

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **Senate Bill 338**

BY SENATORS TRUMP, SMITH, BLAIR, SWOPE, AZINGER,

MULLINS, FERNS, WELD, GAUNCH AND CLINE

[Introduced February 16, 2017; Referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §55-7B-2, §55-7B-4, §55-7B-10 and §55-7B-11 of the Code of West  
2 Virginia, 1931, as amended; and to amend said code by adding thereto a new section,  
3 designated §55-7B-9e, all relating to medical professional liability; defining the term  
4 “occurrence”; providing venue preference; establishing an attorney’s fee schedule based  
5 upon amount recovered; establishing the effective date; and providing for severability.

*Be it enacted by the Legislature of West Virginia:*

1 That §55-7B-2, §55-7B-4, §55-7B-10 and §55-7B-11 of the Code of West Virginia, 1931,  
2 as amended, be amended and reenacted; and that said code be amended by adding thereto a  
3 new section, designated §55-7B-9e, all to read as follows:

## **ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.**

### **§55-7B-2. Definitions.**

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

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

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

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

14 (3) Any group accident, sickness or income disability insurance, any casualty or property  
15 insurance, including automobile and homeowners’ insurance, which provides medical benefits,

16 income replacement or disability coverage, or any other similar insurance benefits, except life  
17 insurance, to the extent that someone other than the insured, including the insured's employer,  
18 has paid all or part of the premium or made an economic contribution on behalf of the plaintiff; or

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

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

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

27 (e) "Health care" means:

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

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

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

39 (f) "Health care facility" means any clinic, hospital, pharmacy, nursing home, assisted living  
40 facility, residential care community, end-stage renal disease facility, home health agency, child  
41 welfare agency, group residential facility, behavioral health care facility or comprehensive

42 community mental health center, intellectual/developmental disability center or program, or other  
43 ambulatory health care facility, in and licensed, regulated or certified by the State of West Virginia  
44 under state or federal law and any state-operated institution or clinic providing health care and  
45 any related entity to the health care facility.

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

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

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

65 (j) "Medical professional liability insurance" means a contract of insurance or any  
66 actuarially sound self-funding program that pays for the legal liability of a health care facility or  
67 health care provider arising from a claim of medical professional liability. In order to qualify as

68 medical professional liability insurance for purposes of this article, a self-funding program for an  
 69 individual physician must meet the requirements and minimum standards set forth in section  
 70 twelve of this article.

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

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

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

80 ~~(m)~~ (n) "Plaintiff" means a patient or representative of a patient who brings an action for  
 81 medical professional liability under this article.

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

88 ~~(o)~~ (p) "Representative" means the spouse, parent, guardian, trustee, attorney or other  
 89 legal agent of another.

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

1 (a) A cause of action for injury to a person alleging medical professional liability against a  
 2 health care provider, except a nursing home, assisted living facility or their related entities, arises  
 3 as of the date of injury, except as provided in subsection ~~(b)~~ (c) of this section, and must be

4 commenced within two years of the date of such injury, or within two year of the date when such  
5 person discovers, or with the exercise of reasonable diligence, should have discovered such  
6 injury, whichever last occurs: *Provided*, That in no event shall any such action be commenced  
7 more than ten years after the date of injury.

8 (b) A cause of action for injury to a person alleging medical professional liability against a  
9 nursing home, assisted living facility or their related entities arises as of the date of injury, except  
10 as provided in subsection (c) of this section, and must be commenced within one year of the date  
11 of such injury, or within one year of the date when such person discovers, or with the exercise of  
12 reasonable diligence, should have discovered such injury, whichever last occurs: *Provided*, That  
13 in no event shall any such action be commenced more than ten years after the date of injury.

14 ~~(b)~~ (c) A cause of action for injury to a minor, brought by or on behalf of a minor who was  
15 under the age of ten years at the time of such injury, shall be commenced within two years of the  
16 date of such injury, or prior to the minor's twelfth birthday, whichever provides the longer period.

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

20 (e) Any medical professional liability action against a nursing home, assisted living facility  
21 or related entity shall be brought in the circuit court of the county in which the nursing home, or  
22 the assisted living facility, at which the alleged act of medical professional liability occurred is  
23 located, unless otherwise agreed upon by the nursing home, assisted living facility or related entity  
24 and the plaintiff. Nothing in this subsection shall prohibit a party from removing the action to  
25 federal court.

