**South Carolina General Assembly**

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**H. 5404**

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Currently residing in the House Committee on **Labor, Commerce and Industry**

Summary: Medical malpractice liability joint underwriting association

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

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**VERSIONS OF THIS BILL**

[5/9/2018](file:///p:\pprever\2017-18\5404_20180509.docx)

**A** **BILL**

TO AMEND SECTION 38‑79‑110, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO DEFINITIONS APPLICABLE TO THE SOUTH CAROLINA MEDICAL MALPRACTICE LIABILITY JOINT UNDERWRITING ASSOCIATION, SO AS TO REDEFINE CERTAIN TERMS AND DEFINE THE TERM “DEFICIT”; TO AMEND SECTION 38‑79‑120, RELATING TO THE CREATION OF THE ASSOCIATION, SO AS TO INCLUDE INSURERS AUTHORIZED TO WRITE PROFESSIONAL LIABILITY INSURANCE AS MEMBERS OF THE ASSOCIATION AND ESTABLISH THE PURPOSE OF THE ASSOCIATION; TO AMEND SECTION 38‑79‑180, RELATING TO THE FILING OF POLICY FORMS, SO AS TO REQUIRE THE ASSOCIATION TO SUBMIT CERTAIN FORMS AND ESTABLISH A TIMEFRAME FOR THE SUBMISSION OF THESE FORMS; TO AMEND SECTIONS 38‑79‑210 THROUGH 38‑79‑290, ALL RELATING TO THE PARTICIPATION IN THE ASSOCIATION AND OBLIGATIONS OF THE ASSOCIATION MEMBERS AND THE BOARD OF DIRECTORS OF THE ASSOCIATION, SO AS TO ESTABLISH CERTAIN RECOUPMENT METHODS FOR DEFICITS ACCUMULATED BY THE ASSOCIATION, TO BIND ASSOCIATION MEMBERS TO THE APPROVED PLAN OF OPERATION AND ANY AMENDMENTS TO THE PLAN, TO ESTABLISH TERMS FOR THE BOARD OF DIRECTORS, AND REQUIRE THE ASSOCIATION TO FILE FINANCIAL STATEMENTS ON SPECIFIED DATES; AND BY ADDING SECTIONS 40‑15‑390, 40‑33‑240, 40‑43‑115, 40‑47‑46, 40‑47‑1025, AND 40‑51‑185 ALL SO AS TO REQUIRE THE COLLECTION OF FEES TO SUPPORT THE MEDICAL MALPRACTICE LIABILITY JOINT UNDERWRITING ASSOCIATION.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 38‑79‑110 of the 1976 Code is amended to read:

“Section 38‑79‑110. As used in this article:

(1) ‘Association’ means any joint underwriting association established by the General Assembly in 1987 and managed and operated pursuant to the provisions of this article .

(2) ‘Licensed health care providers’ means physicians and surgeons, nurses, oral surgeons, dentists, pharmacists, ~~chiropractors,~~ podiatrists, hospitals, nursing homes, or any similar major category of licensed health care providers. The term ‘licensed health care provider’ also includes blood centers which collect, process, and distribute blood to hospitals and physicians for the care of patients if these blood centers as of July 1, 1997, were insured with the Joint Underwriting Association.

(3) ‘Medical malpractice insurance’ means medical professional liability insurance or insurance protection 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 or malpractice in rendering or failing to render professional service by any licensed physician, licensed health care provider, or hospital.

(4) ‘Net direct premiums’ means gross direct premiums written on ~~bodily injury liability insurance, other than automobile liability insurance, homeowners liability insurance, and farmowners liability insurance, including the liability component of multiple peril package policies, as~~ medical malpractice insurance, medical professional liability insurance, hospital professional liability insurance, and any other type of professional liability insurance covering risks of licensed health care providers and facilities, as determined by and computed by the director or his designee, less return premiums or the unused or unabsorbed portions of premium deposits. The net direct premium calculation does not include premiums written by the Association or the South Carolina Patients Compensation Fund established pursuant to Article 5 of this chapter.

(5) ‘Deficit’ means all operating losses of the association, as reported in the association’s financial statements.”

