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SENATE BILL NO. 211

Offered January 9, 2008

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A *BILL to amend and reenact §§ 38.2-5002, 38.2-5002.1, 38.2-5002.2, 38.2-5005, 38.2-5007, 38.2-5008, 38.2-5009, 38.2-5016, 38.2-5020, and 38.2-5021 of the Code of Virginia, relating to the Virginia Birth-Related Neurological Injury Compensation Act.*

Patron—Edwards

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 38.2-5002, 38.2-5002.1, 38.2-5002.2, 38.2-5005, 38.2-5007, 38.2-5008, 38.2-5009, 38.2-5016, 38.2-5020, and 38.2-5021 of the Code of Virginia are amended and reenacted as follows:

§ 38.2-5002. Virginia Birth-Related Neurological Injury Compensation Program; exclusive remedy; exception.

A. There is hereby established the Virginia Birth-Related Neurological Injury Compensation Program.

B. Except as provided in subsection D, the rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury to the infant, including any claims by the infant's personal representative, parents, dependents or next of kin that, by substantive law, are derivative of the medical malpractice claim with respect to the infant's injury, including but not limited to claims of emotional distress proximately related to the infant's injury. This subsection shall not be construed to exclude other rights and remedies available to the infant's mother arising out of or related to a physical injury, separate and distinct from an injury to the infant, that is suffered by the infant's mother during the course of the infant's delivery.

C. Notwithstanding anything to the contrary in this section, a civil action shall not be foreclosed against a physician or a hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury, provided that such suit is filed prior to and in lieu of payment of an award under this chapter. Such suit shall be filed before the award of the Commission becomes conclusive and binding as provided for in § 38.2-5011.

D. Notwithstanding anything to the contrary in this section, a civil action arising out of or related to a birth-related neurological injury under this chapter, brought by an infant, his personal representative, parents, dependents, or next of kin, shall not be foreclosed against a nonparticipating physician or hospital, provided that (i) no participating physician or hospital shall be made a party to any such action or related action, and (ii) ~~the commencement of any such action, regardless of its outcome, shall constitute an election of remedies; to the exclusion of any claim under this chapter; provided that if~~ claim is made, accepted and benefits are provided by the Fund established under this Virginia Birth-Related Neurological Injury Compensation Program, the Fund shall have the right, and be subrogated, to all of the common law rights, based on negligence or malpractice, which the said infant, his personal representative, parents, dependents or next of kin may have or may have had against the non-participating physician or hospital, ~~as the case may be related to the birth-related neurological injury.~~

§ 38.2-5002.1. Representation by Office of Attorney General; applicability of Public Procurement Act, Freedom of Information Act, and Administrative Process Act.

A. The Office of the Attorney General shall provide requested legal services to the Program as provided in this subsection. The Program shall compensate the Office of the Attorney General for its provision of such legal services based on a reasonable hourly rate as shall be agreed upon periodically by the ~~Board~~ *board of directors of the Program* and the Attorney General. If the Office of the Attorney General is unable to provide such legal services as the result of a conflict of interest or other disqualifying circumstances, ~~or the board of directors otherwise desires to retain outside counsel,~~ the ~~Board~~ *board* may employ such other counsel as it deems necessary.

B. The board of directors of the Program shall adopt and implement rules consistent with the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.) that specify policies and procedures regarding the contracting for services not related to the health care provided for claimants, which rules shall be based on competitive principles generally applicable to the procurement of services by state agencies.

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59 C. The Program and its board of directors shall be public bodies for purposes of the Virginia
60 Freedom of Information Act (§ 2.2-3700 et seq.).

61 D. The procedure for adoption of rules and regulations by the board of directors of the Program shall
62 be consistent with the provisions of Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act.

63 § 38.2-5002.2. Confidentiality of certain information; penalty.

