

Report Title:

Medical Malpractice Captive Insurance

Description:

Forms a captive insurance company to provide medical malpractice insurance to self-employed medical doctors. (HB2151 HD1)

HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE, 2008
STATE OF HAWAII

H.B. NO. 2151
H.D. 1

A BILL FOR AN ACT

RELATING TO CAPTIVE INSURANCE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 431, Hawaii Revised Statutes, is amended by adding a new article to be appropriately designated and to read as follows:

"article

MEDICAL MALPRACTICE CAPTIVE INSURANCE COMPANY

§431: -101 Purpose. The medical malpractice captive insurance company is established to provide medical malpractice insurance coverage to self-employed medical doctors licensed and practicing in the state at the highest level of service with the lowest possible cost, consistent with reasonable and applicable

actuarial standards and the sound financial integrity of the company.

§431: -102 Definitions. As used in this article:

"Administrator" means the president and chief executive officer of the medical malpractice captive insurance company.

"Board" means the board of directors of the medical malpractice captive insurance company.

"Company" means the medical malpractice captive insurance company established by this article.

"Council" means the medical malpractice captive insurance company oversight council.

"Investment manager" means any fiduciary that has been designated by the board to manage, acquire, or dispose of the company's assets, a bank as defined by law, or an insurance company qualified to perform services under the laws of more than one state.

"Medical doctor" means a physician licensed under chapter 453 or 460.

"Qualified actuary" means a member of the American Academy of Actuaries who is either a fellow of the Casualty Actuarial Society or an Associate of the Casualty Actuarial Society who has five or more years of experience.

§431: -103 Medical malpractice captive insurance company, established. (a) The medical malpractice captive

insurance company is established as an independent corporation to provide medical malpractice insurance and related services to self-employed medical doctors. The company may be reorganized as a nonprofit corporation under chapter 414D.

(b) The company shall be organized and operated as a domestic mutual insurance company. The company shall comply with, unless specifically excluded, all requirements of the insurance code regarding a domestic mutual insurance company. The company shall not be an agency of the State. The company or its liabilities shall not be deemed to constitute debts or liabilities of the State or pledges of the full faith and credit of the State. The company shall write medical malpractice insurance policies covering self-employed medical doctors to the same extent as any other private insurer. The company shall not write other lines of insurance, reinsurance, or excess insurance.

(c) The company shall also be designated and licensed as a class 4 company under article 19. The company shall comply with, unless specifically excluded, all requirements of the insurance code regarding a class 4 company. No person shall be allowed to become a participant of the class 4 company unless the person is a self-employed medical doctor licensed and practicing medicine in this state. The company may insure the risks of its participants through participant contracts that segregate each participant's or related participants'

liabilities through one or more protected cells pursuant to section 431:19-106.3.

(d) The company's assets shall consist of real and personal property and shall include all premiums and other moneys paid to the company, all property, and other income acquired, earned, or otherwise gained by the use of premiums and other moneys paid to the company by deposits, investments, exchanges, and other transactions. The company's assets shall be the sole property of the company and shall be used exclusively by the company for the operation and obligations of the company.

(e) Notwithstanding any other law to the contrary, the company shall be excluded from the surplus requirements of domestic mutual insurers from January 1, 2009, through December 31, 2019.

(f) The company is exempt from participation, and shall not join, contribute financially to, nor be entitled to the protection of, any plan, association, guaranty, insolvency fund, or education and training fund authorized or required by this chapter. Notwithstanding the foregoing exemptions, beginning January 1, 2009, the company shall participate in the property and liability insurance guaranty association, pursuant to sections 431:16-101 to 431:16-117; provided that the company shall meet the surplus requirements applicable to all other

domestic insurers under chapter 431 effective January 1, 2009.

(g) On or after January 1, 2009, the company shall provide medical malpractice insurance coverage to self-employed medical doctors otherwise entitled to coverage but not able to or not electing to purchase coverage in the voluntary insurance market, and not authorized, either individually or as a part of a group, to self-insure. An authorized self-insured is eligible for coverage upon termination of self-insurance.