**§55-7B-9e. Fees of attorney for plaintiff; unlawful charging or receiving of attorney fees.**

1 (a) An attorney shall not contract for or collect a contingency fee for representing any  
2 person seeking damages in connection with an action brought under this article in excess of the  
3 following limits:

4 (1) Thirty-three and one-third percent of the first \$50,000 recovered;

5 (2) Twenty-five percent of the next \$50,000 recovered;

6 (3) Twenty percent of the next \$500,000 recovered; and

7 (4) Fifteen percent of any amount by which the recovery exceeds \$600,000.

8 These limitations shall apply regardless of whether the recovery is by settlement,  
9 arbitration, or judgment, or whether the person for whom the recovery is made is a responsible  
10 adult, an infant, or a protected person.

11 (b) For purposes of this section, recovered means the net sum recovered after deducting  
12 any disbursements or costs incurred in connection with prosecution or settlement of the claim.  
13 Costs of medical care incurred by the plaintiff are not deductible disbursements or costs for such  
14 purpose.

**§55-7B-10. Effective date; applicability of provisions.**

1 (a) The provisions of House Bill 149, enacted during the first extraordinary session of the  
2 Legislature, 1986, shall be effective at the same time that the provisions of Enrolled Senate Bill  
3 714, enacted during the regular session, 1986, become effective, and the provisions of said  
4 House Bill 149 shall be deemed to amend the provisions of Enrolled Senate Bill 714. The  
5 provisions of this article shall not apply to injuries which occur before the effective date of this said  
6 Enrolled Senate Bill 714.

7 The amendments to this article as provided in House Bill 601, enacted during the sixth  
8 extraordinary session of the Legislature, 2001, apply to all causes of action alleging medical  
9 professional liability which are filed on or after March 1, 2002.

10 The amendments to this article provided in Enrolled Committee Substitute for House Bill  
11 No. 2122 during the regular session of the Legislature, 2003, apply to all causes of action alleging  
12 medical professional liability which are filed on or after July 1, 2003.

13 (b) The amendments to this article provided in Enrolled Committee Substitute for Senate  
14 Bill No. 6 during the regular session of the Legislature, 2015, apply to all causes of action alleging

15 medical professional liability which are filed on or after July 1, 2015.

16 (c) The amendments to this article provided in Enrolled Committee Substitute for  
 17 (Senate/House) Bill \_\_\_\_\_ during the regular session of the Legislature, 2017, apply to all causes  
 18 of action alleging medical professional liability which are filed on or after July 1, 2017.

**§55-7B-11. Severability.**

1 (a) If any provision of this article as enacted during the first extraordinary session of the  
 2 Legislature, 1986, in House Bill 149, or as enacted during the regular session of the Legislature,  
 3 1986, in Senate Bill 714, or as enacted during the regular session of the Legislature, 2015, in  
 4 (Senate/House) Bill \_\_\_\_\_, or as enacted during the regular session of the Legislature, 2017, or  
 5 the application thereof to any person or circumstance is held invalid, the invalidity does not affect  
 6 other provisions or applications of this article, and to this end, the provisions of this article are  
 7 declared to be severable.

8 (b) If any provision of the amendments to section five of this article, any provision of section  
 9 six-d of this article or any provision of the amendments to section eleven, article six, chapter fifty-  
 10 six of this code as provided in House Bill 601, enacted during the sixth extraordinary session of  
 11 the Legislature, 2001, is held invalid, or the application thereof to any person is held invalid, then,  
 12 notwithstanding any other provision of law, every other provision of said House Bill 601 shall be  
 13 deemed invalid and of no further force and effect.

14 (c) If any provision of the amendments to section six or ten of this article or any provision  
 15 of section six-a, six-b or six-c of this article as provided in House Bill 601, enacted during the sixth  
 16 extraordinary session of the Legislature, 2001, is held invalid, the invalidity does not affect other  
 17 provisions or applications of this article, and to this end, such provisions are deemed severable.

NOTE: The purpose of this bill is to amend the Medical Professional Liability Act by adding a definition for "occurrence," providing for a preference of venue, establishing an attorney's fees schedule based upon the amount recovered, establishing the effective date and providing for severability.

Strike-throughs indicate language that would be stricken from a heading or the present law



and underscoring indicates new language that would be added.