, or institution licensed by, or certified in, this state or
50 another state, to provide health care or professional health care services, including, but not limited
51 to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse,
52 hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist,
53 chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist,
54 psychologist, pharmacist, technician, certified nursing assistant, emergency medical service
55 personnel, emergency medical services authority or agency, any person supervised by or acting
56 under the direction of a licensed professional, any person taking actions or providing service or
57 treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan
58 of care, medical diagnosis or treatment; or an officer, employee, or agent of a health care provider
59 acting in the course and scope of the officer's, employee's or agent's employment.

60 (h) "Injury or "Medical injury" means injury or death to a patient arising or resulting from
61 the rendering of or failure to render health care.

62 (i) "Medical professional liability" means any liability for damages resulting from the death
63 or injury of a person for any tort or breach of contract based on health care services rendered, or
64 which should have been rendered, by a health care provider or health care facility to a patient. It
65 also means other claims that may be contemporaneous to or related to the alleged tort or breach
66 of contract or otherwise provided, all in the context of rendering health care services.

67 (j) "Medical professional liability insurance" means a contract of insurance or any
68 actuarially sound self-funding program that pays for the legal liability of a health care facility or
69 health care provider arising from a claim of medical professional liability. In order to qualify as
70 medical professional liability insurance for purposes of this article, a self-funding program for an
71 individual physician must meet the requirements and minimum standards set forth in §55-7B-12
72 of this code.

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

75 (l) "Occurrence" means any and all injuries to a patient arising from health care rendered
76 by a health care facility or a health care provider and includes any continuing, additional, or follow-
77 up care provided to that patient for reasons relating to the original health care provided, regardless
78 if the injuries arise during a single date or multiple dates of treatment, single or multiple patient
79 encounters, or a single admission or a series of admissions.

80 (m) "Patient" means a natural person who receives or should have received health care
81 from a licensed health care provider under a contract, expressed or implied.

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

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

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

§55-7B-4. Health care injuries; limitations of actions; exceptions; venue.

92 (a) A cause of action for medical injury to a person alleging medical professional liability
93 against a health care provider, except a nursing home, assisted living facility, their related entities
94 or employees, or a distinct part of an acute care hospital providing intermediate care or skilled
95 nursing care or its employees, arises as of the date of medical injury, except as provided in
96 subsection (c) of this section, and must be commenced within two years of the date of such injury
97 or death, or within two years of the date when such person discovers, or with the exercise of
98 reasonable diligence, should have discovered such medical injury, whichever last occurs:
99 *Provided*, That in no event shall any such action be commenced more than 10 years after the
100 date of medical injury.

101 (b) A cause of action for medical injury to a person alleging medical professional liability
102 against a nursing home, assisted living facility, their related entities or employees, or a distinct
103 part of an acute care hospital providing intermediate care or skilled nursing care or its employees
104 arises as of the date of medical injury, except as provided in subsection (c) of this section, and
105 must be commenced within one year of the date of such medical injury, or within one year of the
106 date when such person discovers, or with the exercise of reasonable diligence, should have
107 discovered such injury or death, whichever last occurs: *Provided*, That in no event shall any such
108 action be commenced more than 10 years after the date of medical injury. With the amendments
109 to this subsection enacted in the regular session of the Legislature, 2022, that intends to reinstate
110 and codify a one-year statute of limitations for any cause of action for medical injury resulting in
111 injury or death to a person alleging medical professional liability against a nursing home, assisted
112 living facility, their related entities or employees or a distinct part of an acute care hospital
113 providing intermediate care or skilled nursing care or its employees.

114 (c) A cause of action for injury to a minor, brought by or on behalf of a minor who was
115 under the age of 10 years at the time of such injury, shall be commenced within two years of the
116 date of such injury, or prior to the minor's 12th birthday, whichever provides the longer period.

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

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

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

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~~ 120 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 ~~480~~ 120

92 days from the date of mail of a notice of claim to 30 days following receipt of a response to the
93 notice of claim, 30 days from the date a response to the notice of claim would be due, or 30 days
94 from the receipt by the claimant of written notice from the mediator that the mediation has not
95 resulted in a settlement of the alleged claim and that mediation is concluded, whichever last
96 occurs.

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

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