

SECOND REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILLS NOS. 908 & 719

92ND GENERAL ASSEMBLY

Reported from the Committee on Small Business, Insurance and Industrial Relations, April 1, 2004, with recommendation that the Senate Committee Substitute do pass.

3233S.12C

TERRY L. SPIELER, Secretary.

AN ACT

To repeal sections 383.010, 383.015, 383.030, and 383.035, RSMo, and to enact in lieu thereof five new sections relating to malpractice insurance.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 383.010, 383.015, 383.030, and 383.035, RSMo, are repealed and five new sections enacted in lieu thereof, to be known as sections 383.010, 383.015, 383.030, 383.035, and 383.600, to read as follows:

383.010. 1. Notwithstanding any direct or implied prohibitions in chapter 375, 377, or 379, RSMo, any three or more persons, residents of this state, being licensed under the provisions of chapter 330, 331, 332, 334, 335, 336, 338 or 339, RSMo, or under rule 8 of the supreme court of Missouri or architects licensed pursuant to chapter 327, RSMo, may, as provided in sections 383.010 to 383.040, form a business entity for the purpose of providing malpractice insurance or indemnification for such persons upon the assessment plan, and upon compliance with section 379.260, RSMo, liability and automobile insurance as defined in subdivisions (1) and (3) of section 379.230, RSMo, may be provided upon the assessment plan to those persons licensed pursuant to chapter 197, RSMo, and for whom medical malpractice insurance is provided under this section, except that automobile insurance shall be provided only for ambulances as defined in section 190.100, RSMo. Hospitals, public or private, whether incorporated or not, as defined in chapter 197, RSMo, if licensed by the state of Missouri, professional corporations formed under the provisions of chapter 356, RSMo, for the practice of law and corporations, copartnerships or associations licensed under the provisions of chapter 339, RSMo, may also become members of any such entity. The term "persons" as used in sections 383.010 to 383.040 includes such hospitals, professional corporations and real estate business entities.

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

2. Anything in this section to the contrary notwithstanding, any persons duly licensed under the provisions of the laws of any other state who, if licensed under any similar provisions of the laws of this state, would be eligible to become members and insureds of an entity created under the authority of this section, may become members and insureds of such an entity, irrespective of whether such persons are residents of this state; provided, however, that any such persons must be employed by, or be a partner, shareholder or member of, a professional corporation, corporation, copartnership or association insured by or to be insured by such an entity.

3. **Except as provided in this subsection**, notwithstanding any provision of law which might be construed to the contrary, sections 379.882 and 379.888, RSMo, defining "commercial casualty insurance", shall not include professional malpractice insurance policies issued by any insurer in this state. **Sections 379.882 and 379.888, RSMo, defining "commercial casualty insurance" shall include policies providing professional malpractice insurance or indemnification to any health care provider, as defined in section 538.205, RSMo, issued by any insurer in this state, including associations established under sections 383.010 to 383.040.**

4. **No association licensed pursuant to the provisions of sections 383.010 to 383.040, to provide professional malpractice insurance or indemnification to any health care provider, as defined in section 538.205, RSMo, may be converted to a company licensed under chapter 375, 377, or 379, RSMo, or any other business entity. If the members of such an association desire to change the structure of the association and reorganize under chapter 375, 377, or 379, RSMo, all outstanding claims, indemnities and other liabilities thereof shall first be paid. Thereafter, a final dissolution of the association may be performed, and any remaining surplus shall be distributed to the members subject to the approval of the director.**

5. **No association described in subsection 4 of this section shall require, as a condition in any insurance contract or policy issued by such association, the insured health care provider to waive any right to pursue a cause of action against the managers or directors of the association for mismanagement or other breach of fiduciary duties.**

383.015. 1. Any such group of persons desiring to provide malpractice insurance or indemnification for its members shall pay a license fee of one hundred dollars and shall file articles of association with the director of insurance. The articles shall be filed in accordance with the provisions of sections 375.201 to 375.236, RSMo, and shall also include the names of persons initially associated, the method by which other persons may be admitted to the association as members, the purposes for which organized, the amount of the initial assessment which has been paid into the association, the method of assessment thereafter, and the maximum amount of any assessment which the association may make against any

member. The articles of association shall provide for bylaws and for the amendment of the articles of association and bylaws.

2. Each association shall designate and maintain a registered agent within this state, and service upon the agent shall be service upon the association and each of its members.

