

Chapter 752

1977 REPLACEMENT PART (1981 reprint)

Malpractice Insurance

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CROSS REFERENCES

Physicians, general, Ch 677
Statute of limitations for medical malpractice, 12 110

INSURANCE

752.010 Policy. The Legislative Assembly finds that it is in the interest of the people of Oregon that physicians in this state be able to obtain insurance for professional liability and that the insurance be available at reasonable rates. It is declared to be the policy and intent of the Legislative Assembly that an Oregon physician who maintains the designated limits of professional liability insurance and contributes to the Medical Excess Liability Fund shall be deemed to have fulfilled the objectives of this public policy. [1975 c 796 §13, 1977 c 269 §1]

752.020 Definitions. As used in ORS 752.010 to 752.140:

(1) "Physician class 1" includes physicians engaged in the treatment of allergic diseases, administrative or public health medicine, cardiology, dermatology without radiation therapy, endocrinology, gastroenterology, general or family medicine without surgery and who assist at surgery of their own patients under the direct supervision of a primary surgeon, geriatrics, hematology, internal medicine, neurology, pathology, pediatrics, psychiatry, rheumatology, and roentgenology or radiology without radiation therapy.

(2) "Physician class 2" includes physicians engaged in dermatology with radiation therapy and roentgenology or radiology with radiation therapy.

(3) "Physician class 3" includes physicians engaged in general practice with less than 25 percent of the practice being surgery, special practice with less than 25 percent of the practice being surgery and any other physician not included in physician class 4, 5 or 6 who performs surgery.

(4) "Physician class 4" includes physicians engaged in general practice with more than 25 percent of the practice being surgery, special practice with more than 25 percent of the practice being surgery, ophthalmology and proctology.

(5) "Physician class 5" includes physicians engaged in cardiac surgery, otolaryngology, general surgery, head or neck surgery, oncology, pediatric surgery, thoracic surgery, urology, vascular surgery and emergency room service.

(6) "Physician class 6" includes physicians engaged in anesthesiology, gynecology and obstetrics, hand surgery, neurosurgery, orthopedic surgery and plastic surgery. [1975 c 796 §13a, 1977 c 269 §2]

752.030 Classification of physician in case of doubt or dispute. If doubt or dispute exists as to which class a physician belongs for the purposes of ORS 752.010 to 752.140, the Insurance Commissioner, after conferring with the Board of Medical Examiners for the State of Oregon, shall determine the class and shall so notify the physician. [1975 c 796 §13b]

752.040 Limitation of physician's liability for professional negligence; requirements for and conditions of limitation of liability; payment of amounts in excess of limitation of liability. (1) (a) When a physician licensed under ORS chapter 677 is insured in the amount required under subsection (2) of this section by an insurer licensed and approved by the Insurance Commissioner or under a self-insurance plan approved by the Insurance Commissioner for damages arising out of professional negligence for the injury or death of a human being and the physician has paid the current annual fee required under ORS 752.080, the only liability of the physician, those insured under his policy and all others liable for his professional negligence for any judgment, award or approved settlement arising out of a claim for damages due to professional negligence shall be limited to any sum payable under the terms of the physician's professional liability insurance policy or approved self-insurance plan and the Medical Excess Liability Fund.

(b) No judgment or award against a complying physician, those insured under his policy or self-insurance plan or others liable for his professional negligence, nor any approved settlement agreed to by a complying physician, those insured under his policy or self-insurance plan or others liable for his professional negligence, shall be collectible from any source other than the complying physician's professional liability insurance policy or approved self-insurance plan and the Medical Excess Liability Fund. This section shall not be deemed to create any direct right of action against a complying physician's professional liability insurance policy, approved self-insurance plan or the Medical Excess Liability Fund prior to a judgment, award, or approved settlement.

(c) Claims for indemnity or contribution arising out of a claim for damages due to professional negligence shall be subject to the provisions of this subsection.

(2) The amount of professional liability insurance or approved self-insurance required

to obtain the limitation of liability granted by subsection (1) of this section, under an occurrence policy, shall be \$100,000 for each claim and \$300,000 aggregate for occurrences taking place during an annual policy period or under a claims made policy, \$100,000 for each claim and \$300,000 aggregate for claims made during an annual policy period. A policy may provide that the inclusion of more than one insured therein shall not operate to increase the limits of liability.