64 A. The following records of the Program shall be confidential: (i) records subject to the
65 attorney-client privilege; (ii) medical and mental records of claimants obtained by the board of directors
66 in the course of administering the Program; (iii) records concerning deliberations of the board of
67 directors in connection with specific claims; (iv) reports of expert witnesses retained by the board of
68 directors that have not become part of the record before the Commission; and (v) all records required to
69 be kept confidential by federal law. Except as herein authorized, an officer, agent or employee of the
70 Program, and any person who has held any such position, shall not disclose, directly or indirectly, any
71 such confidential record or information.

72 B. *Nothing contained herein shall be construed to prohibit the Commission from ordering the*
73 *Program to produce relevant documents or evidence of any kind during the litigation of a disputed*
74 *claim between the Program and a claimant or a Program beneficiary.*

75 § 38.2-5005. Tolling of statute of limitations.

76 The statute of limitations with respect to any civil action that may be brought by or on behalf of an
77 injured infant, *his personal representative, parents, dependents or next of kin* allegedly arising out of or
78 related to a birth-related neurological injury shall be tolled by the filing of a claim in accordance with
79 this chapter, and the time such claim is pending shall not be computed as part of the period within
80 which such civil action may be brought.

81 § 38.2-5007. Interrogatories and depositions.

82 Any party to a proceeding under this chapter may, upon application to the Commission setting forth
83 the materiality of the information requested, serve interrogatories, *document production requests,*
84 *requests for admissions,* or cause the depositions of witnesses residing within or without the
85 Commonwealth to be taken, the costs to be taxed as expenses incurred in connection with the filing of a
86 claim, in accordance with § 38.2-5009. Such depositions shall be taken after notice and in the manner
87 prescribed by law, for depositions in actions at law, except that they shall be directed to the
88 Commission, the Commissioner or the Deputy Commissioner before whom the proceedings may be
89 pending. *No party shall be precluded from conducting depositions by oral examination.*

90 § 38.2-5008. Determination of claims; presumption; finding of Virginia Workers' Compensation
91 Commission binding on participants; medical advisory panel.

92 A. The Commission shall determine, on the basis of the evidence presented to it, the following
93 issues:

94 1. Whether the injury claimed is a birth-related neurological injury as defined in § 38.2-5001.

95 a. A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury
96 where it has been demonstrated, to the satisfaction of the Virginia Workers' Compensation Commission,
97 that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical
98 injury, and that the infant was thereby rendered permanently motorically disabled and (i)
99 developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated,
100 cognitively disabled.

101 If either party disagrees with such presumption, that party shall have the burden of proving that the
102 injuries alleged are not birth-related neurological injuries within the meaning of the chapter.

103 b. A rebuttable presumption of fetal distress, an element of a birth-related injury, shall arise if the
104 hospital fails to provide the fetal heart monitor tape to the claimant, as required by subsection E of
105 § 38.2-5004.

106 2. Whether obstetrical services were delivered by a participating physician at the birth.

107 3. Whether the birth occurred in a participating hospital.

108 4. How much compensation, if any, is awardable pursuant to § 38.2-5009.

109 5. If the Commission determines (i) that the injury alleged is not a birth-related neurological injury
110 as defined in § 38.2-5001, or (ii) that obstetrical services were not delivered by a participating physician
111 at the birth and that the birth did not occur in a participating hospital, it shall dismiss the petition and
112 cause a copy of its order of dismissal to be sent immediately to the parties by registered or certified
113 mail.

114 6. All parties are bound for all purposes including any suit at law against a participating physician or
115 participating hospital, by the finding of the Virginia Workers' Compensation Commission (or any appeal
116 therefrom) with respect to whether such injury is a birth-related neurological injury.