SECTION 2. Section 38‑79‑120 of the 1976 Code is amended to read:

“Section 38‑79‑120. (1) A joint underwriting association (association) is created, ~~consisting of~~ containing as members all insurers authorized to write and report net direct written premiums for medical malpractice insurance, medical professional liability insurance, hospital professional liability insurance or any other type of professional liability insurance in this State covering the professional liability risk of licensed healthcare providers or facilities. Membership also includes foreign and domestic risk retention groups and surplus lines insurers authorized to do business in accordance with the provisions of this title. Each such insurer, risk retention group, or surplus lines insurer is and must remain a member of the association as a condition of its authority to transact the sale of insurance in the State. However, if the net direct premiums written by all carriers are less than twenty‑five million dollars in any given year, then in such year, the members of the association shall be expanded to include all insurers authorized to write within this State, on a direct basis, bodily injury liability insurance, other than automobile bodily injury liability insurance, homeowners liability insurance, and farmowners liability insurance, including insurers covering such peril in multiple peril package policies~~. Every such insurer is and must remain a member of the association as a condition of its authority to continue to transact such kind of insurance in this State~~ and in such event, the term ‘net direct premiums’ shall mean gross direct premiums written on bodily injury liability insurance, other than automobile liability insurance, homeowners liability insurance, and farmowners liability insurance, including the liability component of multiple peril package policies, as computed by the director or his designee, less return premiums or the unused or unabsorbed portions of premium deposits.

(2) The purpose of the association is to ~~provide medical malpractice insurance~~ ensure the availability of medical malpractice and other types of liability insurance for health care providers on a self‑supporting basis to the fullest extent possible.

(3) The association must be called into operation at any time that the department finds and declares the existence of an emergency because of the unavailability of medical malpractice liability insurance, or the unavailability of medical malpractice liability insurance on a reasonable basis through normal channels, in respect to all or any one or more of the major categories of licensed health care providers listed in item (2) of Section 38‑79‑110.”

SECTION 3. Section 38‑79‑180 of the 1976 Code is amended to read:

“Section 38‑79‑180. ~~Within a time that the director or his designee directs,~~ The association shall submit, for the approval of the director or his designee, ~~an initial filing, 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. In the event the director or his designee disapproves the initial filing, in whole or in part, the association shall amend the filing, in whole or in part, in accordance with the direction of the director or his designee. If the director or his designee is unable to approve the filing or amended filing, within the time specified, he shall promulgate the policy forms, classifications, rates, rating plans, and rules to be used by the association in making rates for and writing the insurance~~ all policy forms, classifications, rates, rating plans or rules applicable to its insurance product offerings to customers in this State. Such filings must be submitted for prior approval to the director no less than sixty days prior to their intended effective date. The director may extend the time for his review by an additional sixty days to allow the department sufficient time to evaluate the proposed form, classification, rate, rating plans or rules to be used by the association. Rates must be actuarially sound, self supporting, and may not be excessive, inadequate, or unfairly discriminatory.”

SECTION 4. Sections 38‑79‑210 through 38‑79‑290 of the 1976 Code are amended to read:

“Section 38‑79‑210. Any deficit accumulated or sustained by the ~~Association in any year~~ association must be recouped, ~~pursuant to the plan of operation and the rating plan then in effect, by one or both~~ by one or more of the following procedures:

(1) ~~An assessment upon the policyholders which may not exceed one additional annual premium at the then current rate~~ A surcharge applied to the license and any annual or biennial renewal for all physicians, surgeons, osteopaths, and physician assistants as authorized pursuant to Chapter 47, Title 40; dentists and oral surgeons as authorized pursuant to Chapter 15, Title 40; advanced practice registered nurses and nurse practitioners as authorized pursuant to Chapter 33, Title 40; podiatrists authorized pursuant to Chapter 51, Title 40; and pharmacists authorized pursuant to Chapter 43, Title 40. All such surcharges must be authorized by the General Assembly and collected by the Department of Labor, Licensing and Regulation and forwarded to the board of the association to be applied toward reduction of an operating deficit of the association.

(2) An assessment against all members of the association according to any plan agreed to by the association’s board and submitted to, and approved by, the director. The board shall make an annual recommendation by July first of each year regarding the need for an assessment against the members, the size and scope of such assessment, and the percentages to be assessed against each member pursuant to this chapter.

