

# WEST VIRGINIA LEGISLATURE

## 2017 REGULAR SESSION

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 338**

SENATORS TRUMP, SMITH, BLAIR, SWOPE, AZINGER,

MULLINS, FERNS, WELD, GAUNCH

AND CLINE, *original sponsors*

[Passed March 31, 2017; in effect 90 days from passage]

RECEIVED  
SECRETARY OF STATE  
STATE OF WEST VIRGINIA

2017 APR -8 PM 6:36

RECEIVED

SB 338

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 338**

SENATORS TRUMP, SMITH, BLAIR, SWOPE, AZINGER,

MULLINS, FERNS, WELD, GAUNCH

AND CLINE, *original sponsors*

[Passed March 31, 2017; in effect 90 days from passage]

1 AN ACT 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 health care facility or a health care provider and includes any continuing, additional or follow-  
75 up care provided to that patient for reasons relating to the original health care 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 (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 (n) "Plaintiff" means a patient or representative of a patient who brings an action for  
81 medical professional liability under this article.

82 (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 (p) "Representative" means the spouse, parent, guardian, trustee, attorney or other legal  
89 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, 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 (c) of this  
5 section, and must be commenced within two years of the date of such injury, or within two years  
6 of the date when such person discovers, or with the exercise of reasonable diligence, should have  
7 discovered such injury, whichever last occurs: *Provided*, That in no event shall any such action  
8 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 (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 (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

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.



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 a claimant or his or her counsel has  
29 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable  
30 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section  
31 except that the claimant or his or her counsel shall furnish the health care provider with a  
32 statement of intent to provide a screening certificate of merit within sixty days of the date the  
33 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 (f) Any health care provider who receives a notice of claim pursuant to the provisions of  
43 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  
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 (g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant  
49 is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care  
50 provider is entitled to prelitigation mediation before a qualified mediator upon written demand to  
51 the claimant.

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

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

69 (2) In medical professional liability actions against a nursing home, assisted living facility,  
70 their related entities or employees or a distinct part of an acute care hospital providing  
71 intermediate care or skilled nursing care or its employees, except as otherwise provided in this

72 subsection, any statute of limitations applicable to a cause of action against a health care provider  
73 upon whom notice was served for alleged medical professional liability shall be tolled one hundred  
74 eighty days from the date of mail of a notice of claim to thirty days following receipt of a response  
75 to the notice of claim, thirty days from the date a response to the notice of claim would be due, or  
76 thirty days from the receipt by the claimant of written notice from the mediator that the mediation  
77 has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever  
78 last occurs.

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Mark R. Huppert*  
.....  
Chairman, Senate Committee

*Sean Husler*  
.....  
Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

*Mark S. Gurnee*  
.....  
Clerk of the Senate

*Scott D. Morris*  
.....  
Clerk of the House of Delegates

*W. H. Samuel*  
.....  
President of the Senate

*Ch. H.*  
.....  
Speaker of the House of Delegates

RECEIVED  
2017 APR - 8 PM 6:37  
GOVERNOR OF STATE  
STATE OF WEST VIRGINIA

The within *is approved* this the *8th*  
Day of *April*, 2017.

*Jim Justice*  
.....  
Governor

**PRESENTED TO THE GOVERNOR**

APR 03 2017

Time 1:57 pm