117 B. The deans of the Eastern Virginia Medical School, University of Virginia School of Medicine,
118 and Medical College of Virginia of Virginia Commonwealth University shall develop a plan whereby
119 each claim filed with the Commission is reviewed by a panel of three qualified and impartial physicians
120 *drawn from the fields of obstetrics, pediatrics, pediatric neurology, neonatology, physical medicine and*

rehabilitation, or any other specialty particularly appropriate to the facts of a particular case. Such plan shall provide that each of the three aforementioned medical schools shall maintain a review panel of physicians to review claims, with responsibility for reviewing claims rotating among each medical school's panel on a case-by-case basis. *The chair of the panel shall be determined by the school's dean. In no event shall the panel contain more than one panel member from the field of obstetrics. The Commission shall direct the Program to pay to the medical school that performed the assessment and prepared a report in conformity with this provision the sum of \$3,000 per claim reviewed.*

C. The panel created pursuant to subsection B shall prepare a report that provides a detailed statement of the opinion of the panel's members regarding whether the infant's injury does or does not satisfy each of the criteria of a birth-related neurological injury enumerated in such term's definition in § 38.2-5001. The report shall include the panel's basis for its determination of whether each such criteria was or was not satisfied. In addition, the report shall include such supporting documentation as the board of directors of the program may reasonably request. The panel shall file its report with the Commission 60 days from the date the petition was filed with the Commission. At the same time that the panel files its report with the Commission, the panel shall send copies thereof to the Program and all parties in the proceeding. At the request of the Commission, at least one member of the panel shall be available to testify at the hearing. The Commission shall consider, but shall not be bound by, the recommendation of the panel.

§ 38.2-5009. Commission awards for birth-related neurological injuries; notice of award.

A. Upon determining (i) that an infant has sustained a birth-related neurological injury and (ii) that obstetrical services were delivered by a participating physician at the birth or that the birth occurred in a participating hospital, the Commission shall make an award providing compensation for the following items relative to such injury:

1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, therapeutic, nursing, attendant, residential and custodial care and service, medications, supplies, special equipment or facilities, and related travel, such expenses to be paid as they are incurred. *Compensation may be awarded for nursing and attendant care that is provided by a relative or legal guardian of a Program beneficiary so long as that care is beyond the scope of child care duties and services normally and gratuitously provided by family members to uninjured children.* However, such expenses shall not include:

a. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the federal government except to the extent prohibited by federal law;

b. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity;

c. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or federal government except to the extent prohibited by federal law; and

d. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

Expenses of medical and hospital services under this subdivision shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person.

In order to provide coverage for expenses of medical and hospital services under this subdivision, the Commission, in all cases where a comparative analysis of the costs, including the effects on the infant's family's health insurance coverage, and benefits indicates that such action is more cost-effective than awarding payment of medical and hospital expenses, shall (i) require the claimant to purchase private health insurance providing coverage for such expenses, provided that the premium or other costs of such coverage shall be paid by the Fund; (ii) require the claimant to participate in the State Medicaid Program, the Children's Health Insurance Program or other state or federal health insurance program for which the infant is eligible; or (iii) if the Commission determines that it would be unreasonably burdensome to require the claimant to purchase private health insurance and that the infant is ineligible for a health insurance program described in clause (ii), to make an award providing compensation for the cost of private accident and sickness insurance for the infant.

2. Loss of earnings from the age of 18 are to be paid in regular installments beginning on the eighteenth birthday of the infant. An infant found to have sustained a birth-related neurological injury shall be conclusively presumed to have been able to earn income from work from the age of 18 through the age of 65, if he had not been injured, in the amount of 50 percent of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector. The provisions of § 65.2-531 shall apply to any benefits awarded under this subdivision.

3. Reasonable expenses incurred in connection with the filing of a claim under this chapter, including

reasonable attorneys' fees, which shall be subject to the approval and award of the Commission.

A copy of the award shall be sent immediately by registered or certified mail to the parties.

B. The amendments to this section enacted pursuant to Chapter 535 of the Acts of Assembly of 1990 shall be retroactively effective in all cases arising prior to July 1, 1990, that have been timely filed and are not yet final.

§ 38.2-5016. Board of directors; appointment; vacancies; term; list of Program claimants.

A. The Birth-Related Neurological Injury Compensation Program shall be governed by a board of ~~seven~~ *nine* directors.

