

WEST VIRGINIA LEGISLATURE

2017 REGULAR SESSION

Committee Substitute

for

Senate Bill 338

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

MULLINS, FERNS, WELD, GAUNCH AND CLINE

[Originating in the Committee on the Judiciary;

reported on March 3, 2017]

1 A BILL to amend and reenact §55-7B-2, §55-7B-4, §55-7B-6, §55-7B-10 and §55-7B-11 of the
2 Code of West Virginia, 1931, as amended, all relating to medical professional liability;
3 defining the term “occurrence” in medical professional liability causes of action; providing
4 for statute of limitations on certain actions for medical professional liability; establishing
5 venue in claims against certain health care providers; addressing screening certificates of
6 merit in certain medical professional liability causes of action; tolling the statute of
7 limitations under certain circumstances; establishing the effective date; and providing for
8 severability.

Be it enacted by the Legislature of West Virginia:

1 That §55-7B-2, §55-7B-4, §55-7B-6, §55-7B-10 and §55-7B-11 of the Code of West
2 Virginia, 1931, as amended, be amended and reenacted, 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

CS for SB 338

2 health care provider, except a nursing home, assisted living facility, their related entities or
3 employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing
4 care or its employees, arises as of the date of injury, except as provided in subsection ~~(b)~~ (c) of
5 this section, and must be commenced within two years of the date of such injury, or within two
6 year of the date when such person discovers, or with the exercise of reasonable diligence, should
7 have discovered such injury, whichever last occurs: *Provided*, That in no event shall any such
8 action be commenced more than ten years after the date of injury.

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

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

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

23 (e) Any medical professional liability action against a nursing home, assisted living facility,
24 related entity or employee or a distinct part of an acute care hospital providing intermediate care
25 or skilled nursing care or its employees shall be brought in the circuit court of the county in which
26 the nursing home, assisted living facility or acute care hospital providing intermediate care or

CS for SB 338

27 skilled nursing care, at which the alleged act of medical professional liability occurred is located,
28 unless otherwise agreed upon by the nursing home, assisted living facility, related entity or a
29 distinct part of an acute care hospital providing intermediate care or skilled nursing care and the
30 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 thirty 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. The notice of claim shall
7 include a statement of the theory or theories of liability upon which a cause of action may be
8 based, and a list of all health care providers and health care facilities to whom notices of claim
9 are being sent, together with a screening certificate of merit. The screening certificate of merit
10 shall be executed under oath by a health care provider qualified as an expert under the West
11 Virginia rules of evidence and shall state with particularity: (1) The expert's familiarity with the
12 applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to
13 how the applicable standard of care was breached; and (4) the expert's opinion as to how the
14 breach of the applicable standard of care resulted in injury or death. A separate screening
15 certificate of merit must be provided for each health care provider against whom a claim is
16 asserted. The person signing the screening certificate of merit shall have no financial interest in
17 the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing
18 in this subsection may be construed to limit the application of Rule 15 of the Rules of Civil
19 Procedure.

CS for SB 338

20 (c) Notwithstanding any provision of this code, if a claimant or his or her counsel, believes
21 that no screening certificate of merit is necessary because the cause of action is based upon a
22 well-established legal theory of liability which does not require expert testimony supporting a
23 breach of the applicable standard of care, the claimant or his or her counsel, shall file a statement
24 specifically setting forth the basis of the alleged liability of the health care provider in lieu of a
25 screening certificate of merit.

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

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

42 ~~(e)~~(f) Any health care provider who receives a notice of claim pursuant to the provisions
43 of this section may respond, in writing, to the claimant or his or her counsel within thirty days of
44 receipt of the claim or within thirty days of receipt of the screening certificate of merit if the claimant

CS for SB 338

45 is proceeding pursuant to the provisions of subsection (d) or (e) of this section. The response may
46 state that the health care provider has a bona fide defense and the name of the health care
47 provider's counsel, if any.

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

52 ~~(g)~~(h) If the health care provider demands mediation pursuant to the provisions of
53 subsection ~~(f)~~(g) of this section, the mediation shall be concluded within forty-five days of the date
54 of the written demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial
55 court rules, unless portions of the rule are clearly not applicable to a mediation conducted prior to
56 the filing of a complaint or unless the Supreme Court of Appeals promulgates rules governing
57 mediation prior to the filing of a complaint. If mediation is conducted, the claimant may depose
58 the health care provider before mediation or take the testimony of the health care provider during
59 the mediation.

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

CS for SB 338

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

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

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

§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 of the Legislature, 1986, become effective, and the

4 provisions of said House Bill 149 shall be deemed to amend the provisions of Enrolled Senate Bill
5 714. The provisions of this article shall not apply to injuries which occur before the effective date
6 of said 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 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 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 Senate
17 Bill 338 during the regular session of the Legislature, 2017, apply to all causes of action alleging
18 medical professional liability which arise or accrue 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, or in
4 Senate Bill 338, as enacted during the regular session of the Legislature, 2017, or the application
5 thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions
6 or applications of this article, and to this end, the provisions of this article are declared to be
7 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.