

West Virginia Board of Risk and Insurance Management

Amended Advisory Bulletin Regarding Interpretation of West Virginia Code § 29-12D-1a

January 19, 2017

The West Virginia Board of Risk and Insurance Management (“BRIM”) is charged with administration of the Patient Injury Compensation Fund (“PICF”). The PICF was created in 2004 pursuant to West Virginia Code § 20-12D-1, *et seq.* as a fund to compensate claimants who are unable to collect all economic damages as a result of the cap in the Medical Professional Liability Act (“MPLA”) on all civil damages arising from acts or omissions in a trauma center, or resulting from elimination of joint liability in medical negligence claims. Because a permanent funding stream for the PICF was not established in the enabling legislation, Senate Bill 602 was enacted during the regular session of the Legislature in 2016, amending article 12D of chapter 29, as well as other sections of the West Virginia Code.¹ The bill can be accessed [here](#).

This Advisory Bulletin provides BRIM’s interpretation of a new section added by the bill, and guidance for compliance with that new section. The section at issue is West Virginia Code § 29-12D-1a, entitled *“Additional funding for Patient Injury Compensation Fund; assessment on licensed physicians; assessment on hospitals; assessment on certain awards”*. This code section requires that beginning July 1, 2016, an assessment shall be levied in the amount of one percent of the gross amount of any settlement or judgment in a qualifying claim. The specific language addressed by this Advisory Bulletin is found in subdivisions (2) and (3), subsection (c) of the new section:

(2) For any assessment levied pursuant to this subsection for which a judgment is entered by a court, the date of the entry of judgment shall be used to determine applicability of this provision. The defendant or defendants shall remit the assessment to the clerk of the court in which the qualified claim was filed. The clerk of the court shall then remit the assessment quarterly to the Board of Risk and Insurance Management to be deposited in the fund.

¹ The bill closes the PICF to claims filed after June 30, 2016. It provides the following funding sources for the PICF for claims filed on or before June 30, 2016: 1) transfer of the Medical Liability Fund at BRIM into the PICF and closure of the Medical Liability Fund; 2) an assessment of \$125 on each license issuance or renewal by the Board of Medicine and Board of Osteopathy during calendar years 2016 through 2019; 3) an assessment of \$25 on designated trauma centers for each trauma patient treated in calendar years 2016 through 2019 as reported to the WV Trauma Registry; 4) an assessment of 1% on gross amount of settlements and judgments in claims arising under the MPLA from July 1, 2016 through June 30, 2020, to be remitted by court clerks or plaintiff/plaintiff’s counsel to BRIM; and 5) an increase (from \$280 to \$400) in filing fees for medical malpractice law suits, with an increase in the amount sent by court clerks to BRIM (from \$165 to \$285) to be placed into the PICF. The assessments will terminate at the times set forth in the bill or sooner if the liability of the PICF has been paid or fully funded. The bill also amends the cap on all civil damages in trauma claims by retaining the current \$500,000 hard cap, but allowing a claimant who has suffered or suffers economic damages in excess of that hard cap to seek up to an additional \$1 million in economic damages beginning July 1, 2016. This essentially mirrors the pre-amendment cap structure in trauma cases, but removes (as of July 1, 2016) the PICF as a source of money for the additional \$1 million in economic damages.

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(3) For any assessment levied pursuant to this subsection on a settlement entered into by the parties, the date on which the agreement is formalized in writing by the parties shall be used to determine applicability of this provision. At the time that an action alleging a qualified claim is dismissed by the parties, the assessment shall be paid to the clerk of the court, who shall then remit the assessment to the Board of Risk and Insurance Management to be deposited in the fund. Collected assessments shall be remitted no less often than quarterly. If a qualifying claim is settled prior to the filing of an action, the plaintiff, or his or her counsel, shall remit the payment to the Board of Risk and Insurance Management within sixty days of the date of the settlement agreement to be paid into the fund.

(emphasis added)

The above subdivisions address three different scenarios for remittance of the 1% assessment on the gross amount paid in resolution of the MPLA claim. In two of these scenarios, the statute identifies the party or parties responsible for remitting the assessment to the Clerk or to BRIM. Specifically, if a judgment is entered by a court the defendant or defendants are responsible for remitting the assessment. If a claim is settled before a civil action is filed, the plaintiff or his/her counsel are responsible for paying the assessment directly to BRIM. However, the section is silent as to the party or parties responsible for remitting payment to the Clerk if a civil action is filed but settled prior to judgement.

As the administrator of the PICF, BRIM has received a request for guidance as to the responsibility for ensuring remittance of the 1% assessment to the Clerk in this third scenario, i.e. a civil action is filed but settled prior to judgment. There is no doubt as to the Legislature's intent that the 1% assessment be remitted to the Clerk in this scenario; there is a clear statutory requirement to do so even though the Legislature chose not to designate the party to make the remittance. Reviewing the language at issue as a whole it is BRIM's interpretation that by not designating the party responsible for remitting payment of the 1% assessment to the Clerk, the Legislature intended that plaintiff(s) and defendant(s) share this responsibility; and that the party or parties responsible for remittance must be determined in connection with settlement of the civil action so that remittance can be made to the Clerk at the time the civil action is dismissed, in accordance with the statute.

It is BRIM's interpretation that the term "remittance" is the administrative act of sending the assessment to the clerk of the court at the time the civil action is dismissed, and does not refer to underlying financial responsibility for the payment itself. Any language herein referring to shared responsibility is intended only to address responsibility for remittance, i.e. sending the assessment to the clerk at the time of dismissal. In accordance with the clear language of W. Va. Code § 29-12D-1a that the assessment be levied on the gross amount of the settlement or judgment, it is further BRIM's interpretation that the 1% assessment is not a payment in addition to the amount of the settlement or judgment; rather, it is part of the gross amount of the settlement or judgment.

Questions concerning this Advisory Bulletin may be addressed by contacting Mary Jane Pickens, Executive Director or Robert Fisher, Deputy Director.