

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

FIRST REGULAR SESSION - 1989

Legislative Document

No. 762

S.P. 289

In Senate, March 14, 1989

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN
Secretary of the Senate

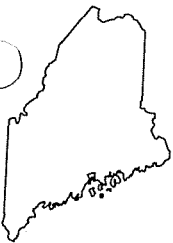
Presented by Senator GAUVREAU of Androscoggin.

Cosponsored by Representative MANNING of Portland, Representative BURKE of Vassalboro and Representative MacBRIDE of Presque Isle.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-NINE

An Act to Establish the Maine Medical Malpractice Act.



1 Be it enacted by the People of the State of Maine as follows:

3 24 MRSA c. 29 is enacted to read:

5 CHAPTER 29

7 MAINE MEDICAL MALPRACTICE ACT

9 §3401. Definitions

11 As used in this chapter, unless the context otherwise
13 indicates, the following terms have the following meanings.

15 1. Action for professional negligence. "Action for
17 professional negligence" means any action for damages for injury
19 or death against any health care provider, its agents or
21 employees, or health care practitioner, the practitioner's agents
23 or employees, whether based upon tort or breach of contract or
25 otherwise, arising out of the provision or failure to provide
27 health care services.

29 2. Director. "Director" means the Director of the Bureau
31 of Medical Services, Department of Human Services.

33 3. Fund. "Fund" means the Patients Compensation Fund.

35 4. Health care practitioner. "Health care practitioner"
37 means physicians and all others certified, registered or licensed
39 in the healing arts, including, but not limited to, nurses,
41 podiatrists, optometrists, chiropractors, physical therapists,
43 dentists, psychologists and physicians' assistants.

45 5. Health care provider. "Health care provider" means any
47 hospital, community or rural health center, clinic, nursing home
49 or other facility in which skilled nursing care or medical
51 services are prescribed by or performed under the general
direction of persons licensed to practice medicine, dentistry,
podiatry or surgery in this State and which is licensed or
otherwise authorized by the laws of this State.

6. Insurer. "Insurer" means any insurance company licensed
in the State offering any policies insuring health care
practitioners or health care providers in actions for
professional negligence.

7. Participant. "Participant" means a participant in the
fund under section 3404.

8. Patient. "Patient" means an individual who receives or
should have received health care from a licensed health care
provider under a contract, express or implied, and includes any
persons having a claim, whether derivative or otherwise, as a

1 result of alleged malpractice on the part of a health care
2 practitioner or health care provider. Derivative claims include,
3 but are not limited to, the claim of a parent or parents,
4 guardian, trustee, child, relative, attorney or other
5 representative of the person receiving health care including
6 claims for loss of services, loss of consortium, expenses and all
7 such similar claims.

9 9. Physician. "Physician" means any natural person
10 authorized by law to practice medicine or osteopathic medicine in
11 this State.

13 10. Professional negligence. "Professional negligence"
14 means that:

15 A. There is a reasonable medical or professional
16 probability that the acts or omissions complained of
17 constitute a deviation from the applicable standard of care
18 by the health care practitioner or health care provider
19 charged with that care; and

21 B. There is a reasonable medical or professional
22 probability that the acts or omissions complained of
23 proximately caused the injury.

25 §3402. Establishment of the Patients Compensation Fund

27 1. Fund established. Effective January 1, 1990, there is
28 established a fund to be known as the Patients Compensation
29 Fund. The fund is not a state agency, board or commission. The
30 Treasurer of State shall maintain, collect, receive and
31 administer this fund and shall hold the fund in trust exclusively
32 for the purposes of this chapter. All amounts received and
33 earned shall be paid into the fund and all claims payable under
34 this chapter shall be paid from the fund.

36 2. Payment of assistance. Upon certification by the
37 director, the Treasurer of State shall make payments from this
38 fund as provided in section 3405.

40 §3403. Components of the fund

42 1. Contribution to the fund. The fund shall consist of:

44 A. An annual surcharge levied on every insured health care
45 provider and practitioner;

46 B. An annual amount levied on every self-insured health
47 care provider and practitioner;

48 C. Any loan from the General Fund as provided by section
49 3410; and

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D. Interest earned on any money in the fund.

2. Determination of amount of surcharge and annual amounts. The director shall determine the amount of each surcharge for every insured health care provider and health care practitioner and of each annual amount for every self-insured health care provider and practitioner. The amount shall be based on actuarial principles to ensure that the total amount in the fund will reach \$5,000,000 by September 1, 1991, and will remain at \$5,000,000 thereafter.

3. Collection of surcharge and annual amounts. The director shall collect the surcharge from every insured health care provider and practitioner and the annual amounts from every self-insured health care provider and practitioner.

4. Surcharges or annual amounts reduced or waived. If on January 31st of any year, the amount of money in the fund exceeds the sum of \$5,000,000 after payment of all claims and expenses, the director shall reduce or waive the surcharges or annual amounts provided for in this section in order to maintain the fund at an approximate level of \$5,000,000.

§3404. Participation in the fund

The director shall establish criteria for health care providers and practitioners who wish to participate in the fund. Criteria must require participants to provide health services to Medicare patients under the United States Health Insurance for the Aged Act, Title XVIII of the Social Security Amendments of 1965, Public Law 89-97, as amended, and Medicaid patients under Title 22, section 3173.

