

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Senate Bill 510

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[Originating in the Committee on Finance; reported on

February 7, 2019]

1 A BILL to amend and reenact §55-7B-6 of the Code of West Virginia, 1931, as amended, relating
2 to medical professional liability; providing for requirements for notice of claim; setting out
3 requirements for an expert who signs a certificate of merit; and providing for information
4 to be included with the certificate of merit.

Be it enacted by the Legislature of West Virginia:

ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.

**§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 30 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. For the purposes of this
7 section, where the medical professional liability claim against a health care facility is premised
8 upon the act or failure to act of agents, servants, employees, or officers of the health care facility,
9 such agents, servants, employees, or officers shall be identified by job title, specific area of
10 professional practice, or specific role in the health care at issue. The notice of claim shall include
11 a statement of the theory or theories of liability upon which a cause of action may be based, and
12 a list of all health care providers and health care facilities to whom notices of claim are being sent,
13 together with a screening certificate of merit, and a list of all medical records and other information
14 reviewed by the signer of the certificate of merit before providing the opinions set forth in
15 subsection (b)(1) through (b)(4). The screening certificate of merit shall be executed under oath
16 by a health care provider qualified as an expert under the West Virginia rules of evidence and
17 ~~shall state with particularity: who meets the requirements of §55-7B-7 of this code as of the date~~
18 of the affidavit. The certificate of merit shall state with particularity: (1) The basis for the expert's

19 familiarity with the applicable standard of care ~~in~~ at issue; (2) the expert's qualifications; (3) the
20 expert's opinion as to how the applicable standard of care was breached; and (4) the expert's
21 opinion as to how the breach of the applicable standard of care resulted in injury or death. A
22 separate screening certificate of merit must be provided for each health care provider against
23 whom a claim is asserted. The ~~person~~ health care provider signing the screening certificate of
24 merit shall have no financial interest in the underlying claim, but may participate as an expert
25 witness in any judicial proceeding. Nothing in this subsection ~~may be construed to limit~~ limits the
26 application of Rule 15 of the Rules of Civil Procedure.

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

34 (d) Except for medical professional liability actions against a nursing home, assisted living
35 facility, 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 60 days of the date the health
41 care provider receives the notice of claim. The screening certificate of merit shall be accompanied
42 by a list of the medical records otherwise required to be provided pursuant to subsection (b) of
43 this section.

44 (e) In medical professional liability actions against a nursing home, assisted living facility,

45 their related entities or employees or a distinct part of an acute care hospital providing
46 intermediate care or skilled nursing care or its employees, if a claimant or his or her counsel has
47 insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable
48 statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section
49 except that the claimant or his or her counsel shall furnish the health care provider with a
50 statement of intent to provide a screening certificate of merit within 180 days of the date the health
51 care provider receives the notice of claim.

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

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

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

69 (i)(1) Except for medical professional liability actions against a nursing home, assisted
70 living facility, their related entities or employees or a distinct part of an acute care hospital

71 providing intermediate care or skilled nursing care or its employees, and except as otherwise
72 provided in this subsection, any statute of limitations applicable to a cause of action against a
73 health care provider upon whom notice was served for alleged medical professional liability shall
74 be tolled from the date of mail of a notice of claim to 30 days following receipt of a response to
75 the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30
76 days from the receipt by the claimant of written notice from the mediator that the mediation has
77 not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last
78 occurs.

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

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

94 (j) Notwithstanding any other provision of this code, a notice of claim, a health care
95 provider's response to any notice claim, a screening certificate of merit and the results of any
96 mediation conducted pursuant to the provisions of this section are confidential and are not

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- 97 admissible as evidence in any court proceeding unless the court, upon hearing, determines that
98 failure to disclose the contents would cause a miscarriage of justice.

NOTE: The purpose of this bill is to update the requirements for a certificate of merit.

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