

ACT 167

S.B. NO. 1059

A Bill for an Act Relating to Medical and Health Care Providers.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. Section 1, Act 219, Session Laws of Hawaii 1976, is amended to read:

**“Sec. 1. Legislative findings and purposes.** (a) The legislature finds that:

- (1) The national crisis in the area of medical malpractice affects Hawaii to the potential disadvantage of all recipients of health care;
  - (2) There is only one insurance carrier that is actively providing medical malpractice coverage in the State;
  - (3) Premium rates for medical malpractice insurance have increased substantially and are expected to continue to increase under existing condition, both for physicians and surgeons and for hospitals; and
  - (4) Act 161, Session Laws of Hawaii 1975, was enacted as a temporary means to become effective in the event that no insurance carrier would provide medical malpractice insurance coverage in the State, and insurance provided under such joint underwriting plan would be subject to the cost pressures that have led to the existing increasingly high premium rates.
- (b) The purposes of this Act are to:
- (1) Stabilize the medical malpractice insurance situation by reintroducing some principles of predictability and spreading of risk;
  - (2) Decrease the costs of the legal system and improve the efficiency of its procedures to the end that awards are more rationally connected to actual damages; and
  - (3) Provide and improve the machinery for resolving patient grievances against health care providers by the addition of lay members to the board of medical examiners, the hiring of additional staff for the board, increasing the reporting requirements to the board, and changing the method of appointments to the board."

SECTION 2. Sec. -1 of Part I, Section 2, Act 219, Session Laws of Hawaii 1976, is amended by amending the definition of "health care provider" to read:

"(1) "Health care provider" means a physician or surgeon licensed under chapter 453, a health care facility as defined in section 323D-41(4), and the employees of any of them. Health care provider shall not mean any nursing institution or nursing service conducted by and for those who rely upon treatment by spiritual means through prayer alone, or employees of such institution or service."

SECTION 3. Sec. -2 of Part I, Section 2, Act 219, Session Laws of Hawaii 1976, is amended to read:

"Sec. -2 **Attorney's contingent fees arrangements.** (a) In any action for medical tort in which the plaintiff's attorney and the plaintiff agree that the attorney is to be paid a fee only if the plaintiff recovers damages, payment to the attorney shall be limited to a reasonable amount as approved by a court of competent jurisdiction.

(b) If the plaintiff recovers damages as a result of settlement or arbitration award without the initiation of court action, the plaintiff's attorney shall submit the amount of his fee to the circuit court which would have had jurisdiction of the action or the circuit court of the circuit in which the plaintiff resides for approval.

(c) If the plaintiff recovers damages as a result of settlement, arbitration award or judgment after court action has been initiated, the plaintiff's attorney

shall submit the amount of his fee to the court having jurisdiction of the action.

(d) Upon receiving a submission for approval of attorney's fees, the court shall approve the fee or so much thereof as it finds to be reasonable."

SECTION 4. Subsection (b) of Sec. -11 of Part II, Section 2, Act 219, Session Laws of Hawaii 1976, is amended to read:

"(b) Each medical claim conciliation panel shall consist of one chairperson selected from among persons who are familiar with and experienced in the personal injury claims settlement process, one active trial attorney licensed to practice in the courts of the State, and one physician or surgeon licensed to practice under the law of the State. The chairperson shall be appointed by the chief justice of the supreme court of Hawaii. The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys submitted annually by the supreme court. The physician or surgeon shall be appointed by the chairperson from a list of not less than thirty-five physicians or surgeons submitted annually by the board of medical examiners. Each member of the panel shall serve on the panel for a period of one month to hear and decide all claims brought before the panel within the month; provided that a number of the panel who has demonstrated a high degree of effectiveness in finding facts or in conciliating claims brought before the panel may be reappointed to the panel for additional months.

The chairperson shall preside at the meetings of the panel. The chairperson and all panel members shall serve voluntarily and without compensation, but shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties on the panel. Such costs shall be paid by the department of regulatory agencies.

