

## LEGISLATIVE BILL 998

Approved by the Governor April 15, 2004

Introduced by D. Pederson, 42; Brown, 6; Combs, 32; Engel, 17; Johnson, 37

AN ACT relating to the Nebraska Hospital-Medical Liability Act; to amend sections 44-2824, 44-2832, and 44-2855, Reissue Revised Statutes of Nebraska, section 44-2833, Revised Statutes Supplement, 2002, and sections 44-2825, 44-2827, 44-2829, and 44-2831, Revised Statutes Supplement, 2003; to change financial responsibility, liability, surcharge, claims, and settlement provisions; to provide for applicability; to harmonize provisions; to provide an operative date; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 44-2824, Reissue Revised Statutes of Nebraska, is amended to read:

44-2824. (1) To be qualified under the Nebraska Hospital-Medical Liability Act, a health care provider or such health care provider's employer, employee, partner, or limited liability company member shall:

(a) File with the director proof of financial responsibility, pursuant to section 44-2827 or 44-2827.01, in the amount of ~~two~~ five hundred thousand dollars for each occurrence. In the case of physicians or nurse anesthetists and their employers, employees, partners, or limited liability company members an aggregate liability amount of ~~six hundred thousand~~ one million dollars for all occurrences or claims made in any policy year for each named insured shall be provided. In the case of hospitals and their employees, an aggregate liability amount of ~~one~~ three million dollars for all occurrences or claims made in any policy year or risk-loss trust year shall be provided. Such policy may be written on either an occurrence or a claims-made basis. Any risk-loss trust shall be established and maintained only on an occurrence basis. Such qualification shall remain effective only as long as insurance coverage or risk-loss trust coverage as required remains effective; and

(b) Pay the surcharge and any special surcharge levied on all health care providers pursuant to sections 44-2829 to 44-2831.

(2) Subject to the requirements in subsections (1) and (4) of this section, the qualification of a health care provider shall be either on an occurrence or claims-made basis and shall be the same as the insurance coverage provided by the insured's policy.

(3) The director shall have authority to permit qualification of health care providers who have retired or ceased doing business if such health care providers have primary insurance coverage under subsection (1) of this section.

(4) A health care provider who is not qualified under the act at the time of the alleged occurrence giving rise to a claim shall not, for purposes of that claim, qualify under the act notwithstanding subsequent filing of proof of financial responsibility and payment of a required surcharge.

(5) Qualification of a health care provider under the Nebraska Hospital-Medical Liability Act shall continue only as long as the health care provider meets the requirements for qualification. A health care provider who has once qualified under the act and who fails to renew or continue his or her qualification in the manner provided by law and by the rules and regulations of the Department of Insurance shall cease to be qualified under the act.

Sec. 2. Section 44-2825, Revised Statutes Supplement, 2003, is amended to read:

44-2825. (1) The total amount recoverable under the Nebraska Hospital-Medical Liability Act from any and all health care providers and the Excess Liability Fund for any occurrence resulting in any injury or death of a patient may not exceed (a) five hundred thousand dollars for any occurrence on or before December 31, 1984, (b) one million dollars for any occurrence after December 31, 1984, and on or before December 31, 1992, (c) one million two hundred fifty thousand dollars for any occurrence after December 31, 1992, and on or before December 31, 2003, and (d) one million seven hundred fifty thousand dollars for any occurrence after December 31, 2003.

(2) A health care provider qualified under the act shall not be liable to any patient or his or her representative who is covered by the act for an amount in excess of ~~two~~ five hundred thousand dollars for all claims or causes of action arising from any occurrence during the period that the act is effective with reference to such patient.

(3) Subject to the overall limits from all sources as provided in subsection (1) of this section, any amount due from a judgment or settlement which is in excess of the total liability of all liable health care providers shall be paid from the Excess Liability Fund pursuant to sections 44-2831 to 44-2833.

Sec. 3. Section 44-2827, Revised Statutes Supplement, 2003, is amended to read:

44-2827. ~~(1)~~ Financial responsibility of a health care provider may be established only by filing with the director proof that the health care provider is insured pursuant to sections 44-2837 to 44-2839 or by a policy of professional liability insurance in a company authorized to do business in Nebraska. Such insurance shall be in the amount of ~~two~~ five hundred thousand dollars per occurrence and, in cases involving physicians or nurse anesthetists, but not with respect to hospitals, an aggregate liability of at least ~~six hundred thousand~~ one million dollars for all occurrences or claims made in any policy year shall be provided. In the case of hospitals and their employees, an aggregate liability amount of ~~one~~ three million dollars for all occurrences or claims made in any policy year shall be provided.

