

JAN 25 2012

A BILL FOR AN ACT

RELATING TO MEDICAL TORTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that medical tort
2 insurance premiums pose a significant challenge to the delivery
3 of health care services if left unchecked. Increased insurance
4 costs are passed on to patients in the form of higher charges
5 for health care services and facilities. Furthermore, the
6 inability to obtain, and the high cost of obtaining, liability
7 insurance may discourage health care providers from offering
8 services and restrict the overall availability of medical and
9 hospital services.

10 One way of controlling medical tort insurance premiums is
11 by creating a secondary source for the payment of a portion of
12 the tort claim. In conjunction with requiring health care
13 providers to maintain a minimum level of liability insurance
14 coverage, this approach would help limit insurer costs for each
15 claim paid. In addition, claimants would have another means of
16 obtaining full compensation for their injuries.

17 The purpose of this Act is to promote affordable liability
18 insurance coverage for health care providers, ensure that



1 injured patients and their families receive reasonable monetary
2 compensation, and reduce overall health care costs, by
3 establishing a fund to pay the portion of a medical tort claim
4 that exceeds the liability limit of a health care provider's
5 insurance coverage. This Act also requires participating health
6 care providers to have a minimum level of insurance coverage,
7 assesses fees for deposit into the fund, and creates a peer
8 review council to evaluate payments made from the fund and to
9 recommend corresponding adjustments to fund fees or insurance
10 premiums assessed against the health care provider.

11 SECTION 2. The Hawaii Revised Statutes is amended by
12 adding a new chapter to title 24 to be appropriately designated
13 and to read as follows:

14 "CHAPTER

15 INJURED PATIENTS AND FAMILIES COMPENSATION FUND

16 PART I. GENERAL PROVISIONS

17 § -1 **Definitions.** As used in this chapter, unless the
18 context clearly requires otherwise:

19 "Commissioner" means the insurance commissioner of the
20 State.



1 "Council" means the injured patients and families
2 compensation fund peer review council established by this
3 chapter.

4 "Fund" means the injured patients and families compensation
5 fund established by this chapter.

6 "Health care provider" has the same meaning as in section
7 671-1.

8 "Liability limit" means insurance coverage of at least
9 \$1,000,000 for each occurrence and at least \$3,000,000 for all
10 occurrences in any one policy year, for the payment of medical
11 tort claims.

12 "Medical tort" has the same meaning as in section 671-1.

13 § -2 **Injured patients and families compensation fund;**
14 **established.** There is established the injured patients and
15 families compensation fund, which shall be expended to pay the
16 portion of a medical tort claim that is in excess of the
17 liability limit for which the health care provider is insured.
18 The fund shall provide occurrence coverage for claims against
19 health care providers or employees of the health care providers,
20 and for reasonable and necessary expenses incurred in the
21 payment of claims and the administrative expenses of the fund.
22 The coverage provided by the fund shall begin on July 1, 2013.



1 The fund shall not be liable for damages for injury or
2 death caused by an intentional crime committed by a health care
3 provider or an employee of a health care provider, whether or
4 not the criminal conduct is the basis for a medical tort claim.
5 For the purposes of this section, "crime" means conduct
6 prohibited by law and punishable by fine or imprisonment or
7 both, and does not include conduct punishable only by a
8 forfeiture.

9 § -3 **Purpose and integrity of fund.** The purpose of the
10 fund shall be to curb the rising costs of health care by
11 financing part of the liability incurred by health care
12 providers as a result of medical tort claims and to ensure that
13 proper claims are satisfied. The fund, including any net worth
14 of the fund, shall be held in irrevocable trust for the sole
15 benefit of health care providers participating in the fund and
16 proper claimants. Moneys in the fund shall not be used for any
17 other purpose.

18 § -4 **Peer review activities; fund coverage.** A health
19 care provider who is found to be liable in a medical tort claim
20 relating to peer review activities conducted under chapter 671D
21 shall be liable for not more than the liability limit for which
22 the health care provider is insured, and the fund shall pay the



1 excess amount, unless the health care provider is found not to
2 have acted in good faith during those activities and the failure
3 to act in good faith is found by the trier of fact, by clear and
4 convincing evidence, to be both malicious and intentional.

