

1 H.35

2 Introduced by Representative Till of Jericho

3 Referred to Committee on

4 Date:

5 Subject: Health care; medical malpractice; no-fault compensation program;
6 primary care physicians

7 Statement of purpose of bill as introduced: This bill proposes to establish a
8 no-fault compensation program for medical injury claims brought against
9 primary care physicians in Vermont. The program, which would replace the
10 current litigation-based medical malpractice system with respect to primary
11 care providers, provides for the payment of compensation to any person
12 injured as a result of treatment provided by a primary care physician,
13 irrespective of fault on the part of the physician. Compensation to the injured
14 person is made from a fund capitalized by annual assessments paid by
15 physicians practicing primary care in Vermont. Physicians who pay
16 assessments into the fund will no longer be required to purchase medical
17 malpractice insurance for providing primary care. The bill establishes a
18 Medical Injury Review Board to hear and decide applications for
19 compensation submitted by injured persons.

1 An act relating to establishing a no-fault compensation program for medical
2 malpractice claims involving primary care physicians

3 It is hereby enacted by the General Assembly of the State of Vermont:

4 Sec. 1. FINDINGS

5 The General Assembly finds that:

6 (1) According to the Vermont Area Health Education Centers (AHEC)
7 network's 2008 snapshot of the State's primary care workforce, Vermont has
8 an inadequate supply of primary care physicians and advanced practice
9 registered nurses (nurse practitioners).

10 (2) The AHEC network's 2008 study shows that: Vermont's supply of
11 internal and family medicine physicians is experiencing a shortfall of
12 57 full-time equivalents (FTEs) statewide; 11 out of 14 counties are lacking
13 sufficient family and internal medicine physicians; the supply of nurse
14 practitioners has a shortfall of 15 FTEs statewide, including midwives;
15 43 percent of Vermont's family and internal medicine practices are limited or
16 closed to new patients; and statewide, 31 percent of all primary care physicians
17 either are not accepting or are limiting their acceptance of new patients.

18 (3) The shortage of primary care physicians in Vermont is caused in part
19 by the litigation-based medical malpractice system used in this state and
20 throughout the country. The threat of lawsuits and the costs associated with
21 defending against them make medical malpractice insurance prohibitively
22 expensive for primary care physicians, forcing them either to pursue better

1 paying specialties or to relocate to states where compensation is more
2 lucrative.

3 (4) A no-fault compensation program, which would compensate patients
4 who suffer injuries as a result of treatment by the patient's primary care
5 physician irrespective of whether the physician was at fault, would help
6 alleviate the primary care physician shortage problem in Vermont. By
7 replacing the current litigation-based malpractice system, the program would
8 streamline remedies for injured patients, free medical providers to participate
9 in health care rather than time-consuming lawsuits, and dramatically scale back
10 the time and expense of litigation. In this way, the program would offer more
11 timely compensation to a greater number of injured patients and more effective
12 processes for complaint resolution and provider accountability while costing
13 less than the litigation-based system currently in place. The lower costs would
14 be reflected in lower medical malpractice expenses, making Vermont a more
15 attractive state for primary care physicians, a particularly beneficial result
16 when federal health care reform is expected to increase the demand for
17 preventive care services.

18 (5) A no-fault compensation system would be more conducive to
19 preserving the doctor's role as the patient's advocate, as opposed to the
20 litigation-based system in which the doctor and the patient become adversaries.

1 Sec. 2. 12 V.S.A. chapter 219 is added to read:

2 CHAPTER 219. NO-FAULT COMPENSATION PROGRAM FOR
3 INJURIES SUFERED AS A RESULT OF TREATMENT PROVIDED BY A
4 PRIMARY CARE PHYSICIAN

5 § 7201. DEFINITIONS

6 As used in this section:

7 (1) “Board” means the Medical Injury Review Board established by
8 section 7203 of this title.

9 (2) “Compensable injury” means an injury suffered by a patient as a
10 result of the patient’s treatment by a primary care physician, irrespective of
11 whether the physician was at fault.

12 (3) “Department” means the Department of Financial Regulation.

13 (4) “Health care facility” shall have the same meaning as in 18 V.S.A.
14 § 9402(6).

