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.

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

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

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

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

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

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

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

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

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

(e) “Health care” means:

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

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

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

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

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

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

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

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

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

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

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

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

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

(p) “Representative” means the spouse, parent, guardian, trustee, attorney, or other legal agent of another.

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

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

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

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

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

(e) Any medical professional liability action against a nursing home, assisted living facility, related entity or employee, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees shall be brought in the circuit court of the county in which the nursing home, assisted living facility, or acute care hospital providing intermediate care or skilled nursing care, at which the alleged act of medical professional liability occurred is located, unless otherwise agreed upon by the nursing home, assisted living facility, related entity, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care, and the 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.

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

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

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

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

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

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

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

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

(e) In medical professional liability actions against a nursing home, assisted living facility, their related entities or employees, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within ~~180~~ 120 days of the date the health care provider receives the notice of claim.

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

(g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care provider is entitled to prelitigation mediation before a qualified mediator upon written demand to the claimant.

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

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

(2) In medical professional liability actions against a nursing home, assisted living facility, their related entities or employees, or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees, except as otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled ~~180~~ 120 days from the date of mail of a notice of claim to 30 days following receipt of a response to the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

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

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