

CHAPTER 655

HEALTH CARE LIABILITY AND PATIENTS COMPENSATION

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SUBCHAPTER I

GENERAL PROVISIONS

655.001 Definitions. In this chapter:

(1) "Board of governors" means the board created under s. 619.04 (3).

(2) "Claimant" means the person filing a request for mediation under s. 655.44 or 655.445.

(4) "Department" means the department of health and social services.

(6) "Fiscal year" means the period beginning on July 1 and ending on the following June 30.

(7) "Fund" means the patients compensation fund under s. 655.27.

(8) "Health care provider" means a person to whom this chapter applies under s. 655.002 (1) or a person who elects to be subject to this chapter under s. 655.002 (2).

(9) "Nurse anesthetist" means a nurse licensed under ch. 441 who is certified as a nurse anesthetist by the American association of nurse anesthetists.

(10) "Patient" means an individual who received or should have received health care services from a health care provider or from an employe of a health care provider acting within the scope of his or her employment.

(10m) "Physician" means a medical or osteopathic physician licensed under ch. 448.

(11) "Principal place of practice" means any of the following:

(a) The state in which a health care provider furnishes health care services to more than 50% of his or her patients in a fiscal year.

(b) The state in which a health care provider derives more than 50% of his or her income in a fiscal year from the practice of his or her profession.

(12) "Representative" means the personal representative, spouse, parent, guardian, attorney or other legal agent of a patient.

(13) "Respondent" means the person alleged to have been negligent in a request for mediation filed under s. 655.44 or 655.445.

History: 1975 c. 37, 79; 1977 c. 26 s. 75; 1977 c. 131; 1977 c. 203 s. 106; Sup. Ct. Order, 88 W (2d) xiii; 1979 c. 124, 185, 355; 1983 a. 189 s. 329 (5); 1985 a. 340; 1987 a. 27, 182, 264, 403; 1989 a. 187; 1991 a. 214.

Medical malpractice panels: The Wisconsin approach. Kravat. 61 MLR 55.

A summary of the new statutes governing medical malpractice. Saichok. WBB Oct: 1986.

Recent developments in Wisconsin medical malpractice law. 1974 WLR 891.

Testing the constitutionality of medical malpractice legislation: The Wisconsin medical malpractice act of 1975. 1977 WLR 838. See also: State ex rel Strykowski v. Wilkie, 81 W (2d) 491.

655.002 Applicability. (1) MANDATORY PARTICIPATION. Except as provided in s. 655.003, this chapter applies to all of the following:

(a) A physician or a nurse anesthetist for whom this state is a principal place of practice and who practices his or her profession in this state more than 240 hours in a fiscal year.

(b) A physician or a nurse anesthetist for whom Michigan is a principal place of practice, if all of the following apply:

1. The physician or nurse anesthetist is a resident of this state.

2. The physician or nurse anesthetist practices his or her profession in this state or in Michigan or a combination of both more than 240 hours in a fiscal year.

3. The physician or nurse anesthetist performs more procedures in a Michigan hospital than in any other hospital. In this subdivision, "Michigan hospital" means a hospital located in Michigan that is an affiliate of a corporation organized under the laws of this state that maintains its principal office and a hospital in this state.

(c) A physician or nurse anesthetist who is exempt under s. 655.003 (1) or (3), but who practices his or her profession outside the scope of the exemption and who fulfills the requirements under par. (a) in relation to that practice outside the scope of the exemption. For a physician or a nurse anesthetist who is subject to this chapter under this paragraph, this chapter applies only to claims arising out of practice that is outside the scope of the exemption under s. 655.003 (1) or (3).

(d) A partnership comprised of physicians or nurse anesthetists and organized and operated in this state for the

primary purpose of providing the medical services of physicians or nurse anesthetists.

(e) A corporation organized and operated in this state for the primary purpose of providing the medical services of physicians or nurse anesthetists.

(f) A cooperative sickness care association organized under ss. 185.981 to 185.985 that operates a nonprofit sickness care plan in this state and that directly provides services through salaried employees in its own facility.

(g) An ambulatory surgery center that operates in this state.

(h) A hospital, as defined in s. 50.33 (2) (a) and (c), that operates in this state.

(i) An entity operated in this state that is an affiliate of a hospital and that provides diagnosis or treatment of, or care for, patients of the hospital.

(j) A nursing home, as defined in s. 50.01 (3), whose operations are combined as a single entity with a hospital described in par. (h), whether or not the nursing home operations are physically separate from the hospital operations.

(2) OPTIONAL PARTICIPATION. All of the following may elect, in the manner designated by the commissioner by rule under s. 655.004, to be subject to this chapter:

(a) A physician or nurse anesthetist for whom this state is a principal place of practice but who practices his or her profession fewer than 241 hours in a fiscal year, for a fiscal year, or a portion of a fiscal year, during which he or she practices his or her profession.

(b) Except as provided in sub. (1) (b), a physician or nurse anesthetist for whom this state is not a principal place of practice, for a fiscal year, or a portion of a fiscal year, during which he or she practices his or her profession in this state. For a health care provider who elects to be subject to this chapter under this paragraph, this chapter applies only to claims arising out of practice that is in this state and that is outside the scope of an exemption under s. 655.003 (1) or (3).

History: 1987 a. 27; 1991 a. 214.

655.003 Exemptions for public employes and facilities and volunteers. Except as provided in s. 655.002 (1) (c), this chapter does not apply to a health care provider that is any of the following:

(1) A physician or a nurse anesthetist who is a state, county or municipal employe, or federal employe or contractor covered under the federal tort claims act, as amended, and who is acting within the scope of his or her employment or contractual duties.

(2) A facility that is exempt under s. 50.39 (3) or operated by any governmental agency.

(3) A physician or a nurse anesthetist who provides professional services under the conditions described in s. 146.89, with respect to those professional services provided by the physician or nurse anesthetist for which he or she is covered by s. 165.25 and considered an agent of the department, as provided in s. 165.25 (6) (b).

History: 1989 a. 187, 206; 1991 a. 214.

655.004 Rule-making authority. The director of state courts, department and commissioner may promulgate such rules under ch. 227 as are necessary to enable them to perform their responsibilities under this chapter.

