

**"CHAPTER 435E
PHYSICIANS AND SURGEONS COOPERATIVE
INDEMNITY**

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"PART I. COOPERATIVE INDEMNITY

§435E-1 Definitions. Unless the context clearly requires otherwise:

"Commissioner" means the insurance commissioner of this State.

"Physician" or "surgeon" means any person licensed to practice medicine or osteopathic medicine under chapter 453; or any professional corporation, partnership, or other entity whose stockholders or partners are comprised solely of persons licensed under chapter 453. [L 1977, c 182, pt of §1; am L 1982, c 203, §15; am L 1996, c 202, §10; am L 2009, c 11, §56]

Cross References

Insurance commissioner, see §431:2-102.

" **§435E-2 Cooperative indemnity.** Physicians and surgeons may, any other law to the contrary notwithstanding, form cooperative corporations for the purposes of this chapter. The members of a cooperative corporation, which shall be limited to physicians and surgeons only, may enter into unincorporated interindemnity or reciprocal contracts among themselves; provided that such contracts indemnify solely in respect to medical malpractice claims against such members, and do not collect in advance of loss any moneys other than contributions by each member to a collective reserve trust fund or for necessary expenses of administration. In addition, each such interindemnity, reciprocal, or interinsurance contract shall meet the requirements of this chapter. [L 1977, c 182, pt of §1]

" **§435E-3 Rules.** The commissioner may adopt, amend, and repeal rules necessary to implement this chapter, subject to chapter 91. [L 1977, c 182, pt of §1; am L 1982, c 203, §16]

"PART II. TRUST AGREEMENTS

§435E-11 Trust agreement, required. (a) Each participating member shall enter into and, concurrently therewith, receive an executed copy of a trust agreement, which shall govern the collection and disposition of all funds of the interindemnity arrangement.

(b) The trust agreement shall, as a minimum, provide for meeting all requirements of this part. [L 1977, c 182, pt of §1]

" **§435E-12 Trust corpus, contributions.** There shall be an initial trust corpus of not less than \$3,000,000 which corpus shall be a trust fund to secure enforcement of the interindemnity arrangement. The average initial contribution to such corpus shall be not less than \$20,000 per member participating in the interindemnity arrangement. No such interindemnity arrangement shall become operative until the requisite minimum reserve trust fund has been established by such participating members. The commissioner shall have the power to investigate and verify the amounts specified by law. [L 1977, c 182, pt of §1; am L 1979, c 207, §1; am L 1982, c 203, §16]

" **§435E-13 Board of trustees.** The reserve trust fund created by such trust agreement shall be administered by a board of trustees of three or more members, all of whom shall be physicians and surgeons, participating members in the interindemnity arrangement, and elected biennially or more frequently by at least a majority of all members participating in the interindemnity arrangement. [L 1977, c 182, pt of §1]

" **§435E-14 Board of trustees, custodian.** The board of trustees shall be the custodian of all funds of the interindemnity arrangement, and all such funds shall be deposited in such bank or banks and savings and loan associations in Hawaii as the board designates, and each such account shall require two or more signatories for withdrawal of funds. The authorized signatories shall be appointed by the board and shall be limited to physicians and surgeons and participating members in the interindemnity arrangement. Each signatory on such accounts shall maintain, at all times while empowered to draw on such funds, for the benefit of the interindemnity arrangement, a bond against loss suffered through embezzlement, mysterious disappearance, holdup, or burglary or other loss issued by a bonding company licensed to do business in Hawaii in a penal sum of not less than \$100,000. [L 1977, c 182, pt of §1]

" **§435E-15 Funds, investment.** All funds held in trust which are in excess of current financial needs shall be invested and reinvested from time to time, under the direction of the board of trustees, in a manner consistent with the requirements of article 8 of chapter 412, or in certificates of deposits or time deposits issued by banks, savings banks, savings and loan associations and depository financial services loan companies in Hawaii duly insured by instrumentalities of the United States government. [L 1977, c 182, pt of §1; am L 1993, c 350, §21]

