

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

House Bill 5643

FISCAL
NOTE

By Delegates Hanshaw (Mr. Speaker), Riley, Jeffries,

Phillips, Kelly, and Cannon

[Introduced February 12, 2024; Referred to the

Committee on the Judiciary]

1 A BILL to amend and reenact §29-12-5 of the Code of West Virginia, 1931, as amended, relating to
 2 actions for damages or attorney's fees in cases involving Board of Risk Management and
 3 Insurance; clarifying that no action for damages or attorney's fees under *Shamblin v.*
 4 *Nationwide Mut. Ins. Co.*, 183 W. Va. 585 (1990) shall be awardable or cognizable against
 5 the board or any person employed by the board or any entity with which the board has
 6 contracted to administer the board's programs; and providing for retrospective application
 7 to all pending claims and actions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 12. STATE INSURANCE.

§29-12-5. Powers and duties of board.

1 (a)(1) The board has, without limitation and in its discretion as it seems necessary for the
 2 benefit of the insurance program, general supervision and control over the insurance of state
 3 property, activities and responsibilities, including:

- 4 (A) The acquisition and cancellation of state insurance;
- 5 (B) Determination of the kind or kinds of coverage;
- 6 (C) Determination of the amount or limits for each kind of coverage;
- 7 (D) Determination of the conditions, limitations, exclusions, endorsements, amendments
 8 and deductible forms of insurance coverage;
- 9 (E) Inspections or examinations relating to insurance coverage of state property, activities
 10 and responsibilities;
- 11 (F) Reinsurance; and
- 12 (G) Any and all matters, factors and considerations entering into negotiations for
 13 advantageous rates on and coverage of such state property, activities and responsibilities.

14 (2) The board shall endeavor to secure reasonably broad protection against loss, damage
 15 or liability to state property and on account of state activities and responsibilities by proper,
 16 adequate, available and affordable insurance coverage and through the introduction and

17 employment of sound and accepted principles of insurance, methods of protection and principles
18 of loss control and risk.

19 (3) The board is not required to provide insurance for every state property, activity or
20 responsibility.

21 (4) Any policy of insurance purchased or contracted for by the board shall provide that the
22 insurer shall be barred and estopped from relying upon the Constitutional immunity of the State of
23 West Virginia against claims or suits: *Provided*, That nothing herein shall bar a state agency or
24 state instrumentality from relying on the Constitutional immunity granted the State of West Virginia
25 against claims or suits arising from or out of any state property, activity or responsibility not
26 covered by a policy or policies of insurance: *Provided, however*, That nothing herein shall bar the
27 insurer of political subdivisions from relying upon any statutory immunity granted such political
28 subdivisions against claims or suits.

29 (5) The board shall make a complete survey of all presently owned and subsequently
30 acquired state property subject to insurance coverage by any form of insurance, which survey
31 shall include and reflect inspections, appraisals, exposures, fire hazards, construction and any
32 other objectives or factors affecting or which might affect the insurance protection and coverage
33 required.

34 (6) The board shall keep itself currently informed on new and continuing state activities and
35 responsibilities within the insurance coverage herein contemplated. The board shall work closely
36 in cooperation with the state Fire Marshal's office in applying the rules of that office insofar as the
37 appropriations and other factors peculiar to state property will permit.

38 (7) The board may negotiate and effect settlement of any and all insurance claims arising
39 on or incident to losses of and damages to covered state properties, activities and responsibilities
40 hereunder and shall have authority to execute and deliver proper releases of all such claims when
41 settled. The board may adopt rules and procedures for handling, negotiating and settlement of all
42 such claims. Any discussion or consideration of the financial or personal information of an insured

43 may be held by the board in executive session closed to the public, notwithstanding the provisions
44 of §6-9A-1 *et seq.* of this code.

45 (8) The board may employ an executive director and such other employees, including legal
46 counsel, as may be necessary to carry out its duties. The executive director shall receive an
47 annual salary as provided in §6-7-2a of this code. The legal counsel may represent the board
48 before any judicial or administrative tribunal and perform such other duties as may be requested
49 by the board.