B. Except as provided in subsection C, directors shall be appointed for a term of three years or until their successors are appointed and have qualified.

C. 1. The directors shall be appointed by the Governor as follows:

a. ~~Four~~ *Six* citizen representatives. ~~The term of the member appointed in 1999 shall commence when appointed and shall end on July 1, 2002. When the terms of the two members expire in 2001, one shall be appointed for a term of two years ending July 1, 2003, and one shall be appointed for a term of three years ending July 1, 2004. Two~~ *One* of the members shall have a minimum of five years of professional investment experience; ~~one. One of the members shall have a minimum of five years of professional experience in finance and be licensed as a certified public accountant or hold a similar professional designation. One of the members shall have professional experience working with the disabled community; and one. One of the members shall be the parent relative of a disabled child. Citizen members shall not have children or relatives who are claimants or who have been awarded benefits under the Act One of the members shall be an attorney with a minimum of three years of experience in the practice of law representing clients with physical personal injuries. One of the members shall be an at large representative consisting of a person deemed qualified to serve by knowledge, education, training, interest or life experiences;~~

b. One representative of participating physicians. The initial term of the member appointed in 1999 shall commence when appointed and shall be for one year;

c. One representative of participating hospitals. The initial term of the member appointed in 1999 shall commence when appointed and shall be for two years; and

d. One representative of liability insurers. The initial term of the member appointed in 1999 shall commence when appointed and shall be for three years.

2. The Governor may select the representative of the participating physicians from a list of at least three names to be recommended by the Virginia Society of Obstetrics and Gynecology; the representative of participating hospitals from a list of at least three names to be recommended by the Virginia Hospital & Healthcare Association; and the representative of liability insurers from a list of at least three names, one of which is recommended by the American Insurance Association, one by the Alliance of American Insurers, and one by the National Association of Independent Insurers. *The Governor may select the attorney member from a list of at least three names to be recommended by the Virginia Trial Lawyers Association. The Governor may select the parent of a disabled child member and the at large member from applications duly submitted. Nothing contained herein shall preclude qualified applicants for any position on the Board from submitting an application to the Governor to serve as a member of the Board.* In no case shall the Governor be bound to make any appointment from among the nominees of the respective associations.

D. The Governor shall promptly notify the appropriate association, which may make nominations, of any vacancy other than by expiration among the members of the board representing a particular interest and like nominations may be made for the filling of the vacancy.

E. The directors shall act by majority vote with ~~four~~ *five* directors constituting a quorum for the transaction of any business or the exercise of any power of the Program. The directors shall serve without salary, but each director shall be reimbursed for actual and necessary expenses incurred in the performance of his official duties as a director of the Program. The directors shall not be subject to any personal liability with respect to the administration of the Program or the payment of any award.

F. The board shall have the power to (i) administer the Program, (ii) administer the Birth-Related Neurological Injury Compensation Fund, which shall include the authority to purchase, hold, sell or transfer real or personal property and the authority to place any such property in trust for the benefit of claimants who have received awards pursuant to § 38.2-5009, (iii) appoint a service company or companies to administer the payment of claims on behalf of the Program, (iv) direct the investment and reinvestment of any surplus in the Fund over losses and expenses, provided any investment income generated thereby remains in the Fund, (v) reinsure the risks of the Fund in whole or in part, and (vi) obtain and maintain directors' and officers' liability insurance. The board shall discharge its duties with respect to the Fund solely in the interest of the recipients of awards pursuant to §§ 38.2-5009 and 38.2-5009.1 and shall invest the assets of the Fund with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Any decisions

regarding the investment of the assets of the Fund shall be based on the advice of one or more investment advisors retained by the board, provided that any investment advisor retained by the board shall be registered pursuant to the provisions of Article 3 (§ 13.1-504 et seq.) of Chapter 5 of Title 13.1 or shall be a federal covered advisor as defined in § 13.1-501 who has filed such documents and paid such fees as may be necessary to transact business in the Commonwealth pursuant to § 13.1-504. The board shall report annually to the Governor and to the Speaker of the House of Delegates and the Clerk of the House of Delegates and to the Chairman of the Senate Rules Committee and the Clerk of the Senate regarding the investment of the Fund's assets. The board shall establish a procedure in the plan of operation for notice to be given to obstetrical patients concerning the no-fault alternative for birth-related neurological injuries provided in this chapter, such notice to include a clear and concise explanation of a patient's rights and limitations under the program.