" **§435E-16 Payments.** The income earned on the corpus of the trust fund shall be the source for the payment of the claims, costs, judgments, settlements, and costs of administration contemplated by such interindemnity arrangement, and to the extent such income is insufficient for such purposes, the board of trustees shall have the power and authority to assess participating members for all amounts necessary to meet the obligations of such interindemnity arrangement in accordance with the terms thereof and any such assessment levied against a member shall be the personal obligation of such member. Any person who obtains a final judgment of recovery for medical malpractice against a member of such interindemnity arrangement shall have, in addition to any other remedy, the right to assert directly all rights to indemnification which the judgment debtor has under the interindemnity arrangement. Such final judgment shall be a lien on the reserve trust fund to secure payment of such judgment, limited to the extent of the judgment debtor's rights to indemnification. [L 1977, c 182, pt of §1]

" **§435E-17 Minimum indemnity level.** Each participating member shall be covered by such interindemnity arrangement for not less than \$100,000 for each claim and not less than \$300,000 annual aggregate of professional negligence, with the terms and conditions of such coverage to be specified in the trust agreement. [L 1977, c 182, pt of §1]

" **§435E-18 Withdrawal of corpus.** Withdrawal of all, or any portion of, the corpus of the reserve trust fund shall be upon the written authorization signed by at least two-thirds of the members of the board of trustees. [L 1977, c 182, pt of §1]

" **§435E-19 Annual reports; disclosure.** The board of trustees shall furnish the following to each member participating in such interindemnity arrangement, and shall file a copy with the commissioner:

- (1) Within one hundred twenty days after the end of each fiscal year a statement of the assets and liabilities of the interindemnity arrangement as of the end of such year, a statement of the revenue and expenditures of the interindemnity arrangement, and a statement of the changes in corpus of the reserve trust for such year, in each case accompanied by a certificate signed by a firm of independent certified public accountants selected by the board of trustees indicating that such firm has conducted an audit of such statements in

accordance with generally accepted auditing standards and indicating the results of such audit.

- (2) Within forty-five days after the end of each of the first three quarterly periods of each fiscal year a statement of the assets and liabilities of the interindemnity arrangement as of the end of such quarterly period, a statement of the revenue and expenditures of the interindemnity arrangement and a statement of the changes in corpus of the reserve trust for such period, in each case accompanied by a certificate signed by a majority of the members of the board of trustees to the effect that such statements were prepared from the official books and records of the interindemnity arrangement.

In addition to the statements required to be filed pursuant to this section, the board of trustees shall annually file with the commissioner an authorization for disclosure of all financial records pertaining to the interindemnity arrangement. For the purpose of this paragraph, the authorization for disclosure shall also include the financial records of any association, partnership, or corporation that has management or control of the funds or the operation of the interindemnity arrangement. [L 1977, c 182, pt of §1; am L 1982, c 203, §16]

" **§435E-20 Death of member.** In the event a participating member who is in full compliance with the trust agreement dies, the initial contribution made by the decedent shall be returned to the member's estate or designated beneficiary; the indemnity coverage shall continue for the benefit of the decedent's estate in respect of occurrences during the time the decedent was a participating member; and neither the person receiving the repayment of the initial contribution nor the decedent's estate shall be responsible for any assessments levied following the death of the member. [L 1977, c 182, pt of §1]

" **§435E-21 Retirement of member.** A participating member who is then in full compliance with the trust agreement and who has reached the age of sixty-five and who has retired completely from the practice of medicine may elect to retire from the interindemnity arrangement, in which case the member shall not be responsible for assessments levied following the date notice of retirement is given to the trust. Following retirement, the indemnity coverage shall continue for the benefit of the member in respect of occurrences prior to the time the member retired from the interindemnity arrangement. The retired member's initial contribution shall be repaid ten years from the date the notice of retirement is received by the trust, or such earlier

date as specified in the trust agreement. [L 1977, c 182, pt of §1]