(3) A rate increase applicable prospectively approved by the director or his designee pursuant to Section 38‑79‑180.

Section 38‑79‑220. ~~Effective after the initial year of operation, rates, rating plans, and rating rules, and any provision for recoupment through policyholder assessment or premium rate increase, must be based upon the association’s loss and expense experience and investment income, together with any other information based upon such experience and income as the director or his designee considers appropriate. The resultant premium rates must be on an actuarially sound basis and must be calculated to be self‑supporting.~~

~~In the event that sufficient funds are not available for the sound financial operation of the association, pending recoupment as provided in Section 38‑79‑210, all members shall, on a temporary basis, contribute to the financial requirements of the association in the manner provided for in Section 38‑79‑230. Any such contribution must be reimbursed to the members following recoupment as provided in Section 38‑79‑210.~~ Reserved.

Section 38‑79‑230. All insurers which are members of the association pursuant to the provisions of Section 38‑79‑120 shall participate in its writings, expenses, profits, and losses in the proportion that the ~~net~~ direct premiums of each member ~~(excluding that portion of premiums attributable to the operation of the association)~~ written during the preceding calendar year bear to the aggregate ~~net~~ direct premiums written in this State by all members of the association, excluding that portion of premiums attributable to the operation of the association. However, no member of the association may share in any profits or otherwise financially gain or benefit from the operation of the association unless and until the board and the director have mutually determined that all deficits of the association have been satisfactorily recovered.

Each insurer’s participation in the association must be determined annually on the basis of the ~~net~~ direct premiums written during the preceding calendar year, as reported in the annual statements and other reports filed by the insurer with the department or as reported by the insurer in reports or financial statements requested by the director to effectuate the provisions of this section.

The assessment of a member insurer~~, after hearing,~~ may be ordered deferred in whole or in part upon application by the insurer if, in the opinion of the director or his designee, payment of the assessment may render the insurer insolvent or in danger of insolvency or otherwise may leave the insurer in a hazardous financial condition ~~that further transaction of the insurer’s business may be hazardous to its policyholders, creditors, members, subscribers, stockholders, or the public~~ or the insurer has been placed into administrative supervision or receivership by their domestic state’s insurance regulator. If payment of an assessment against a member insurer is deferred by order of the director or his designee in whole or in part, the amount by which the assessment is deferred must be assessed against other member insurers in the same manner as provided in this section. ~~In the order of deferral or in subsequent orders as may be necessary~~ When ordering a deferral in whole or in part, the director or his designee shall prescribe a plan by which the assessment deferred must be repaid to the association by the impaired insurer with interest at the six‑month treasury bill rate adjusted semiannually. Profits, dividends, or other funds of the association to which the insurer is otherwise entitled may not be distributed to the impaired insurer but must be applied toward repayment of any assessment until the obligation has been satisfied. The association shall distribute the repayments, including interest on them, to the other member insurers on the basis on which assessments were made.

Section 38‑79‑240. Every member of the Association is bound by the approved plan of operation of the Association, including any amendments made, and by any other rules the board of directors of the Association lawfully prescribes.

Section 38‑79‑250. (1) ~~If the authority of an insurer to transact bodily injury liability insurance, other than automobile, homeowners, or farmowners, in this State terminates for any reason its obligations as a member of the association nevertheless continue until all its obligations have been fulfilled and the director or his designee has so found and certified to the board of directors.~~ If any member insurer ceases writing business in the State, either voluntarily or involuntarily, or by order or authority of the director, such insurer member shall nonetheless continue to be a member until all of its obligations to the association have been satisfied and the director or his designee has so found and certified to the association’s board.

(2) If a member insurer merges into, acquires, or consolidates with another insurer ~~authorized to transact such insurance in this State or another insurer authorized to transact such insurance in this State has reinsured the insurer’s entire general liability business in this State, both the insurer and its successor or assuming reinsurer, as the case may be are liable for the insurer’s,~~ transacting business subject to this article, or if any other insurer or entity has reinsured or assumed a member insurer’s entire liability business in this State, the surviving insurer, the acquiring insurer, its legal successor, or its assuming reinsurer, as the case may be, nonetheless remains liable for the member insurer’s obligations in respect to the association.

