

Department of Legislative Services
 Maryland General Assembly
 2004 1st Special Session

FISCAL AND POLICY NOTE

Senate Bill 2 (Senator Frosh)(Chairman, Senate Special Commission on
 Medical Malpractice Liability Insurance)

Rules

Maryland Medical Professional Liability Insurance Rate Stabilization Act of 2004

This emergency bill establishes the Maryland Medical Professional Liability Insurance Rate Stabilization Program and Fund, with three accounts, an administrative cost account, a rate stabilization account, and a medical assistance program account. The bill repeals the exemption from the 2% premium tax applicable to HMOs and Medicaid Managed Care Organizations (MCOs) and exempts HMOs and MCOs from the corporate income tax. The premium tax from HMOs and MCOs is allocated to the fund. The bill also makes several changes to laws affecting patient safety, insurance, and the tort system applicable to medical malpractice claims.

Fiscal Summary

State Effect: Special fund premium tax revenues could increase by as much as \$64.4 million in FY 2006. Potential \$1.0 million general fund and \$326,900 Transportation Trust Fund (TTF) revenue reductions from the loss of corporate income tax revenues in FY 2006. Out-year estimates reflect annualization and inflation. Special fund expenditures to establish the People's Insurance Counsel Division would increase by \$1 million in FY 2005. Future year expenditures would depend upon staffing levels.

(in dollars)	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Premium Tax Rev.	\$0	\$64,427,881	\$70,874,647	\$78,031,360	\$85,980,863	\$94,815,975
GF Revenues	0	(1,035,174)	(2,260,819)	(2,468,815)	(2,695,945)	(2,943,972)
TTF Revenues	0	(326,897)	(713,943)	(779,626)	(851,351)	(929,676)
SF Expenditures	1,000,000	-	-	-	-	-
Net Effect	(\$1,000,000)	\$63,065,810	\$67,899,885	\$74,782,919	\$82,433,567	\$90,942,327

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: To the extent carriers increase their premiums as a result of the premium tax exemption repeal, expenditures for local jurisdiction employee health benefits could increase. Corporate income tax revenues that are remanded to local jurisdictions for local highway purposes could decrease by a minimal amount.

Small Business Effect: Minimal.

Analysis

Bill Summary and Current Law: The bill's provisions apply prospectively and do not affect causes of action arising before its effective date. The provisions fall broadly into three categories: patient safety, insurance, and tort.

Patient Safety

Standard of Review for Physician Discipline by the Board of Physicians

The Bill: Factual findings by the Board of Physicians (BOP) for disciplinary actions against physicians must be by a "preponderance of the evidence" standard. Under this standard, an assertion is proven if it more probably than not occurred.

Current Law: Factual findings for BOP disciplinary actions against physicians for failing to meet the appropriate standard of care must be by a "clear and convincing evidence" standard. Under this standard, an assertion is proven if it is reasonably certain that it occurred. "Clear and convincing" is a greater standard of proof than "preponderance of the evidence," but it is less than "beyond a reasonable doubt."

Reports of Disciplinary Actions against Physicians

The Bill: BOP may impose a civil penalty of up to \$5,000 against a hospital or a related institution for failing to report a disciplinary action against a licensed physician.

Current Law: BOP must apply to a circuit court, and the circuit court may impose a civil penalty against a hospital or related institution for failing to report a disciplinary action against a licensed physician.

Reporting of Adverse Events by Hospitals

The Bill: A hospital or related institution must report adverse events to the Department of Health and Mental Hygiene (DHMH). The Secretary may impose a fine of up to \$10,000 for failing to comply.

Current Law: DHMH may fine a hospital up to \$500 per day for failing to establish a risk management program, which, by regulation, must include a patient safety component. The patient safety regulations require a reporting system for adverse events. An adverse event is an unexpected occurrence related to a patient's medical treatment but not related to the natural course of the patient's illness or underlying disease condition. The regulations also provide for and encourage the voluntary reporting of near misses, defined as a situation that could have resulted in an adverse event but did not because of timely intervention or chance.

