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**SENATE BILL NO. 401**

Offered January 14, 2004

Prefiled January 14, 2004

*A BILL to amend and reenact §§ 38.2-2800, 38.2-2801, 38.2-2804, 38.2-2806, 38.2-2812, and 38.2-2814 of the Code of Virginia and to repeal §§ 38.2-2802 and 38.2-2807 of the Code of Virginia, relating to the Virginia Medical Malpractice Joint Underwriting Association.*

Patron—O'Brien

Referred to Committee on Commerce and Labor

**Be it enacted by the General Assembly of Virginia:**

**1. That §§ 38.2-2800, 38.2-2801, 38.2-2804, 38.2-2806, 38.2-2812, and 38.2-2814 of the Code of Virginia are amended and reenacted as follows:**

§ 38.2-2800. Definitions.

As used in this chapter:

"Association" means the joint underwriting association established pursuant to the provisions of this chapter.

"Incidental coverage" means any other type of liability insurance covering activities directly related to the continued and efficient delivery of health care that: (i) cannot be obtained in the voluntary market because medical malpractice insurance is being provided pursuant to this chapter; and (ii) cannot be obtained through other involuntary market mechanisms.

"Liability insurance" includes the classes of insurance defined in §§ 38.2-117 through 38.2-119 and the liability portions of the insurance defined in §§ 38.2-124, 38.2-125, and 38.2-130 through 38.2-132.

"Medical malpractice insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence in rendering or failing to render professional service by any provider of health care.

"Net direct premiums written" means gross direct premiums written in this Commonwealth on all policies of liability insurance less, (i) all return premiums on the policy, (ii) dividends paid or credited to policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability insurance.

"Provider of health care" means any of the following ~~deemed by the Commission to be necessary for the delivery of health care~~: (i) a physician and any other individual licensed or certified pursuant to Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1; (ii) a nurse, dentist, or pharmacist licensed pursuant to Title 54.1; *and* (iii) any health facility licensed or eligible for licensure pursuant to Chapter 5 (§ 32.1-123 et seq.) of Title 32.1 or Chapter 8 (§ 37.1-179 et seq.) of Title 37.1; ~~and (iv) any other group, type, or category of individual or health-related facility that the Commission finds to be necessary for the continued delivery of health care after providing notice and opportunity to be heard.~~

§ 38.2-2801. Association activation; members; purpose; determinations by Commission; powers of association.

A. ~~The Commission shall activate a joint underwriting association if, after investigation, notice, and hearing, it finds that medical malpractice insurance cannot be made reasonably available in the voluntary market for a significant number of any class, type, or group of providers of health care. There is hereby established the Virginia Medical Malpractice Joint Underwriting Association. The purpose of the association shall be to provide a market for medical malpractice insurance for any provider of health care that cannot otherwise obtain insurance in a form and at a premium acceptable to the provider.~~ The association shall consist of all insurers licensed to write and engaged in writing liability insurance within this Commonwealth on a direct basis except those exempted from rate regulation by subsection C of § 38.2-1902. Each such insurer shall be a member of the association as a condition of its license to write liability insurance in this Commonwealth.

B. ~~The purpose of the association shall be to provide a market for medical malpractice insurance on a self-supporting basis without subsidy from its members.~~

C. ~~1. The association shall not commence underwriting operations for any class, type or group of providers of health care until it is activated by the Commission. At the direction of the Commission, the association shall commence operations in accordance with the provisions of this chapter.~~

2. ~~If the Commission determines at any time that medical malpractice insurance can be made reasonably available in the voluntary market for any class, type or group of providers of health care, the association shall, at the direction of the Commission, cease its underwriting operations for that class, type or group of providers of health care.~~

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SB401

D. The Commission shall also determine after investigation and a hearing whether the association shall be the exclusive source of medical malpractice insurance for any class, type or group of providers of health care and the type of policy or policies that shall be issued to any class, type or group of providers of health care. If the Commission determines that a claims-made policy will be issued to any class, type or group of providers of health care, the Commission shall also provide for the guaranteed availability of insurance that covers claims that (i) result from incidents occurring during periods when the basic claims-made policies are in force, and (ii) are reported after the expiration of the basic claims-made policies. The Commission may from time to time after an investigation and hearing reexamine and reconsider any determination made pursuant to this subsection.

E. Pursuant to this chapter and the plan of operation required by § 38.2-2804, the association shall have the power on behalf of its members to: (i) issue, or cause to be issued, policies of medical malpractice insurance to applicants, including incidental coverages, subject to limits as specified in the plan of operation but not to exceed \$2 million for each claimant under any one policy and \$6 million for all claimants under one policy in any one year; (ii) underwrite the insurance and adjust and pay losses on the insurance; (iii) appoint a service company or companies to perform the functions enumerated in this subsection; (iv) assume reinsurance from its members; and (v) reinsure its risks in whole or in part.

§ 38.2-2804. Plan of operation.

A. Within forty-five days of the date the Commission makes a determination to activate a joint underwriting association pursuant to subsection A of § 38.2-2801 *On or before September 30, 2004*, the directors of the association shall submit to the Commission for review a proposed plan of operation consistent with this chapter.

B. The plan of operation shall provide for economic, fair and nondiscriminatory administration and for the prompt and efficient provision of medical malpractice insurance. The plan shall contain other provisions including (i) preliminary assessment of all members for initial expenses necessary to commence operations, (ii) establishment of necessary facilities, (iii) management of the association, (iv) assessment of members to defray losses and expenses, (v) reasonable and objective minimum underwriting standards developed in consultation with the medical and hospital advisory committees provided for in § 38.2-2805, (vi) acceptance and cession of reinsurance, (vii) appointment of servicing carriers or other servicing arrangements, (viii) the establishment of premium payment plans, (ix) procedures for determining amounts of insurance to be provided by the association, (x) procedures for the recoupment of preliminary assessments and other assessments of members as authorized by this chapter, and (xi) any other matters necessary for the efficient and equitable operation and termination of the association.

