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HOUSE BILL 851

47TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2006

INTRODUCED BY

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AN ACT

RELATING TO INSURANCE; ENACTING THE MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION ACT; CREATING A JOINT UNDERWRITING ASSOCIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Medical Malpractice Joint Underwriting Association Act"."

Section 2. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] PURPOSE OF ACT.--The purpose of the Medical Malpractice Joint Underwriting Association Act is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico."

Section 3. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] DEFINITIONS.--As used in the Medical Malpractice Joint Underwriting Association Act:

A. "association" means the joint underwriting association established pursuant to the provisions of the Medical Malpractice Joint Underwriting Association Act;

B. "board" means the board of directors of the association;

C. "licensed health care provider" means a person, corporation, organization, facility or institution licensed or certified by this state to provide health care services;

D. "medical malpractice insurance" means medical professional liability insurance protection against the legal liability of the insured arising out of the death or injury of a person as the result of negligence or malpractice in rendering or failing to render professional service by a licensed health care provider;

E. "member" means a member of the association as provided for in Subsection A of Section 4 of the Medical Malpractice Joint Underwriting Association Act;

F. "net direct premiums" means gross direct premiums written on bodily injury liability insurance, including automobile and homeowners liability insurance as well as the liability component of multiple peril package policies, as computed by the superintendent, less return premiums or the unused or unabsorbed portions of premium deposits; and

G. "plan of operation" means the plan of operation as provided for in Section 7 of the Medical Malpractice Joint Underwriting Association Act."

Section 4. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] JOINT UNDERWRITING ASSOCIATION CREATED.--

A. A "joint underwriting association" is created, consisting of all insurers authorized to write within New Mexico, on a direct basis, bodily injury liability insurance other than automobile, homeowners and farmowners liability insurance. Every such insurer is and shall remain a member of the association as a condition of its authority to continue to transact this kind of insurance in the state.

B. The purpose of the association is to provide medical malpractice insurance on a self-supporting basis.

C. The association shall be called into operation immediately and shall be utilized in the event of the unavailability of medical malpractice liability insurance or of medical malpractice liability insurance on a reasonable basis through normal channels.

D. The association shall be an authorized insurer in New Mexico."

Section 5. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] BOARD OF DIRECTORS.--

A. The association shall be governed by a board of five directors as follows:

(1) a representative appointed by the New Mexico trial lawyers association;

(2) a representative appointed by the New Mexico medical society;

(3) a member appointed by the governor representing the allied health care providers;

(4) a member appointed by the governor representing the insurance industry; and

(5) a representative appointed by the private insurance company that has issued the greatest number of medical malpractice insurance policies for practitioners in New Mexico during the prior calendar year.

B. The directors specified in Paragraphs (1) through (4) of Subsection A of this section shall serve two-year terms. The director specified in Paragraph (5) of Subsection A of this section shall serve a one-year term.

C. The superintendent shall serve as an ex-officio member of the board.

D. The terms of directors shall coincide with the calendar year. Directors shall serve until their successors have been appointed. A director shall not be removed during a term except for cause."

Section 6. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] POWERS OF THE ASSOCIATION.--The association has the power on behalf of its members to:

A. issue or cause to be issued policies of insurance, including incidental coverage and premises or operations liability coverage on the premises where services are rendered, all subject to limits of liability as specified in the plan of operation of at least one million dollars (\$1,000,000) for each claimant under one policy and three million dollars (\$3,000,000) for all claimants under one policy in any one policy year. The minimum set forth herein shall increase annually by the consumer price index for medical expenses. Policies shall be issued on a claims-made basis;

B. appoint a service company to underwrite medical malpractice insurance, issue contracts of insurance and adjust and pay losses with respect thereto. The service company shall be physically located in New Mexico. Preference shall be given to qualified companies domiciled in New Mexico;

C. cede and assume reinsurance; and

D. assess members for funds to pay the association's operating expenses and obligations pursuant to policies of insurance issued by the association."

Section 7. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] PLAN OF OPERATION.--

A. The association shall operate pursuant to a plan of operation that shall provide for:

- (1) economic, fair and nondiscriminatory administration;
- (2) prompt and efficient distribution of medical malpractice insurance;
- (3) conditions that more precisely define the thresholds of unavailability or reasonableness of cost that trigger the issuance of policies by the joint underwriting association;
- (4) reasonable preconditions of practice before which policies will be issued to a particular class of health care providers; and
- (5) conditions under which the joint underwriting association may refuse to issue policies to a particular class of health care providers or to any particular health care provider.

B. The plan of operation shall include the following:

- (1) preliminary assessment of all members for initial expenses necessary to commence operations;
- (2) establishment of necessary facilities;
- (3) management of the association;
- (4) assessment of the members to defray losses and expenses;
- (5) reasonable and objective underwriting standards;
- (6) guidelines for evaluating claims and paying losses;
- (7) acceptance and cession of reinsurance; and
- (8) procedures for determining amounts and types of insurance to be provided by the association.

C. Amendments to the plan of operation may be made after due notice and public hearing.

D. The plan of operation becomes effective and operative no later than forty-five days after notice to the public and a hearing on its content."

