

Senate Bill No. 503

(By Senators Wills and Yost)

[Introduced February 2, 2012; referred to the Committee on the
Judiciary; and then to the Committee on Finance.]

**FISCAL
NOTE**

A BILL to amend and reenact §29-12C-1 and §29-12C-2 of the Code of
West Virginia, 1931, as amended; and to amend and reenact
§29-12D-1 and §29-12D-3 of said code, all relating to payments
from the West Virginia Patient Injury Compensation Fund;
removing the limitation that damages must be economic; and
limiting the amount in any one occurrence to \$1 million.

Be it enacted by the Legislature of West Virginia:

That §29-12C-1 and §29-12C-2 of the Code of West Virginia,
1931, as amended, be amended and reenacted; and that §29-12D-1 and
§29-12D-3 of said code be amended and reenacted, all to read as
follows:

ARTICLE 12C. PATIENT INJURY COMPENSATION PLAN.

**§29-12C-1. Patient injury compensation plan study board created;
purpose; study of creation and funding of patient**

1 **injury compensation fund; developing rules and**
2 **establishing program; and report to the Legislature.**

3 (a) In recognition of the statewide concern over the rising
4 cost of medical malpractice insurance and the difficulty that
5 health care practitioners have in locating affordable medical
6 malpractice insurance, there is hereby created a patient injury
7 compensation fund study board to study the feasibility of
8 establishing a patient injury compensation fund to reimburse
9 claimants in medical malpractice actions for any portion of
10 ~~economic~~ damages awarded which are uncollectible due to statutory
11 limitations on damage awards ~~for trauma care~~ and/or the elimination
12 of joint and several liability of tortfeasor health care providers
13 and health care facilities.

14 (b) The patient injury compensation fund study board shall
15 consist of the director of the board of Risk and Insurance
16 Management, who shall serve as chairperson, the Insurance
17 Commissioner and an appointee of the Governor. The patient injury
18 compensation fund study board shall utilize the resources of the
19 Board of Risk and Insurance Management and the Insurance Commission
20 to effectuate the study required by this article. The patient
21 injury compensation fund study board shall meet upon the call of
22 the chair. A simple majority of the patient injury compensation
23 fund study board members constitutes a quorum for the transaction
24 of business.

1 (c) The patient injury compensation fund study board is
2 authorized to hold hearings, conduct investigations and consider,
3 without limitation, all options for identifying funding methods and
4 for the operation and administration of a patient injury
5 compensation fund within the following guidelines:

6 (1) The Board of Risk and Insurance Management is responsible
7 for implementing, administering and operating any patient injury
8 compensation fund;

9 (2) The patient injury compensation fund must be actuarially
10 sound and fully funded in accordance with generally accepted
11 accounting principles;

12 (3) Eligibility for reimbursement from the patient injury
13 compensation fund is limited to claimants who have been awarded
14 damages in a medical malpractice action but have been certified by
15 the board of Risk and Insurance Management to be unable, after
16 exhausting all reasonable means available by law of recovering the
17 award, to collect all or part of the ~~economic~~ damages awarded due
18 to the limitations on awards established in sections eight, nine
19 and nine-c, article seven-b, chapter fifty-five of this code; and

20 (4) The Board of Risk and Insurance Management may invest the
21 moneys in the patient injury compensation fund and use any interest
22 or other return from investments to pay administration expenses and
23 claims granted.

24 (d) The patient injury compensation fund study board's report

1 and recommendations shall be completed no later than December 1,
2 2003, and shall be presented to the joint committee of government
3 and finance during the legislative interim meetings to be held in
4 December, 2003.

