

Department of Legislative Services  
Maryland General Assembly  
2015 Session

**FISCAL AND POLICY NOTE**

Senate Bill 569  
Finance

(Senator Kelley, *et al.*)

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**Health Care Provider Malpractice Insurance - Scope of Coverage**

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This bill allows a medical malpractice insurance policy to include coverage for the defense of a health care provider in a disciplinary hearing arising out of the practice of the health care provider's profession – by repealing the provision prohibiting such coverage. The bill also makes a conforming change by repealing the provision that allows a *separate* insurance policy to be purchased to cover this kind of defense.

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**Fiscal Summary**

**State Effect:** General fund revenues may decrease minimally due to the 2% tax collected on premiums paid in the State, to the extent that authorizing a health care provider to purchase medical malpractice insurance and disciplinary defense insurance in one policy, instead of in two separate policies, leads to smaller premiums for those health care providers. Conversely, general fund revenues may increase minimally due to the 2% tax collected on premiums paid in the State, to the extent that health care providers who do not currently have disciplinary defense insurance choose to purchase it as a result of the bill. It is unclear whether these impacts would fully offset. Maryland Insurance Administration (MIA) special fund revenue increases minimally in fiscal 2016 due to rate and form filing fees. Expenditures are not affected.

**Local Effect:** None.

**Small Business Effect:** Potential meaningful. The bill may reduce premium costs for small business health care providers and result in the purchase of disciplinary hearing defense coverage when such coverage otherwise would not have been purchased.

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## Analysis

**Current Law:** The Insurance Article requires that each policy insuring a health care provider against damages due to medical injury arising from providing or failing to provide health care must contain provisions that are consistent with certain requirements in the Courts Article. Additionally, the policy must authorize the insurer, without restriction, to negotiate and effect a compromise of claims within the limits of the insurer's liability, if the entire amount settled on is to be paid by the insurer.

A policy insuring a health care provider may not include coverage for the defense of a health care provider in a disciplinary hearing arising out of the practice of the health care provider's profession. However, such a policy may be offered and priced separately from a policy against damages from medical injury arising from providing or failing to provide adequate care.

Medical licensing boards are granted broad authority to reprimand or fine a licensee, place a license on probation, suspend a license, or revoke a license if the medical professional is found guilty of specified offenses before a disciplinary panel. For example, penalty fines that the State Board of Physicians may impose range from \$1,000 (for failing to provide a medical record to a patient, another physician, or hospital) to \$100,000 (for prescribing drugs for illegal or illegitimate medical purposes) depending on the severity of the offense.

### **Background:**

#### *Medical Professional Liability Insurance*

The National Association of Insurance Commissioners (NAIC) reports that medical professional liability insurance, commonly known as medical malpractice insurance, covers bodily injury or property damage as well as liability for personal injury such as mental anguish. NAIC further reports that the complexity involved in discovering negligence related to medical malpractice results in higher premiums paid by insureds and a higher percentage of premiums being used to pay for defense and cost containment expenses. Medical liability insurers spend considerable funds to investigate and defend claims where there is an adverse patient outcome not resulting from negligence.

In health care malpractice actions, there are two primary kinds of damages. Noneconomic damages include payment for pain, suffering, physical impairment, disfigurement, loss of consortium, or other nonpecuniary injury; economic damages, in contrast, include payment for loss of earnings and medical expenses and are not limited to a maximum amount. Studies by the U.S. Government Accountability Office indicated that sharp increases in medical malpractice insurance rates in the early 2000s were due, in part, to insurer losses on medical malpractice claims. Other contributing factors included decreased investment

income, artificially low premium rates adopted while insurers competed for market share during boom years, and higher overall costs due largely to increased reinsurance rates for medical malpractice insurers.

In 2004 and 2005, the General Assembly adopted legislation in response to increasing concern that medical malpractice insurance had become unaffordable for individuals practicing in certain high-risk specialties such as emergency surgery, obstetrics, neurosurgery, and orthopedic surgery. One provision of the legislation placed a four-year moratorium on the annual increase of \$15,000 in the cap on noneconomic damages for medical malpractice awards. Another provision decreased the maximum amount that may be awarded to claimants in wrongful death cases.

#### *Maryland Insurance Administration Survey*

In 2014, MIA undertook a survey to investigate the potential fiscal impact of allowing disciplinary hearing defense coverage to be included in a medical malpractice policy. MIA requested information from all 40 insurers that are authorized to offer medical professional liability insurance in the State, 32 of which responded. MIA advises that the survey did not provide a good basis for comparing the cost of providing disciplinary hearing defense coverage in a separate policy because many insurers had continued to include disciplinary hearing defense coverage in their medical professional liability policies during the survey time period, even though they were not and are not authorized by law to do so.

MIA asked the 16 insurers that currently provide disciplinary hearing defense coverage in Maryland about the cost of disciplinary hearing defense coverage and medical malpractice policy if they were offered in one policy instead of separate policies. Nine insurers indicated that there would not be any change in the aggregate rate. One insurer indicated that the aggregate cost may be slightly reduced, while another insurer indicated that the aggregate cost would increase by 1% to 11%, depending on the coverage purchased. Finally, one insurer was undecided, and the other four were already offering both in a consolidated policy and could not isolate the premium rate applicable to disciplinary hearing defense coverage. Furthermore, 25 of the 32 insurers that responded to the survey argued that professional liability insurance policies should be allowed to include coverage for disciplinary hearing defense coverage, citing the following reasons:

- Disciplinary hearing defense coverage is a valuable coverage and many health care providers may not be aware that it is available.
- All other states allow disciplinary hearing coverage to be included in a medical professional liability insurance policy.
- Disciplinary hearing coverage is a standard feature in medical professional liability insurance policies in many other states.

- It is more cost effective to include disciplinary hearing defense coverage in a medical professional liability insurance policy.

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### **Additional Information**

**Prior Introductions:** SB 832 of 2014 was passed by the Senate but was reported unfavorable by the House Economic Matters Committee. Its cross file, HB 1363 of 2014, was withdrawn without a hearing.

**Cross File:** HB 724 (Delegate Valderrama, *et al.*) - Economic Matters.

**Information Source(s):** National Association of Insurance Commissioners, Department of Health and Mental Hygiene, Maryland Insurance Administration, Department of Legislative Services

**Fiscal Note History:** First Reader - February 23, 2015  
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