History: 1975 c. 37; Sup. Ct. Order, 88 W (2d) xiii; 1987 a. 27; Stats 1987 s. 655.004; 1989 a. 187 s. 28.

655.005 Health care provider employes. (1) Any person listed in s. 655.007 having a claim or a derivative claim against a health care provider or an employe of the health care provider, for damages for bodily injury or death due to acts or omissions of the employe of the health care provider acting

within the scope of his or her employment and providing health care services, is subject to this chapter.

(2) The fund shall provide coverage, under s. 655.27, for claims against the health care provider or the employe of the health care provider due to the acts or omissions of the employe acting within the scope of his or her employment and providing health care services. This subsection does not apply to an employe of a health care provider if the employe is a physician or a nurse anesthetist.

History: 1985 a. 340; 1987 a. 27; Stats 1987 s. 655.005; 1989 a. 187; 1991 a. 214.

655.006 Remedy. (1) (a) On and after July 24, 1975, every patient, every patient's representative and every health care provider shall be conclusively presumed to have accepted to be bound by this chapter.

(b) Except as otherwise specifically provided in this chapter, this subsection also applies to minors.

(2) This chapter does not apply to injuries or death occurring, or services rendered, prior to July 24, 1975.

History: 1975 c. 37; 1987 a. 27; Stats 1987 s. 655.006.

655.007 Patients' claims. On and after July 24, 1975, any patient or the patient's representative having a claim or any spouse, parent or child of the patient having a derivative claim for injury or death on account of malpractice is subject to this chapter.

History: 1975 c. 37, 199; 1983 a. 253.

This chapter was inapplicable to third-party claim based on contract where no bodily injury was alleged. Northwest General Hospital v. Yee, 115 W (2d) 59, 339 NW (2d) 583 (1983).

655.009 Actions against health care providers. An action to recover damages on account of malpractice shall comply with the following:

(1) **COMPLAINT.** The complaint in such action shall not specify the amount of money to which the plaintiff supposes to be entitled.

(2) **MEDICAL EXPENSE PAYMENTS.** The court or jury, whichever is applicable, shall determine the amounts of medical expense payments previously incurred and for future medical expense payments.

(3) **VENUE.** Venue in a court action under this chapter is in the county where the claimant resides if the claimant is a resident of this state, or in a county specified in s. 801.50 (2) (a) or (c) if the claimant is not a resident of this state.

History: 1975 c. 37, 198, 199; 1983 a. 253; 1985 a. 340.

655.01 Forms. The director of state courts shall prepare and cause to be printed, and upon request furnish free of charge, such forms and materials as the director deems necessary to facilitate or promote the efficient administration of this chapter.

History: 1975 c. 37, 199; Sup. Ct. Order, 88 W (2d) xiii; 1989 a. 187 s. 28.

655.013 Attorney fees. (1) With respect to any act of malpractice after July 24, 1975, for which a contingency fee arrangement has been entered into before June 14, 1986, the compensation determined on a contingency basis and payable to all attorneys acting for one or more plaintiffs or claimants is subject to the following unless a new contingency fee arrangement is entered into that complies with subs. (1m) and (1t):

(a) The determination shall not reflect amounts previously paid for medical expenses by the health care provider or the provider's insurer.

(b) The determination shall not reflect payments for future medical expense in excess of \$25,000.

(1m) Except as provided in sub. (1t), with respect to any act of malpractice for which a contingency fee arrangement is entered into on and after June 14, 1986, in addition to

compensation for the reasonable costs of prosecution of the claim, the compensation determined on a contingency basis and payable to all attorneys acting for one or more plaintiffs or claimants is subject to the following limitations:

(a) Except as provided in par. (b), 33 1/3% of the first \$1,000,000 recovered.

(b) Twenty-five percent of the first \$1,000,000 recovered if liability is stipulated within 180 days after the date of filing of the original complaint and not later than 60 days before the first day of trial.

(c) Twenty percent of any amount in excess of \$1,000,000 recovered.

(1f) A court may approve attorney fees in excess of the limitations under sub. (1m) upon a showing of exceptional circumstances, including an appeal.

(2) An attorney shall offer to charge any client in a malpractice proceeding or action on a per diem or per hour basis. Any such agreement shall be made at the time of the employment of the attorney. An attorney's fee on a per diem or per hour basis is not subject to the limitations under sub. (1) or (1m).

History: 1975 c. 37, 199; 1985 a. 340.

655.015 Future medical expenses. If a settlement, panel award or judgment under this chapter entered into or rendered before June 14, 1986, provides for future medical expense payments in excess of \$25,000, that portion of future medical expense payments in excess of \$25,000 shall be paid into the fund. The commissioner shall develop by rule a system for managing and disbursing those moneys through payments for these expenses. The payments shall be made under the system until either the amount is exhausted or the patient dies.

History: 1975 c. 37; 1977 c. 29; 1979 c. 34, 154; 1983 a. 158; 1985 a. 340; 1991 a. 214.

655.017 Limitation on noneconomic damages. The amount of noneconomic damages recoverable by a claimant or plaintiff under this chapter for acts or omissions of a health care provider if the action is filed on or after June 14, 1986 and before January 1, 1991, and for acts or omissions of an employe of a health care provider, acting within the scope of his or her employment and providing health care services, for actions filed on or after June 14, 1986 and before January 1, 1991, is subject to the limit under s. 893.55 (4).

History: 1985 a. 340.

See note to 895.04, citing *Rineck v. Johnson*, 155 W (2d) 659, 456 NW (2d) 336 (1990).

655.019 Information needed to set fees. The department shall provide the director of state courts, the commissioner and the board of governors with information on hospital bed capacity and occupancy rates as needed to set fees under s. 655.27 (3) or 655.61.

History: 1985 a. 340; 1989 a. 187 s. 28; 1991 a. 214.

SUBCHAPTER III

INSURANCE PROVISIONS

655.23 Limitations of liability; proof of financial responsibility. (3) (a) Except as provided in par. (d), every health care provider either shall insure and keep insured the health care provider's liability by a policy of health care liability insurance issued by an insurer authorized to do business in this state or shall qualify as a self-insurer. Qualification as a self-insurer is subject to conditions established by the commissioner and is valid only when approved by the commissioner.

