

**SUMMARY OF CHANGES TO THE MPLA  
2015 LEGISLATIVE SESSION—SB6**

**PREPARED BY: KIP REESE**  
**March 25, 2015**

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**SPONSORS:** Senators Ferns, Boley, Carmichael, Gaunch, Leonhardt, Mullins, Nohe, Trump, Blair, Plymale, Stollings, Cole (Mr. President) and Takubo.

**DATE INTRODUCED:** January 14, 2015.

**COMPLETED LEGISLATIVE ACTION:** March 10, 2015—the effective date of the law. (However, the provisions of SB6 apply only to actions filed after July 1, 2015.).

**CODE SECTIONS AFFECTED:** §55-7B-1; §55-7B-2, §55-7B-7, §55-7B-8, §55-7B-9, §55-7B-9a, §55-7B-9c and §55-7B-11 (all amended and reenacted); §55-7B-7a and §55-7B-9d (new code sections).

**SUMMARY ANALYSIS AND BRIEF LEGISLATIVE HISTORY:**

SB6 addresses the Medical Professional Liability Act (MPLA)— more particularly sections regarding legislative findings, definitions, testimony of experts, admissibility of certain information, limits on non-economic loss, several liability, the effect of collateral sources on economic losses, treatment of emergency conditions, adjustment of non-economic damage caps, adjustment of past medical expenses verdict, and the severability clause, among others.

The expressed purpose of the bill (delineated in the bill’s “Note”) was to control the increase in the cost of liability insurance and to maintain access to affordable health care services for West Virginians, by providing a mechanism to increase the limitation on civil damages in medical malpractice cases to account for inflation by linking increases to the Consumer Price Index. It also adds provisions limiting the admissibility and use of certain information; and requires adjustment of verdicts for past medical expenses.

The original Senate bill was amended, in primarily minor fashion, at about every legislative turn: the Senate Committee Substitute presented several modifications to the original bill; the House passed a “strike and insert amendment” which reinserted legislative findings removed by the Senate in their committee substitute; and, the House also passed separate amendments generated in the Judiciary Committee which were adopted with some modification by the Senate. Governor Tomblin signed SB6 into law on March 18, 2015.

## **SECTION DIRECTORY:**

**CHAPTER 55—ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE; ARTICLE 7B—MEDICAL PROFESSIONAL LIABILITY;**

**SECTION 1—**Legislative findings and declaration of purpose (repealed in Senate Com Sub);

**SECTION 2—**Definitions;

**SECTION 7—**Testimony of expert witnesses on the standard of care;

**SECTION 7a —**Admissibility and use of certain information;

**SECTION 8—**Limit on liability for noneconomic loss;

**SECTION 9—** Several liability;

**SECTION 9a—**(New) Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury;

**SECTION 9c—**Limit on liability for treatment of emergency conditions for which patient is admitted to a designated trauma center; exceptions; emergency rules;

**SECTION 9d—** (New) Adjustment of verdict for past medical expenses;

**SECTION 11—** Severability.

## **FULL ANALYSIS:**

### **I. ENACTED VERSION - BY SECTION.**

#### **A. §55-7B-1—Legislative findings and declaration of purpose.**

1. The final bill reincorporates legislative findings removed by the Senate including a new paragraph which elaborates on the motivation and purpose for the noted code changes. Proponents of these findings argued they were an integral aspect of the law, necessary to support arguments before judicial bodies when asserting and justifying the code changes. Many changes to the legislative findings section of the MPLA involved stylistic and technical corrections.

The proposed substantive language of the original bill follows:

“Decisions of the Supreme Court of Appeals of West Virginia have narrowly interpreted the provisions of this article, resulting in uncertainty over its application and have expanded claims against health care facilities, health care providers and related entities. The decisions frustrate the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.”

By the time the bill passed, the above paragraph was modified to read:

“The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.”

**B. §55-7B-2—Definitions.**

(b)(2) Amends the definition of “collateral source” — now specifically excludes any agreed reductions, discounts or write-offs of a medical bill.

Cross reference: *W.Va. Code* §55-7B-9a. Reduction in compensatory damages for economic loss for payment from collateral sources for same injury.