§431: -104 Board of directors, established. (a) The board of directors of the company shall be responsible for the organization, management, policies, and activities of the company. The board shall consist of nine voting members and one nonvoting member. The voting members shall consist of the following:

(1) Eight directors who shall be self-employed medical doctors licensed and practicing in the state; and

(2) One director who shall be a public, at-large member elected by the board of directors.

The administrator shall be the nonvoting member of the board.

(b) The initial eight directors shall be appointed by the governor within sixty days of July 1, 2008, and shall serve for terms of one year each.

The public, at-large member initially elected by the board shall serve for a term of one year.

The initial board of directors shall determine the staggering and length of future directors' terms; provided that no term shall exceed three years. Upon the expiration of the terms of the initial directors, the company's policyholders shall elect the directors. Each director shall serve for terms as specified by the board unless sooner removed for cause pursuant to rules adopted by the board. Each director shall hold office until a successor is elected as provided in this section. No person shall serve more than two full terms as director. Any other law to the contrary notwithstanding, the election and composition of the board of directors as provided in this section shall be deemed adequate to qualify the company as a mutual insurer under chapter 431.

(c) A vacancy on the board shall be filled by appointment of the governor or insurance commissioner in the case of appointed directors, or by election by the company policyholders or the board of directors in the case of positions formerly occupied by a director elected by the company policyholders or by the board of directors, respectively. The person appointed to fill a vacancy shall serve for the remainder of the term of the person's predecessor.

(d) Within one year after appointment, each director shall be a member or a policyholder of the company and shall continue in that status during the director's term of office. Any

director who fails to maintain medical malpractice insurance from the company shall be disqualified from serving on the board.

(e) Each director shall receive necessary traveling and board expenses incurred in the performance of duty as director and a fee commensurate with the duties expected of actual attendance at board meetings.

(f) No person shall be a director who has a direct and substantial interest in a competing insurer as a stockholder (excluding the holding of less than one per cent of the outstanding shares in a publicly traded insurer).

§431: -105 Powers; generally. Except as otherwise limited by this chapter, the company may:

(1) Sue, be sued, complain, and defend, in its corporate name;

(2) Have a corporate seal, which may be altered at pleasure, and use the seal by causing it, or a facsimile thereof, to be impressed, affixed, or in any other manner reproduced;

(3) Purchase, take, receive, lease, take by gift, devise, or bequest, or otherwise acquire, own, hold, improve, use, and otherwise deal in and with real or personal property, or any interest therein, wherever situated;

(4) Sell, convey, mortgage, pledge, lease,

exchange, transfer, and otherwise dispose of all and any part of its property and assets;

(5) Make contracts and incur liabilities, borrow money at rates of interest as the board may determine, issue guaranty capital shares and surplus notes, require capital contributions, issue its notes, debenture bonds, and other obligations, secure any of its obligations by mortgage or pledge of all or any portion of its property or income, and secure financing by any board-approved mechanism;

(6) Allocate fiduciary responsibilities among the directors and designate other persons to carry out fiduciary responsibilities;

(7) Collect, receive, hold, and disburse all money payable to or by the company;

(8) Deposit the company's money in banks or depositories selected by the board and withdraw the company's money from those banks or depositories; provided that the withdrawal shall be made or authorized only upon the signatures of at least two persons approved by the board;

(9) Pay money from the company to effectuate the company's purpose and administration, including amounts for costs incurred to establish the company; and

(10) Exercise all powers necessary or convenient to effect the purposes of the company.

§431: -106 Duties and responsibilities. (a) All

corporate powers shall be exercised by or under the authority of the board, unless otherwise provided in this chapter or in the articles of incorporation.