(b) Each insurance company issuing health care liability insurance that meets the requirements of sub. (4) to any

health care provider shall, at the times prescribed by the commissioner, file with the commissioner in a form prescribed by the commissioner a certificate of insurance on behalf of the health care provider upon original issuance and each renewal.

(c) Each self-insured health care provider furnishing coverage that meets the requirements of sub. (4) shall, at the times and in the form prescribed by the commissioner, file with the commissioner a certificate of self-insurance and a separate certificate of insurance for each additional health care provider covered by the self-insured plan.

(d) If a cash or surety bond furnished by a health care provider for the purpose of insuring and keeping insured the health care provider's liability was approved by the commissioner before April 25, 1990, par. (a) does not apply to the health care provider while the cash or surety bond remains in effect. A cash or surety bond remains in effect unless the commissioner, at the request of the health care provider or the surety, approves its cancellation.

(4) Health care liability insurance, self-insurance or a cash or surety bond under sub. (3) (d) shall be in amounts of at least \$200,000 for each occurrence and \$600,000 per year for all occurrences in any one policy year for occurrences before July 1, 1987, \$300,000 for each occurrence and \$900,000 for all occurrences in any one policy year for occurrences on or after July 1, 1987 and before July 1, 1988, and \$400,000 for each occurrence and \$1,000,000 for all occurrences in any one policy year for occurrences on or after July 1, 1988.

(5) While health care liability insurance, self-insurance or a cash or surety bond under sub. (3) (d) remains in force, the health care provider, the health care provider's estate and those conducting the health care provider's business, including the health care provider's health care liability insurance carrier, are liable for malpractice for no more than the limits expressed in sub. (4) or the maximum liability limit for which the health care provider is insured, whichever is higher, if the health care provider has met the requirements of this chapter.

(5m) The limits set forth in sub. (4) shall apply to any joint liability of a physician or nurse anesthetist and his or her corporation or partnership under s. 655.002 (1) (d) or (e).

(6) Any person who violates this section or s. 655.27 (3) (a) is subject to s. 601.64. For purposes of s. 601.64 (3) (c), each week of delay in compliance with this section or s. 655.27 (3) (a) constitutes a new violation.

(7) Each health care provider shall comply with this section and with s. 655.27 (3) (a) before exercising any rights or privileges conferred by his or her health care provider's license. The commissioner shall notify the board that issued the license of a health care provider that has not complied with this section or with s. 655.27 (3) (a). The board that issued the license may suspend, or refuse to issue or to renew the license of any health care provider violating this section or s. 655.27 (3) (a).

(8) No health care provider who retires or ceases operation after July 24, 1975, shall be eligible for the protection provided under this chapter unless proof of financial responsibility for all claims arising out of acts of malpractice occurring after July 24, 1975, is provided to the commissioner in the form prescribed by the commissioner.

History: 1975 c. 37, 79, 199; 1977 c. 131; 1983 a. 158; 1985 a. 340; 1989 a. 56 s. 259; 1989 a. 187 ss. 14 to 19, 29; 1989 a. 332; 1991 a. 214.

Insurer is liable under (5) up to policy limits. *Patients Fund v. St. Paul Ins. Co.* 116 W (2d) 537, 342 NW (2d) 693 (1984).

655.24 Insurance policy forms. (1) No insurer may enter into or issue any policy of health care liability insurance until its policy form has been submitted to and approved by the commissioner under s. 631.20 (1). The filing of a policy form by any insurer with the commissioner for approval shall

constitute, on the part of the insurer, a conclusive and unqualified acceptance of all provisions of this chapter, and an agreement by it to be bound hereby as to any policy issued by it to any health care provider.

(1m) Notwithstanding sub. (1), the issuance of a policy of health care liability insurance by an insurer to a health care provider constitutes, on the part of the insurer, a conclusive and unqualified acceptance of all of the provisions of this chapter, and an agreement by it to be bound under the provisions of this chapter as to any policy issued by it to a health care provider.

(2) Every policy issued under this chapter shall be deemed conclusively to provide all of the following:

(a) That the insurer agrees to pay in full all of the following:

1. Attorney fees and other costs incurred in the settlement or defense of any claims.

2. Any settlement, arbitration award or judgment imposed against the insured under this chapter up to the limits expressed in s. 655.23 (4), or the maximum liability limit for which the health care provider is insured, whichever is greater.

3. Any portion or all of the interest, as determined by the board of governors, on an amount recovered against the insured under this chapter for which the insured is liable under s. 807.01 (4), 814.04 (4) or 815.05 (8).

(b) That any termination of the policy by cancellation or nonrenewal is not effective as to patients claiming against those covered by the policy unless the insured has been notified as provided in sub. (3) and s. 631.36, except that an insurer may cancel a health care provider's policy under s. 631.36 (2) if the health care provider is no longer licensed to practice medicine or nursing.

(3) A notice of cancellation or nonrenewal that is required under sub. (2) (b) issued to a health care provider who is a natural person must inform the health care provider that his or her license to practice medicine or nursing may be suspended or not renewed if the health care provider has no insurance or insufficient insurance. The insurer shall retain a copy of each notice issued under sub. (2) (b) for not less than 10 years from the date of mailing or delivery of the notice and shall furnish a copy to the commissioner upon request.

(4) The insurer shall, upon termination of a policy of health care liability insurance issued under this chapter by cancellation or nonrenewal, notify the commissioner of the termination.

History: 1975 c. 37; 1977 c. 131; 1985 a. 340; 1989 a. 187; 1991 a. 214.

655.245 Insurance policy limitations. **(1)** No policy of health care liability insurance may permit a health care provider to reject any settlement agreed upon between the claimant and the insurer.

(2) A policy of health care liability insurance may permit the insurer to make payments for medical expenses prior to any determination of fault. Such payments are not an admission of fault. Such payments may be deducted from any judgment or arbitration award, but shall not be repaid regardless of the judgment or award. Nothing in this subsection shall restrict the insurer's right of comparative contribution or indemnity in accordance with the laws of this state.

History: 1975 c. 37

655.25 Availability and effectiveness for health care liability insurance. **(1)** No policy of health care liability insurance written under the provisions of s. 619.04 may be canceled or nonrenewed except for nonpayment of premiums unless the health care provider's license is revoked by the appropriate licensing board. A health care provider whose

license is revoked shall be permitted to buy out in cases of a claims-made policy.

