

WEST VIRGINIA LEGISLATURE

2024 REGULAR SESSION

Introduced

Senate Bill 686

BY SENATOR AZINGER

[Introduced February 7, 2024; referred
to the Committee on Finance]

1 A BILL to amend and reenact §29-12-5 of the Code of West Virginia, 1931, as amended, relating
2 to actions for damages or attorney's fees in cases involving Board of Risk and Insurance
3 Management; clarifying that no action for damages or attorney's fees under *Shamblin v.*
4 *Nationwide Mut. Ins. Co.*, 183 W. Va. 585 (1990) shall be awardable or cognizable against
5 the board or any person employed by the board or any entity with which the board has
6 contracted to administer the board's programs; and providing for retrospective application
7 to all pending claims and actions.

Be it enacted by the Legislature of West Virginia:

ARTICLE 12. STATE INSURANCE.

§29-12-5. Powers and duties of board.

1 (a)(1) The board has, without limitation and in its discretion as it seems necessary for the
2 benefit of the insurance program, general supervision and control over the insurance of state
3 property, activities and responsibilities, including:

4 (A) The acquisition and cancellation of state insurance;

5 (B) Determination of the kind or kinds of coverage;

6 (C) Determination of the amount or limits for each kind of coverage;

7 (D) Determination of the conditions, limitations, exclusions, endorsements, amendments
8 and deductible forms of insurance coverage;

9 (E) Inspections or examinations relating to insurance coverage of state property, activities
10 and responsibilities;

11 (F) Reinsurance; and

12 (G) Any and all matters, factors and considerations entering into negotiations for
13 advantageous rates on and coverage of such state property, activities and responsibilities.

14 (2) The board shall endeavor to secure reasonably broad protection against loss, damage
15 or liability to state property and on account of state activities and responsibilities by proper,
16 adequate, available and affordable insurance coverage and through the introduction and

17 employment of sound and accepted principles of insurance, methods of protection and principles
18 of loss control and risk.

19 (3) The board is not required to provide insurance for every state property, activity or
20 responsibility.

21 (4) Any policy of insurance purchased or contracted for by the board shall provide that the
22 insurer shall be barred and estopped from relying upon the Constitutional immunity of the State
23 of West Virginia against claims or suits: *Provided*, That nothing herein shall bar a state agency or
24 state instrumentality from relying on the Constitutional immunity granted the State of West Virginia
25 against claims or suits arising from or out of any state property, activity or responsibility not
26 covered by a policy or policies of insurance: *Provided, however*, That nothing herein shall bar the
27 insurer of political subdivisions from relying upon any statutory immunity granted such political
28 subdivisions against claims or suits.

29 (5) The board shall make a complete survey of all presently owned and subsequently
30 acquired state property subject to insurance coverage by any form of insurance, which survey
31 shall include and reflect inspections, appraisals, exposures, fire hazards, construction and any
32 other objectives or factors affecting or which might affect the insurance protection and coverage
33 required.

34 (6) The board shall keep itself currently informed on new and continuing state activities
35 and responsibilities within the insurance coverage herein contemplated. The board shall work
36 closely in cooperation with the state Fire Marshal's office in applying the rules of that office insofar
37 as the appropriations and other factors peculiar to state property will permit.

38 (7) The board may negotiate and effect settlement of any and all insurance claims arising
39 on or incident to losses of and damages to covered state properties, activities and responsibilities
40 hereunder and shall have authority to execute and deliver proper releases of all such claims when
41 settled. The board may adopt rules and procedures for handling, negotiating and settlement of all
42 such claims. Any discussion or consideration of the financial or personal information of an insured

43 may be held by the board in executive session closed to the public, notwithstanding the provisions
44 of §6-9A-1 *et seq.* of this code.

45 (8) The board may employ an executive director and such other employees, including
46 legal counsel, as may be necessary to carry out its duties. The executive director shall receive an
47 annual salary as provided in §6-7-2a of this code. The legal counsel may represent the board
48 before any judicial or administrative tribunal and perform such other duties as may be requested
49 by the board.