(b) The board shall discharge its duties:

(1) In accordance with the company's purpose;

(2) With the care, skill, prudence, and diligence under the circumstances that a prudent director, acting in a like capacity and familiar with those matters would use in conducting a similar enterprise and purpose;

(3) By diversifying the company's investments to minimize the risk of losses, unless it is prudent not to do so;

(4) In accordance with governing legal documents;

(5) By having an annual audit of the company by an independent certified public accountant;

(6) By securing a fidelity bond for the administrator and in its discretion for other agents dealing with the company's assets at the company's expense;

(7) By purchasing liability insurance for errors and omissions for the board, each director, and any

other fiduciary employed or contracted by the company to cover liability or losses caused by the act or omission of a fiduciary;

(8) By maintaining proper books of accounts and records of the company's administration;

(9) By carrying out the reporting and disclosure requirements required by law;

(10) By appointing a qualified actuary to develop and recommend a responsible schedule of premium rates with consideration of the company's investment income or refunds, or both, and to provide actuarial certification of the company's loss reserves; and

(11) By cooperating with and assisting the council in its duties and responsibilities.

(c) Except as otherwise provided by law, the board may:

(1) Transact workers' compensation insurance policies required or authorized by state law to the same extent as any other insurer;

(2) Provide the terms and conditions of an insurance policy;

(3) Provide that any written instrument be executed for the company by the administrator or the administrator's agent;

(4) Enter into agreements to reinsure all or part

of the company's exposure to loss and to limit the risk to the company; and

(5) Employ persons to administer the company, including legal counsel, accountants, insurance consultants, administrators, qualified actuaries, investment managers, adjustors, other experts, and clerical employees and pay compensation and expenses in connection therewith.

§431: -107 Administrator; appointment; duties. (a) The

board shall hire an administrator, who shall serve at the pleasure of the board. The administrator shall be the president of the company and the chief executive officer, who shall be responsible for the day-to-day operations and management of the company.

(b) The administrator shall have proven, successful experience as an executive at the general management level in the insurance business. The administrator shall manage and conduct the business of the company according to the board's direction and policies. The administrator shall receive compensation authorized by the board.

(c) Before entering the duties of office, the administrator shall give a fidelity bond in an amount and with sureties approved by the board. The premium for the bond shall be paid by the company.

(d) The administrator shall be an ex officio, nonvoting member of the board.

§431: -108 Financial management. (a) The board shall select a custodial trustee to collect, receive, hold, or disburse moneys payable to or by the company.

(b) The board shall invest the company's principal and income without distinction between principal and income and keep the company's assets invested in real or personal property or other securities. The board may retain cash temporarily awaiting investment or to meet contemplated payments without liability for interest thereon.

(c) The board shall manage the company's assets, except to the extent that the authority to manage the company's assets is delegated to other qualified investment managers. The board may appoint investment managers to manage, acquire, or dispose of any of the company's assets. An investment manager may be designated as an "investment agent". The investment manager shall acknowledge in writing that the investment manager is a fiduciary under the company.

(d) The board may:

(1) Sell the company's securities. No purchaser of the company's securities is bound to see to the application of the purchase money or inquire as to the validity of such sale;

(2) Vote on behalf of any stocks, bonds, or securities of any corporation or issuer held in the company or request any action to such corporation or issuer. The board may give general or special proxies or powers of attorney with or without powers of substitution;

(3) Participate in reorganizations, recapitalization, consolidations, mergers, and similar transactions for stocks, bonds, or other securities of any corporation that are held by the company, and accept and retain any property received thereunder for the company;

(4) Exercise any subscription rights and conversion privileges for the company's stocks or securities;

(5) Compromise, compound, and settle any debt or obligation due to or from the company; reduce the amount of principal and interest, damages, and costs of collection in settling such debts;

(6) Cause securities held by it to be registered in its own name or in the name of a nominee without indicating that the securities are held in a fiduciary capacity and to hold any securities in bearer form. The company's records, however, shall show that such

investments are part of the company;

(7) Delegate its investment powers to investment managers of the company to expedite the purchase and sale of securities. The purchase or sale of securities by these managers shall be in the name selected by the board. The authority of these managers to purchase or sell securities for the company shall be evidenced by written authority executed by the administrator. The board shall require these managers to keep it currently informed as to the nature and amount of the investments made for the company by them. The board may enter into appropriate agreements with these managers setting forth their investment powers and limitations. The board may terminate the services of these managers. These managers shall be subject to the board's instructions;

(8) Pay taxes or assessments that are assessed against the company;

(9) Require any applicant or policyholder to furnish the board with information necessary for the company's administration; and

(10) Delegate its authority to the administrator or any authorized representative to maintain any legal proceedings necessary to protect the company or the directors or to secure payment due to the company. In

connection with this delegation, the board or the administrator or their representative may compromise, settle, or release claims on behalf of or against the company or the board.