History: 1975 c. 37

655.26 Reports on claims paid. **(1)** In addition to any information required by the commissioner under s. 601.42, by the 15th day of each month, each insurer that writes health care liability insurance in this state and each self-insurer approved under s. 655.23 (3) (a) shall report the following information to the medical examining board and the board of governors on each claim paid during the previous month for damages arising out of the rendering of health care services:

(a) The name and address of the policyholder or self-insured entity and the name and address of any individual on whose behalf the claim was paid.

(b) The profession of the individual or the type of facility or entity on whose behalf the claim was paid.

(c) The health care provider's medical specialty, if the provider is a physician.

(d) A description of the injury, including its cause and severity.

(e) Whether the claim was paid as a result of a settlement, a patients compensation panel award or a court award.

(f) The amount of the payment.

(g) The number and amounts of any previous claims paid by the insurer or self-insurer for damages arising out of the rendering of health care services by the insured, the self-insurer or the employees of the insured or self-insurer. Only claims paid on or after July 20, 1985, are required to be reported under this paragraph.

(h) Any additional information requested by the medical examining board or the board of governors.

(2) By the 15th day of each month, the board of governors shall report the information specified in sub. (1) to the medical examining board for each claim paid by the fund during the previous month for damages arising out of the rendering of health care services by a health care provider or an employe of a health care provider.

(3) If more than one payment will be made on a claim, the first report filed under sub. (1) or (2) after the first payment is made on the claim shall include the total amount of the award or settlement and the projected schedule and amounts of payments.

(4) Any person who in good faith provides information to the medical examining board or the board of governors under this section is immune from civil liability for his or her acts or omissions in providing such information.

History: 1985 a. 29, 340; 1989 a. 187; 1991 a. 214

SUBCHAPTER IV

PATIENTS COMPENSATION FUND

655.27 Patients compensation fund. **(1) FUND.** There is created a patients compensation fund for the purpose of paying that portion of a medical malpractice claim which is in excess of the limits expressed in s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, paying future medical expense payments under s. 655.015 and paying claims under sub. (1m). The fund shall provide occurrence coverage for claims against health care providers that have complied with this chapter, and against employes of those health care providers, and for reasonable and necessary expenses incurred in payment of claims and fund administrative expenses. The coverage provided by the fund shall begin July 1, 1975. The fund shall not be liable for damages for injury or death caused by an intentional crime, as defined under s. 939.12, committed

by a health care provider or an employe of a health care provider, whether or not the criminal conduct is the basis for a medical malpractice claim.

(1m) **PEER REVIEW ACTIVITIES.** (a) The fund shall pay that portion of a claim described in par. (b) against a health care provider that exceeds the limit expressed in s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater.

(b) A health care provider who engages in the activities described in s. 146.37 (1g) and (3) shall be liable for not more than the limits expressed under s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, if he or she is found to be liable under s. 146.37, and the fund shall pay the excess amount, unless the health care provider is found not to have acted in good faith during those activities and the failure to act in good faith is found by the trier of fact, by clear and convincing evidence, to be both malicious and intentional.

(2) **FUND ADMINISTRATION AND OPERATION.** Management of the fund shall be vested with the board of governors. The commissioner shall either provide staff services necessary for the operation of the fund or, with the approval of the board of governors, contract for all or part of these services. Such a contract is subject to s. 16.765, but is otherwise exempt from subch. IV of ch. 16. The commissioner shall adopt rules governing the procedures for creating and implementing these contracts before entering into the contracts. At least annually, the contractor shall report to the commissioner and to the board of governors regarding all expenses incurred and subcontracting arrangements. If the board of governors approves, the contractor may hire legal counsel as needed to provide staff services. The cost of contracting for staff services shall be funded from the appropriation under s. 20.145 (2) (u).

(3) **FEES.** (a) *Assessment.* Each health care provider shall pay an annual assessment, which, subject to pars. (b) to (br), shall be based on the following considerations:

1. Past and prospective loss and expense experience in different types of practice.

2. The past and prospective loss and expense experience of the fund.

2m. The loss and expense experience of the individual health care provider which resulted in the payment of money, from the fund or other sources, for damages arising out of the rendering of medical care by the health care provider or an employe of the health care provider, except that an adjustment to a health care provider's fees may not be made under this subdivision prior to the receipt of the recommendation of the patients compensation fund peer review council under s. 655.275 (5) (a) and the expiration of the time period provided, under s. 655.275 (7), for the health care provider to comment or prior to the expiration of the time period under s. 655.275 (5) (a).

3. Risk factors for persons who are semiretired or part-time professionals.

(am) *Assessments for peer review council.* The fund, a mandatory health care liability risk-sharing plan established under s. 619.04 and a private health care liability insurer shall be assessed, as appropriate, fees sufficient to cover the costs of the patients compensation fund peer review council, including costs of administration, for reviewing claims paid by the fund, plan and insurer, respectively, under s. 655.275 (5). The fees shall be set by the commissioner by rule, after approval by the board of governors, and shall be collected by the commissioner for deposit in the fund. The costs of the patients compensation fund peer review council shall be funded from the appropriation under s. 20.145 (2) (um).

(b) *Fees established.* 1. The commissioner, after approval by the board of governors, shall by rule set the fees under par. (a). The rule shall provide that fees may be paid annually or in semiannual or quarterly instalments. In addition to the prorated portion of the annual fee, semiannual and quarterly instalments shall include an amount sufficient to cover interest not earned and administrative costs incurred because the fees were not paid on an annual basis. This paragraph does not impose liability on the board of governors for payment of any part of a fund deficit.

2. With respect to fees paid by physicians, the rule shall provide for not more than 4 payment classifications, based upon the amount of surgery performed and the risk of diagnostic and therapeutic services provided or procedures performed.

2m. In addition to the fees and payment classifications described under subds. 1 and 2, the commissioner, after approval by the board of governors, may by rule establish a separate payment classification for physicians satisfying s. 655.002 (1) (b) and a separate fee for nurse anesthetists satisfying s. 655.002 (1) (b) which take into account the loss experience of health care providers for whom Michigan is a principal place of practice.