5 **§29-12C-2. Legislative rules.**

6 (a) The Legislature hereby declares that an emergency exists
7 necessitating expeditious implementation of a patient injury
8 compensation fund, if economically feasible, and directs the
9 patient injury compensation fund study board to propose emergency
10 legislative rules relating to the establishment, implementation and
11 operation of the patient injury compensation fund in conjunction
12 with its report and recommendations to the Legislature under
13 section one of this article. The rules proposed by the patient
14 injury compensation fund study board shall:

15 (1) Provide the funding mechanism and the methodology for
16 processing and timely and accurately collect funds;

17 (2) Assure the actuarial soundness of the patient injury
18 compensation fund and sufficient moneys to satisfy all foreseeable
19 claims against the patient injury compensation fund, giving due
20 consideration to relevant loss or claim experience or trends and
21 normal costs of operation;

22 (3) Provide a reasonable reserve fund for unexpected
23 contingencies, consistent with generally accepted accounting
24 principles;

1 (4) Establish appropriate procedures for notification of
2 payment adjustments prior to any payment periods established in
3 which a funding adjustment will be in effect, consistent with
4 generally accepted accounting principles;

5 (5) Establish procedures for determining eligibility for and
6 distribution of funds to claimants seeking reimbursement;

7 (6) Establish the requirements and procedure for certifying
8 that a claimant has been unable to collect a portion of the
9 ~~economic~~ damages recovered;

10 (7) Establish the process for submitting a claim for payment
11 from the patient injury compensation fund; and

12 (8) Establish any additional requirements and criteria
13 consistent with and necessary to effectuate the provisions of this
14 article.

15 (b) If the Legislature accepts, in whole or in part, the
16 recommendations of the patient injury compensation fund study
17 board, enacts legislation establishing a patient injury
18 compensation fund and approves rules governing the initial
19 establishment, implementation and operation of the patient injury
20 compensation fund, those rules shall be filed with the Secretary of
21 State as emergency rules.

22 **ARTICLE 12D. WEST VIRGINIA PATIENT INJURY COMPENSATION FUND.**

23 **§29-12D-1. Creation of patient injury compensation fund; purpose;**
24 **initial funding of patient injury compensation fund.**

1 (a) There is created the West Virginia patient injury
2 compensation fund, for the purpose of providing fair and reasonable
3 compensation to claimants in medical malpractice actions for any
4 portion of ~~economic~~ damages awarded that is uncollectible as a
5 result of limitations on ~~economic~~ damage awards ~~for trauma care~~, or
6 as a result of the operation of the joint and several liability
7 principles and standards, set forth in article seven-b, chapter
8 fifty-five of this code. The fund shall consist of all
9 contributions, revenues and moneys which may be paid into the fund
10 from time to time by the State of West Virginia or from any other
11 source whatsoever, together with any and all interest, earnings,
12 dividends, distributions, moneys or revenues of any nature
13 whatsoever accruing to the fund.

14 (b) Initial funding for the fund shall be provided as follows:
15 During fiscal year 2005, \$2,200,000 of the revenues that would
16 otherwise be transferred to the tobacco account established in
17 subsection (b), section two, article eleven-a, chapter four of this
18 code pursuant to ~~the provisions of~~ section fourteen, article three,
19 chapter thirty-three of this code shall be transferred to the fund;
20 during fiscal year 2006, \$2,200,000 of the revenues that would
21 otherwise be transferred to the tobacco account established in
22 subsection (b), section two, article eleven-a, chapter four of this
23 code pursuant to the provisions of section fourteen, article three,
24 chapter thirty-three of this code, shall be transferred to the

1 fund; and during fiscal year 2007, \$2,200,000 of the revenues that
2 would otherwise be transferred to the tobacco account established
3 in subsection (b), section two, article eleven-a, chapter four of
4 this code pursuant to the provisions of section fourteen, article
5 three, chapter thirty-three of this code shall be transferred to
6 the fund. Beginning fiscal year 2008, if and to the extent
7 additional funding for the fund is required from time to time to
8 maintain the actuarial soundness of the fund, the additional
9 funding may be provided by further act of the Legislature, either
10 from the revenue stream identified in this subsection or otherwise.
11 Payments to the tobacco fund shall be extended until the tobacco
12 fund is repaid in full.

13 (c) The fund is not and shall not be considered a defendant in
14 any civil action arising under article seven-b, chapter fifty-five
15 of this code.