(3) Any physician who carries a claims made policy or is protected by an approved self-insurance plan and who discontinues practice may obtain the limitation of liability granted by subsection (1) of this section by maintaining the claims made policy by paying the premiums for the period required by the insurer or approved self-insurer not to exceed three years.

(4) When a party obtains a final judgment or award against a physician, those insured under his policy or others liable for the physician's professional negligence or agrees to an approved settlement and does not receive the full amount of the judgment, award or approved settlement from an insurer or approved self-insurer of the physician because it is in excess of the insurance or self-insurance required under subsection (2) of this section, that party shall be paid the remaining unpaid amount from the Medical Excess Liability Fund as provided in ORS 752.010 to 752.140.

(5) Upon a showing to the court of the insufficiency of the physician's professional liability insurance or approved self-insurance, the court shall issue an order to the Insurance Commissioner directing him to pay the difference between the insurance or approved self-insurance and the final judgment, award or approved settlement subject to the limitations of this section.

(6) After payment by the insurer or approved self-insurer on behalf of its insured physician, those insured under his policy or others liable for the physician's professional negligence and after issuance of a court order requiring the Insurance Commissioner to pay the difference, if any, from the Medical Excess Liability Fund, the claimant shall execute and deliver to the physician, those insured under his policy and others liable for the physician's professional negligence a full and complete satisfaction of judgment or award or a full and complete release for damages due to the occurrence which was the basis of the claim. In lieu of a complete satisfaction or complete

release, the settling parties may mutually agree to some other instrument to conclude the claim. [1975 c 796 §14, 1977 c 269 §3]

752.050 [1975 c 796 §15, repealed by 1977 c 269 §12]

752.060 Payment of claimants after judgment, award or settlement; commissioner to review settlements; claimant to execute satisfaction of judgment or release. (1) When a party obtains a final judgment or award against a physician, those insured under his policy or others liable for the physician's professional negligence in excess of the insurance or self-insurance required by ORS 752.040 (2), the court shall determine whether the liability of the physician, those insured under his policy and others liable for the physician's professional negligence is limited under ORS 752.040 (1) and (2) by compliance with those subsections. If the court determines that the liability is so limited, the court shall issue an order to the Insurance Commissioner directing him to pay the amount, if any, by which the judgment or award exceeds the physician's professional liability insurance or approved self-insurance from the Medical Excess Liability Fund to the party in whose favor the judgment or award was given.

(2) When a party agrees to a settlement of his claim arising out of professional negligence against a physician, those insured under his policy or others liable for the physician's professional negligence in an amount greater than the insurance required by ORS 752.040, that party shall petition any circuit court in this state for an order approving the settlement and requiring payment of any amount greater than the required insurance or self-insurance to be made from the Medical Excess Liability Fund. When a party files a petition under this subsection, a copy of the petition must be mailed by registered mail to the Insurance Commissioner. When the Insurance Commissioner receives a copy of a petition under this subsection, he shall review the facts of the case and evaluate the proposed settlement. He or his representative may meet with the parties to the settlement or their representatives. If, after review and evaluation, the Insurance Commissioner approves the proposed settlement, he shall file a statement of approval with the circuit court in which the petition was filed. When the statement of approval is filed, further court proceedings in the matter of the proposed settlement shall cease and the settlement shall be

approved. If, after review and evaluation, the Insurance Commissioner does not approve the proposed settlement, he shall so notify the circuit court in which the petition was filed, and the court shall make the Insurance Commissioner a party to the settlement proceedings until the proposed settlement is approved or disapproved by the court. After a hearing at which the Insurance Commissioner or his representative shall be present, if the court approves the settlement, it shall issue an order directing the Insurance Commissioner to pay the amount, if any, in excess of the insurance or self-insurance of the physician from the Medical Excess Liability Fund.