§3405. Payment of claims from the fund

1. Payment to claimant. The director shall pay an amount from the fund to a claimant for damages on account of professional negligence to the extent a final judgment or a settlement of the action for professional negligence or alleged professional negligence is against a health care provider or practitioner who was a participant in the Patients Compensation Fund at the time the professional negligence or alleged professional negligence occurred. The payment shall equal the amount by which the final judgment or settlement exceeds \$250,000.

2. Fund exhausted. All eligible claims from the fund shall be paid on or before the end of each calendar quarter, but in no event later than the succeeding January 15th. At the end of each calendar quarter, the director shall determine if the fund is in danger of being exhausted. If that determination is made, the

1 amount paid to each claimant of all claims allowed thereafter
2 shall be prorated as determined by the director.

3
4 3. Expenditures of money. Expenditures of money in the
5 fund shall not be subject to any provisions of law requiring
6 specific appropriations or other formal release by state officers
7 of money in their custody. All benefits shall be paid from the
8 fund upon vouchers approved by the director.

9
10 **§3406. Director approval of payment from the fund**

11 The director shall approve payment of a claim from the fund
12 upon receipt of:

13
14 1. Final judgment. A certified copy of a final judgment
15 which has passed the deadline for appeal in excess of \$250,000
16 for a claimant against a health care provider or practitioner; or

17
18 2. Settlement. A certified copy of a settlement in excess
19 of \$250,000 for a claimant against a health care provider or
20 practitioner.

21
22 **§3407. Management of fund**

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24 Money in the fund may be deposited by the Treasurer of State
25 but shall not be commingled with other state funds and shall be
26 maintained in a separate account.

27
28 All expenses of collecting, protecting and administering the
29 fund shall be paid from the fund.

30
31 The director shall invest money in the fund in excess of the
32 amount deemed necessary for the payment of claims from the fund,
33 provided that the investments shall at all times be made so that
34 all the assets of the fund are always readily convertible into
35 cash when needed for the payment of claims.

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37 **§3408. Powers of director**

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39 1. Report of claim. Every insurer providing medical
40 malpractice insurance to a health care provider or practitioner
41 and every self-insured health care provider shall report to the
42 director within 10 working days any claim filed against a health
43 care provider or practitioner and shall make supplemental reports
44 as required by the director.

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46 2. Contract with attorney. For any court action on an
47 action for professional negligence, the director may contract
48 with an attorney to represent the health care provider or
49 practitioner if the director finds that action is necessary to
50 protect the interest of the fund.

1 3. Settlement. Settlement of an action for professional
2 negligence which may result in a recovery from the fund may be
3 made only with the agreement of the director.

5 4. Professional staff. The director may employ or contract
6 for the services of professional staff to carry out the
7 responsibilities of this chapter. Compensation for those
8 services shall be paid from the fund.

9
11 5. Bad faith failure to settle. If the plaintiff in an
12 action for professional negligence offers in writing to settle at
13 a sum of \$250,000 or less, that offer is rejected in bad faith by
14 the insurer or the self-insured health care provider or
15 practitioner and the claim subsequently results in a judgment
16 award that exceeds \$250,000, the fund shall have a cause of
17 action against the insurer or self-insured health care provider
18 or practitioner for the amount paid by the fund as a result of
19 the bad faith failure to settle. The director, on behalf of the
20 fund, may bring an action to recover on the cause of action and
21 if the judgment is for the fund, it shall be awarded costs and
22 reasonable attorney's fees and the costs of suit.

23 §3409. Proof of financial responsibility

25 1. Financial responsibility required. Financial
26 responsibility of a health care practitioner or health care
27 provider and its officers, agents and employees while acting in
28 the course and scope of their employment with the health care
29 practitioner or provider shall be maintained.

31 2. Manner of proof of financial responsibility. Financial
32 responsibility required by subsection 1 may be established:

33
35 A. By the health care practitioner or health care provider
36 filing proof with the director that the practitioner or
37 provider is insured by a policy of malpractice liability
38 insurance in the amount of at least \$250,000; or

39 B. By filing and maintaining with the director cash or
40 surety bond approved by the director in the amount of
41 \$250,000.

43 §3410. Loans by State to the fund

45 Until the amount of money in the fund exceeds \$5,000,000
46 calculated in the manner provided in section 3403, the director
47 may request a loan from the General Fund, provided that the
48 aggregate amount of loans that are unpaid may not exceed
49 \$1,500,000 at any time. Every loan shall be repaid by the fund
50 within 3 years, with interest at the rate of 10% per year. Upon
51 receipt of a loan from the State to the fund, the director shall
 increase, in addition to any other actuarially required

1 increases, the annual surcharge and the annual amounts provided
3 for in section 3403, over the next 2 years to a level that is
5 calculated to provide a sum to repay to the State the loan and
7 interest. Loans from the State are authorized only during the
9 period that the fund is accumulating through surcharges on health
11 care providers and practitioners. No loan may be made after the
13 amount in the fund first reaches the sum of \$5,000,000. The loan
15 shall be made only upon a finding by the Treasurer of State that
17 there is money in the General Fund which is in excess of the
19 amounts necessary for the immediate state requirements.

STATEMENT OF FACT

21 There is increasing evidence that the significant increase
23 in the cost of medical malpractice insurance has contributed to a
25 decline of certain health care specialties in Maine. The decline
27 of practitioners in specific areas is a severe impediment to the
health care system for many.

This bill would create a Patients Compensation Fund which
would serve to insure health care providers who meet the criteria
for participation in the fund. Criteria would include the
requirement that participants provide health care to Medicaid and
Medicare recipients. There would be a cap on liability for
health care providers, and the fund would ensure payment above
this amount.