16 (d) The fund is not and shall not be considered an insurance
17 company or insurer for any purpose under this code.

18 **§29-12D-3. Payments from the patient injury compensation fund.**

19 (a) Other than payments in connection with the ongoing
20 operation and administration of the fund, no payments may be made
21 from the fund other than in satisfaction of claims for ~~economic~~
22 damages to qualified claimants who would have collected ~~economic~~
23 damages but for the operation of the limits on ~~economic~~ damages set
24 forth in article seven-b, chapter fifty-five of this code.

1 (b) For purposes of this article, a qualified claimant must be
2 both a "patient" and a "plaintiff" as those terms are defined in
3 article seven-b, chapter fifty-five of this code.

4 (c) Any qualified claimant seeking payment from the fund must
5 establish to the satisfaction of the board that he or she has
6 exhausted all reasonable means to recover from all applicable
7 liability insurance an award of ~~economic~~ damages, following
8 procedures prescribed by the board by legislative rule.

9 (d) Upon a determination by the board that a qualified
10 claimant to the fund for compensation has exhausted all reasonable
11 means to recover from all applicable liability insurance an award
12 of ~~economic~~ damages arising under article seven-b, chapter fifty-
13 five of this code, the board shall make a payment or payments to
14 the claimant for ~~economic~~ damages. The ~~economic~~ damages must have
15 been awarded but be uncollectible after the exhaustion of all
16 reasonable means of recovery of applicable insurance proceeds. In
17 no event shall the amount paid by the board in respect to any one
18 occurrence exceed \$1 million. ~~or the maximum amount of money that~~
19 ~~could have been collected from all applicable insurance prior to~~
20 ~~the creation of the patient injury compensation fund under this~~
21 ~~article, regardless of the number of plaintiffs or the number of~~
22 ~~defendants or, in the case of wrongful death, regardless of the~~
23 ~~number of distributees.~~

24 (e) The board, in its discretion, may make payments to a

1 qualified claimant in a lump sum amount or in the form of periodic
2 payments. Periodic payments are to be based upon the present value
3 of the total amount to be paid by the fund to the claimant by using
4 federally approved qualified assignments.

5 (f) In its discretion, the board may make a payment or
6 payments out of the fund to a qualified claimant in connection with
7 the settlement of claims arising under article seven-b, chapter
8 fifty-five of this code, all according to rules promulgated by the
9 board. The board shall prior to making payment determine that
10 payment from the fund to a qualified claimant is in the best
11 interests of the fund. When the claimant and the board agree upon
12 a settlement amount, the following procedure shall be followed:

13 (1) A petition shall be filed by the claimant with the court
14 in which the action is pending, or if none is pending, in a court
15 of appropriate jurisdiction, for approval of the agreement between
16 the claimant and the board.

17 (2) The court shall set the petition for hearing as soon as
18 the court's calendar permits. Notice of the time, date and place
19 of hearing shall be given to the claimant and to the board.

20 (3) At the hearing the court shall approve the proposed
21 settlement if the court finds it to be valid, just and equitable.

22 (g) If and to the extent that any payment to one or more
23 qualified claimants under this section would deplete the fund
24 during any fiscal year, payments to and among qualified claimant's

1 shall be prorated during the fiscal year according to the rules
2 promulgated by the board. Any amounts due and unpaid to qualified
3 claimants shall be paid in subsequent fiscal years from available
4 funds, but only to the extent funds are available in any fiscal
5 year, according to the board's rules.

6 (h) Payments out of the fund may be used to pay reasonable
7 attorney fees of attorneys representing qualified claimants
8 receiving compensation in respect of ~~economic~~ damages as
9 established by the Board of Risk and Insurance Management.

10 (i) The claimant may appeal a final decision made by the board
11 pursuant to ~~the provisions of~~ article five, chapter twenty-nine-a
12 of this code.

NOTE: The purpose of this bill is to remove the limitation that damages must be economic before payments from the West Virginia Patient Injury Compensation Fund may be made. The bill caps the amount in any one occurrence to \$1 million.

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