The office and meeting space, secretarial and clerical assistance, office equipment and office supplies for the panel shall be furnished by the department of regulatory agencies.

The board of medical examiners shall prepare a list of physicians and surgeons along with their respective specialties who shall then be considered consultants to the panel in their respective fields. Panel members may consult with other legal, medical and insurance specialists. Any consultant called by the panel to appear before the panel shall be paid an allowance for travel and living expenses which may be incurred as a result of such person's appearance before the panel. Such costs will be paid by the department of regulatory agencies."

SECTION 5. Sec. -31 of Part III, Section 2, Act 219, Session Laws of Hawaii 1976, is amended to read:

"Sec. -31 Establishment of patients' compensation fund. (a) Effective September 1, 1976, there is established in the department of regulatory agencies, separate and apart from all other moneys or funds, a patients' compensation fund, hereinafter referred to as the "fund", which shall be collected, received, and administered by the insurance commissioner and held by him in trust exclusively for the purposes of this part. The fund may sue and be sued under its name. All amounts received and earned shall be paid into the fund and all claims payable shall be paid from the fund. The fund shall offer medical malpractice insurance

in excess of the basic insurance coverage necessary to participate in the fund as provided in section -36 in such amounts as shall be set by rule adopted by the insurance commissioner pursuant to chapter 91; provided that the liability of the fund for any policy shall not exceed \$1,000,000 per claim and \$5,000,000 per policy period aggregate.

(b) The fund shall consist of:

(1) An annual surcharge levied on every insured health care provider in Hawaii who participates in the fund. The surcharge shall be determined by the insurance commissioner based upon actuarial principles and shall be levied in terms of stated percentage of the annual premium cost to each health care provider for the basic insurance coverage necessary to participate in the fund as provided in section -36. The surcharge shall be collected, on the same basis as premiums, by each insurer or surplus lines agent and paid over to the insurance commissioner;

(2) A reasonable annual amount, levied on every self-insured health care provider in Hawaii who participates in the fund. The amount shall be determined by the insurance commissioner and shall be comparable to that paid by an insured health care provider of the same risk category. The amount shall be paid by the self insured health care provider to the insurance commissioner;

(3) Any loan from the state general funds as provided by section -37; and

(4) Interest earned on any money in the fund.

(c) If on January 31 of any year, the amount of money in the fund exceeds the sum of \$5,000,000 after payment of all claims and expenses and accumulation of appropriate, unencumbered loss reserves in an amount determined by the insurance commissioner, the insurance commissioner shall reduce or waive the surcharges provided for in this section in order to maintain the fund at an approximate level of \$5,000,000."

SECTION 6. Subsection (a) of Sec. -32 of Part III, Section 2, Act 219, Session Laws of Hawaii 1976, is amended to read:

"(a) Subject to the limits of liability of the insurance coverage purchased from the fund by a health care provider, the insurance commissioner shall pay an amount from the fund to a claimant for damages on account of a medical tort when and to the extent a final judgment, a binding arbitration award or a settlement of the claim arising as a result of the medical tort or alleged medical tort is in excess of the basic insurance coverage necessary to participate in the fund or is within the provisions of section - , and the judgment, award or settlement is against a health care provider who was a participant in the fund at the time the medical tort or alleged medical tort occurred."

SECTION 7. Sec. -33 of Part III, Section 2, Act 219, Session Laws of Hawaii 1976, is amended to read:

"Sec. -33 Insurance commissioner approval of payment from the fund. The insurance commissioner shall approve payment of a claim from the fund upon receipt of:

- (1) A certified copy of a final judgment in excess of the basic insurance coverage for a claimant against a participating health care provider; or
- (2) A certified copy of a binding arbitration award in excess of the basic insurance coverage for a claimant against a participating health care provider; or
- (3) A certified copy of a settlement in excess of the basic insurance coverage for a claimant against a participating health care provider; or
- (4) A certified copy of a judgment, binding arbitration award or settlement for a claimant against a health care provider and satisfactory evidence that the claim for which payment is to be made falls within the provisions of section - "