~~(2) The filing required in subsection (1) of this section shall be made by the insurer providing the professional liability insurance to the health care provider and shall include the following information:~~

- ~~(a) Name of the health care provider;~~
- ~~(b) Address of the health care provider;~~
- ~~(c) Whether the coverage is on an occurrence basis or a claims-made basis or whether the coverage is a reporting endorsement that covers for future reports of past occurrences;~~
- ~~(d) Coverage dates applying to the insurance;~~
- ~~(e) Requested effective dates of qualification;~~
- ~~(f) Premium paid by the health care provider for the underlying insurance coverage necessary to qualify;~~
- ~~(g) Surcharge paid by the health care provider pursuant to sections 44-2829 to 44-2831; and~~
- ~~(h) Any other information required by the director.~~

~~(3) The information reported to the director under subsection (2) of this section shall not be subject to public disclosure, except that in response to a request regarding a specific health care provider for a specific date or range of dates, the director shall disclose whether the health care provider is qualified under the Nebraska Hospital-Medical Liability Act.~~

~~(4) The director shall adopt and promulgate notice requirements for insurers to use in notifying policyholders of their eligibility and the cost for qualification under the act. The filing shall state the premium charged for the policy of insurance.~~

Sec. 4. Section 44-2829, Revised Statutes Supplement, 2003, is amended to read:

44-2829. (1) There is hereby created an Excess Liability Fund to be collected and received by the director for the exclusive use and purposes stated in the Nebraska Hospital-Medical Liability Act. Such fund and any income from it shall be held by the State Treasurer in trust, deposited in a separate account, and invested and reinvested pursuant to law.

(2) To create the fund, an annual surcharge shall be levied on all health care providers in Nebraska who have qualified under sections 44-2824 and 44-2827. The surcharge for each health care provider shall be determined by the director subject to the following limitations:

(a) The annual surcharge shall not exceed fifty percent of the annual premium paid by such health care provider for maintenance of current financial responsibility as provided in sections 44-2827 and 44-2837 to 44-2839; and

(b) The charge shall not exceed the amount necessary to maintain the fund in the amount stated in section 44-2830.

(3) Such surcharge and any primary insurance premiums due under sections 44-2837 to 44-2839 shall be due and payable within thirty days after the health care provider has qualified in Nebraska pursuant to section 44-2824 and shall be payable annually thereafter in such amounts as may be determined by the director insofar as the surcharge is concerned and by the risk manager insofar as primary liability coverage is concerned. ~~The insurer which provides professional liability insurance to the health care provider shall collect the surcharge from the provider and remit it to the Department of Insurance for credit to the fund within thirty days after receipt.~~

(4) The net premiums payable for primary insurance provided by the risk manager pursuant to sections 44-2837 to 44-2839 shall be deposited in the fund at least annually by the risk manager.

(5) If the annual premium surcharge or premiums for primary

insurance under sections 44-2837 to 44-2839 are not paid ~~to the insurer~~ within the time specified in subsection (3) of this section, the qualification of the health care provider under section 44-2824 shall be suspended until the annual premiums are paid. Such suspension shall not be effective as to patients claiming against the health care provider unless, at least thirty days before the effective date of the suspension, a written notice giving the date upon which the suspension becomes effective has been provided by the director to the health care provider.

(6) The Director of Insurance, as administrator of the fund, shall be responsible for legal defense of the fund. The director, using money from the fund as deemed necessary, appropriate, or desirable, may purchase the services of persons, firms, and corporations to aid in protecting the fund against claims. The Department of Justice shall not be responsible for legal defense of the fund. All expenses of collecting, protecting, and administering the fund shall be paid from the fund.

Sec. 5. Section 44-2831, Revised Statutes Supplement, 2003, is amended to read:

44-2831. (1) The director may, at any time, analyze the fund to determine if the amount in such fund is inadequate to pay in full all claims allowed or to be allowed during the calendar year. Upon such determination, the director shall have the power to levy a special surcharge on all health care providers who have qualified under the Nebraska Hospital-Medical Liability Act, which special surcharge shall be an amount sufficient to permit full payment of all claims allowed against the fund during a calendar year. The special surcharge shall be levied against all health care providers who have qualified under the Nebraska Hospital-Medical Liability Act on the date of the special surcharge or at any time during the preceding twelve months and shall be in an amount proportionate to the surcharge each health care provider has paid to the fund. Such special surcharge shall be due and payable within thirty days after the same is levied. ~~Such special surcharge shall be collected by the health care provider's current insurer if the health care provider is currently qualified or by the health care provider's most recent insurer that provided qualifying underlying coverage if the health care provider is no longer qualified.~~

(2) The director shall have authority to cause all or any part of the potential liability of the Excess Liability Fund to be reinsured, if such reinsurance is available, on a fair and reasonable basis. The cost of such reinsurance shall be paid by the fund and the fact of the reinsurance shall be taken into account in determining the surcharge as provided in sections 44-2829 and 44-2830, but in no event shall the surcharge exceed fifty percent of the annual premium paid by a health care provider for maintenance of current financial responsibility.