G. The board shall establish a procedure in the plan of operation for maintaining a list of Program claimants. Each claimant may consent to have his name, address, phone number, and other personal information included on such list, for distribution to other Program claimants. The Board shall distribute the list to Program claimants who have given consent to be included on such list, and to no other person.

§ 38.2-5020. Assessments.

A. A physician who otherwise qualifies as a participating physician pursuant to this chapter may become a participating physician in the Program for a particular calendar year by paying an annual participating physician assessment to the Program in the amount of \$5,000 on or before December 1 of the previous year, in the manner required by the plan of operation. Effective January 1, 2005 2008, the total annual assessment shall be ~~\$5,100~~ \$5,600, and shall increase by ~~\$100~~ \$300 *for the 2010 assessment and by \$100 each year thereafter*, to a maximum of ~~\$5,500~~ \$6,200 per year. The board may authorize a prorated participating physician or participating hospital assessment for a particular year in its plan of operation, but such prorated assessment shall not become effective until the physician or hospital has given at least 30 days' notice to the Program of the request for a prorated assessment.

B. Notwithstanding the provisions of subsection A, a participating hospital with a residency training program accredited to the American Council for Graduate Medical Education may pay an annual participating physician assessment to the Program for residency positions in the hospital's residency training program, in the manner provided by the plan of operation. However, any resident in a duly accredited family practice or obstetrics residency training program at a participating hospital shall be considered a participating physician in the Program and neither the resident nor the hospital shall be required to pay any assessment for such participation. No resident shall become a participating physician in the Program, however, until 30 days following notification by the hospital to the Program of the name of the resident or residents filling the particular position for which the annual participating physician assessment payment, if required, has been made.

C. A hospital that otherwise qualifies as a participating hospital pursuant to this chapter may become a participating hospital in the Program for a particular year by paying an annual participating hospital assessment to the Program, on or before December 1 of the previous year, amounting to \$50 per live birth for the prior year, as reported to the Department of Health in the Annual Survey of Hospitals. *Effective January 1, 2009, the annual participating hospital assessment shall increase by \$2.50 per live birth for the prior year, as reported to the Department of Health in the Annual Survey of Hospitals, and shall be increased at that rate each year thereafter to a maximum of \$55 per live birth so reported for the prior year.* The participating hospital assessment shall not exceed \$150,000 for any participating hospital in any 12-month period until January 1, 2005. Effective January 1, 2005, the maximum total annual assessment shall be \$160,000, and shall increase by \$10,000 each year thereafter, to a maximum of \$200,000 in any 12-month period.

D. All ~~licensed~~ *practicing licensed* physicians practicing in the Commonwealth on September 30 of a particular year, other than participating physicians, shall pay to the Program an annual assessment of \$250 for the following year, in the manner required by the plan of operation until January 1, 2005. Effective January 1, 2005, the total annual assessment shall be \$260, and shall increase by \$10 each year thereafter to a maximum of \$300 per year.

Upon proper certification to the Program, the following physicians shall be exempt from the payment of the annual assessment under this subsection:

1. A physician who is employed by the Commonwealth or federal government and whose income from professional fees is less than an amount equal to 10 percent of the annual salary of the physician.

2. A physician who is enrolled in a full-time graduate medical education program accredited by the American Council for Graduate Medical Education.

3. A physician who has retired from active clinical practice.

4. A physician whose active clinical practice is limited to the provision of services, voluntarily and without compensation, to any patient of any clinic which is organized in whole or in part for the

305 delivery of health care services without charge as provided in § 54.1-106.