5 § -5 **Board of governors.** (a) There is established
6 within the insurance division a board of governors for the
7 purpose of administering the fund. The board shall be composed
8 of the commissioner and the following members to be nominated
9 and, by and with the advice and consent of the senate, appointed
10 by the governor in accordance with section 26-34:

- 11 (1) Three representatives from the insurance industry;
- 12 (2) A representative from the Hawaii State Bar
13 Association;
- 14 (3) Two representatives from the Hawaii Medical
15 Association;
- 16 (4) Two representatives from the Healthcare Association of
17 Hawaii; and
- 18 (5) Four representatives from the public, at least two of
19 whom are not attorneys or physicians and are not
20 professionally affiliated with any hospital or
21 insurance company.



1 (b) Board members shall serve without compensation, but
2 shall be reimbursed for actual expenses, including travel
3 expenses, necessary for the performance of their duties.

4 (c) The board shall elect its chairperson and vice
5 chairperson annually. The board shall meet at its discretion
6 but not less than quarterly.

7 § -6 **Fund administration and operation.** Management of
8 the fund shall be vested with the board of governors. The
9 commissioner shall either provide staff services necessary for
10 the operation of the fund or, with the approval of the board of
11 governors, contract for all or a portion of the services. The
12 commissioner shall adopt rules pursuant to chapter 91 for the
13 purpose of effectuating this chapter. At least annually, the
14 contractor shall report to the commissioner and to the board of
15 governors regarding all expenses incurred and subcontracting
16 arrangements. If the board of governors approves, the
17 contractor may hire legal counsel as needed to provide staff
18 services. The cost of contracting for staff services shall be
19 paid from the fund.

20 § -7 **Health care provider fees.** (a) Each health care
21 provider shall pay an annual fee for deposit into the fund,
22 which fee shall be based on the following considerations:



- 1 (1) The past and prospective loss and expense experience
- 2 in different types of practice;
- 3 (2) The past and prospective loss and expense experience
- 4 of the fund;
- 5 (3) The loss and expense experience of the individual
- 6 health care provider that resulted in the payment of
- 7 money, from the fund or other sources, for damages
- 8 arising out of the rendering of medical care by the
- 9 health care provider or an employee of the health care
- 10 provider, except that an adjustment to a health care
- 11 provider's fees may not be made under this paragraph
- 12 prior to the receipt of the recommendation of the
- 13 council under section -12(a) and the expiration of
- 14 the time period provided under section -14 for the
- 15 health care provider to comment or prior to the
- 16 expiration of the time period under section -12(a);
- 17 (4) Risk factors for persons who are semiretired or part-
- 18 time professionals; and
- 19 (5) For health care providers that are organizations, risk
- 20 factors and past and prospective loss and expense
- 21 experience attributable to employees of the health



1 care provider other than employees licensed as a
2 physician.

3 (b) The commissioner, after approval by the board of
4 governors, shall adopt rules establishing the fees set forth in
5 subsection (a). The fees may be paid annually or in semiannual
6 or quarterly installments. In addition to the prorated portion
7 of the annual fee, semiannual and quarterly installments shall
8 include an amount sufficient to cover interest not earned and
9 administrative costs incurred because the fees were not paid on
10 an annual basis. This subsection does not impose liability on
11 the board of governors for payment of any part of a fund
12 deficit.

13 (c) With respect to fees paid by physicians, the rule
14 shall provide for not more than four payment classifications,
15 based upon the amount of surgery performed and the risk of
16 diagnostic and therapeutic services provided or procedures
17 performed.

18 (d) The board of governors shall adopt rules providing for
19 an automatic increase in the fees under this section, if the
20 loss and expense experience of the fund and other sources with
21 respect to the health care provider or an employee of the health
22 care provider exceeds either a number of claims paid threshold



1 or a dollar volume of claims paid threshold, as established by
2 the rules of the board of governors. The rules shall specify
3 applicable amounts of increase corresponding to the number of
4 claims paid and the dollar volume of awards in excess of the
5 respective thresholds.

