

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Committee Substitute

for

Senate Bill 510

SENATORS TAKUBO, MARONEY, AND WELD, *original sponsors*

[Originating in the Committee on the Judiciary;

Reported on February 18, 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 area of professional practice
10 or role in the health care at issue. The notice of claim shall include a statement of the theory or
11 theories of liability upon which a cause of action may be based, and a list of all health care
12 providers and health care facilities to whom notices of claim are being sent, together with a
13 screening certificate of merit. The screening certificate of merit shall be executed under oath by
14 a health care provider who:

15 (1) Is qualified as an expert under the West Virginia rules of evidence and shall state with
16 particularity;

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

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

21 If the health care provider executing the screening certificate of merit meets the
22 qualifications of subdivisions (1), (2), and (3) of this subsection, there shall be a presumption that
23 the health care provider is qualified as an expert for the purpose of executing a screening
24 certificate of merit. The screening certificate of merit shall state with particularity, and include: (1)
25 The ~~basis for the~~ expert's familiarity with the applicable standard of care ~~is~~ at issue; (2) the
26 expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was
27 breached; ~~and~~ (4) the expert's opinion as to how the breach of the applicable standard of care
28 resulted in injury or death; and (5) a list of all medical records and other information reviewed by
29 the expert executing the screening certificate of merit. A separate screening certificate of merit
30 must be provided for each health care provider against whom a claim is asserted. The ~~person~~
31 health care provider signing the screening certificate of merit shall have no financial interest in
32 the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing
33 in this subsection ~~may be construed to limit~~ limits the application of Rule 15 of the Rules of Civil
34 Procedure. No challenge to the notice of claim may be raised prior to receipt of the notice of claim
35 and the executed screening certificate of merit.

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

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

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

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

67 (g) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant
68 is proceeding pursuant to the provisions of subsection (d) or (e) of this section, the health care

69 provider is entitled to prelitigation mediation before a qualified mediator upon written demand to
70 the claimant.

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

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

88 (2) In medical professional liability actions against a nursing home, assisted living facility,
89 their related entities or employees, or a distinct part of an acute care hospital providing
90 intermediate care or skilled nursing care or its employees, except as otherwise provided in this
91 subsection, any statute of limitations applicable to a cause of action against a health care provider
92 upon whom notice was served for alleged medical professional liability shall be tolled 180 days
93 from the date of mail of a notice of claim to 30 days following receipt of a response to the notice
94 of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from

95 the receipt by the claimant of written notice from the mediator that the mediation has not resulted
96 in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

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

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