Challenges of Medical Review Committee Decisions

The Bill: In a civil action brought by a party to the proceedings of a medical review committee, the court may award court costs and reasonable attorney's fees to the prevailing party.

Current Law: Generally, attorney's fees are not recoverable as damages in a civil action absent a requirement in statute, in a contractual agreement, or under the Maryland Rules. Under the Maryland Rules, a court must find that the conduct of a party in maintaining or defending a proceeding was in bad faith or without substantial justification before the court may require the offending party, the attorney advising the conduct, or both to pay the adverse party's costs, including reasonable attorney's fees. Attorney's fees are not specifically authorized when a physician challenges the decision of a medical review committee.

Insurance

Maryland Medical Professional Liability Insurance Rate Stabilization Program and Fund

The Bill: The purposes of the program are to retain health care providers in the State by allowing insurers to charge lower rates, increasing fee-for-service rates to specialty physicians participating in the Maryland Medical Assistance Program, and increasing capitation payments to MCOs participating in the Maryland Medical Assistance Program

to pay network physicians at least 100% of the fee schedule used in the fee-for-service program.

The bill establishes a Maryland Medical Professional Liability Insurance Stabilization Board, consisting of the Secretary of Health and Mental Hygiene, the Insurance Commissioner, and the Secretary of Budget and Management, to manage the program and the fund. The board must administer the fund. The bill establishes criteria that the board must consider in determining eligibility for participation in the program.

The fund receives money from the premium tax imposed on HMOs and MCOs. The fund consists of three accounts. Disbursements from the rate stabilization account must be made to medical professional liability insurers to reduce the cost of liability insurance to health care providers identified by the board. A medical professional liability insurer must provide a rate reduction or a rebate in the form of a credit against the premium owed by a health care provider and/or a rebate at the insurer's discretion.

The board may retain up to 0.5% of the money collected for the fund each year for the administrative cost account. After that the allocation is as follows:

- In fiscal 2006 and 2007, \$48 million from the fund is allocated to the rate stabilization account to reduce medical professional liability insurance premiums, with the remaining balance allocated to the medical assistance program account to increase Medicaid reimbursement rates.
- In fiscal 2008, \$32 million is allocated to the rate stabilization account, with the remainder going to the medical assistance program account.
- In fiscal 2009, \$16 million is allocated to the rate stabilization account, with the remainder going to the medical assistance program account.
- In fiscal 2010 and thereafter, the entire amount is allocated to the medical assistance program account.

To the extent funds in the Medicaid assistance program account exceed the amount necessary to increase reimbursement rates, the funds must be used to support the operations of the Medicaid assistance program.

Current Law: Insurers that offer medical professional liability insurance may set rates subject to approval of the Insurance Commissioner.

Comparison of Medical Professional Liability Insurance Rates

The Bill: The Maryland Insurance Administration (MIA) must prepare a comparison guide, on its web site and in printed form, for medical professional liability insurance premiums. The guide must list: (1) base premium charged for physicians with policy limits of \$1 million and \$3 million; and (2) base premiums for hospitals, medical day care centers, hospice care programs, assisted living programs, and freestanding ambulatory care facilities.

Current Law: MIA is not required to publish insurance rate comparisons. Although not required to do so, MIA does provide a comparison guide for homeowners and automobile insurance rates on its web site.

Disclosure Report for Medical Professional Liability Insurers

The Bill: The bill expands the entities that must report and specifies the form of the report. Insurers must also report if they provide professional liability insurance to medical day care centers, hospice programs, assisted living programs, or freestanding ambulatory care facilities. Self-insured medical day care centers, hospice programs, assisted living programs, or freestanding ambulatory care facilities must also report, as must risk retention groups and medical professionals and facilities that obtain insurance through other means. The required form specifies information to be provided on the insurer, the policy, the type of injury, the type of institution at which the incident occurred, the patient status, the health care provider, and the outcome.