50 (9) The board may enter into any contracts necessary to the execution of the powers
51 granted to it by this article or to further the intent of this article.

52 (10) The board may make rules governing its functions and operations and the
53 procurement of state insurance. Except where otherwise provided by statute, rules of the board
54 are subject to the provisions of §29A-3-1 *et seq.* of this code.

55 (11) The funds received by the board, including, but not limited to, state agency premiums,
56 mine subsidence premiums and political subdivision premiums, shall be deposited with the West
57 Virginia Investment Management Board with the interest income and returns on investment a
58 proper credit to such property insurance trust fund or liability insurance trust fund as applicable.

59 (b) (1) *Definitions.* -- The following words and phrases when used in this subsection, for the
60 purposes of this subsection, have the meanings respectively ascribed to them in this subsection;

61 (A) "Political subdivision" has the same meaning as in §29-12A-3 of this code;

62 (B) "Charitable" or "public service organization" means any hospital in this state which has
63 been certified as a critical access hospital by the federal Centers for Medicare and Medicaid upon
64 the designation of the state Office of Rural Health Policy, the Office of Community and Rural
65 Health Services, the Bureau for Public Health or the Department of Health and any bona fide, not-
66 for-profit, tax-exempt, benevolent, educational, philanthropic, humane, patriotic, civic, religious,
67 eleemosynary, incorporated or unincorporated association or organization or a rescue unit or other
68 similar volunteer community service organization or association, but does not include any

69 nonprofit association or organization, whether incorporated or not, which is organized primarily for
70 the purposes of influencing legislation or supporting or promoting the campaign of any candidate
71 for public office; and

72 (C) "Emergency medical service agency" has the same meaning as in §16-4C-3 of this
73 code.

74 (2) If requested by a political subdivision, a charitable or public service organization or an
75 emergency medical services agency, the board may, but is not required to, provide property and
76 liability insurance to insure the property, activities and responsibilities of the political subdivision,
77 charitable or public service organization or emergency medical services agency. The board may
78 enter into any contract necessary to the execution of the powers granted by this article or to further
79 the intent of this article.

80 (A) Property insurance provided by the board pursuant to this subsection may also include
81 insurance on property leased to or loaned to the political subdivision, a charitable or public service
82 organization or an emergency medical services agency which is required to be insured under a
83 written agreement.

84 (B) The cost of insurance, as determined by the board, shall be paid by the political
85 subdivision, the charitable or public service organization or the emergency medical services
86 agency and may include administrative expenses. For purposes of this section, if an emergency
87 medical services agency is a for-profit entity, its claims history may not adversely affect other
88 participants' rates in the same class.

89 (c)(1) The board has general supervision and control over the optional medical liability
90 insurance programs providing coverage to health care providers as authorized by the provisions of
91 §29-12B-1 *et seq.* of this code. The board is hereby granted and may exercise all powers
92 necessary or appropriate to carry out and effectuate the purposes of this article.

93 (2) The board shall:

94 (A) Administer the preferred medical liability program and the high risk medical liability

95 program and exercise and perform other powers, duties and functions specified in this article;

96 (B) Obtain and implement, at least annually, from an independent outside source, such as
97 a medical liability actuary or a rating organization experienced with the medical liability line of
98 insurance, written rating plans for the preferred medical liability program and high-risk medical
99 liability program on which premiums shall be based;

100 (C) Prepare and annually review written underwriting criteria for the preferred medical
101 liability program and the high-risk medical liability program. The board may utilize review panels,
102 including, but not limited to, the same specialty review panels to assist in establishing criteria;

103 (D) Prepare and publish, before each regular session of the Legislature, separate
104 summaries for the preferred medical liability program and high-risk medical liability program
105 activity during the preceding fiscal year, each summary to be included in the board of Risk and
106 Insurance Management audited financial statements as "other financial information" and which
107 shall include a balance sheet, income statement and cash flow statement, an actuarial opinion
108 addressing adequacy of reserves, the highest and lowest premiums assessed, the number of
109 claims filed with the program by provider type, the number of judgments and amounts paid from
110 the program, the number of settlements and amounts paid from the program and the number of
111 dismissals without payment;