6 The automatic increase of fees under this subsection shall
7 not apply if the board of governors determines that the
8 performance of the council in making recommendations under
9 section -12(a) adequately addresses the consideration set
10 forth in subsection (a)(3).

11 (e) The fees assessed under this section for any fiscal
12 year shall not exceed the greatest of the following:

13 (1) The estimated total dollar amount of claims to be paid
14 during that fiscal year;

15 (2) The fees assessed for the fiscal year preceding that
16 fiscal year, adjusted by the commissioner to reflect
17 changes in the consumer price index for all urban
18 consumers, United States city average, for the medical
19 care group, as determined by the United States
20 Department of Labor; or



1 (3) Two hundred per cent of the total dollar amount
2 disbursed for claims during the calendar year
3 preceding that fiscal year.

4 (f) The fees under this section shall be collected by the
5 commissioner for deposit into the fund in a manner prescribed by
6 the commissioner.

7 (g) If the rules establishing fees under this section do
8 not take effect prior to June 2 of any fiscal year, the
9 commissioner may elect to collect fees as established for the
10 previous fiscal year. If the commissioner so elects and the
11 rules subsequently take effect, the balance for the fiscal year
12 shall be collected or refunded or the remaining semiannual or
13 quarterly installment payments shall be adjusted, except the
14 commissioner may elect not to collect, refund, or adjust for
15 minimal amounts.

16 § -8 **Fund accounting and audit.** (a) Moneys shall be
17 withdrawn from the fund by the commissioner only upon vouchers
18 approved and authorized by the board of governors.

19 (b) All books, records, and audits of the fund shall be
20 government records as defined by section 92F-3, with the
21 exception of confidential claims information, which shall be
22 exempt from disclosure pursuant to section 92F-13.



1 (c) Persons authorized to deposit, withdraw, issue
2 vouchers for, or otherwise disburse any fund moneys shall post a
3 blanket fidelity bond in an amount reasonably sufficient to
4 protect fund assets. The cost of the bond shall be paid from
5 the fund.

6 (d) Annually, after the close of a fiscal year, the board
7 of governors shall furnish a financial report to the
8 commissioner and to the legislature. The report shall be
9 prepared in accordance with accepted accounting procedures and
10 shall include the present value of all claims reserves,
11 including those for incurred but unreported claims as determined
12 by accepted actuarial principles, and any other information as
13 may be required by the commissioner. The board of governors
14 shall furnish a summary of the report to all fund participants.

15 (e) The board of governors shall submit a quarterly report
16 to the commissioner and the director of finance projecting the
17 future cash flow needs of the fund. The director of finance
18 shall invest moneys held in the fund in investments with
19 maturities and liquidity that are appropriate for the needs of
20 the fund as reported by the board of governors in its quarterly
21 reports under this subsection. All income derived from the
22 investments shall be credited to the fund.



1 (f) The board of governors shall submit a progress report
2 on its activities to the chief clerk of each house of the
3 legislature, for distribution to the appropriate standing
4 committees as determined by the president of the senate and the
5 speaker of the house of representatives, on or before January 1
6 of each year.

7 (g) The board of governors may cede reinsurance to an
8 insurer authorized to do business in this State or pursue other
9 loss funding management to preserve the solvency and integrity
10 of the fund, subject to the commissioner's approval. The
11 commissioner may prescribe controls over or other conditions on
12 the use of reinsurance or other loss-funding management
13 mechanisms.

14 § -9 **Claims procedures.** (a) Claims may be filed
15 against the fund as follows:

16 (1) Any person may file a claim for damages arising out of
17 the rendering of medical care or services or
18 participation in peer review activities under chapter
19 671D within this State against a health care provider
20 or an employee of a health care provider. A person
21 filing a claim may recover from the fund only if the
22 health care provider or the employee of the health



1 care provider has coverage under the fund, the fund is
2 named as a party in the action, and the action against
3 the fund is commenced within the same time limitation
4 within which the action against the health care
5 provider or employee of the health care provider must
6 be commenced; or