Sec. 6. (1) Any health care provider who has furnished proof of financial responsibility prior to the operative date of this act under sections 44-2824 and 44-2827 shall be qualified under section 44-2824 for the remainder of the policy year or risk-loss trust year.

(2) The increases in coverage requirements made by this legislative bill in sections 44-2824 and 44-2827 shall apply to policies issued or renewed and risk-loss trust years which commence after the operative date of this act.

(3) The changes made to sections 44-2825, 44-2832, and 44-2833 by this legislative bill apply commencing with policies issued or renewed and risk-loss trust years which commence after the operative date of this act.

Sec. 7. Section 44-2832, Reissue Revised Statutes of Nebraska, is amended to read:

44-2832. (1) The Director of Administrative Services shall issue a warrant drawn on the fund in the amount of each claim submitted by the director. All claims against the fund shall be made on a voucher or other appropriate request by the director after he or she has received:

(a) A certified copy of a final judgment in excess of ~~two~~ five hundred thousand dollars against a health care provider and in excess of the amount recoverable from all health care providers;

(b) A certified copy of a court-approved settlement in excess of ~~two~~ five hundred thousand dollars against a health care provider and in excess of the amount recoverable from all health care providers; or

(c) In case of claims based on primary insurance issued by the risk manager under sections 44-2837 to 44-2839, a certified copy of a final judgment or court-approved settlement requiring payment from the fund.

(2) The amount paid from the fund for excess liability when added to the payments by all health care providers may not exceed the maximum amount recoverable pursuant to subsection (1) of section 44-2825. The amount paid from the fund on account of a primary insurance policy issued by the risk manager to a health care provider under sections 44-2837 to 44-2839 may not

exceed ~~two~~ five hundred thousand dollars for any one occurrence covered by such policy under any circumstances.

Sec. 8. Section 44-2833, Revised Statutes Supplement, 2002, is amended to read:

44-2833. (1) If the insurer of a health care provider shall agree to settle its liability on a claim against its insured by payment of its policy limits of ~~two~~ five hundred thousand dollars and the claimant shall demand an amount in excess thereof for a complete and final release and if no other health care provider is involved, the procedures prescribed in this section shall be followed.

(2) A motion shall be filed by the claimant with the court in which the action is pending against the health care provider or, if no action is pending, the claimant shall file a complaint in one of the district courts of the State of Nebraska, seeking approval of an agreed settlement, if any, or demanding payment of damages from the Excess Liability Fund.

(3) A copy of such motion or complaint shall be served on the director, the health care provider, and the health care provider's insurer and shall contain sufficient information to inform the parties concerning the nature of the claim and the additional amount demanded. The health care provider and his or her insurer shall have a right to intervene and participate in the proceedings.

(4) The director, with the consent of the health care provider, may agree to a settlement with the claimant from the Excess Liability Fund. Either the director or the health care provider may file written objections to the payment of the amount demanded. The agreement or objections to the payment demanded shall be filed within twenty days after the motion or complaint is filed.

(5) After the motion or complaint, agreement, and objections, if any, have been filed, the judge shall set the matter for trial as soon as practicable. The court shall give notice of the trial to the claimant, the health care provider, and the director.

(6) At the trial, the director, the claimant, and the health care provider may introduce relevant evidence to enable the court to determine whether or not the settlement should be approved if it has been submitted on agreement without objections. If the director, the health care provider, and the claimant shall be unable to agree on the amount, if any, to be paid out of the Excess Liability Fund, the amount of claimant's damages, if any, in excess of the ~~two~~ five hundred thousand dollars already paid by the insurer of the health care provider shall be determined at trial.

(7) The court shall determine the amount for which the fund is liable and render a finding and judgment accordingly. In approving a settlement or determining the amount, if any, to be paid from the Excess Liability Fund in such a case, the court shall consider the liability of the health care provider as admitted and established by evidence.

(8) Any settlement approved by the court may not be appealed. Any judgment of the court fixing damages recoverable in any such contested proceeding shall be appealable pursuant to the rules governing appeals in any other civil case.

Sec. 9. Section 44-2855, Reissue Revised Statutes of Nebraska, is amended to read:

44-2855. Sections 44-2801 to 44-2855 and section 6 of this act shall be known and may be cited as the Nebraska Hospital-Medical Liability Act.

Sec. 10. This act becomes operative on January 1, 2005.

Sec. 11. Original sections 44-2824, 44-2832, and 44-2855, Reissue Revised Statutes of Nebraska, section 44-2833, Revised Statutes Supplement, 2002, and sections 44-2825, 44-2827, 44-2829, and 44-2831, Revised Statutes Supplement, 2003, are repealed.