15 (5) “Primary care” means health services provided by health care
16 professionals specifically trained for and skilled in first-contact and continuing
17 care for individuals with signs, symptoms, or health concerns, not limited by
18 problem origin, organ system, or diagnosis, and shall include prenatal care and
19 the treatment of mental illness.

20 (6) “Primary care physician” means a physician who provides primary
21 care.

1 § 7202. INJURIES SUFFERED AS RESULT OF TREATMENT BY
2 PRIMARY CARE PHYSICIAN; NO-FAULT COMPENSATION
3 PROGRAM

4 (a) A no-fault compensation program for medical injury claims against
5 primary care physicians is established under the direction and authority of the
6 Department of Financial Regulation. The program shall provide for the
7 payment of compensation from the No-Fault Medical Malpractice Insurance
8 Special Fund established by section 7207 of this title to any person injured as a
9 result of treatment provided by a primary care physician, irrespective of fault
10 on the part of the physician. All physicians who provide primary care in
11 Vermont shall pay assessments into the fund pursuant to subsection 7207(b) of
12 this title, and the Medical Injury Review Board established by section 7203 of
13 this title shall determine whether a person's application for compensation from
14 the fund shall be granted pursuant to section 7206 of this title.

15 (b) The Department shall adopt rules under section 7209 of this title for
16 purposes of administering the no-fault compensation program established by
17 this chapter.

18 § 7203. MEDICAL INJURY REVIEW BOARD

19 (a)(1) A Medical Injury Review Board is established under the direction
20 and authority of the Commissioner of Financial Regulation for the purpose of

1 hearing and deciding applications for compensation submitted pursuant to the
2 no-fault compensation program established by this chapter.

3 (2) The Board shall consist of the following five members appointed by
4 the Governor:

5 (A) one primary care physician licensed to practice in this State;

6 (B) one attorney licensed to practice in this State who has experience
7 bringing medical malpractice actions;

8 (C) one person employed by a health insurer as defined in 18 V.S.A.
9 § 9402(8); and

10 (D) two public members.

11 (b) The Medical Injury Review Board shall have the authority to:

12 (1) receive and review applications filed by a patient seeking
13 compensation for an injury the patient alleges to have suffered as a result of
14 treatment provided by a primary care physician; and

15 (2) determine whether the patient has suffered a compensable injury
16 and, if so, order that the Department compensate the patient from the No-Fault
17 Medical Malpractice Insurance Special Fund established by section 7207 of
18 this title.

19 (c) The Board shall meet at least monthly to review and determine
20 applications. Members of the Board are entitled to compensation and expenses
21 as provided under 32 V.S.A. § 1010.

1 (d) The Board may employ staff and hire consultants as are needed to carry
2 out the provisions of this chapter. Staff and consultants retained by the Board
3 shall be compensated from the No-Fault Medical Malpractice Insurance
4 Special Fund established by section 7207 of this title and shall not be
5 considered state employees.

6 § 7204. PETITION FOR COMPENSATION; RESPONSE TO PETITION

7 (a) A person seeking compensation pursuant to this chapter shall file a
8 petition with the Medical Injury Review Board pursuant to this section.

9 (b) A petition for compensation filed pursuant to this section shall include
10 the following:

11 (1) The name and address of the petitioner, the injured person, and the
12 petitioner's attorney and the petitioner's relationship to the injured person.

13 (2) The name and address of the primary care physician alleged to have
14 provided the care which resulted in the injury and the name and address of the
15 health care facility where the care was provided.

16 (3) A brief statement of the facts and circumstances surrounding the
17 injury, including the nature of the injury and the time and place where it
18 occurred.

19 (4) All available medical records relating to the injury and identification
20 of any unavailable medical records relating to the injury that are known to the
21 petitioner along with the reasons for the records' unavailability.

1 (5) Assessments, evaluations, prognoses, and other records and
2 documents relevant to the determination of the amount of compensation to be
3 paid to or on behalf of the injured party.

4 (6) Documentation of any expenses paid or services incurred as a result
5 of the injury.