50 (9) The board may enter into any contracts necessary to the execution of the powers
51 granted to it by this article or to further the intent of this article.

52 (10) The board may make rules governing its functions and operations and the
53 procurement of state insurance. Except where otherwise provided by statute, rules of the board
54 are subject to the provisions of §29A-3-1 *et seq.* of this code.

55 (11) The funds received by the board, including, but not limited to, state agency premiums,
56 mine subsidence premiums and political subdivision premiums, shall be deposited with the West
57 Virginia Investment Management Board with the interest income and returns on investment a
58 proper credit to such property insurance trust fund or liability insurance trust fund as applicable.

59 (b) (1) *Definitions.* — The following words and phrases when used in this subsection, for
60 the purposes of this subsection, have the meanings respectively ascribed to them in this
61 subsection;

62 (A) "Political subdivision" has the same meaning as in §29-12A-3 of this code;

63 (B) "Charitable" or "public service organization" means any hospital in this state which has
64 been certified as a critical access hospital by the federal Centers for Medicare and Medicaid upon
65 the designation of the state Office of Rural Health Policy, the Office of Community and Rural
66 Health Services, the Bureau for Public Health or the Department of Health and any bona fide, not-
67 for-profit, tax-exempt, benevolent, educational, philanthropic, humane, patriotic, civic, religious,
68 eleemosynary, incorporated or unincorporated association or organization or a rescue unit or

69 other similar volunteer community service organization or association, but does not include any
70 nonprofit association or organization, whether incorporated or not, which is organized primarily
71 for the purposes of influencing legislation or supporting or promoting the campaign of any
72 candidate for public office; and

73 (C) "Emergency medical service agency" has the same meaning as in §16-4C-3 of this
74 code.

75 (2) If requested by a political subdivision, a charitable or public service organization or an
76 emergency medical services agency, the board may, but is not required to, provide property and
77 liability insurance to insure the property, activities and responsibilities of the political subdivision,
78 charitable or public service organization or emergency medical services agency. The board may
79 enter into any contract necessary to the execution of the powers granted by this article or to further
80 the intent of this article.

81 (A) Property insurance provided by the board pursuant to this subsection may also include
82 insurance on property leased to or loaned to the political subdivision, a charitable or public service
83 organization or an emergency medical services agency which is required to be insured under a
84 written agreement.

85 (B) The cost of insurance, as determined by the board, shall be paid by the political
86 subdivision, the charitable or public service organization or the emergency medical services
87 agency and may include administrative expenses. For purposes of this section, if an emergency
88 medical services agency is a for-profit entity, its claims history may not adversely affect other
89 participants' rates in the same class.

90 (c)(1) The board has general supervision and control over the optional medical liability
91 insurance programs providing coverage to health care providers as authorized by the provisions
92 of §29-12B-1 *et seq.* of this code. The board is hereby granted and may exercise all powers
93 necessary or appropriate to carry out and effectuate the purposes of this article.

94 (2) The board shall:

95 (A) Administer the preferred medical liability program and the high risk medical liability
96 program and exercise and perform other powers, duties and functions specified in this article;

97 (B) Obtain and implement, at least annually, from an independent outside source, such as
98 a medical liability actuary or a rating organization experienced with the medical liability line of
99 insurance, written rating plans for the preferred medical liability program and high-risk medical
100 liability program on which premiums shall be based;

101 (C) Prepare and annually review written underwriting criteria for the preferred medical
102 liability program and the high-risk medical liability program. The board may utilize review panels,
103 including, but not limited to, the same specialty review panels to assist in establishing criteria;