(3) After payment in full of the amount of the final judgment or award, the approved settlement or after payment of the available insurance, and upon the issuance of the court's order under subsections (1) and (2) of this section for payment from the Medical Excess Liability Fund, the claimant shall execute and deliver to the physician, those insured under his policy and others liable for the physician's professional negligence, a complete satisfaction or a complete release of all claims against the physician, those insured under his policy and others liable for the physician's professional negligence for all damages relating to the occurrence which was the basis of the claim. The settling parties may mutually agree to some other instrument to conclude the claim. [1975 c 796 §16, 1977 c 269 §4]

752.070 Payment of claims from fund; alternative methods of payment. (1) When the Insurance Commissioner receives a court order requiring payment of moneys from the Medical Excess Liability Fund, he shall pay the amounts stated in the court's order

(2) In the discretion of the commissioner and with the approval of the court, payment may be made by instalments or annuities. [1975 c 796 §17, 1977 c 269 §5]

752.080 Physician's annual payment to fund; receipt by commissioner; evidence of limitation of physician's personal liability. (1) An Oregon physician who wishes to limit his liability for damages for the injury or death of a human being as provided in ORS 752.040 (1) and (2) shall, not later than the date specified by the Insurance Commissioner in each year, pay the Insurance Commissioner the sum of

(a) \$500, if the physician is in physician class 1;

(b) \$1,000, if the physician is in physician class 2;

(c) \$1,500, if the physician is in physician class 3;

(d) \$2,000, if the physician is in physician class 4;

(e) \$2,500, if the physician is in physician class 5; or

(f) \$3,000, if the physician is in physician class 6.

(2) Moneys received by the Insurance Commissioner under subsection (1) of this section shall be delivered by him to the State Treasurer for deposit in the Medical Excess Liability Fund.

(3) Upon receipt of a payment by an Oregon physician under subsection (1) of this section, the Insurance Commissioner shall send the physician a certificate of receipt that evidences the payment and the limitation of the personal liability of the physician.

(4) A physician who pays the fee required under subsection (1) of this section shall not be required to make further payments for the same year. [1975 c 796 §18, 1977 c 269 §6]

752.090 Medical Excess Liability Fund; purpose; investment. There is created a Medical Excess Liability Fund to be held by the State Treasurer and to be deposited by him in such banks as are authorized to receive deposits of the General Fund. All payment of compensation to claimants under ORS 752.010 to 752.140 shall be made from the Medical Excess Liability Fund. The moneys deposited in the Medical Excess Liability Fund are continuously appropriated for the purpose of paying compensation to claimants under ORS 752.010 to 752.140 and paying the administrative expenses of the Insurance Division of the Department of Commerce in administering ORS 752.010 to 752.140. All moneys in the Medical Excess Liability Fund may be invested as provided in ORS 293.701 to 293.776, 293.810 and 293.820, and the earnings from such investment shall be credited to the Medical Excess Liability Fund. [1975 c 796 §21, 1977 c 269 §7]

752.100 Liability for payments contingent on reserves in fund. Liability of the Medical Excess Liability Fund for the payment of compensation under ORS 752.010 to 752.140 is contingent upon and limited by the availability of reserves in the Medical Excess Liability Fund. [1975 c 796 §22]

752.110 Fund not liable for punitive damages. The Medical Excess Liability Fund shall not be liable for awards for punitive damages nor shall an insurer or approved self-insurer of a complying physician be liable for punitive damages unless the policy or plan expressly provides for such coverage. Nothing in ORS 752.010 to 752.140 shall be construed to grant a physician, those insured under his policy or others liable for the physician's negligence personal immunity from that portion of any judgment that is assessed as punitive damages. [1975 c 796 §23, 1977 c 269 §8]

752.120 Notifying commissioner of claims against fund. A physician, his insurer or approved self-insurer shall notify the Insurance Commissioner of all actions filed which may subject the Medical Excess Liability Fund to claims. Such notice shall include the name of the physician, the claimant and all other parties to the action, the date of the alleged occurrence, the filing date of the complaint and the amount prayed for in the complaint. [1975 c 796 §24, 1977 c 269 §9]

752.130 Commissioner to report to Legislative Assembly. The Insurance Commissioner shall transmit to the Legislative Assembly, as soon after January 15 of every odd-numbered year as is consistent with full and accurate preparation, a report of his transactions under ORS 752.010 to 752.140, including a detailed statement of moneys deposited in and expended from the Medical Excess Liability Fund, and such other information as the Legislative Assembly may require. [1975 c 796 §19]

752.140 Rules; limitations, conditions and exclusions from liability policies; engaging counsel to defend claims against complying physicians. (1) (a) In accordance with the applicable provisions of ORS 183.310 to 183.550, the Insurance Commissioner may make reasonable rules necessary to implement ORS 752.010 to 752.140.