(bg) *Fee increase.* 1. Every rule under par. (b) shall provide for an automatic increase in a health care provider's fees, except as provided in subd. 2, if the loss and expense experience of the fund and other sources with respect to the health care provider or an employe of the health care provider exceeds either a number of claims paid threshold or a dollar volume of claims paid threshold, both as established in the rule. The rule shall specify applicable amounts of increase corresponding to the number of claims paid and the dollar volume of awards in excess of the respective thresholds.

2. The rule shall provide that the automatic increase does not apply if the board of governors determines that the performance of the patients compensation fund peer review council in making recommendations under s. 655.275 (5) (a) adequately addresses the consideration set forth in par. (a) 2m.

(br) *Limit on fees.* Every rule setting fees for a particular fiscal year under par. (b) shall ensure that the fees assessed do not exceed the greatest of the following:

1. The estimated total dollar amount of claims to be paid during that particular fiscal year.

2. The fees assessed for the fiscal year preceding that particular fiscal year, adjusted by the commissioner of insurance to reflect changes in the consumer price index for all urban consumers, U.S. city average, for the medical care group, as determined by the U.S. department of labor.

3. Two hundred percent of the total dollar amount disbursed for claims during the calendar year preceding that particular fiscal year.

(c) *Collection and deposit of fees.* Fees under pars. (a) and (b) and future medical expense payments specified for the fund by a settlement, panel award or judgment entered into or rendered before June 14, 1986, shall be collected by the commissioner for deposit into the fund in a manner prescribed by the commissioner by rule.

(d) *Rule not effective; fees.* If the rule establishing fees under par. (b) does not take effect prior to June 2 of any fiscal year, the commissioner may elect to collect fees as established for the previous fiscal year. If the commissioner so elects and the rule subsequently takes effect, the balance for the fiscal year shall be collected or refunded or the remaining semiannual or quarterly instalment payments shall be adjusted except the commissioner may elect not to collect, refund or adjust for minimal amounts.

(e) *Podiatrist fees.* The commissioner, after approval by the board of governors, may by rule assess fees against podiatrists for the purpose of paying the fund's portion of medical malpractice claims and expenses resulting from claims against podiatrists based on occurrences before July 1, 1986.

(4) **FUND ACCOUNTING AND AUDIT.** (a) Moneys shall be withdrawn from the fund by the commissioner only upon vouchers approved and authorized by the board of governors.

(b) All books, records and audits of the fund shall be open to the general public for reasonable inspection, with the exception of confidential claims information.

(c) Persons authorized to receive deposits, withdraw, issue vouchers or otherwise disburse any fund moneys shall post a blanket fidelity bond in an amount reasonably sufficient to protect fund assets. The cost of such bond shall be paid from the fund.

(d) Annually after the close of a fiscal year, the board of governors shall furnish a financial report to the commissioner. The report shall be prepared in accordance with accepted accounting procedures and shall include the present value of all claims reserves, including those for incurred but not reported claims as determined by accepted actuarial principles, and such other information as may be required by the commissioner. The board of governors shall furnish an appropriate summary of this report to all fund participants.

(e) The board of governors shall submit a quarterly report to the state investment board and the department of administration projecting the future cash flow needs of the fund. The state investment board shall invest moneys held in the fund in investments with maturities and liquidity that are appropriate for the needs of the fund as reported by the board of governors in its quarterly reports under this paragraph. All income derived from such investments shall be credited to the fund.

(f) The board of governors shall submit a functional and progress report to the chief clerk of each house of the legislature, for distribution to the appropriate standing committees under s. 13.172 (3), on or before March 1 of each year.

(g) The board of governors may cede reinsurance to an insurer authorized to do business in this state under ch. 611, 613, 614 or 618 or pursue other loss funding management to preserve the solvency and integrity of the fund, subject to approval by the commissioner. The commissioner may prescribe controls over or other conditions on such use of reinsurance or other loss-funding management mechanisms.

(5) **CLAIMS PROCEDURES.** (a) 1. Any person may file a claim for damages arising out of the rendering of medical care or services or participation in peer review activities under s. 146.37 within this state against a health care provider or an employe of a health care provider. A person filing a claim may recover from the fund only if the health care provider or the employe of the health care provider has coverage under the fund and the fund is named as a party in the action.

2. Any person may file an action for damages arising out of the rendering of medical care or services or participation in peer review activities under s. 146.37 outside this state against a health care provider or an employe of a health care provider. A person filing an action may recover from the fund only if the health care provider or the employe of the health care provider has coverage under the fund and the fund is named as a party in the action. If the rules of procedure of the jurisdiction in which the action is brought do not permit naming the fund as a party, the person filing the action may recover from the fund only if the health care provider or the employe of the health care provider has coverage under the fund and the fund is notified of the action within 60 days of service of process on the health care provider or the employe

of the health care provider. The board of governors may extend this time limit if it finds that enforcement of the time limit would be prejudicial to the purposes of the fund and would benefit neither insureds nor claimants.

3. If, after reviewing the facts upon which the claim or action is based, it appears reasonably probable that damages paid will exceed the limits in s. 655.23 (4), the fund may appear and actively defend itself when named as a party in an action against a health care provider, or an employe of a health care provider, that has coverage under the fund. In such action, the fund may retain counsel and pay out of the fund attorney fees and expenses including court costs incurred in defending the fund. The attorney or law firm retained to defend the fund shall not be retained or employed by the board of governors to perform legal services for the board of governors other than those directly connected with the fund. Any judgment affecting the fund may be appealed as provided by law. The fund may not be required to file any undertaking in any judicial action, proceeding or appeal.

(b) It shall be the responsibility of the insurer or self-insurer providing insurance or self-insurance for a health care provider who is also covered by the fund to provide an adequate defense of the fund on any claim filed that may potentially affect the fund with respect to such insurance contract or self-insurance contract. The insurer or self-insurer shall act in good faith and in a fiduciary relationship with respect to any claim affecting the fund. No settlement exceeding an amount which could require payment by the fund may be agreed to unless approved by the board of governors.

(c) It shall be the responsibility of any health care provider with a cash or surety bond in effect under s. 655.23 (3) (d) to provide an adequate defense of the fund on any malpractice claim filed or any claim filed under sub. (1m) that may potentially affect the fund. The health care provider shall act in good faith and in a fiduciary relationship with respect to any claim affecting the fund. No settlement exceeding an amount which could require payment by the fund may be agreed to unless approved by the board of governors.