§431: -109 Oversight council. (a) There is established

the medical malpractice captive insurance company oversight council which shall meet at least once annually. For administrative purposes only, the council shall be assigned to the department of commerce and consumer affairs. The council shall oversee the activities of the company to ensure that the company fulfills its purpose as set forth in this article.

(b) The council shall consist of five members who shall include:

(1) A member of the senate appointed by the president of the senate;

(2) A member of the house of representatives appointed by the speaker of the house of representatives;

(3) The director of health;

(4) The director of commerce and consumer affairs;

and

(5) An at-large member who is an owner, officer, or employee of the company policyholder appointed by the governor;

provided that if any designee under paragraphs (1) to (4) does

not meet the test in subsection (c), the president of the senate, speaker of the house of representatives, or governor, as applicable, shall designate an appropriate representative. Section 26-34 shall not apply to appointments under this section.

(c) No person shall serve on the council, who within the second degree of consanguinity or affinity, has a direct and substantial interest in an insurer that competes with the company, including but not limited to:

(1) A stockholder of a competing company (excluding a holder of less than one per cent of the outstanding shares in a publicly traded company);

(2) An employee of a competing company;

(3) An attorney who represents a competing company; or

(4) A party who contracts with a competing company (excluding an independent contractor or business owner who does less than twenty-five per cent of its total annual volume of business per year with competing insurers).

(d) Members of the council shall serve without compensation, but shall be reimbursed for reasonable expenses necessary for the performance of their duties.

(e) The administrator shall serve as liaison officer to the council. Not later than sixty days after July 20, 2010, and

every June 15 thereafter, the board shall provide to the council any and all data and information the council may require, including but not limited to:

(1) The company's statutorily-required annual financial statement;

(2) Copies of any reports issued by the insurance division in connection with the triennial examination of the company; and

(3) Actuarial certification of loss reserves.

(f) After receipt of the data and information required pursuant to subsection (e), the council shall review the activities of the company and determine whether the company is fulfilling its purpose as set forth in this article. The council shall promptly, but in no event later than October 15, 2010, and every October 15 thereafter, submit a report to the governor with a copy to the board of directors, stating whether the company is fulfilling its purpose as set forth in this article. If the council determines that there are any deficiencies in the company's fulfillment of its purposes as set forth in this article, it shall include in its report a detailed description of any deficiencies. Within a period established by the council, but in no event later than six months after delivery of the council's report in accordance with this section, the company shall respond in writing to any

deficiencies identified in the council's report. The medical malpractice captive insurance company shall provide staff support to the council.

(g) If the governor determines that corrective action is appropriate after reviewing the council's report and the company's response, the governor shall inform the legislature, and the legislature shall consider what action is needed.

§431: -110 Premium rates, determination. (a) The board shall establish the premium rates to be charged for insurance sold by the company. The company shall comply with the requirements set forth in articles 14 and 19 of this chapter. Premium rates shall be set at levels sufficient, when invested, to carry all claims to maturity, to meet the reasonable expenses for administering the company, and to maintain a reasonable surplus.

(b) The board shall hire a qualified actuary to assist with the development of sound premium rates.

§431: -111 Reserves, investment. The board may invest or reinvest any surplus or reserves within the limitations established for insurance companies under chapter 431.

§431: -112 Financial statements and other reports. (a) The company shall submit to the commissioner an annual statement of financial condition audited by an independent certified accountant. The audit report shall contain an actuarial opinion

prepared by a qualified actuary on the company's claims reserves and expenses. The financial statement shall be on a form prescribed by the commissioner and shall include actuarially appropriate reserves for:

- (1) Known claims and associated expenses;
- (2) Claims incurred but not reported and associated expenses;
- (3) Unearned premiums; and
- (4) Bad debts, reserves for which shall be shown as liabilities.