7 (2) Any person may file an action for damages arising out
8 of the rendering of medical care or services or
9 participation in medical peer review activities
10 outside this State against a health care provider or
11 an employee of a health care provider. A person
12 filing an action may recover from the fund only if the
13 health care provider or the employee of the health
14 care provider has coverage under the fund, the fund is
15 named as a party in the action, and the action against
16 the fund is commenced within the same time limitation
17 within which the action against the health care
18 provider or employee of the health care provider must
19 be commenced. If the rules of procedure of the
20 jurisdiction in which the action is brought do not
21 permit naming the fund as a party, the person filing
22 the action may recover from the fund only if the



1 health care provider or the employee of the health
2 care provider has coverage under the fund and the fund
3 is notified of the action within sixty days of service
4 of process on the health care provider or the employee
5 of the health care provider. The board of governors
6 may extend the time limit if it finds that enforcement
7 of the time limit would be prejudicial to the purposes
8 of the fund and would benefit neither insureds nor
9 claimants.

10 (b) If, after reviewing the facts upon which the claim or
11 action is based, it appears reasonably probable that damages
12 paid will exceed the liability limit for which the health care
13 provider is insured, the fund may appear and actively defend
14 itself when named as a party in an action against a health care
15 provider, or an employee of a health care provider, that has
16 coverage under the fund. In such action, the fund may retain
17 counsel and pay out of the fund attorney fees and expenses
18 including court costs incurred in defending the fund. The
19 attorney or law firm retained to defend the fund shall not be
20 retained or employed by the board of governors to perform legal
21 services for the board of governors other than those directly
22 connected with the fund. Any judgment affecting the fund may be



1 appealed as provided by law. The fund may not be required to
2 file any undertaking in any judicial action, proceeding or
3 appeal.

4 (c) It shall be the responsibility of the insurer or self-
5 insurer providing insurance or self-insurance for a health care
6 provider who is also covered by the fund to provide an adequate
7 defense of the fund on any claim filed that may potentially
8 affect the fund with respect to the insurance contract or self-
9 insurance contract. The insurer or self-insurer shall act in
10 good faith and in a fiduciary relationship with respect to any
11 claim affecting the fund. No settlement that could require
12 payment by the fund may be agreed to unless approved by the
13 board of governors.

14 (d) It shall be the responsibility of any health care
15 provider with a cash or surety bond in effect to provide an
16 adequate defense of the fund on any medical tort claim that may
17 potentially affect the fund. The health care provider shall act
18 in good faith and in a fiduciary relationship with respect to
19 any claim affecting the fund. No settlement that could require
20 payment by the fund may be agreed to unless approved by the
21 board of governors.



1 (e) A person who has recovered a final judgment or a
2 settlement approved by the board of governors against a health
3 care provider, or an employee of a health care provider, that
4 has coverage under the fund may file a claim with the board of
5 governors to recover that portion of the judgment or settlement
6 that is in excess of the liability limit for which the health
7 care provider is insured. If the fund incurs liability for
8 future payments exceeding \$1,000,000 to any person under a
9 single claim as the result of a settlement or judgment that is
10 entered into or rendered for an act or omission that occurred on
11 or after the effective date of this chapter, the fund shall pay,
12 after deducting the reasonable costs of collection attributable
13 to the remaining liability, including attorney's fees reduced to
14 present value, the full medical expenses each year, plus an
15 amount not to exceed \$500,000 per year that will pay the
16 remaining liability over the person's anticipated lifetime, or
17 until the liability is paid in full. If the remaining liability
18 is not paid before the person dies, the fund may pay the
19 remaining liability in a lump sum. Payments shall be made from
20 moneys collected and paid into the fund under section -7 and
21 from interest earned thereon. For claims subject to a periodic
22 payment made under this paragraph, payments shall be made until



1 the claim has been paid in full. Periodic payments made under
2 this section include direct or indirect payment or commitment of
3 moneys to or on behalf of any person under a single claim by any
4 funding mechanism. No interest may be paid by the fund on the
5 unpaid portion of any claim filed under this section.

6 (f) Claims filed against the fund shall be paid in the
7 order received within ninety days after filing unless appealed
8 by the fund.

9 § -10 **Actions against insurers, self-insurers, or**
10 **providers.** The board of governors may bring an action against
11 an insurer, self-insurer, or health care provider for failure to
12 act in good faith or breach of fiduciary responsibility under
13 section -9(c) or (d).