(d) A person who has recovered a final judgment or a settlement approved by the board of governors against a health care provider, or an employe of a health care provider, that has coverage under the fund may file a claim with the board of governors to recover that portion of such judgment or settlement which is in excess of the limits in s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater. In the event the fund incurs liability exceeding \$1,000,000 to any person under a single claim as the result of a settlement, panel award or judgment entered into or rendered under this chapter before June 14, 1986, the fund shall pay not more than \$500,000 per year. Payments shall be made from money collected and paid into the fund under sub. (3) and from interest earned thereon. For claims subject to the \$500,000 limit, payments shall be made until the claim has been paid in full, and any attorney fees in connection with such claim shall be similarly prorated. Payment of not more than \$500,000 per year includes direct or indirect payment or commitment of moneys to or on behalf of any person under a single claim by any funding mechanism. No interest may be paid by the fund on the unpaid portion of any claim filed under this paragraph, except as provided under s. 807.01 (4), 814.04 (4) or 815.05 (8).

(e) Claims filed against the fund shall be paid in the order received within 90 days after filing unless appealed by the fund. If the amounts in the fund are not sufficient to pay all of the claims, claims received after the funds are exhausted shall be immediately payable the following year in the order in which they were received.

(6) **INTEGRITY OF FUND.** The fund shall be held in trust for the purposes of this chapter and may not be used for purposes other than those of this chapter.

(7) **ACTIONS AGAINST INSURERS, SELF-INSURERS OR PROVIDERS.** The board of governors may bring an action against an insurer, self-insurer or health care provider for failure to act in good faith or breach of fiduciary responsibility under sub. (5) (b) or (c).

History: 1975 c. 37, 79, 199; 1977 c. 29, 131; 1979 c. 34, 194; 1981 c. 20; 1983 a. 27, 158; 1985 a. 340; 1987 a. 27, 186, 247, 399; 1989 a. 102, 187, 332; 1991 a. 214, 315.

655.275 Patients compensation fund peer review council.

(1) **DEFINITION.** In this section, "council" means the patients compensation fund peer review council.

(2) **APPOINTMENT.** The board of governors shall appoint the members of the council. Section 15.09, except s. 15.09 (4) and (8), does not apply to the council. The board of governors shall designate the chairperson, vice chairperson and secretary of the council and the terms to be served by council members. The council shall consist of 5 persons, not more than 3 of whom are physicians who are actively engaged in the practice of medicine in this state. The chairperson shall be a physician and shall serve as an ex officio nonvoting member of the medical examining board.

(3) **MEETINGS.** The council shall meet at the call of the chairperson of the board of governors or the chairperson of the council. The council shall meet at the location determined by the person calling the meeting.

(4) **REPORTS.** The council shall submit to the chairperson of the board of governors, upon request of the chairperson but not more often than annually, a report on the operation of the council.

(5) **DUTIES.** (a) The council shall review, within one year of the date of first payment on the claim, each claim that is paid by the fund, a mandatory health care liability risk-sharing plan established under s. 619.04, a private health care liability insurer or a self-insurer for damages arising out of the rendering of medical care by a health care provider or an employe of the health care provider and shall make recommendations to all of the following:

1. The commissioner and the board of governors regarding any adjustments to be made, under s. 655.27 (3) (a) 2m, to fund fees assessed against the health care provider, based on the paid claim.

2. The commissioner and the board of governors regarding any adjustments to be made, under s. 619.04 (5) (b), to premiums assessed against a physician under a mandatory health care liability risk-sharing plan established under s. 619.04, based on the paid claim.

3. A private health care liability insurer regarding adjustments to premiums assessed against a physician covered by private insurance, based on the paid claim, if requested by the private insurer.

(b) In developing recommendations under par. (a), the council may consult with any person and shall consult with the following:

1. If a claim was paid for damages arising out of the rendering of care by a physician, with at least one physician from the area of medical specialty of the physician who rendered the care and with at least one physician from the area of medical specialty of the medical procedure involved, if the specialty area of the procedure is different than the specialty area of the physician who rendered the care.

2. If a claim was paid for damages arising out of the rendering of care by a nurse anesthetist, with at least one nurse anesthetist.

(6) **FEES.** Fees sufficient to cover the council's costs, including costs of administration, shall be collected under s. 655.27 (3) (am).

(7) **NOTICE OF RECOMMENDATION.** The council shall notify the affected health care provider, in writing, of its recommendations to the commissioner, the board of governors or a private insurer made under sub. (5). The notice shall inform the health care provider that the health care provider may submit written comments on the council's recommendations to the commissioner, the board of governors or the private insurer within a reasonable period of time specified in the notice.

(8) **PATIENT RECORDS.** The council may obtain any information relating to any claim it reviews under this section that is in the possession of the commissioner or the board of governors. The council shall keep patient health care information confidential as required by s. 146.82 (2) (b).

(9) **IMMUNITY.** Members of the council and persons consulting with the council under sub. (5) (b) are immune from civil liability for acts or omissions while performing their duties under this section.

(10) **MEMBERS' AND CONSULTANTS' EXPENSES.** Any person serving on the council and any person consulting with the council under sub. (5) (b) shall be paid \$50 for each day's actual attendance at council meetings, plus actual and necessary travel expenses.

History: 1985 a. 340; 1989 a. 187; 1991 a. 214, 315.

SUBCHAPTER VI

MEDIATION SYSTEM

655.42 Establishment of mediation system. (1) **LEGISLATIVE INTENT.** The legislature intends that the mediation system provide the persons under sub. (2) with an informal, inexpensive and expedient means for resolving disputes without litigation and intends that the director of state courts administer the mediation system accordingly.

(2) **MEDIATION SYSTEM.** The director of state courts shall establish a mediation system complying with this subchapter not later than September 1, 1986. The mediation system shall consist of mediation panels that assist in the resolution of disputes, regarding medical malpractice, between patients, their representatives, spouses, parents or children and health care providers.

History: 1985 a. 340; 1989 a. 187 s. 28.

655.43 Mediation requirement. The claimant and all respondents named in a request for mediation filed under s. 655.44 or 655.445 shall participate in mediation under this subchapter.