" **§435E-22 Disability of member.** During any period in which a participating member, who is then in full compliance with the trust agreement, has, in the judgment of the board of trustees, become unable to perform any and every duty of his or her regular professional occupation, the indemnity coverage shall continue for the benefit of such member and such member shall not be responsible for assessments levied during such period. [L 1977, c 182, pt of §1]

" **§435E-23 Member failure to pay.** In the event a participating member fails to pay any assessment when the same is due, the board of trustees may terminate such person's membership status if such failure to pay is not cured within thirty days from the date the assessment was due. Upon termination the former participating member shall not be entitled to the return of all or any part of his or her initial contribution, and the indemnity coverage shall thereupon terminate as to all claims then pending against such person and in respect to all occurrences prior to the date of such termination of membership. However, in the event the interindemnity arrangement is then providing legal defense services to such person, the interindemnity arrangement shall continue to provide those services for a period of ten days following such termination. [L 1977, c 182, pt of §1]

" **§435E-24 Noncomplying member.** In the event a participating member fails to comply with any provision of the trust agreement (other than a failure to pay assessments when due), the board of trustees may terminate the person's membership status if such failure to comply is not cured within sixty days from the date the person is notified of the failure; provided that before such membership status may be terminated such person shall be given the right to call for a hearing before the board of trustees (to be held before the expiration of such sixty-day period), at which hearing such person shall be given the opportunity to demonstrate to the board of trustees that no failure to comply has occurred; or, if it has occurred, that it has been cured. Upon termination, the former participating member shall not be entitled to the return of all or any part of his or her initial contribution, and the indemnity coverage shall thereupon terminate as to all claims then pending against such person and in respect to all occurrences prior to the date of such termination of membership. However, in the event the interindemnity arrangement is then

providing legal defense services to such person, the interindemnity arrangement shall continue to provide those services for a period of ten days following such termination. [L 1977, c 182, pt of §1]

" **§435E-25 Voluntary termination of a member.** A participating member who is then in full compliance with the trust agreement may elect voluntarily to terminate his or her membership in the interindemnity arrangement. Upon voluntary termination, such person may further elect to cease being responsible for future assessments, or to continue to pay such assessments until such time as such person's initial contribution is repaid. In the event such person elects to cease being responsible for future assessments, the indemnity coverage shall thereupon terminate and such person shall either be responsible for his or her own exposure for acts committed while a participating member in the interindemnity arrangement, or he or she may request the interindemnity arrangement to purchase or provide, at the cost of such person, coverage for such exposure. The initial contribution of such person shall be repaid on the tenth anniversary of the date such contribution was made. In the event such person elects to continue to be responsible for assessments, the indemnity coverage shall continue in respect of occurrences prior to the date of the voluntary termination, and the initial contribution of such person shall be repaid at such time as the board of trustees is satisfied that (1) there are no claims pending against the person in respect of occurrences during the time the person was a participating member, and (2) the statute of limitations has run on all claims which might be asserted against the person in respect of occurrences during such time. In no event shall such repayment be made earlier than the tenth anniversary of the date such contribution was made. [L 1977, c 182, pt of §1]

" **§435E-26 Involuntary termination of a member.** The board of trustees shall have the right to terminate the membership of a participating member where the board of trustees determines that such termination is in the best interests of the interindemnity arrangement even though such person has complied with all of the provisions of the trust agreement. Such a termination may be effected only if at least two-thirds of the members of the board of trustees indicate in writing their decision so to terminate. If the board of trustees proposes to terminate a member, the member shall have the right to call a special meeting of all participating members for the purpose of voting on whether or not the member shall be so terminated. The member shall not be terminated if at least two-thirds of the

participating members present indicate that the member should not be terminated. In the event a member is terminated, the person may elect either:

- (1) To request the return of his or her initial contribution, in which case the same shall be repaid and the indemnity coverage shall thereupon terminate as to all claims then pending against such person and in respect to all occurrences prior to the date of such termination of membership. However, in the event the interindemnity arrangement is then providing legal defense services to such person, the interindemnity arrangement shall continue to provide those services for a period of thirty days to enable such person to assume his or her own defense; or
- (2) To release all rights to the return of the initial contribution, in which case the indemnity coverage shall continue for the benefit of the member in respect of occurrences during the time the person was a participating member and the person shall have no responsibility for assessments levied following such termination. [L 1977, c 182, pt of §1]