The Commissioner must report of the availability and affordability of medical professional liability insurance, the nature and cost of reinsurance, reserve amounts, investment income, and specified information about claims and settlements. The report must be posted on MIA's web site. MIA may impose a civil penalty for failure to report as required.

Current Law: Insurers must file quarterly reports of any claim or action for damages if the claim or action: (1) is claimed based on an error, omission, or negligence of performing professional services or based on the lack of consent; and (2) resulted in a final judgment, a settlement, or a final disposition that does not result in payment. The report must contain: (1) the name and address of the insured; (2) the policy number; (3) the date of occurrence; (4) the date of filing suit; (5) the date and amount of final judgment or settlement, or the reason for final disposition without a settlement or judgment; (6) a summary of the occurrence; and (7) any other information MIA requires. The reporting requirements apply to an insurer that provides professional liability

insurance to specified licensed medical professionals and licensed hospitals, as well as to self-insured hospitals. A court may impose a penalty for failure to report as required.

People's Insurance Counsel

The Bill: A People's Insurance Counsel, appointed by the Attorney General with the advice and consent of the Senate, is established in the Office of the Attorney General. The People's Insurance Counsel Division may appear before the Insurance Commissioner or in court to represent the interests of insurance consumers in the State and must review any proposed rate increase of 10% or more. The division has the rights of counsel to a party in a proceeding. The bill establishes a special fund, funded by an assessment on insurers generally, pursuant to a specified formula, to pay the expenses of the division.

Current Law: The Consumer Protection Division within the Office of the Attorney General provides mediation services to consumers to help resolve complaints against businesses and health insurance carriers. The division also brings law enforcement actions against businesses that harm large numbers of Maryland consumers through unfair and deceptive practices.

The Office of People's Counsel (OPC) performs a similar function to the proposed People's Insurance Counsel. OPC evaluates all matters pending before the Public Service Commission (PSC) to determine if the interests of residential users of public utilities are affected. It appears before PSC, various federal agencies, and the courts on behalf of consumers in all matters or proceedings over which PSC has original jurisdiction and in other matters in which OPC deems its interest to be involved.

Single Source Insurance Producer Contracts

The Bill: An insurance producer may not enter into an exclusive agreement with a medical professional liability insurer.

Current Law: Agreements between insurers and insurance producers are not specifically regulated by the State. Instead, they are governed by the common law of contracts.

Policy Coverage in a Disciplinary Hearing

The Bill: A professional liability insurance policy issued or delivered to a health care provider may not include coverage for defense costs during a disciplinary hearing. An insurer may offer a separately priced policy to defend a health care provider in a disciplinary hearing.

Current Law: A health care provider's professional liability insurance policy must authorize the insurer, without restriction, to negotiate and settle claims within the policy's limits and must be consistent with the requirements of the provisions governing claims for personal injury against a health care provider.

Policy Deductibles

The Bill: Insurers that issue or offer medical professional liability insurance policies must offer, in addition to the basic policy, policies with deductibles in the amounts of \$10,000, \$25,000, \$50,000, \$100,000, and \$150,000.

Current Law: There are no deductible requirements imposed on medical professional liability insurance policies.

Policy Cancellation

The Bill: An insurer or insurance producer that issues or delivers a medical professional liability policy to a medical professional who has been licensed for three or more years is exempt from the prohibition against canceling or refusing to underwrite or renew a particular insurance risk except by standards that are reasonably related to the insurer's economic and business purposes.

Current Law: Generally, an insurer is prohibited from canceling or refusing to underwrite or renew a particular insurance risk except by standards that are reasonably related to the insurer's economic and business purposes. In the case of cancellation or refusal to renew a policy, the policy remains in effect until the Maryland Insurance Commissioner issues a finding if the insured asks for review before the termination date and the Commissioner begins action to issue a finding.

Findings by the Insurance Commissioner

The Bill: For medical professional liability insurance, the Commissioner must issue a finding within 90 days after receiving a request to review the policy's cancellation or nonrenewal. In the absence of a finding, the insurer may terminate the policy.