104 (D) Prepare and publish, before each regular session of the Legislature, separate
105 summaries for the preferred medical liability program and high-risk medical liability program
106 activity during the preceding fiscal year, each summary to be included in the board of Risk and
107 Insurance Management audited financial statements as "other financial information" and which
108 shall include a balance sheet, income statement and cash flow statement, an actuarial opinion
109 addressing adequacy of reserves, the highest and lowest premiums assessed, the number of
110 claims filed with the program by provider type, the number of judgments and amounts paid from
111 the program, the number of settlements and amounts paid from the program and the number of
112 dismissals without payment;

113 (E) Determine and annually review the claims history debit or surcharge for the high-risk
114 medical liability program;

115 (F) Determine and annually review the criteria for transfer from the preferred medical
116 liability program to the high-risk medical liability program;

117 (G) Determine and annually review the role of independent agents, the amount of
118 commission, if any, to be paid therefor and agent appointment criteria;

119 (H) Study and annually evaluate the operation of the preferred medical liability program
120 and the high-risk medical liability program and make recommendations to the Legislature, as may

121 be appropriate, to ensure their viability, including, but not limited to, recommendations for civil
122 justice reform with an associated cost-benefit analysis, recommendations on the feasibility and
123 desirability of a plan which would require all health care providers in the state to participate with
124 an associated cost-benefit analysis, recommendations on additional funding of other state-run
125 insurance plans with an associated cost-benefit analysis and recommendations on the desirability
126 of ceasing to offer a state plan with an associated analysis of a potential transfer to the private
127 sector with a cost-benefit analysis, including impact on premiums;

128 (l) Establish a five-year financial plan to ensure an adequate premium base to cover the
129 long-tail nature of the claims-made coverage provided by the preferred medical liability program
130 and the high-risk medical liability program. The plan shall be designed to meet the program's
131 estimated total financial requirements, taking into account all revenues projected to be made
132 available to the program and apportioning necessary costs equitably among participating classes
133 of health care providers. For these purposes, the board shall:

134 (i) Retain the services of an impartial, professional actuary, with demonstrated experience
135 in analysis of large group malpractice plans, to estimate the total financial requirements of the
136 program for each fiscal year and to review and render written professional opinions as to financial
137 plans proposed by the board. The actuary shall also assist in the development of alternative
138 financing options and perform any other services requested by the board or the executive director.
139 All reasonable fees and expenses for actuarial services shall be paid by the board. Any financial
140 plan or modifications to a financial plan approved or proposed by the board pursuant to this
141 section shall be submitted to and reviewed by the actuary and may not be finally approved and
142 submitted to the Governor and to the Legislature without the actuary's written professional opinion
143 that the plan may be reasonably expected to generate sufficient revenues to meet all estimated
144 program and administrative costs, including incurred but not reported claims, for the fiscal year
145 for which the plan is proposed. The actuary's opinion for any fiscal year shall include a
146 requirement for establishment of a reserve fund;

147 (ii) Submit its final, approved five-year financial plan, after obtaining the necessary
148 actuary's opinion, to the Governor and to the Legislature no later than January 1, preceding the
149 fiscal year. The financial plan for a fiscal year becomes effective and shall be implemented by the
150 executive director on July 1, of the fiscal year. In addition to each final, approved financial plan
151 required under this section, the board shall also simultaneously submit an audited financial
152 statement based on generally accepted accounting practices (GAAP) and which shall include
153 allowances for incurred but not reported claims: *Provided*, That the financial statement and the
154 accrual-based financial plan restatement shall not affect the approved financial plan. The
155 provisions of §29A-1-1 *et seq.* of this code shall not apply to the preparation, approval and
156 implementation of the financial plans required by this section;

157 (iii) Submit to the Governor and the Legislature a prospective five-year financial plan
158 beginning on January 1, 2003, and every year thereafter, for the programs established by the
159 provisions of §29-12B-1 *et seq.* of this code. Factors that the board shall consider include, but
160 shall not be limited to, the trends for the program and the industry; claims history, number and
161 category of participants in each program; settlements and claims payments; and judicial results;

162 (iv) Obtain annually certification from participants that they have made a diligent search
163 for comparable coverage in the voluntary insurance market and have been unable to obtain the
164 same;