6 (7) Documentation of any private or public insurance or services
7 received or expected to be received or reimbursement paid or expected to be
8 paid as a result of the injury.

9 (c) The petition shall be filed within the time established by section 521 of
10 this title. The statute of limitations for any civil action that may be brought as
11 a result of an alleged compensable injury shall be tolled by the filing of a
12 petition in accordance with this chapter, and the time during which the petition
13 is pending shall be excluded in determining the time within which a civil
14 action must be commenced.

15 (d) The Board shall provide copies of the petition to the Department, the
16 primary care physician, the health care facility, and any other interested party
17 named in the petition. The Board shall afford all parties a reasonable
18 opportunity to respond to the petition.

19 § 7205. HEARING; EVIDENCE; DISCOVERY

20 (a) The Board shall hold a hearing on the petition no less than 30 days and
21 no later than 90 days after the final response to the petition has been filed. The

1 Board shall provide the parties with at least 30 days' notice of the time and
2 place of the hearing.

3 (b) A party may serve interrogatories on and conduct depositions of
4 witnesses in a proceeding under this chapter.

5 (c) A party shall have the right to examine and cross-examine witnesses at
6 the hearing.

7 (d) The Vermont Rules of Evidence shall not apply at the hearing. The
8 Board may consider any evidence it deems relevant to its determination of the
9 petition.

10 § 7206. APPROVAL OR REJECTION OF PETITION; COMPENSATION

11 AWARD

12 (a) The Board shall grant the petition if it determines, after the hearing and
13 consideration of all relevant evidence, that a preponderance of the evidence
14 shows a compensable injury has occurred. The Board shall immediately notify
15 all parties to the proceeding of its determination that a compensable injury has
16 occurred.

17 (b) If the Board determines, after the hearing and consideration of all
18 relevant evidence, that a preponderance of the evidence shows a compensable
19 injury has not occurred, it shall dismiss the petition and send a copy of its order
20 describing the reasons for its decision to all parties.

1 (c)(1) If the Board grants the petition, it shall issue an order describing the
2 reasons for its decision and fixing an award of compensation to the petitioner.

3 (2) A compensation order issued under this section shall include:

4 (A) the amount of compensation due for that particular type of injury
5 as determined by the Department pursuant to subdivision 7209(2) of this title;

6 (B) actual medically necessary and reasonable expenses already
7 incurred, provided documentation for such expenses is submitted;

8 (C) actual necessary and reasonable lost wages already incurred,
9 provided documentation for such expenses is submitted; and

10 (D) reasonable expenses incurred in connection with the filing of a
11 petition under this chapter, including reasonable attorney's fees.

12 (3) If the Board determines that a compensable injury occurred as a
13 result of a patient's treatment by a primary care physician and as a result of one
14 or more other causes, the compensation award fixed by the board shall only be
15 for the portion of the injury caused by the primary care physician's treatment.

16 (d) An order of the Board dismissing a petition issued under subsection (b)
17 of this section or an order of the Board granting a petition and awarding
18 compensation issued under subsection (c) of this section is a final order and
19 may be appealed to the Civil Division of the Superior Court pursuant to Rule
20 75 of the Vermont Rules of Civil Procedure. Review by the court shall be on
21 the record and subject to an abuse of discretion standard.

1 § 7207. NO-FAULT MEDICAL MALPRACTICE INSURANCE SPECIAL
2 FUND

3 (a) There is established a fund to be known as the No-Fault Medical
4 Malpractice Insurance Special Fund. The Fund shall be administered by the
5 Department of Financial Regulation. The purpose of the Fund is to
6 compensate patients injured as a result of treatment by the patients' primary
7 care physician, irrespective of fault on the part of the physician.

8 (b) All primary care physicians in this State shall pay an annual assessment
9 into the Special Fund. The amount of the assessment and the procedures for
10 deposits into the Fund shall be determined by the Department pursuant to rules
11 adopted under section 7209 of this title.

12 (c) The Fund shall consist of payments made to it by physicians pursuant to
13 subsection (b) of this section and any grants or donations the Department
14 receives on behalf of the Fund. When the Department receives a compensation
15 award order issued by the Board under subsection 7206(c) of this title, the
16 department shall cause a payment to be issued from the Fund to the petitioner
17 in the amount of the award.