Section 8. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] APPLICATION FOR COVERAGE.--A licensed health care provider in a category for which the board has declared insurance is unavailable or not

obtainable at a reasonable cost through normal channels is entitled to apply to the association for coverage. The application may be made on behalf of the applicant by a licensed agent or broker authorized in writing by the applicant. If the association determines the applicant meets the underwriting standards of the association and there is no unpaid, uncontested premium due from the applicant for any prior insurance of the same kind, the association, upon receipt of the premium or a portion thereof as prescribed by the plan of operation, shall cause to be issued a policy of medical malpractice liability insurance for a term of up to one year."

Section 9. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] STATISTICAL DATA AND PLAN.--The superintendent shall obtain complete statistical data regarding medical malpractice losses and reparation costs and all other costs or expenses that underlie or are related to medical malpractice liability insurance issued by admitted and nonadmitted companies. The superintendent shall promulgate any statistical plan considered necessary for the purpose of gathering data referring to loss and loss adjustment expense experience and other expense experience."

Section 10. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] INITIAL FILINGS.--Within a time frame set by the board, the association shall submit an initial filing to the insurance department, in proper form, of policy forms, classifications, rates, rating plans and rating rules applicable to medical malpractice liability insurance to be written by the association. The filing shall be processed and reviewed in the same manner as any other insurance filing."

Section 11. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] POLICY FORMS AND RATE STRUCTURE.--

A. The board shall specify whether policy forms and the rate structure are to be on a claims-made or occurrence basis, and coverage may be provided by the association only on the basis specified by the board. The board shall specify the claims-made basis only if the policy makes provision for residual occurrence coverage upon the retirement, death or permanent disability of the insured. Provision may be made for a premium charge allocable to any such residual occurrence coverage, and the premium charges for the residual coverage shall be segregated and separately maintained for such purpose, which may include the reinsurance of all or a part of that portion of the risk.

B. The policy form, whether on a claims-made or occurrence basis, shall not require, as a condition precedent to settlement or compromise of a claim, the consent or acquiescence of the insured. However, such settlement or compromise shall not be held or considered to be an admission of fault or wrongdoing by the insured.

C. Effective after the initial year of operation, rates, rating plans, rating rules and premium rate increases shall be based upon the association's loss and expense experience

and investment income, together with other information based upon such experience and income as the board considers appropriate. The resultant premium rates shall be on an actuarially sound basis and shall be calculated to be self-supporting."

Section 12. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] ASSOCIATION ASSESSMENTS OF MEMBERS.--

A. If sufficient funds are not available for the sound financial operation of the association, additional funds shall be raised by making an assessment on all members. Assessments shall be made against members in the proportion that the net direct premiums for the preceding calendar year of each member for each line of insurance requiring it to participate in the plan bear to the net direct premiums for the preceding calendar year of all members for such line of insurance; provided that, assessments made shall not exceed in any calendar year one percent of each member's surplus.

B. The assessment of a member may be ordered deferred in whole or in part upon application by the member if in the opinion of the superintendent payment of the assessment may render the member insolvent or in danger of insolvency or otherwise may leave the member in a condition such that further transaction of the member's business may be hazardous to its policyholders, creditors, members, subscribers, stockholders or the public. If payment of an assessment against a member is deferred by order of the superintendent in whole or in part, the amount by which the assessment is deferred shall be assessed against other members in the same manner as provided in this section. In the order of deferral or in subsequent orders as may be necessary, the superintendent shall prescribe a plan by which the assessment deferred shall be repaid to the association by the impaired member with interest at the six-month treasury bill rate adjusted semiannually. Profits, dividends or other funds of the association to which the member is otherwise entitled shall not be distributed to the impaired member but shall be applied toward repayment of an assessment until the obligation has been satisfied. The association shall distribute the repayments, including interest on them, to the other members on the basis on which assessments were made.

C. All members shall deduct the amount of an assessment from past or future premium taxes due but not yet paid the state."

Section 13. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] OBLIGATIONS OF TERMINATED MEMBERS AND RESPONSIBILITY OF THE STATE.--

A. If the authority of a member to transact bodily injury liability insurance, other than automobile, homeowners or farmowners liability insurance, in this state terminates for any reason, its obligations as a member of the association continue until all its obligations have been fulfilled and the superintendent has so found and certified to the board.

B. If a member merges into or consolidates with another insurer authorized to transact such insurance in New Mexico or another insurer authorized to transact such insurance in New Mexico has reinsured the member's entire general liability business in New Mexico, the member and its successor or assuming reinsurer are liable for the member's obligations in respect to the association.

C. An unsatisfied net liability of an insolvent member of the association shall be assumed by and apportioned among the remaining members in the same manner in which assessments or gains and losses are apportioned. The association shall thereby acquire and have all rights and remedies allowed by law on behalf of the remaining members against the estate or funds of the insolvent member for funds due the association.

D. The state is not responsible for any costs, expenses, liabilities, judgments or other obligations of the association."

Section 14. A new section of the New Mexico Insurance Code is enacted to read:

"[NEW MATERIAL] ANNUAL STATEMENT AND EXAMINATION OF ASSOCIATION.--

A. The association shall file with the insurance division by April 1 of every year a statement that contains information with respect to its transactions, condition, operations and affairs during the preceding year. The statement shall contain such matters and information as are prescribed by the division and shall be in the form the division directs. The division at any reasonable time may require the association to furnish additional information with respect to its transactions, condition or any matter considered to be material and of assistance in evaluating the scope, operation and experience of the association.

B. The board shall file an annual report with the insurance division. The expenses of the examination shall be paid by the association."

Section 15. SEVERABILITY.--If any part or application of the Medical Malpractice Joint Underwriting Association Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

Section 16. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2006.

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