(b) The company shall compile and maintain statistical and actuarial data relating to the determination of premium rate levels, the incidence of medical malpractice claims, the cost of medical malpractice claims, and other data relating to medical malpractice. The compiled information shall be submitted annually to the commissioner.

§431: -113 Annual accounting; dividends. (a) The company shall conduct an annual accounting of its incurred loss experience and expenses.

(b) The board may declare and apportion reasonable dividends to policyholders, determined by an actuarial opinion prepared by a qualified actuary after evaluating the impact of the dividends on the solvency of the company. The dividends may be paid or credited to policyholders according to

classifications of policies established by the board.

(c) No dividends shall be:

(1) Paid or credited in a manner that unfairly discriminates between policies within the same classification;

(2) Made contingent upon payment of any renewal premium on any policy; or

(3) Paid or credited in the first three years of operation of the company.

§431: -114 Audits. The administrator, or designated representative, shall have reasonable access to any policyholder's payroll and employment records during regular working hours to carry out audits of payroll reported, the number of employees on the payroll, and other information necessary for the administration of this article.

§431: -115 Denial, cancellation, and termination. The company may deny coverage or renewal of an existing policy or may terminate an existing policy of a policyholder or applicant for:

(1) Nonpayment of an undisputed premium;

(2) Refusal to permit on-site workplace safety examinations;

(3) Failure to comply with workplace safety and health programs required by the company; or

(4) Failure to accurately disclose information concerning the applicant's or policyholder's ownership, change of ownership, operations, or payroll, including the allocation of payroll among state and federal compensation programs, and other information necessary for the board to determine premium rates.

§431: -116 Wilful misrepresentation and fraud. (a) Any

person who wilfully makes a false statement or representation for the purpose of directly obtaining any compensation or payment or for the purpose of avoiding any compensation or payment under this article shall be subject to the penalties in article 13.

(b) The company shall develop and implement a program to identify and investigate fraudulent insurance acts.

§431: -117 Discontinuation of residual market plan.

(a) The residual market plan, as authorized by section 431:14-116.6, is discontinued effective December 31, 2008, or the date the company writes its first policy, whichever date is later, except for dissolution of any obligations for claims arising out of any policies written pursuant to the plan with inception dates of or before December 31, 2008, or the date the company writes its first policy, whichever date is later. It is the intent of this section to provide for an orderly transfer of policies from the residual market plan as authorized by section

431:14-116.6 to the company.

(b) The residual market plan shall continue its operation for all policies with inception dates of or before December 31, 2008, or the date the company writes its first policy, whichever date is later. All policies written thereunder shall be for one-year terms, and shall not be terminated prior to expiration except for cause. In no case shall policies with inception dates of January 1, 2009, or the date the company writes its first policy, whichever date is later, be provided under the residual market plan authorized by section 431:14-116.6.

§431: -118 Discontinuation of assigned risks. (a)

Assigned risk coverage, as authorized by section 431:14-116, is discontinued effective December 31, 2008, or the date the company writes its first policy, whichever date is later, except for dissolution of any obligations for claims arising out of any policies written pursuant to section 431:14-116 with inception dates on or before December 31, 2008, or the date the company writes its first policy, whichever date is later. It is the intent of this section to provide for an orderly transfer of assigned risks as authorized by section 431:14-116 to the company.

(b) Assigned risk coverage, as authorized under section 431:14-116, shall continue operation for all policies with inception dates of or before December 31, 2008, or the date the

company writes its first policy, whichever date is later. All policies written thereunder shall be for one-year terms, and shall not be terminated prior to expiration except for cause. In no case shall policies with inception dates of January 1, 2009, or the date the company writes its first policy, whichever date is later, be provided for assigned risks authorized by section 431:14-116."

SECTION 2. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ or so much thereof as may be necessary for fiscal year 2008-2009 for the insurance commissioner to oversee the establishment of the medical malpractice captive insurance company.

The sum appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.

SECTION 3. This Act shall take effect on January 1, 2050.