112 (E) Determine and annually review the claims history debit or surcharge for the high-risk
113 medical liability program;

114 (F) Determine and annually review the criteria for transfer from the preferred medical
115 liability program to the high-risk medical liability program;

116 (G) Determine and annually review the role of independent agents, the amount of
117 commission, if any, to be paid therefor and agent appointment criteria;

118 (H) Study and annually evaluate the operation of the preferred medical liability program
119 and the high-risk medical liability program and make recommendations to the Legislature, as may
120 be appropriate, to ensure their viability, including, but not limited to, recommendations for civil

121 justice reform with an associated cost-benefit analysis, recommendations on the feasibility and
122 desirability of a plan which would require all health care providers in the state to participate with an
123 associated cost-benefit analysis, recommendations on additional funding of other state-run
124 insurance plans with an associated cost-benefit analysis and recommendations on the desirability
125 of ceasing to offer a state plan with an associated analysis of a potential transfer to the private
126 sector with a cost-benefit analysis, including impact on premiums;

127 (I) Establish a five-year financial plan to ensure an adequate premium base to cover the
128 long-tail nature of the claims-made coverage provided by the preferred medical liability program
129 and the high-risk medical liability program. The plan shall be designed to meet the program's
130 estimated total financial requirements, taking into account all revenues projected to be made
131 available to the program and apportioning necessary costs equitably among participating classes
132 of health care providers. For these purposes, the board shall:

133 (i) Retain the services of an impartial, professional actuary, with demonstrated experience
134 in analysis of large group malpractice plans, to estimate the total financial requirements of the
135 program for each fiscal year and to review and render written professional opinions as to financial
136 plans proposed by the board. The actuary shall also assist in the development of alternative
137 financing options and perform any other services requested by the board or the executive director.
138 All reasonable fees and expenses for actuarial services shall be paid by the board. Any financial
139 plan or modifications to a financial plan approved or proposed by the board pursuant to this section
140 shall be submitted to and reviewed by the actuary and may not be finally approved and submitted
141 to the Governor and to the Legislature without the actuary's written professional opinion that the
142 plan may be reasonably expected to generate sufficient revenues to meet all estimated program
143 and administrative costs, including incurred but not reported claims, for the fiscal year for which
144 the plan is proposed. The actuary's opinion for any fiscal year shall include a requirement for
145 establishment of a reserve fund;

146 (ii) Submit its final, approved five-year financial plan, after obtaining the necessary

147 actuary's opinion, to the Governor and to the Legislature no later than January 1, preceding the
148 fiscal year. The financial plan for a fiscal year becomes effective and shall be implemented by the
149 executive director on July 1, of the fiscal year. In addition to each final, approved financial plan
150 required under this section, the board shall also simultaneously submit an audited financial
151 statement based on generally accepted accounting practices (GAAP) and which shall include
152 allowances for incurred but not reported claims: *Provided*, That the financial statement and the
153 accrual-based financial plan restatement shall not affect the approved financial plan. The
154 provisions of §29A-1-1 *et seq.* of this code shall not apply to the preparation, approval and
155 implementation of the financial plans required by this section;

156 (iii) Submit to the Governor and the Legislature a prospective five-year financial plan
157 beginning on January 1, 2003, and every year thereafter, for the programs established by the
158 provisions of §29-12B-1 *et seq.* of this code. Factors that the board shall consider include, but shall
159 not be limited to, the trends for the program and the industry; claims history, number and category
160 of participants in each program; settlements and claims payments; and judicial results;

161 (iv) Obtain annually certification from participants that they have made a diligent search for
162 comparable coverage in the voluntary insurance market and have been unable to obtain the same;