History: 1985 a. 340.

655.44 Request for mediation prior to court action. (1) **REQUEST AND FEE.** Beginning September 1, 1986, any person listed in s. 655.007 having a claim or a derivative claim under this chapter for bodily injury or death because of a tort or breach of contract based on professional services rendered or that should have been rendered by a health care provider may file a request for mediation and shall pay the fee under s. 655.54.

(2) **CONTENT OF REQUEST.** The request for mediation shall be in writing and shall include all of the following information:

(a) The claimant's name and city, village or town, county and state of residence.

(b) The name of the patient.

(c) The name and address of the health care provider alleged to have been negligent in treating the patient.

(d) The condition or disease for which the health care provider was treating the patient when the alleged negligence occurred and the dates of treatment.

(e) A brief description of the injury alleged to have been caused by the health care provider's negligence.

(3) **DELIVERY OR REGISTERED MAIL.** The request for mediation shall be delivered in person or sent by registered mail to the director of state courts.

(4) **STATUTE OF LIMITATIONS.** Any applicable statute of limitations is tolled on the date the director of state courts receives the request for mediation if delivered in person or on the date of mailing if sent by registered mail. The statute remains tolled until 30 days after the last day of the mediation period under s. 655.465 (7).

(5) **NO COURT ACTION COMMENCED BEFORE MEDIATION.** Except as provided in s. 655.445, no court action may be commenced unless a request for mediation has been filed under this section and until the expiration of the mediation period under s. 655.465 (7).

(6) **NOTICE OF COURT ACTION TO DIRECTOR OF STATE COURTS.** A claimant who files a request for mediation under this section and who commences a court action after the expiration of the mediation period under s. 655.465 (7) shall send notice of the court action by 1st class mail to the director of state courts.

History: 1985 a. 340; 1989 a. 187 s. 28.

Request for mediation of claim naming only one doctor did not toll statute of limitations applicable to claims against doctors not named in mediation request *Dipple v. Wis. Patients Comp. Fund*, 161 W (2d) 854, 468 NW (2d) 789 (Ct. App. 1991).

655.445 Request for mediation in conjunction with court action. (1) **COMMENCING ACTION, REQUEST AND FEE.** Beginning September 1, 1986, any person listed in s. 655.007 having a claim or a derivative claim under this chapter for bodily injury or death because of a tort or breach of contract based on professional services rendered or that should have been rendered by a health care provider shall, within 15 days after the date of filing an action in court, file a request for mediation. The request shall be prepared and delivered in person or sent by registered mail to the director of state courts, in the form and manner required under s. 655.44 (2) and (3), together with a notice that a court action has been commenced and the fee under s. 655.54 shall be paid.

(2) **SCHEDULING.** All time periods under s. 802.10 (2) and (3) (a) and (b) are tolled on the date of filing the court action. The time periods remain tolled until the expiration of the mediation period under s. 655.465 (7).

(3) **NO COURT PROCEEDINGS BEFORE MEDIATION.** For actions filed under sub. (1), no discovery may be made and no trial, pretrial conference or scheduling conference may be held until the expiration of the mediation period under s. 655.465 (7).

History: 1985 a. 340; 1989 a. 187 s. 28.

655.45 Reports to licensing bodies. (1) For the quarter beginning on July 1, 1986, and for each quarter thereafter, the director of state courts shall file reports complying with sub. (2) with the medical examining board, the board of nursing and the department, respectively, regarding health care providers licensed by the respective bodies.

(2) The reports under sub. (1) shall set forth all of the following:

(a) The names of all health care providers who are named as defendants in court actions of which the director of state courts receives notice under s. 655.44 (6) or 655.445 (1) during the quarter.

(b) Whether any court action of which the director of state courts received notice under s. 655.44 (6) or 655.445 (1) was disposed of by settlement, compromise, stipulation agree-

ment, dismissal default or judgment during the quarter and the amount of the settlement or award to the claimant, if any, to the extent the director of state courts has any of the information under this paragraph.

History: 1985 a. 340; 1989 a. 187 s. 28.

655.455 Notice to health care providers. The director of state courts shall serve notice of a request for mediation upon all health care providers named in the request, at the respective addresses provided in the request, by registered mail within 7 days after the director of state courts receives the request if delivered in person or within 10 days after the date of mailing of the request to the director of state courts if sent by registered mail.

History: 1985 a. 340; 1989 a. 187 s. 28.

15-day time limit for filing request for mediation after commencement of court action is directory, rather than mandatory *Eby v. Kozarek*, 153 W (2d) 75, 450 NW (2d) 249 (1990).

655.465 Mediation panels; mediation period. (1) **MEDIATION PANEL FOR DISPUTE.** The director of state courts shall appoint the members of a mediation panel under sub. (2) and send notice to the claimant and all respondents by registered mail. The notice shall inform the claimant and all respondents of the names of the persons appointed to the mediation panel and the date, time and place of the mediation session. The director of state courts may change the date, time or place of the mediation session as necessary to accommodate the parties, subject to the requirement that the mediation session be held before the expiration of the mediation period under sub. (7).

(2) **APPOINTMENT OF MEDIATORS.** Each mediation panel shall consist of the following members appointed by the director of state courts:

(a) One public member who is neither an attorney nor a health care provider and who is selected from a list of public member mediators prepared every 2 years, or more frequently upon request of the director of state courts, by the governor or, if any person resigns or is unable to serve as a public member mediator, from a list of alternates prepared by the director of state courts.

(b) One attorney who is licensed to practice law in this state.

(c) One health care provider as follows:

1. Except as provided in subds. 4 and 5, if all respondents named in the request for mediation are physicians, a physician who is licensed to practice in this state and who is selected from a list prepared by a statewide organization of physicians designated by the director of state courts.

2. Except as provided in subds. 4 and 5, if none of the respondents named in the request for mediation is a physician, a health care provider who is licensed to practice in this state in the same health care field as the respondent and who is selected from a list prepared by the department or the examining board that regulates health care providers in that health care field.

3. Except as provided in subds. 4 and 5, if more than one respondent is named in the request for mediation at least one of whom is a physician and at least one of whom is not, a health care provider who is licensed to practice in this state and who is selected from the list under subd. 1 or 2, as determined by the director of state courts.