(3) Any unsatisfied net liability of any insolvent member of the association must be assumed by and apportioned among the remaining members in the same manner in which assessments or gain and loss are apportioned and the association shall thereupon acquire and have all rights and remedies allowed by law in behalf of the remaining members against the estate or funds of the insolvent insurer for funds due the association.

(4) The State is not responsible for any costs, expenses, liabilities, judgments, or other obligations of the association.

Section 38‑79‑260. The association is governed by a board of thirteen directors, all of whom must be appointed by the Governor. Each member of the board shall serve a term of four years. A board member may be reappointed for up to two additional four‑year terms. The Governor shall appoint five health care providers after consultation with the South Carolina Medical Association~~,~~ and the South Carolina Dental Association~~, and the South Carolina Health Alliance~~; four insurance representatives after consultation with the insurance industry; one consumer representative who is unaffiliated with the insurance or health care industries or the medical or legal professions; and two licensed insurance agents or brokers. The professional associations listed and the insurance industry may nominate qualified individuals to the Governor for his consideration. The Governor may also receive nominations for appointments to the board from any other individual, group, or association. ~~Notices of vacancies on the board must be published in newspapers of general statewide circulation.~~ The association and director must publicize all vacancies on the board to the general public. The director or his designee shall serve as an ex officio member of the board. The board shall develop a plan of operation which is subject to the approval of the director or his designee as provided in this article. The plan of operation shall provide for staggered terms of the members of the board. The approved plan of operation of the association may make provision for combining insurers under common ownership or management into groups for voting, assessment, and all other purposes and may provide that not more than one of the officers or employees of a group may serve as a director at any one time. The board shall elect a chairman and other necessary officers for two‑year terms. A vacancy must be filled for the unexpired portion of the term only. The Governor may receive recommendations from any individual, group, or association for any vacancy on the board. The board must meet at the call of the chairman or a majority of the members of the board, but in any event it must meet at least once a year.

Section 38‑79‑280. ~~The association shall file in the office of the department annually, by March first, a statement which contains information with respect to its transactions, condition, operations, and affairs during the preceding year~~ The association shall file a financial statement with the department by March first of each year detailing its transactions, financial condition, operations, and affairs during the previous calendar year. In addition, the director may require the association to file quarterly financial statements with the department on the fifteenth of May, August, and November of each year. The ~~statement~~ statements shall contain such matters and information as are prescribed by the director or his designee and must be in the form he directs. The director or his designee may, at any reasonable time, require the association to furnish additional information with respect to its transactions, condition, or any matter connected therewith considered to be material and of assistance in evaluating the scope, operation, and experience of the association.

Section 38‑79‑290. The director or his designee shall make an examination into the financial condition and affairs of the association at least annually and shall file a report thereon with the department, the Governor, and the General Assembly. The expenses of the examination must be paid by the association. In lieu of conducting his own examination, the director or his designee may accept an audit of the association performed by a qualified public accounting firm. The expenses of the audit must be paid by the association.”

SECTION 5. A. Article 1, Chapter 15, Title 40 of the 1976 Code is amended by adding:

“Section 40‑15‑390. In addition to the fees for initial licenses and renewal licenses, the board and department also shall collect a surcharge fee of fifty dollars per dentist license or license renewal for the purpose of reducing the operating deficit of the South Carolina Medical Malpractice Liability Joint Underwriting Association created pursuant to Section 38‑79‑120. Such surcharge fees must be remitted, on a quarterly basis, by the department to the board of the South Carolina Medical Malpractice Liability Joint Underwriting Association and shall continue until June 30, 2025, after which the fifty dollar surcharge fee shall expire, unless extended by act of the General Assembly. The failure to pay or remit the charge authorized by this section shall result, after notice and a hearing, in the suspension of the license until the license fee and applicable surcharge fees have been paid in full.”