(e) Amends the definition of “health care” to include

(1) actions, services or treatment provided pursuant to physician’s or health care facility’s plan of care, medical diagnosis or treatment;

(2) “service” to treatment performed or furnished, and extends health care activities to persons “acting under the supervision or direction of a health care provider or licensed professional”, specifically including:

- staffing,
- medical transport,
- custodial care or basic care,
- infection control,
- positioning,
- hydration,
- nutrition
- similar patient services; and,

(3) the process employed by health care providers and health care facilities for appointment, employment, contracting, credentialing, privileging and supervision of healthcare providers;

(f) Amends the definition of “health care facility” by:

→ deleting:

- “personal care home”, and

- “residential board and care home”;

→ adding:

- pharmacy,
- end-stage renal disease facility,
- home health agency,
- child welfare agency,
- group residential facility,
- health center,
- intellectual/developmental disability center,
- other ambulatory health care facility – in and licensed, regulated or certified by the State of W.Va., under state or federal law, and,
- any related entity (defined now at 55-7B-2(f)).

→modifying:

- “comprehensive community mental health/mental retardation center, in and licensed health center” to, “comprehensive community mental health center”.

(g) Amends “health care provider” by adding the following health care practitioners:

- physician assistant,
- advanced practice registered nurse,
- health care facility,
- occupational therapist,
- speech language pathologist and audiologist,
- psychologist,
- pharmacist,
- technician,
- certified nursing assistant (CNA),
- emergency medical service personnel,
- any person under direction of a licensed professional,
- any person acting pursuant to or in furtherance of a plan of care, medical diagnosis or treatment, or,
- an officer, employee or agent “of a health care provider” acting within their course and scope.

*See, Phillips v Larry’s Drive-in Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007). “The list of health care providers . . . does not include pharmacies, and in the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies. The *expressio unius maxim* is premised upon an assumption that certain omissions from a

statute by the legislature are intentional. If the legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the legislature intended the limited rule would not apply to any other situation.”

Any other health care providers not specifically listed in the statute are very likely to be excluded.

(I) Amends the definition of “medical professional liability” to include, “other claims contemporaneous to tort or breach of contract provided in the context of health care services.”

This modification appears to explicitly overrule current case law. See, Syl. Pt. 3, *Gray v Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005): “The West Virginia Medical Professional Liability Act, codified at W. Va. Code § 55-7B-1 *et seq.*, applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. ***It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.***” citing, Syl. Pt. 3, *Boggs v. Camden-Clark Meml. Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004).

“Other claims contemporaneous to tort or breach of contract provided in the context of health care services,” might include: institutional risk of infection — *Riggs v. West Virginia Univ. Hosps., Inc.*, 221 W. Va. 646, 666, 656 S.E.2d 91, 111 (2007); understaffing — *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73 (2014); defective sutures—*Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007). Negligent credentialing issues also come to mind, however, credentialing is included specifically in the expanded definition of “health care”. See, §55-7B-2(e)(3).

(n) “Related entity”- “any corporation, foundation, partnership, joint venture, professional limited liability company, limited liability company, trust, affiliate or other entity under common control or ownership, whether directly or indirectly, partially or completely, legally, beneficially or constructively, with a health care provider or health care facility; or which owns directly, indirectly, beneficially or constructively any part of a health care provider or health care facility.”

The term, “related entity”, is used in 55-7B-2(f)—definition of “health care facility”.

**D. §55-7B-7—Testimony of expert witness on standard of care.**

(a)(4) Adds the requirement that, “the expert witness’s opinion is grounded on scientifically valid peer-reviewed studies if available.”

This language is the result lengthy debate and legislative compromise. Originally the bill read: “the expert witness's opinion is grounded on a scientifically valid and properly applied methodology;”

Additionally, the original bill contained a new subsection (c): “An appellate court shall review de novo whether the circuit court applied the proper standards in qualification of an expert witness, in deciding whether to admit or exclude expert testimony and to ascertain whether the expert evidence was scientific, technical or otherwise specialized knowledge.” This provision was removed in the Senate due to concerns of constitutional overreach.