Current Law: If the Commissioner finds that an insurer has violated provisions governing discrimination in underwriting, agreements with or refusal to accept business from an insurance producer, or discrimination based on domestic violence, the Commissioner may order the insurer to accept the risk or the business.

False Claims against State Health (Medicaid) Plans

The Bill: The bill prohibits a person from knowingly making a false health claim against one of the State's Medicaid programs. The bill establishes a civil penalty for making the false health claim for up to \$10,000 and an additional amount of up to triple the amount of the State's damages sustained. The bill authorizes a person to file a civil action on behalf of the State against a person who has made a false health claim and authorizes that person to share in the proceeds of the action. The bill also protects individuals from retaliatory actions by their employers because of their participation in pursuing such a claim.

Current Law: The Medicaid Fraud Control Unit in the Office of the Attorney General may investigate and prosecute provider fraud.

Tort

Limits on Noneconomic Damages

The Bill: For a medical practice award for a cause of action arising on or after January 1, 2005, noneconomic damages are limited to \$650,000. The bill freezes the limit for four years, through calendar 2008, and then allows the amount to increase by \$15,000 annually. Generally, this aggregate amount applies to all claims for personal injury and wrongful death arising from the same medical injury, regardless of the number of claims, claimants, plaintiffs, or beneficiaries. However, if there is a wrongful death action in which there is more than one beneficiary, whether or not there is a personal injury action arising from the same injury, the total amount of noneconomic damages that may be awarded is 150% of the established limit, regardless of the number of claims, plaintiffs, or beneficiaries (\$975,000 for four years under the bill). If there is more than one claimant or beneficiary, noneconomic damages would be apportioned among them if the jury awards an amount that exceeds the limit.

Current Law: The limit on noneconomic damages in a civil case is \$650,000 in calendar 2004. The amount increases by \$15,000 annually. In a wrongful death case, there are typically two separate claims, one for personal injury (survival action) and one for wrongful death. Currently, a jury may award \$650,000 in the personal injury action and \$975,000 in a companion claim for wrongful death. The total amount that could be awarded in the two cases is \$1,625,000 (\$650,000 + \$975,000).

Mandatory Alternative Dispute Resolution

The Bill: Within 30 days after the later of the filing of the defendant's answer to the complaint or the defendant's certificate of a qualified expert, the court must order the parties to engage in mediation, neutral case evaluation, or neutral fact finding at the earliest practical date. This does not apply if all parties file an agreement not to engage in alternative dispute resolution and the court finds that it would not be productive or all parties have already engaged in alternative dispute resolution. The bill specifies mediation procedures and establishes requirements for individuals who serve as mediators. Mediators are immune from suit for any act or decision made during mediation and within the scope of authority.

Current Law: Under the Maryland Rules, a circuit court may order alternative dispute resolution, including mediation, neutral fact finding, neutral case evaluation, or pretrial settlement conferences, before trial.

Apologies and Expressions of Sympathy

The Bill: An apology or an expression of regret made on behalf of a health care provider may not be admitted in court under specified circumstances. An admission of liability or fault that is part of or in addition to an apology or expression of regret is admissible.

Current Law: An apology or expression of sympathy by a health care provider may be introduced as evidence as an admission against interest or as an admission of liability.

Three Strikes for Frivolous Cases

The Bill: At the conclusion of a malpractice trial, the court may make a finding that the malpractice case has been brought in bad faith or without substantial justification and report the attorney who brought the case to the Administrative Office of the Courts (AOC). An attorney who has been reported to AOC three or more times in a five-year period may not bring another medical malpractice case for 10 years.

Current Law: Generally, attorney discipline is governed by the Maryland Rules. Under the supervision of the Court of Appeals, the Attorney Grievance Commission supervises and administers the discipline of attorneys. Under the Maryland Rules, if a court in any civil action finds that a party's conduct is in bad faith or without substantial justification, the court may require the offending party, the attorney advising the conduct, or both, to pay the adverse party's costs, including reasonable attorney's fees. In a medical malpractice case heard by an arbitration panel where the panel finds that a party's conduct is in bad faith or without substantial justification, the panel may require the

offending party, the attorney advising the conduct, or both, to pay the adverse party's costs, including reasonable attorney's fees.