SECTION 8. Subsection (e) of Sec. -35 of Part III, Section 2 of Act 219, Session Laws of Hawaii 1976, is amended to read:

"(e) If the plaintiff in a medical tort claim offers in writing to settle at a sum within the limits of liability of the basic insurance coverage necessary to participate in the fund, which offer is not accepted by the insurer of the participating health care provider or the participating self insured health care provider, and the claim subsequently results in a judgment or arbitration award that exceeds the limits of liability of the basic insurance coverage; and the offer to settle was rejected in bad faith, the fund shall have a cause of action against the insurer or self insured health care provider for the amount paid by the fund as a result of the bad faith failure to settle. The insurance commissioner, on behalf of the fund, may bring an action to recover on the cause of action and if the judgment is for the fund, it shall also recover reasonable attorneys fees and costs of suit."

SECTION 9. Sec. -36 of Part III, Section 2, Act 219, Session Laws of Hawaii 1976, is amended to read:

"Sec. -36 **Participation in fund; basic insurance coverage.** No health care provider shall be permitted to participate in the patients' compensation fund unless the health care provider gives evidence to the insurance commissioner of medical malpractice insurance coverage in the following amounts:

- (1) For individual physicians or surgeons, \$100,000 per claim and \$300,000 per policy period aggregate;
- (2) For hospitals and other health care providers, \$100,000 per claim and \$1,000,000 per policy period aggregate;

provided that in lieu of the insurance provided for above, a health care provider may participate in the fund upon presenting evidence to the insurance commissioner of a surety bond, proof of qualifications as a self-insurer, or other securities affording coverage for medical torts substantially equivalent to that afforded under a medical malpractice insurance in the amounts provided for above, as applicable, as approved by the insurance commissioner under rules adopted by the insurance commissioner."

SECTION 10. Section 2 of Act 219, Session Laws of Hawaii 1976, is amended by adding a new section to be appropriately designated and to read:

"Sec. - Claims after six years; payment by patients' compensation

**fund.** (a) Effective September 1, 1977, subject to the limits of liability of the insurance coverage purchased from the fund by a health care provider, the fund shall pay the entire amount of damages arising as a result of a medical tort for which a health care provider becomes legally liable if the claim for the medical tort is filed with the medical claim conciliation panels established in section -11 more than six years after the occurrence of the medical tort or alleged medical tort and the health care provider was a participant in the fund at the time of occurrence.

(b) The liability of the fund under this section shall arise only for medical torts or alleged medical torts which occur after September 1, 1977 and if the health care provider against whom the claim is made or his insurer give timely notice to the insurance commissioner of the filing of a claim which may fall under the provisions of this section."

SECTION 11. Section 323D-12, Hawaii Revised Statutes, is amended to read:

**"Sec. 323D-12 Functions; state agency.** The state agency shall:

- (1) Conduct the health planning activities of the State and implement those parts of the state health plan and plans of the health systems agencies within the State which relate to state government.
- (2) Prepare, review, and annually revise the preliminary state health plan pursuant to Public Law 93-641, section 1523(a)(2).
- (3) Assist the statewide council in reviewing the state medical facilities plan pursuant to section 323D-31.
- (4) Administer the state certificate of need program pursuant to part IV of this chapter and serve as designated planning agency under Title XI, Sec. 1122 of the Social Security Act, as amended.
- (5) Determine the need for new institutional health services proposed by health systems agencies.
- (6) Review on a periodic basis all institutional health services offered in the State respecting the appropriateness of such activities.
- (7) Do all things necessary as required by federal and state laws."

SECTION 12. Section 453-2, Hawaii Revised Statutes, is amended to read:

**"Sec. 453-2 License required; exceptions.** Except as otherwise provided by law, no person shall practice medicine or surgery in the State either gratuitously or for pay, or shall offer to so practice, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practice, or shall append the letters "DR." OR "M.D." to his name, with the intent thereby to imply that he† is a practitioner of medicine or surgery, without having a valid unrevoked license or a limited and temporary license, obtained from the board of medical examiners, in form and manner substantially as hereinafter set forth.