14 **PART II. INJURED PATIENTS AND FAMILIES COMPENSATION FUND**
15 **PEER REVIEW COUNCIL**

16 § -11 **Council established.** (a) There is established
17 the injured patients and families compensation fund peer review
18 council whose members shall be appointed by the board of
19 governors. The board of governors shall designate the
20 chairperson, vice chairperson, and secretary of the council and
21 the terms to be served by council members. The council shall
22 consist of five persons, not more than three of whom shall be



1 physicians who are actively engaged in the practice of medicine
2 in this State. The chairperson shall be a physician and shall
3 serve as an ex officio nonvoting member of the Hawaii medical
4 board.

5 (b) The council shall meet at the call of the chairperson
6 of the board of governors or the chairperson of the council.
7 The council shall meet at the location determined by the person
8 calling the meeting.

9 (c) The council shall submit to the chairperson of the
10 board of governors, upon request of the chairperson but not more
11 often than annually, a report on the operation of the council.

12 § -12 Council duties. (a) The council shall review,
13 within one year of the date of the first payment on the claim,
14 each claim that is paid by the fund, by a private health care
15 liability insurer, or by a self-insurer for damages arising out
16 of the rendering of medical care by a health care provider or an
17 employee of the health care provider, and shall make
18 recommendations to all of the following:

19 (1) The commissioner and the board of governors regarding
20 any adjustments to be made under section -7(a)(3)
21 to fund fees assessed against the health care
22 provider, based on the paid claim; and



1 (2) A private health care liability insurer regarding
2 adjustments to premiums assessed against a physician
3 covered by private insurance, based on the paid claim,
4 if requested by the private insurer.

5 (b) In developing recommendations under subsection (a),
6 the council may consult with any person and shall consult with
7 the following:

8 (1) If a claim was paid for damages arising out of the
9 rendering of care by a physician, with at least one
10 physician who practices in the area of medical
11 specialty as the physician who rendered the care and
12 with at least one physician who practices in the area
13 of medical specialty as the medical procedure
14 involved, if the specialty area of the procedure is
15 different from the specialty area of the physician who
16 rendered the care; and

17 (2) If a claim was paid for damages arising out of the
18 rendering of care by a nurse anesthetist, with at
19 least one nurse anesthetist.

20 § -13 **Council fees.** The fund and all private health
21 care liability insurers shall be assessed, as appropriate, fees
22 sufficient to cover the costs of the council, including costs of



1 administration, for reviewing claims pursuant to section -12.
2 The fees shall be established by the commissioner, with the
3 approval of the board of governors, and shall be collected by
4 the commissioner for deposit into the fund.

5 § -14 **Notice of recommendation.** The council shall
6 notify the affected health care provider in writing of its
7 recommendations to the commissioner, the board of governors or a
8 private insurer, as applicable. The notice shall inform the
9 health care provider that the health care provider may submit
10 written comments on the council's recommendations to the
11 commissioner, the board of governors or the private insurer
12 within a reasonable period of time specified in the notice.

13 § -15 **Patient records.** The council may obtain any
14 information relating to any claim it reviews under section
15 -12 that is in the possession of the commissioner or the
16 board of governors. The council shall keep patient health care
17 records confidential.

18 § -16 **Immunity.** Members of the council and persons
19 consulting with the council under section -12(b) shall be
20 immune from civil liability for acts or omissions while
21 performing their duties under this part.



1 § -17 Members' and consultants' expenses. Any person
 2 serving on the council and any person consulting with the
 3 council under section -12(b) shall be paid at a rate
 4 established by the commissioner."

5 SECTION 3. This Act shall take effect upon its approval.

6

INTRODUCED BY: Charles H. Bell

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S.B. NO. 2656

Report Title:

Medical Torts; Medical Malpractice Insurance; Claims in Excess of Liability Limits

Description:

Establishes the injured patients and families compensation fund to pay the portion of a medical tort claim that exceeds the liability limit of a health care provider's insurance coverage. Requires participating health care providers to have a minimum level of insurance coverage. Provides for assessment of fees and peer council review of claims paid.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

