

## LEGISLATIVE BILL 146

Approved by the Governor May 28, 2003

Introduced by D. Pederson, 42; Combs, 32; Johnson, 37; Aguilar, 35

AN ACT relating to medical liability; to amend sections 44-2825, 44-2827, 44-2829, and 44-2831, Reissue Revised Statutes of Nebraska, and sections 44-2840 and 44-2842, Revised Statutes Supplement, 2002; to change provisions relating to recoverable amounts, filing of proof of insurance, notice, surcharges, and medical review panel proceedings under the Nebraska Hospital-Medical Liability Act; to provide immunity for volunteer medical personnel; and to repeal the original sections.

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

Section 1. Section 44-2825, Reissue Revised Statutes of Nebraska, 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, ~~and~~ (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 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. 2. Section 44-2827, Reissue Revised Statutes of Nebraska, 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 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 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 million dollars for all occurrences or claims made in any policy year shall be provided. ~~Such filing shall state the amount of the premium charged for the policy of insurance.~~

(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.

Sec. 3. Section 44-2829, Reissue Revised Statutes of Nebraska, 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. 4. Section 44-2831, Reissue Revised Statutes of Nebraska, 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. 5. Section 44-2840, Revised Statutes Supplement, 2002, is amended to read:

44-2840. (1) Provision is hereby made for the establishment of medical review panels to review all malpractice claims against health care providers covered by the Nebraska Hospital-Medical Liability Act in advance of filing such actions.

(2) No action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to section 44-2841 and an opinion has been rendered by the panel.

(3) The proceedings for action by the medical review panel shall be initiated by the patient or his or her representative by notice in writing with copy of a proposed complaint served upon the director personally or by registered or certified mail. Such notice shall designate the claimant's choice of the physician to serve on the panel, claimant's suggestion of an attorney to serve, and the court where the action shall be filed, if necessary.

(4) The claimant may affirmatively waive his or her right to a panel review, and in such case the claimant may proceed to file his or her action directly in court. If the claimant waives the panel review, the claimant shall serve a copy of the complaint upon the director personally or by registered or certified mail at the time the action is filed in court.

~~(5) The exercise of the waiver authorized by this section shall not be subject to attack for the sole reason that the claimant served the director with the notice prescribed by subsection (3) of this section prior to July 10, 1984, if the requirements of sections 44-2840 to 44-2847 have not been fulfilled on such date.~~

Sec. 6. Section 44-2842, Revised Statutes Supplement, 2002, is amended to read:

44-2842. (1) The evidence to be considered by the medical review panel shall be promptly submitted by the respective parties in written form only. If any party to the proceedings fails to submit his or her evidence within a reasonable time after notice from the panel requesting such evidence, the panel may proceed to decide the matter on the evidence previously submitted. The determination of reasonable time shall be made by the panel. The evidence submitted may consist of medical charts, X-rays, laboratory test results, excerpts of treatises, depositions of witnesses including parties, and any other form of evidence allowable by the medical review panel.

(2) Depositions of parties and witnesses may be taken prior to the convening of the panel and prior to the commencement of the action, but in such event the attorney for the medical care provider shall be furnished with a copy of the complaint which the claimant proposes to file at least ten days before any deposition is taken. The patient shall have the right to request and receive all medical and hospital records relating to his or her case which would be admissible in evidence in a court of law. The chairperson of the panel shall advise the panel relative to any legal question involved in the review proceeding and shall prepare the opinion of the panel. A copy of the evidence shall be sent to each member of the panel.

(3) Either party, after submission of all evidence and upon ten days' notice to the other side, shall have the right to convene the panel at a time and place agreeable to the members of the panel. At such time either party shall have the right to present argument concerning any matters relevant to issues to be decided by the panel before the issuance of its report. The chairperson of the panel shall preside at all meetings, which meetings shall be informal.

(4) ~~If the members of the medical review panel have not convened within six months of the initiation of the proceeding, the judge shall have authority to order the panel to convene may terminate the proceeding at the request of either party.~~

Sec. 7. (1) A person credentialed under the Uniform Licensing Law to practice as a physician, osteopathic physician, pharmacist, dentist, physician assistant, nurse, or physical therapist who, without the expectation or receipt of monetary or other compensation either directly or indirectly, provides professional services, of a kind which are eligible for reimbursement under the medical assistance program established pursuant to sections 68-1018 to 68-1025, as a volunteer in a free clinic or other facility operated by a not-for-profit organization as defined in section 25-21,190, by an agency of the state, or by any political subdivision shall be immune from civil liability for any act or omission which results in damage or injury unless

such damage or injury was caused by the willful or wanton act or omission of such practitioner.

(2) The individual immunity granted by subsection (1) of this section shall not extend to any act or omission of such practitioner which results in damage or injury if:

(a) The free clinic or other facility is operated by a licensed hospital;

(b) The practitioner has been disciplined by the professional board having oversight over that practitioner in the previous five years at the time of the act or omission causing injury; or

(c) The damage or injury is caused by such practitioner (i) during the operation of any motor vehicle, airplane, or boat or (ii) while impaired by alcohol or any controlled substance enumerated in section 28-405.

Sec. 8. Original sections 44-2825, 44-2827, 44-2829, and 44-2831, Reissue Revised Statutes of Nebraska, and sections 44-2840 and 44-2842, Revised Statutes Supplement, 2002, are repealed.