18 (d) Balances in the Fund at the end of the fiscal year shall be carried over
19 and remain in the Fund. The Fund shall be audited annually by the State
20 Auditor.

1 § 7208. PAYMENT OF ASSESSMENT BY PRIMARY CARE PHYSICIAN;
2 EXEMPTION FROM PAYMENT FOR MEDICAL MALPRACTICE
3 INSURANCE

4 (a) Except as provided in subsection (b) of this section, a primary care
5 physician who pays an annual assessment into the No-Fault Medical
6 Malpractice Insurance Special Fund pursuant to section 7207 of this title shall
7 be exempt from paying for primary care medical malpractice insurance.

8 Except as provided in subsection (b) of this section, no medical malpractice
9 insurance provider operating in this state shall charge any cost for primary care
10 medical malpractice insurance to a primary care physician who pays an annual
11 assessment into the No-Fault Medical Malpractice Insurance Special Fund
12 pursuant to section 7207 of this title.

13 (b) This section shall not be construed:

14 (1) to exempt a primary care physician from obtaining primary care
15 medical malpractice insurance if the physician has failed to pay the assessment
16 required by subsection 7207(b) of this title; or

17 (2) to prohibit a medical malpractice insurance provider from charging a
18 primary care physician for medical malpractice insurance that provides
19 coverage for care other than primary care, provided that such charges shall
20 fairly and reasonably reflect the exclusion of primary care medical malpractice
21 coverage.

1 § 7209. RULEMAKING

2 The Commissioner of Financial Regulation shall adopt rules to administer
3 the no-fault compensation program for medical injury claims established by
4 this chapter. The rules shall address the following program matters:

5 (1) The rules shall contain a comprehensive list of the types of medical
6 injuries which are compensable under this chapter.

7 (2) For each particular type of injury that is compensable under this
8 chapter, the rules shall set a fixed amount of compensation. The amount shall
9 include compensation for:

10 (A) Medically necessary and reasonable future medical expenses,
11 including hospitalization, rehabilitation, therapy, nursing and attendant care,
12 residential and custodial care and service, medications, supplies, special
13 equipment or facilities, and related travel. Compensation may be provided for
14 nursing and attendant care provided by a relative or legal guardian of the
15 patient if the care is beyond the scope of duties and services normally and
16 gratuitously provided to an uninjured family member, provided that such
17 compensation shall not be provided for services that the patient has received or
18 is entitled to receive under any state or federal law or under any insurance
19 contract.

20 (B) Future lost wages.

1 (C) Any other loss or injury the Department determines should be
2 compensated, provided that the rationale for its inclusion is set forth in the rule.

3 (3) The rules shall set the assessment amounts to be paid into the
4 No-Fault Medical Malpractice Insurance Special Fund by primary care
5 physicians and describe the processes and formulas for determining how the
6 amounts were set.

7 (4) The rules shall include rules for proceedings before the Medical
8 Injury Review Board.

9 (5) The rules shall describe how compensation payments shall be made
10 from the Fund to successful petitioners.

11 § 7210. EXCLUSIVE REMEDY; IMMUNITY

12 (a) Except as provided in subsection (c) of this section, the provisions of
13 this chapter shall constitute the exclusive remedy for injuries suffered as a
14 result of treatment by a primary care physician. No claim may be brought in
15 court by or on behalf of a person injured as a result of treatment by a primary
16 care physician except as provided in subsection (c) of this section.

17 (b) Except as provided in subsection (c) of this section, a primary care
18 physician shall not be liable for injuries suffered as a result of treatment he or
19 she provides to a patient.

20 (c) This chapter shall not be construed to prohibit or in any way limit an
21 action:

1 (1) alleging that a primary care physician willfully caused injury to a
2 person;

3 (2) against a primary care physician for injuries suffered as a result of
4 treatment that does not constitute primary care; or

5 (3) against a primary care physician who has failed to pay the
6 assessment required by subsection 7207(b) of this title.

7 Sec. 3. EFFECTIVE DATE

8 This act shall take effect on July 1, 2013.