4. If the director of state courts determines that a list under subd. 1 or 2 is inadequate to permit the selection of an appropriate health care provider, a health care provider who is licensed to practice in this state and who is selected from an additional list prepared by the director of state courts.

5. If the director of state courts determines that lists under subds. 1 or 2 and 4 are inadequate to permit the selection of an appropriate health care provider for a particular dispute, a

health care provider who is licensed to practice in this state and who is selected by the director of state courts.

(3) **FILLING VACANCIES.** If a person appointed to a mediation panel under sub. (1) resigns from or is unable to serve on the mediation panel, the director of state courts shall appoint a replacement selected in the same manner as the predecessor appointee.

(4) **CONFLICT OF INTEREST.** No person may serve on a mediation panel if the person has a professional or personal interest in the dispute.

(5) **COMPENSATION.** Each mediator shall be compensated \$150 plus actual and necessary expenses for each day of mediation conducted. Compensation and expenses shall be paid out of the appropriation under s. 20.680 (2) (qm) upon such authorizations as the director of state courts may prescribe.

(6) **IMMUNITY AND PRESUMPTION OF GOOD FAITH.** (a) A mediator is immune from civil liability for any good faith act or omission within the scope of the mediator's performance of his or her powers and duties under this subchapter.

(b) It is presumed that every act or omission under par. (a) is a good faith act or omission. This presumption may be overcome only by clear and convincing evidence.

(7) **MEDIATION PERIOD.** The period for mediation shall expire 90 days after the director of state courts receives a request for mediation if delivered in person or within 93 days after the date of mailing of the request to the director of state courts if sent by registered mail, or within a longer period agreed to by the claimant and all respondents and specified by them in writing for purposes of applying ss. 655.44 (4) and (5) and 655.445 (3).

History: 1985 a. 340; 1989 a. 187 s. 28; 1989 a. 359.

Claimant's failure to participate in mediation within 90-day period under (7) does not require dismissal; court may determine appropriate sanction. *Schulz v. Nienhuis*, 152 W (2d) 434, 448 NW (2d) 655 (1989).

Completion of mediation within period under (7) isn't jurisdictional prerequisite for maintenance of medical malpractice suit. *Bertorello v. St. Joseph's Hosp. of Marshfield*, 685 F Supp. 192 (W. D. Wis. 1988).

655.54 Filing fee. Requests for mediation filed with the director of state courts are subject to a filing fee of \$11. The filing fee shall be paid into the mediation fund under s. 655.68.

History: 1985 a. 340; 1989 a. 187 s. 28.

655.58 Mediation procedure. (1) NO RECORD. Mediation shall be conducted without a stenographic record or any other transcript.

(2) **NO EXAMS, SUBPOENAS, OATHS.** No physical examinations or production of records may be ordered, no witnesses may be subpoenaed and no oaths may be administered in mediation, whether by a mediation panel or member thereof or as a result of application to a court by any person.

(3) **NO EXPERT WITNESSES; PANEL CONSULTANTS PERMITTED.** (a) Except as provided in par. (b), no expert witnesses, opinions or reports may be submitted or otherwise used in mediation.

(b) The mediation panel or any member thereof may consult with any expert, and upon authorization of the director of state courts may compensate the expert from the appropriation under s. 20.680 (2) (qm).

(4) **PATIENT RECORDS CONFIDENTIAL EXCEPT TO PARTIES.** All patient health care records in the possession of a mediation panel shall be kept confidential by all members of the mediation panel and all other persons participating in mediation. Every person participating in mediation shall make available to one another and all members of the mediation

panel all patient health care records of the patient named in the request for mediation that are in the person's possession.

(5) **COUNSEL PERMITTED.** Any person participating in mediation may be represented by counsel authorized to act for his or her respective client.

History: 1985 a. 340; 1989 a. 187 s. 28.

655.59 Inadmissibility. Filings under ss. 655.44 and 655.445 are not admissible in any court action. No statement or expression of opinion made in the course of a mediation session is admissible, either as an admission or otherwise, in any court action.

History: 1985 a. 340.

655.61 Funding. (1) The mediation fund created under s. 655.68 shall be financed from fees charged to health care providers. The director of state courts shall, by February 1 annually, determine the revenues needed for the operation of the mediation system during the succeeding fiscal year and inform the board of governors of that amount. The director of state courts shall also inform the board of governors of the number of requests for mediation involving each type of health care provider set out in s. 655.002 for the most recent fiscal year for which statistics are available. The board of governors shall, by rule, set fees to charge health care providers at a level sufficient to provide the necessary revenue.

(1m) Notwithstanding sub. (1), the board of governors may exempt any type of health care provider set out in s. 655.002 from payment of the annual fee based on a low number of requests for mediation involving that type of health care provider.

(2) The annual fees under sub. (1) shall be collected in a manner prescribed by rule of the commissioner. The commissioner shall pay all money collected under sub. (1) into the mediation fund created under s. 655.68.

History: 1985 a. 340; 1989 a. 187; 1991 a. 214.

SUBCHAPTER VII

MEDIATION FUND

655.68 Mediation fund. (1) CREATION. There is created a mediation fund to pay the administrative expenses of the mediation system created under subch. VI.

(2) **ADMINISTRATION AND OPERATION.** Management of the mediation fund is vested with the director of state courts.

(3) **FEES.** The mediation fund is financed from fees generated under ss. 655.54 and 655.61.

(4) **ACCOUNTING AND FINANCIAL REPORTS.** (a) Any person authorized to receive deposits, withdraw moneys, issue vouchers or otherwise disburse mediation fund moneys shall post a blanket fidelity bond in an amount reasonably sufficient to protect mediation fund assets. The cost of the bond shall be paid from the mediation fund.

(b) The state investment board shall invest money held in the mediation fund in short-term, fixed-return, interest-bearing investments. All income derived from these investments returns to the mediation fund.

(c) On or before March 1 annually, the director of state courts shall submit a report on the operation of the mediation system and on the status of the mediation fund to the chief clerk of each house of the legislature, for distribution to the appropriate standing committees under s. 13.172 (3).

History: 1985 a. 340; 1987 a. 186; 1989 a. 187 s. 28; 1991 a. 214.