B. Article 1, Chapter 33, Title 40 of the 1976 Code is amended by adding:

“Section 40‑33‑240. In addition to the fees for initial licenses and renewal licenses, the board and department also shall collect a surcharge fee of fifty dollars per license or license renewal for every person licensed as an advanced practice registered nurse or nurse practitioner. The surcharge is imposed for the purpose of reducing the operating deficit of the South Carolina Medical Malpractice Liability Joint Underwriting Association created pursuant to Section 38‑79‑120. Such surcharge fees must be remitted, on a quarterly basis, by the department to the board of the South Carolina Medical Malpractice Liability Joint Underwriting Association and shall continue until June 30, 2025, after which the fifty dollar surcharge fee shall expire, unless extended by act of the General Assembly. The failure to pay or remit the charge authorized by this section shall result, after notice and a hearing, in the suspension of the license until the license fee and applicable surcharge fees have been paid in full.”

C. Chapter 43, Title 40 of the 1976 Code is amended by adding:

“Section 40‑43‑115. In addition to the fees for initial licenses and renewal licenses, the board and department also shall collect a surcharge fee of ten dollars per pharmacist license or license renewal for the purpose of reducing the operating deficit of the South Carolina Medical Malpractice Liability Joint Underwriting Association created pursuant to Section 38‑79‑120. Such surcharge fees must be remitted, on a quarterly basis, by the department to the board of the South Carolina Medical Malpractice Liability Joint Underwriting Association and shall continue until June 30, 2025, after which the ten dollar surcharge fee shall expire, unless extended by act of the General Assembly. The failure to pay or remit the charge authorized by this section shall result, after notice and a hearing, in the suspension of the license until the license fee and applicable surcharge fees have been paid in full.”

D. Article 1, Chapter 47, Title 40 of the 1976 Code is amended by adding:

“Section 40‑47‑46. In addition to the fees for initial licenses and renewal licenses, the board and department also shall collect a surcharge fee of one hundred dollars per medical doctor, surgeon or osteopathic physician license or license renewal for the purpose of reducing the operating deficit of the South Carolina Medical Malpractice Liability Joint Underwriting Association created pursuant to Section 38‑79‑120. Such fees must be remitted, on a quarterly basis, by the department to the board of the South Carolina Medical Malpractice Liability Joint Underwriting Association and shall continue until June 30, 2025, after which the one hundred dollar surcharge fee shall expire, unless extended by act of the General Assembly. The failure to pay or remit the charge authorized by this section shall result, after notice and a hearing, in the suspension of the license until the license fee and applicable surcharge fees have been paid in full.”

E. Article 7, Chapter 47, Title 40 of the 1976 Code is amended by adding:

“Section 40‑47‑1025. In addition to the fees for initial licenses and renewal licenses, the board and department also shall collect a surcharge fee of fifty dollars per physician assistant license or license renewal for the purpose of reducing the operating deficit of the South Carolina Medical Malpractice Liability Joint Underwriting Association created pursuant to Section 38‑79‑120. Such fees shall be remitted by the department, on a quarterly basis, to the board of the South Carolina Medical Malpractice Liability Joint Underwriting Association and shall continue until June 30, 2025, after which the fifty dollar surcharge fee shall expire, unless extended by act of the General Assembly. The failure to pay or remit the charge authorized by this section shall result, after notice and a hearing, in the suspension of the license until the license fee and applicable surcharge fees have been paid in full.”

F. Chapter 51, Title 40 of the 1976 Code is amended by adding:

“Section 40‑51‑185. In addition to the fees for initial licenses and renewal licenses, the board and department also shall collect a surcharge fee of ten dollars per podiatrist license or license renewal for the purpose of reducing the operating deficit of the South Carolina Medical Malpractice Liability Joint Underwriting Association created pursuant to Section 38‑79‑120. Such surcharge fees must be remitted, on a quarterly basis, by the department to the board of the South Carolina Medical Malpractice Liability Joint Underwriting Association and shall continue until June 30, 2025, after which the ten dollar surcharge fee shall expire, unless extended by act of the General Assembly. The failure to pay or remit the charge authorized by this section shall result, after notice and a hearing, in the suspension of the license until the license fee and applicable surcharge fees have been paid in full.”

SECTION 6. A board member serving on the joint underwriting association board on the effective date of this act may be reappointed by the Governor.

SECTION 7. This act takes effect upon approval by the Governor.

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