**E. §55-7B-7a—Admissibility and use of certain information. (NEW).**

(a) There is now a rebuttable presumption that following information may not be introduced as evidence unless it: (i) applies specifically to the injured person, or (ii) involves substantially similar conduct (iii) that occurred within one year of the incident:

- (1) state or federal survey, audit, review or report of a healthcare provider or facility;
- (2) disciplinary actions against a provider’s license, registration or certification;
- (3) accreditation report of a health care provider or healthcare facility;
- (4) assessment of a civil or criminal penalty;

(b) if health care provider or health care facility demonstrates compliance with minimum staffing requirements under state law, the provider or facility is entitled to a rebuttable presumption that staffing was appropriate; and,

(c) any information introduced under this section must also be admissible under the WVRE

NOTE: The original bill contained a new subsection which addressed attorney advertising: “(d) Information described in subsection (a) of this section may not be used by any person or entity in an advertisement unless the advertisement includes all of the following: (1) The date of the survey report, disciplinary action, accreditation report or civil or criminal penalty; (2) A statement of the frequency of inspections of the health

care facility or individual; (3) If a finding or deficiency cited in a report or survey has been substantially corrected or if the applicable plan of compliance or correction has been accepted, a statement that the finding or deficiency has been substantially corrected or the plan of correction or compliance was accepted and the date that the finding or deficiency was substantially corrected or the plan of correction or compliance was accepted (4) If no person was injured as a result of a finding or deficiency cited in a report or survey, a statement to this effect; and (5) A statement that the advertisement is neither authorized nor endorsed by any government agency.

Considerations for free speech were cited when the provision was removed.

**F. §55-7B-8—Limit on Liability for noneconomic loss.**

(a) noneconomic damages capped: may not exceed \$250,000 for each occurrence, regardless of number of plaintiffs, defendants, or distributees, except as noted in subsection (b);

(b) in case of (1) wrongful death, (2) permanent and substantial physical deformity, loss of limb or bodily organ system or (3) permanent capped at \$500,000;

(c) each year since 2004 damage limits have increased for inflation at the rate of the DOL CPI rate; NOW, increase cannot exceed 150% of \$250,000 (\$375,000) or 150% of \$500,000 (\$750,000). By current calculations COL increases are rapidly approaching these new statutory ceilings: (\$330,000 and \$642,000 respectively)

NOTE: Original bill provided for a 50% capped inflationary increase. The Senate Committee Substitute raised this percentage, which was adopted in the House and included in the final bill.

(d) noneconomic damages limits do not apply to any defendant which does not have medical professional liability insurance in the aggregate amount of at least \$1M.

**G. §55-7B-9—Several liability.**

(g) Healthcare provider cannot be held vicariously liable for acts of a nonemployee under theory of ostensible agency unless the alleged agent does not maintain professional liability insurance in the aggregate amount of \$1M for each occurrence.

**H. §55-7B-9a—Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury.**

Technical and stylistic changes.

**I. §55-7B-9c—Limit on liability for treatment of emergency conditions for which patient is admitted to a designated trauma center; exceptions; emergency rules.**

(a) Strikes “EMS” and substitutes “certified emergency service personnel”, “emergency medical services authority”, or an employee of licensed emergency medical services authority.

Total civil damages may not exceed \$500,000 for each occurrence, regardless of the number of plaintiffs, defendants or distributees; and, adds a new subsection:

(1) As of January 1, 2016 and thereafter, damages shall increase for inflation by an amount equal to the CPI published by the US DOL, not to exceed 150% of amounts noted in subsection(a)— (\$750,000).

NOTE: Original bill provided for a 50% capped inflationary increase.

**J. §55-7B-9d—Adjustment of verdict for past medical expenses. (NEW)**

A verdict for past medical expenses is limited to:

(1) total amount of medical expenses paid by or on behalf of the plaintiff, and

(2) total amount of medical expenses incurred but not paid for which the plaintiff or another is obligated to pay.

**K. §55-7B-10. Effective date; applicability of provisions.**

(b) The amendments to this article provided in Enrolled Committee Substitute for Senate Bill No. 6 during the regular session of the Legislature, 2015, apply to all causes of action alleging medical professional liability which are filed on or after July 1, 2015.

**L. §55-7B-11—Severability.**

Any invalid enactments in 2015 do not affect other provisions of the article.