Nothing herein shall (1) apply to so-called Christian Scientists so long as they merely practice the religious tenets of their church without pretending a

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†"He" added.

knowledge of medicine or surgery; (2) prohibit service in the case of emergency or the domestic administration of family remedies; (3) apply to any commissioned medical officer in the United States army, navy, marine corps, or public health service, engaged in the discharge of his official duty, nor to any practitioner of medicine and surgery from another state when in actual consultation with a licensed practitioner of this State if the practitioner from another state, at the time of such consultation, is licensed to practice in the state in which he resides; provided, that the practitioner from another state shall not open an office, or appoint a place to meet patients, or receive calls within the limits of the State; and provided further that the laws and regulations relating to contagious diseases are not violated; (4) prohibit services rendered by any physician-support personnel or any physician's assistant when such services are rendered under the direction and control of a physician licensed in this State, except for those specific functions and duties delegated by law to those persons licensed as optometrists under chapter 459. Such direction and control shall not be construed in every case to require the personal presence of the supervising and controlling physician. Any physician who employs or directs such support personnel or physician's assistant shall retain full professional and personal responsibility for any act which constitutes the practice of medicine when performed by such personnel or physician's assistant. The board of medical examiners shall, in conformity with chapter 91, promulgate rules and regulations regarding standards of medical education and training governing physician-support personnel and physician's assistant, such standards to equal but not be limited by existing national educational and training standards; and standards governing information to be given to patients as required by section -3."

SECTION 13. Section 453-8, Hawaii Revised Statutes, is amended to read:

"**Sec. 453-8 Revocation, limitation or suspension of licenses.** Any license to practice medicine and surgery may be revoked, limited, or suspended by the board of medical examiners at any time in a proceeding before the board for any one or more of the following acts or conditions on the part of the holder of such license:

- (1) Procuring, or aiding or abetting in procuring, a criminal abortion;
- (2) Employing any person to solicit patients for him;
- (3) Obtaining a fee on the assurance that a manifestly incurable disease can be permanently cured;
- (4) Wilfully betraying a professional secret;
- (5) Making any untruthful and improbable statement in advertising one's medical or surgical practice or business;
- (6) False, fraudulent, or deceptive advertising;
- (7) Being habituated to the excessive use of drugs or alcohol; or being addicted to, dependent on, or an habitual user of a narcotic, barbituate, amphetamine, hallucinogen, or other drug having similar effects;
- (8) Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability, or mental instability;
- (9) Procuring a license through fraud, misrepresentation, or deceit or knowingly permitting an unlicensed person to perform activities requir-

- ing a license;
- (10) Professional misconduct or gross carelessness or manifest incapacity in the practice of medicine or surgery;
  - (11) Conduct or practice contrary to recognized standards of ethics of the medical profession;
  - (12) Consistently utilizing medical service or treatment which is inappropriate or unnecessary;
  - (13) Violation of the conditions or limitations upon which a limited or temporary license is issued.

If any such license is revoked, limited, or suspended by the board for any act or condition listed in this section, the holder of the license shall be in writing notified by the board of the revocation or suspension. Any license to practice medicine and surgery which has been revoked under this section may be restored by the board of medical examiners."

SECTION 14. Section 657-7.3, Hawaii Revised Statutes, is amended to read:

**"Sec. 657-7.3 Medical torts; limitation of actions; time.** No action for injury or death against a chiropractor, clinical laboratory technologist or technician, dentist, naturopath, nurse, nursing home administrator, dispensing optician, optometrist, osteopath, physician or surgeon, physical therapist, podiatrist, psychologist, or veterinarian duly licensed or registered under the laws of the State, or a licensed hospital as the employer of any such person, based upon such person's alleged, professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, but in any event not more than six years after the date of the alleged act or omission causing the injury or death. This six year time limitation shall be tolled for any period during which the person has failed to disclose any act, error, or omission upon which the action is based and which is known to him."

SECTION 15. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.\*

SECTION 16. This Act shall take effect upon its approval.

(Approved June 4, 1977.)

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\*Edited accordingly.