" **§435E-27 Rights of members.** Each member participating in an interindemnity arrangement shall have the right of access to, and the inspection of, the books and records of the interindemnity arrangement, subject to reasonable regulation by the board of trustees. [L 1977, c 182, pt of §1]

" **§435E-28 Meeting of members.** There shall be a meeting of all members participating in the interindemnity arrangement, at least annually, after not less than ten days' written notice has been given, at a location reasonably convenient to the participating members and on a date which is within a reasonable period of time following the distribution of the annual financial statements. [L 1977, c 182, pt of §1]

" **§435E-29 Termination.** The interindemnity arrangement, and the reserve trust fund incident thereto, shall be subject to termination at any time by the vote or written consent of not less than three-fourths of the participating members. [L 1977, c 182, pt of §1]

"PART III. BOARD OF TRUSTEES, MEMBERS

§435E-31 Annual report, certificate of transmittal. The board of trustees shall cause to be recorded with the commissioner within one hundred twenty days following the end of

each fiscal year, a written statement, executed by a majority of the board of trustees under penalty of perjury, reciting that each member participating in the interindemnity arrangement was mailed a copy of the annual financial statement and quarterly audit certificates by first-class mail, postage prepaid, required by section 435E-19. [L 1977, c 182, pt of §1; am L 1982, c 203, §16]

" **§435E-32 Prospective member.** Each physician or surgeon solicited to become a participating member in an interindemnity arrangement shall receive in writing, at least forty-eight hours prior to the execution by the prospective participating member of the trust agreement, and at least forty-eight hours prior to the payment by the prospective participating member of any consideration in connection with such interindemnity arrangements, the following information:

- (1) A copy of the articles of incorporation and bylaws of the cooperative corporation and a copy of the form of trust agreement to be executed by such prospective participating member.
- (2) A disclosure statement regarding the interindemnity arrangement. The disclosure statement shall contain on the first or cover page a legend in boldface type reading substantially as follows:

"THE INTERINDEMNITY ARRANGEMENT CONTEMPLATED HEREIN PROVIDES THAT PARTICIPATING MEMBERS HAVE UNLIMITED PERSONAL LIABILITY FOR ASSESSMENTS WHICH MAY BE LEVIED TO PAY FOR THE PROFESSIONAL NEGLIGENCE LIABILITIES COVERED BY THIS ARRANGEMENT. NO ASSURANCES CAN BE GIVEN REGARDING THE AMOUNT OR FREQUENCY OF ASSESSMENTS WHICH MAY BE SO LEVIED, OR THAT ALL PARTICIPATING MEMBERS WILL MAKE TIMELY PAYMENT OF THEIR ASSESSMENTS TO COVER THE PROFESSIONAL NEGLIGENCE LIABILITY OF A PARTICIPATING MEMBER."

- (3) The disclosure statement shall further contain all of the following information:
 - (A) The amount, nature, and terms and conditions of the professional negligence coverage available under the interindemnity arrangement.
 - (B) The amount of the initial contribution required of each participating member and a statement of the minimum number of members and aggregate contributions required for the interindemnity arrangement to commence.
 - (C) The names, addresses, and professional experience of each member of the board of trustees.

- (D) The requirements for admission as a participating member.
 - (E) A statement of the services to be provided under the interindemnity arrangement to each participating member.
 - (F) A statement regarding the obligation of each member to pay assessments and the consequences for failure to do so.
 - (G) A statement of the rights and obligations of a participating member in the event the member dies, retires, becomes disabled, or terminates participation for any reason, or the interindemnity arrangement terminates for any reason.
 - (H) A statement regarding the claims administration services to be provided, indicating whether these services will be delegated to others pursuant to a contractual arrangement.
 - (I) A statement of the voting rights of the members and the circumstances under which participation of the member may be terminated and under which the interindemnity arrangement may be terminated.
 - (J) If any statement of estimated or projected financial information for the interindemnity arrangement is issued, a statement of the estimation or projection and a summary of the data and assumptions upon which it is based.
- (4) A list with the names and addresses of all then current participating members of the interindemnity arrangement. [L 1977, c 182, pt of §1]