165 (J) Meet on at least a quarterly basis to review implementation of its current financial plan
166 in light of the actual experience of the medical liability programs established in §29-12B-1 *et seq.*
167 of this code. The board shall review actual costs incurred, any revised cost estimates provided by
168 the actuary, expenditures and any other factors affecting the fiscal stability of the plan and may
169 make any additional modifications to the plan necessary to ensure that the total financial
170 requirements of these programs for the current fiscal year are met;

171 (K) To analyze the benefit of and necessity for excess verdict liability coverage;

172 (L) Consider purchasing reinsurance, in the amounts as it may, from time to time,
173 determine is appropriate, and the cost thereof shall be considered to be an operating expense of
174 the board;

175 (M) Make available to participants optional extended reporting coverage or tail coverage:
176 *Provided, That*, at least five working days prior to offering such coverage to a participant or
177 participants, the board shall notify the President of the Senate and the Speaker of the House of
178 Delegates in writing of its intention to do so and such notice shall include the terms and conditions
179 of the coverage proposed;

180 (N) Review and approve, reject or modify rules that are proposed by the executive director
181 to implement, clarify or explain administration of the preferred medical liability program and the
182 high-risk medical liability program. Notwithstanding any provisions in this code to the contrary,
183 rules promulgated pursuant to this paragraph are not subject to the provisions of §29A-3-9
184 through §29A-3-16 of this code. The board shall comply with the remaining provisions of article
185 three and shall hold hearings or receive public comments before promulgating any proposed rule
186 filed with the Secretary of State: *Provided, That* the initial rules proposed by the executive director
187 and promulgated by the board shall become effective upon approval by the board notwithstanding
188 any provision of this code;

189 (O) Enter into settlements and structured settlement agreements whenever appropriate.
190 The policy may not require as a condition precedent to settlement or compromise of any claim
191 the consent or acquiescence of the policyholder. The board may own or assign any annuity
192 purchased by the board to a company licensed to do business in the state;

193 (P) Refuse to provide insurance coverage for individual physicians whose prior loss
194 experience or current professional training and capability are such that the physician represents
195 an unacceptable risk of loss if coverage is provided;

196 (Q) Terminate coverage for nonpayment of premiums upon written notice of the
197 termination forwarded to the health care provider not less than 30 days prior to termination of
198 coverage;

199 (R) Assign coverage or transfer insurance obligations and/or risks of existing or in-force
200 contracts of insurance to a third-party medical professional liability insurance carrier with the
201 comparable coverage conditions as determined by the board. Any transfer of obligation or risk
202 shall effect a novation of the transferred contract of insurance and if the terms of the assumption
203 reinsurance agreement extinguish all liability of the board and the State of West Virginia, such
204 extinguishment shall be absolute as to any and all parties; and

205 (S) Meet and consult with and consider recommendations from the Medical Malpractice
206 Advisory Panel established by the provisions of §29-12B-1 *et seq.* of this code.

207 (d) If, after September 1, 2002, the board has assigned coverages or transferred all
208 insurance obligations and/or risks of existing or in-force contracts of insurance to a third-party
209 medical professional liability insurance carrier, and the board otherwise has no covered
210 participants, then the board shall not thereafter offer or provide professional liability insurance to
211 any health care provider pursuant to the provisions of subsection (c) of this section or the
212 provisions of §29-12B-1 *et seq.* of this code unless the Legislature adopts a concurrent resolution
213 authorizing the board to reestablish medical liability insurance programs.

214 (e) No action for damages or attorney's fees under *Shamblin v. Nationwide Mut. Ins. Co.*,
215 183 W. Va. 585 (1990) shall be awardable or cognizable against the board or any person
216 employed by the board or any entity with which the board has contracted to administer the board's
217 programs. The amendments to this section enacted by the Legislature during the 2024 Regular
218 Session apply retrospectively to all pending claims and actions.