(b) The Insurance Commissioner may make rules governing qualification of self-insurance by physicians or groups of physicians including those affiliated with health care service contractors or health maintenance organizations.

(2) The Insurance Commissioner shall have the authority to approve limitations, conditions and exclusions for professional liability insurance policies under ORS 752.010 to 752.180. The fact that a physician's profes-

sional liability policy may have certain approved limitations, conditions or exclusions shall not affect the protection of ORS 752.010 to 752.180 so long as the policy affords coverage for the claim asserted.

(3) The Insurance Commissioner shall engage counsel to defend claims against complying physicians when their insurance company no longer has a duty to defend. The costs of such counsel, if other than counsel from the Attorney General, shall be borne by the Medical Excess Liability Fund. [1975 c 796 §20, 1977 c 269 §10]

752.150 Attorney fees in action for damages resulting from professional negligence. When, in an action to recover damages for injuries to the person arising from any medical, surgical or dental treatment, omission or operation, the plaintiff's attorney is employed under an agreement whereby the attorney receives as his fee a percentage of the damages awarded to the plaintiff, notwithstanding the terms of that agreement the plaintiff's attorney shall not receive more than 33-1/3 percent of the moneys awarded to the plaintiff. [1975 c 796 §25]

752.160 Applicability. The provisions of ORS 752.010 to 752.140 apply to and govern alleged incidents of professional negligence that occur on or after July 1, 1975. [1975 c 796 §27]

752.170 Participation in Medical Excess Liability Fund by state-employed physicians. (1) Physicians acting within the scope of state employment under ORS 30.260 to 30.300 may participate in the Medical Excess Liability Fund upon payment of the appropriate fee under ORS 752.080 and thereby claim the protection offered by this chapter.

(2) The liability coverage provided under ORS 30.260 to 30.300 satisfies the primary insurance requirements of ORS 752.040 for participation in the Medical Excess Liability Fund by physicians acting within the scope of state employment and not otherwise disqualified for protection under ORS 30.260 to 30.300 for claims resulting from professional negligence [1977 c 851 §5]

752.180 Effect of participation in fund by state-employed physicians. Participation in the Medical Excess Liability Fund by a physician shall not be construed as a waiver of the limitations of liability provided under ORS 30.260 to 30.300, and payment under ORS 30.260 to 30.300 shall be the ex-

clusive source of indemnification for professional negligence claims against physicians acting within the scope of state employment thereunder. However, if the indemnification provisions of ORS 30.260 to 30.300 are declared to be unconstitutional, total payment of professional negligence claims against such physicians shall be made by the Insurance Commissioner from the Medical Excess Liability Fund. [1977 c 851 §6]

752.190 Judicial examination of ORS 752.010 to 752.180; jurisdiction; procedure.

The Insurance Commissioner, the Oregon Medical Association, or any other interested party may, by petition to the Supreme Court, commence proceedings for a judicial examination and judgment of the Supreme Court as to the constitutionality and legality of ORS 752.010 to 752.180 and any act or proceeding

thereunder. The procedure shall follow the procedure of courts of equity. Jurisdiction shall be acquired pursuant to ORS 28.020 and a justiciable controversy ripe for determination shall be deemed to exist in the event a complaint is filed. The Supreme Court shall have sole and exclusive jurisdiction of proceedings initiated under this section and shall use as evidence the legislative history of the 58th and 59th sessions of the Oregon Legislative Assembly [1977 c 269 §11]

CHAPTERS 753 to 755
[Reserved for expansion]

INSURANCE