" **§435E-33 Compensation.** No person shall receive, or be entitled to receive any payment, bonus, salary, income, compensation, or other benefit whatsoever, either from the reserve trust fund or the income therefrom or from any other funds of the interindemnity arrangement or the members thereof based on the number of participating members, or the amount of the reserve trust fund or other funds of the interindemnity arrangement. [L 1977, c 182, pt of §1]

" **§435E-34 Peer review.** (a) A peer review committee or committees shall be established by the trust agreement to review the qualifications of any physician and surgeon to participate or continue to participate in the interindemnity arrangement, and to review the quality of medical services rendered by any participating member, as well as the validity of medical malpractice claims made against participating members.

(b) Any physician and surgeon, prior to becoming a participating member of the interindemnity arrangement, shall be reviewed and approved by a majority of the members of the peer review committee.

(c) No peer review committee, or any of its members, shall be liable for any action taken by the committee in reviewing the qualifications of a physician and surgeon to participate or continue to participate, or the quality of medical services rendered, or the validity of a medical malpractice claim, unless it is alleged and proved that such action was taken with actual malice. [L 1977, c 182, pt of §1]

Cross References

Chiropractic peer review, see §663-1.8.
Health care peer review, see chapter 671D.
Professional society peer review, see §663-1.7.

"PART IV. UNFAIR COMPETITION AND DECEPTIVE ACTS OR PRACTICES

§435E-41 Unfair methods of competition and deceptive acts or practices. The following are unfair methods of competition and deceptive acts or practices with respect to cooperative corporations or interindemnity arrangements under this chapter:

- (1) Making any false or misleading statement as to, or issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, or statement misrepresenting the terms of any interindemnity arrangement or the benefits or advantages promised thereby, or making any misleading representation or any misrepresentation as to the financial condition of an interindemnity arrangement, or making any misrepresentation to any participating member for the purpose of inducing or tending to induce the member to lapse, forfeit, or surrender his or her rights to indemnification under the interindemnity arrangement. It shall be a false or misleading statement to state or represent that a cooperative corporation or interindemnity arrangement is or constitutes "insurance" or an "insurance company" or an "insurance policy".
- (2) Making or disseminating or causing to be made or disseminated before the public in this State, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatsoever, any statement

containing any assertion, representation, or statement with respect to such cooperative corporations or interindemnity arrangements, or with respect to any person in the conduct of such cooperative corporations or interindemnity arrangements, which is untrue, deceptive, or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue, deceptive, or misleading. It shall be a false or misleading statement to state or represent that a cooperative corporation or interindemnity arrangement is or constitutes "insurance" or an "insurance company" or an "insurance policy".

- (3) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in or tending to result in an unreasonable restraint of, or monopoly in, such cooperative corporations or interindemnity arrangements.
- (4) Filing with any supervisory or other public official, or making, publishing, disseminating, circulating, or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, or delivered to any person, or placed before the public any false statement of financial conditions of such a cooperative corporation or interindemnity arrangement with intent to deceive.
- (5) Making any false entry in any book, report, or statement of such a cooperative corporation or interindemnity arrangement with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such a cooperative corporation or interindemnity arrangement is required by law to report or who has authority by law to examine into its conditions or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to a cooperative corporation or interindemnity arrangement in any book, report, or statement of a cooperative corporation or interindemnity arrangement.
- (6) Making or disseminating, or causing to be made or disseminated, before the public in this State, in any newspaper or other publication, or any other advertising device, or by public outcry or proclamation, or in any other manner or means whatever, whether directly or by implication, any

statement that such a cooperative corporation or interindemnity arrangement is insured against insolvency, or otherwise protected by law.