C. The plan of operation shall be subject to approval by the Commission after consultation with the members of the association and representatives of interested individuals and organizations. If the Commission disapproves all or any part of the proposed plan of operation, the directors shall within fifteen days submit for review an appropriate revised plan of operation. If the directors fail to do so, the Commission shall promulgate a plan of operation. The plan of operation approved or promulgated by the Commission shall become effective and operational upon order of the Commission.

D. Amendments to the plan of operation may be made by the directors of the association, subject to the approval of the Commission.

§ 38.2-2806. Policy forms; applicants to be issued policies; cancellation of policies; rates; examination of business of association.

A. All policies issued by the association shall be subject to the group retrospective premium adjustment and to the stabilization reserve fund required by § 38.2-2807. No policy form shall be used by the association unless it has been filed with the Commission and either (i) the Commission has approved it or (ii) thirty days have elapsed and the Commission has not disapproved the form or endorsement for one or more of the reasons enumerated in subsection A of § 38.2-317.

B. Policies shall be issued by the association, after receipt of the premium or portion of the premium prescribed by the plan of operation, to applicants that (i) meet the minimum underwriting standards, and (ii) have no unpaid or uncontested premium due as evidenced by the applicant having failed to make written objection to premium charges within thirty days after billing.

C. Any policy issued by the association may be cancelled for any one of the following reasons: (i) nonpayment of premium or portion of the premium; (ii) suspension or revocation of the insured's license; (iii) failure of the insured to meet the minimum underwriting standards; and (iv) failure of the insured to meet other minimum standards prescribed by the plan of operation; and (v) nonpayment of any stabilization reserve fund charge.

D. The rates, rating plans, rating rules, rating classifications, premium payment plans and territories applicable to the insurance written by the association, and related statistics shall be subject to the provisions of Chapter 20 (§ 38.2-2000 et seq.) of this title. Due consideration shall be given to the past and prospective loss and expense experience for medical malpractice insurance written and to be written

in this Commonwealth, trends in the frequency and severity of losses, the investment income of the association, and other information the Commission requires. All rates shall be on an actuarially sound basis, giving due consideration to the stabilization reserve fund, and shall be calculated to be self-supporting. The Commission *and may include an appropriate premium surcharge based on past and prospective loss and expense experience. However, policies shall be issued on a nonassessable basis, and payment by the policyholder of premium including any surcharge shall be presumed to satisfy the policyholder's obligations with respect to payment of premium. Members of the association writing or having written medical malpractice insurance in the Commonwealth shall take all appropriate steps to make available to the association the their loss and expense experience of insurers writing or having written medical malpractice insurance in this Commonwealth.*

E. All policies issued by the association shall be subject to a nonprofit group retrospective premium adjustment to be approved by the Commission under which the final premium for all policyholders of the association, as a group, will be calculated based upon the experience of all policyholders. The experience of all policyholders shall be calculated following the end of each fiscal period and shall be based upon earned premiums, administrative expenses, loss and loss adjustment expenses, and taxes, plus a reasonable allowance for contingencies and servicing. Policyholders shall be given full credit for all investment income, net of expenses and a reasonable management fee on policyholder supplied funds. Any final premium resulting from a retrospective premium adjustment will be collected from the stabilization fund set forth in § 38.2-2807. The maximum premium for all policyholders as a group shall be limited as provided in § 38.2-2807.

F. 1. The association shall certify to the Commission the estimated amount of any deficit remaining after the stabilization reserve fund has been exhausted in payment of the maximum final premium for all policyholders of the association. Within sixty days after such certification, the Commission shall authorize the association to recover from the members their respective share of the deficit.

2 E. Members shall be permitted to recover any assessment made by the association under subdivision 1 by deducting the members' share of the deficit from future premium taxes due the Commonwealth. The amount of premium tax deduction for each member's share of the deficit shall be apportioned by the Commission so that the amount of each member's premium tax deduction in each of the ten calendar years following the payment of the member's assessment is equal to ten percent of the assessment paid by the member.

G F. In the event that sufficient funds are not available for the sound financial operation of the association, subject to recoupment as provided in this chapter and the plan of operation, all members shall, on a temporary basis, contribute to the financial requirements of the association in the manner provided in this chapter. The contribution shall be reimbursed to *may be recovered by* the members by the procedure set forth in subdivision F 2 subsection E.

H. The Commission shall examine the business of the association as often as it deems appropriate to make certain that the group retrospective premium adjustments are being calculated and applied in a manner consistent with this section. If the Commission finds that they are not being calculated and applied in a manner consistent with this section, it shall issue an order to the association, specifying (i) how the calculation and application are not consistent and (ii) stating what corrective action shall be taken.

§ 38.2-2812. Public officers or employees.

No member of the board of directors of the stabilization reserve fund who is a public officer or employee shall forfeit his office or employment, or incur any loss or diminution in the rights and privileges associated with his office or employment, because of membership on the board.

§ 38.2-2814. Liability.

There shall be no liability imposed on the part of and no civil cause of action of any nature shall arise against the association or the stabilization reserve fund, *their its* board of directors, *their its* agents, *their its* employees, any service carrier, any participating insurer or its employees, any licensed producer, the Commission or its authorized representatives, the medical and hospital advisory committees, or their members or employees for any statements or actions made by them in good faith in carrying out the provisions of this chapter.

2. That §§ 38.2-2802 and 38.2-2807 of the Code of Virginia are repealed.