306 E. Taking into account the assessments collected pursuant to subsections A through D of this section,
307 if required to maintain the Fund on an actuarially sound basis, all insurance carriers licensed to write
308 and engaged in writing liability insurance in the Commonwealth of a particular year, shall pay into the
309 Fund an assessment for the following year, in an amount determined by the State Corporation
310 Commission pursuant to subsection A of § 38.2-5021, in the manner required by the plan of operation.
311 Liability insurance for the purposes of this provision shall include the classes of insurance defined in
312 §§ 38.2-117 through 38.2-119 and the liability portions of the insurance defined in §§ 38.2-124, 38.2-125
313 and 38.2-130 through 38.2-132.

314 1. All annual assessments against liability insurance carriers shall be made on the basis of net direct
315 premiums written for the business activity which forms the basis for each such entity's inclusion as a
316 funding source for the Program in the Commonwealth during the prior year ending December 31, as
317 reported to the State Corporation Commission, and shall be in the proportion that the net direct
318 premiums written by each on account of the business activity forming the basis for their inclusion in the
319 Program bears to the aggregate net direct premiums for all such business activity written in this
320 Commonwealth by all such entities. For purposes of this chapter "net direct premiums written" means
321 gross direct premiums written in this Commonwealth on all policies of liability insurance less (i) all
322 return premiums on the policy, (ii) dividends paid or credited to policyholders, and (iii) the unused or
323 unabsorbed portions of premium deposits on liability insurance.

324 2. The entities listed in this subsection shall not be individually liable for an annual assessment in
325 excess of one quarter of one percent of that entity's net direct premiums written.

326 3. Liability insurance carriers shall be entitled to recover their initial and annual assessments through
327 (i) a surcharge on future policies, (ii) a rate increase applicable prospectively, or (iii) a combination of
328 the two, at the discretion of the State Corporation Commission.

329 F. On and after January 1, 1989, a participating physician covered under the provisions of this
330 section who has paid an annual assessment for a particular calendar year to the Program and who retires
331 from the practice of medicine during that particular calendar year shall be entitled to a refund of
332 one-half of his or her annual assessment for the calendar year if he or she retires on or before July 1 of
333 that year.

334 G. Whenever the State Corporation Commission determines the Fund is actuarially sound in
335 conjunction with actuarial investigations conducted pursuant to § 38.2-5021, it shall enter an order
336 suspending the assessment required under subsection D. The annual assessment shall be reinstated
337 whenever the State Corporation Commission determines that such assessment is required to maintain the
338 Fund's actuarial soundness.

339 § 38.2-5021. Actuarial investigation, valuations, gain/loss analysis; notice if assessments prove
340 insufficient.

341 A. The Bureau of Insurance of the State Corporation Commission shall undertake an actuarial
342 investigation of the requirements of the Fund based on the Fund's experience in the first year of
343 operation, including without limitation the assets and liabilities of the Fund. Pursuant to such
344 investigation, the State Corporation Commission shall establish the rate of contribution of the entities
345 listed in subsection E of § 38.2-5020 for the tax year beginning January 1, 1989.

346 Following the initial valuation, the State Corporation Commission shall cause an actuarial valuation
347 to be made of the assets and liabilities of the Fund no less frequently than biennially. Pursuant to the
348 results of such valuations, the State Corporation Commission shall prepare a statement as to the
349 contribution rate applicable to contributors listed in subsection E of § 38.2-5020. However, at no time
350 shall the rate be greater than ~~one quarter~~ *four tenths* of one percent of net direct premiums written.

351 B. In the event that the State Corporation Commission finds that the Fund cannot be maintained on
352 an actuarially sound basis subject to the maximum assessments listed in § 38.2-5020, the Commission
353 shall promptly notify the Speaker of the House of Delegates, the President of the Senate, the board of
354 directors of the Program, and the Virginia Workers' Compensation Commission.