State Fiscal Effect: The bill removes the exemption from the premium tax for HMOs and MCOs and dedicates the revenues to the Maryland Medical Professional Liability Insurance Rate Stabilization Fund established under the bill. The premium tax is applicable to capitation payments including supplemental or bonus payments made to MCOs on or after July 1, 2005 and subscription charges or other amounts paid to a health maintenance organization after July 1, 2005. HMOs and MCOs currently must pay corporate income tax, of which 76% goes to the general fund and the remaining 24% is dedicated to the Transportation Trust Fund (TTF).

Premium tax revenues could increase by as much as \$64,427,881 in fiscal 2006 under the bill. This estimate is based on the following facts and assumptions:

- in calendar 2003, actual HMO premiums were \$1,537,046,859 and MCO premiums were \$1,025,370,962;
- HMO premiums increase 12.4% annually to reflect health insurance inflation;
- MCO premiums increase 5.8% annually to reflect medical inflation in the Medicaid program; and
- revenues were adjusted to reflect fiscal years.

Future year revenue increases reflect annual inflation.

The board established under the bill is authorized to distribute up to 0.5% of the premium tax revenues from the rate stabilization fund to an administrative cost account for expenses. The board could thus retain up to approximately \$322,100 in fiscal 2006. Actual administrative costs could be less. The remaining special fund revenue would be spent as provided under the bill.

Revenues for the fund under the bill are shown in **Exhibit 1** below. The allocations assume that the board would retain the maximum authorization for administration and account for the bill's required allocation (described above) between the other two accounts in the fund. It is assumed that expenditures from the accounts in the fund would roughly equal revenues. Based on insurance industry projections, it is estimated that approximately \$48 million would be required to hold medical professional liability insurance rates at their 2004 level in 2005.

Exhibit 1
Revenue to the Fund

	<u>Premium Tax Revenue</u>	<u>Administrative Cost Account</u>	<u>To Fund</u>	<u>Rate Stabilization Account</u>	<u>Medical Assistance Program Account</u>
FY 2006	\$64,427,881	\$322,139	\$64,105,741	\$48,000,000	\$16,105,741
FY 2007	70,874,647	354,373	70,520,274	48,000,000	22,520,274
FY 2008	78,031,360	390,157	77,641,203	32,000,000	45,641,203
FY 2009	85,980,863	429,904	85,550,959	16,000,000	69,550,959
FY 2010	\$94,815,975	\$474,080	\$94,341,895	\$0	\$94,341,895

Corporate income tax revenues could decrease by as much as \$1,362,071 (\$326,897 TTF; \$1,035,174 general funds) in fiscal 2006 due to the corporate income tax exemption applied to HMOs and MCOs that would then be paying premium taxes. Future year revenue reductions reflect annualization and inflation.

The People’s Insurance Counsel Division established by the bill is financed by an annual assessment on insurers pursuant to a specified formula. The bill directs the Insurance Commissioner to collect the assessment and deposit the amounts collected to the People’s Insurance Counsel Fund. The bill requires the Governor to process a budget amendment of \$1 million in special funds by June 1, 2005 to pay for establishing and operating the People’s Insurance Counsel Division. It is assumed that this would cover any one-time start-up costs. Based on similar 2004 legislation that would have established an independent people’s insurance counsel, annual expenditures could be as much as approximately \$1.25 million to cover ongoing costs, including salaries and other operating costs for 18 positions to staff the division. Costs under this bill may be somewhat less because of administrative savings realized by housing the People’s Insurance Counsel in the Office of the Attorney General.

General fund revenues could increase minimally due to the bill’s enhanced penalty provisions. Any other increase in administrative costs is assumed to be minimal and absorbable within existing resources.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Legislative Services, Maryland Insurance Administration

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