- (7) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices:
- (A) Misrepresenting to claimants pertinent facts or provisions relating to any coverage at issue.
 - (B) Failing to acknowledge and act promptly upon communications with respect to claims arising under such interindemnity arrangements.
 - (C) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under such interindemnity arrangement.
 - (D) Failing to affirm or deny coverage of claims within a reasonable time after proof of claim requirements have been completed and submitted by the participating member.
 - (E) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
 - (F) Compelling participating members to institute litigation to recover amounts due under an interindemnity arrangement by offering substantially less than the amounts ultimately recovered in actions brought by such participating members when such participating members have made claims under such interindemnity arrangements for amounts reasonably similar to the amounts ultimately recovered.
 - (G) Attempting to settle a claim by a participating member for less than the amount to which a reasonable person would have believed he or she was entitled by reference to written or printed advertising material accompanying or made part of an application for membership in such an interindemnity arrangement.
 - (H) Attempting to settle claims on the basis of an interindemnity arrangement which was altered without notice to the participating member.
 - (I) Failing, after payment of a claim, to inform participating members, upon request by them, of the coverage under which payment has been made.
 - (J) Making known to claimants a practice of such cooperative corporation or interindemnity

arrangement of appealing from arbitration awards in favor of claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

- (K) Delaying the investigation or payment of claims by requiring a claimant, or the claimant's physician or advanced practice registered nurse, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
- (L) Failing to settle claims promptly, where liability has become apparent, under one portion of an interindemnity arrangement in order to influence settlements under other portions of the interindemnity arrangement.
- (M) Failing to provide promptly a reasonable explanation of the basis relied on in the interindemnity arrangement, in relation to the facts of applicable law, or the denial of a claim or for the offer of a compromise settlement.
- (N) Directly advising a claimant not to obtain the services of an attorney.
- (O) Misleading a claimant as to the applicable statute of limitations. [L 1977, c 182, pt of §1; am L 2014, c 45, §13]

" **§435E-42 Enforcement.** Whenever it appears to the commissioner that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter, the commissioner may in the commissioner's discretion bring an appropriate action in any circuit court of the State to enjoin the acts or practices or to otherwise enforce this chapter. Upon a proper showing a permanent or preliminary injunction, restraining order, or writ of mandate shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court shall not require the commissioner to post a bond. [L 1977, c 182, pt of §1; am L 1982, c 203, §16; gen ch 1985]

" **§435E-43 Investigation, publication.** The commissioner may, in the commissioner's discretion, (1) make such public or private investigations within or outside of this State as the commissioner deems necessary to determine whether any person has violated or is about to violate this chapter, or to aid in the

enforcement of this chapter, and (2) publish information concerning the violation of this chapter. [L 1977, c 182, pt of §1; am L 1982, c 203, §16; gen ch 1985]

" **§435E-44 Hearing, subpoena.** For the purpose of any investigation or proceeding, the commissioner or any person designated by the commissioner may hold hearings subject to chapter 91. [L 1977, c 182, pt of §1; am L 1982, c 203, §16; gen ch 1985]

" **§435E-45 Refusal to comply.** In case of contumacy by, or refusal to obey a subpoena issued to, any person, the circuit court, upon application by the commissioner, may issue to the person an order requiring the person to appear before the commissioner or the officer designated by the commissioner, there to produce documentary evidence, if so ordered, or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court shall be punished by the court as a contempt. [L 1977, c 182, pt of §1; am L 1982, c 203, §16; gen ch 1985]

" **§435E-46 Attendance and testimony.** No person is excused from attending or testifying or from producing any document or record before the commissioner, or in obedience to the subpoena of the commissioner or any officer designated by the commissioner, or in any proceeding instituted by the commissioner, on the ground that the testimony or evidence (documentary or otherwise) required of the person may tend to incriminate the person or subject the person to a penalty or forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which the individual is compelled, after validly claiming the individual's privilege against self-incrimination, to testify or produce evidence (documentary or otherwise), except that the individual testifying is not exempt from prosecution and punishment for perjury or contempt committed in testifying. [L 1977, c 182, pt of §1; am L 1982, c 203, §16; gen ch 1985]