163 (J) Meet on at least a quarterly basis to review implementation of its current financial plan
164 in light of the actual experience of the medical liability programs established in §29-12B-1 *et seq.*
165 of this code. The board shall review actual costs incurred, any revised cost estimates provided by
166 the actuary, expenditures and any other factors affecting the fiscal stability of the plan and may
167 make any additional modifications to the plan necessary to ensure that the total financial
168 requirements of these programs for the current fiscal year are met;

169 (K) To analyze the benefit of and necessity for excess verdict liability coverage;

170 (L) Consider purchasing reinsurance, in the amounts as it may, from time to time,
171 determine is appropriate, and the cost thereof shall be considered to be an operating expense of
172 the board;

173 (M) Make available to participants optional extended reporting coverage or tail coverage:
174 *Provided, That*, at least five working days prior to offering such coverage to a participant or
175 participants, the board shall notify the President of the Senate and the Speaker of the House of
176 Delegates in writing of its intention to do so and such notice shall include the terms and conditions
177 of the coverage proposed;

178 (N) Review and approve, reject or modify rules that are proposed by the executive director
179 to implement, clarify or explain administration of the preferred medical liability program and the
180 high-risk medical liability program. Notwithstanding any provisions in this code to the contrary,
181 rules promulgated pursuant to this paragraph are not subject to the provisions of §29A-3-9 through
182 §29A-3-16 of this code. The board shall comply with the remaining provisions of article three and
183 shall hold hearings or receive public comments before promulgating any proposed rule filed with
184 the Secretary of State: *Provided, That* the initial rules proposed by the executive director and
185 promulgated by the board shall become effective upon approval by the board notwithstanding any
186 provision of this code;

187 (O) Enter into settlements and structured settlement agreements whenever appropriate.
188 The policy may not require as a condition precedent to settlement or compromise of any claim the
189 consent or acquiescence of the policyholder. The board may own or assign any annuity purchased
190 by the board to a company licensed to do business in the state;

191 (P) Refuse to provide insurance coverage for individual physicians whose prior loss
192 experience or current professional training and capability are such that the physician represents
193 an unacceptable risk of loss if coverage is provided;

194 (Q) Terminate coverage for nonpayment of premiums upon written notice of the
195 termination forwarded to the health care provider not less than 30 days prior to termination of
196 coverage;

197 (R) Assign coverage or transfer insurance obligations and/or risks of existing or in-force
198 contracts of insurance to a third-party medical professional liability insurance carrier with the

199 comparable coverage conditions as determined by the board. Any transfer of obligation or risk
200 shall effect a novation of the transferred contract of insurance and if the terms of the assumption
201 reinsurance agreement extinguish all liability of the board and the State of West Virginia, such
202 extinguishment shall be absolute as to any and all parties; and

203 (S) Meet and consult with and consider recommendations from the Medical Malpractice
204 Advisory Panel established by the provisions of §29-12B-1 *et seq.* of this code.

205 (d) If, after September 1, 2002, the board has assigned coverages or transferred all
206 insurance obligations and/or risks of existing or in-force contracts of insurance to a third-party
207 medical professional liability insurance carrier, and the board otherwise has no covered
208 participants, then the board shall not thereafter offer or provide professional liability insurance to
209 any health care provider pursuant to the provisions of subsection (c) of this section or the
210 provisions of §29-12B-1 *et seq.* of this code unless the Legislature adopts a concurrent resolution
211 authorizing the board to reestablish medical liability insurance programs.

212 (e) No action for damages or attorney's fees under *Shamblin v. Nationwide Mut. Ins. Co.*,
213 183 W. Va. 585 (1990) shall be awardable or cognizable against the board or any person
214 employed by the board or any entity with which the board has contracted to administer the board's
215 programs. The amendments to this section enacted by the Legislature during the 2024 Regular
216 Session apply retrospectively to all pending claims and actions.

NOTE: The purpose of this bill is to prohibit actions for damages or attorney's fees under *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585 (1990) against the Board of Risk and Insurance Management or any person employed by the board or any entity with which the board has contracted to administer the board's programs; and to make the amendments retrospective to all pending claims and actions.

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