3. The articles of association shall be accompanied by a copy of the initial bylaws of the association. The bylaws shall provide for a governing body for the association, a manner of election thereof, the manner in which assessments will be made, the specific kinds of insurance or indemnification which will be offered, the classes of membership which will be offered, and may provide that assessments of various amounts for particular classes of membership may be made. All assessments shall be uniform within classes. The bylaws may provide for the transfer of risks to other insurance companies or for reinsurance.

4. The articles of association and the bylaws of the association shall:

(1) Specify and define the types of assessments, including but not limited to, initial, regular, operating, special, any other assessment to cover losses and expenses incurred in the operation of the association, or any other assessment to maintain or restore the association's assets, solvency, or surplus;

(2) Specify by type of assessment the assessments that shall apply to members, former members, or both members and former members of the association; and

(3) With respect to any assessment to cover losses and expenses incurred in the operation of the association, and any assessment to maintain or restore the association's assets, solvency, or surplus, specify the exact method and criteria by which the amounts of each type of assessment are to be determined, the time in which such assessments must be paid, that such assessments may be made without limitation as to frequency, and the maximum amount of any one such assessment.

383.030. 1. The director of the department of insurance shall be authorized in accordance with sections 374.190 and [374.200] **374.202 to 374.207**, RSMo, or in the event that [either or both of] such sections are repealed, then any successor sections relating to [financial] examination, to examine the **activities, operations, market conduct**, financial condition, affairs and management of any association organized under the provisions of sections 383.010 to 383.040, and the association shall pay the expenses of any such examination in accordance with sections 374.160 and 374.220, RSMo. Annually thereafter, within thirty days before the expiration of its license, each association shall pay a renewal license fee of one hundred dollars.

2. Any existing association shall also, at the time it files for renewal of its license, file any amendments to its articles of association or bylaws which have been adopted in the preceding year.

383.035. 1. Any association licensed pursuant to the provisions of sections 383.010

to 383.040 shall be subject to the provisions of the following provisions of the revised statutes of Missouri:

(1) Sections 374.010, 374.040, 374.046, 374.110, 374.115, 374.122, 374.170, 374.210, 374.215, 374.216, 374.230, 374.240, 374.250 and 374.280, RSMo, relating to the general authority of the director of the department of insurance;

(2) Sections 375.022, 375.031, 375.033, 375.035, 375.037 and 375.039, RSMo, relating to dealings with licensed agents and brokers;

(3) Sections 375.041 and 379.105, RSMo, relating to annual statements;

(4) Section 375.163, RSMo, relating to the competence of managing officers;

(5) Section 375.246, RSMo, relating to reinsurance requirements, except that no association shall be required to maintain reinsurance, and for insurance issued to members who joined the association on or before January 1, 1993, an association shall be allowed credit, as an asset or as a deduction from liability, for reinsurance which is payable to the ceding association's insured by the assuming insurer on the basis of the liability of the ceding association under contracts reinsured without diminution because of the insolvency of the ceding association;

(6) Section 375.390, RSMo, relating to the use of funds by officers for private gain;

(7) Section 375.445, RSMo, relating to insurers operating fraudulently;

(8) Section 379.080, RSMo, relating to permissible investments[, except that limitations in such section shall apply only to assets equal to such positive surplus as is actually maintained by the association];

(9) Section 379.102, RSMo, relating to the maintenance of unearned premium and loss reserves as liabilities[, except that any such loss reserves may be discounted in accordance with reasonable actuarial assumptions];

(10) With respect to associations described in subsection 4 of section 383.010, RSMo, sections 379.882 to 379.886, RSMo, and sections 379.888 to 379.893, RSMo, relating to commercial casualty insurance;

(11) With respect to associations described in subsection 4 of section 383.010, RSMo, subsection 6 of section 379.321, RSMo, relating to commercial casualty rate filings and notice requirements;

(12) With respect to associations described in subsection 4 of section 383.010, RSMo, sections 375.930 to 375.948, RSMo, relating to unfair trade practices.

2. Any association which was licensed pursuant to the provisions of sections 383.010 to 383.040 on or before January 1, 1992, shall be allowed until December 31, 1995, to comply with the provisions of this section as they relate to investments, reserves and reinsurance.

3. Any association licensed pursuant to the provisions of sections 383.010 to 383.040 shall file with its annual statement a certification by a fellow or an associate of the Casualty Actuarial Society. Such certification shall conform to the National Association of Insurance

Commissioners annual statement instructions unless otherwise provided by the director of the department of insurance.

4. The director of the department of insurance shall have authority in accordance with section 374.045, RSMo, to make all reasonable rules and regulations to accomplish the purpose of sections 383.010 to 383.040, including the extent to which insurance provided by an association may be extended to provide payment to a covered person resulting from a specific illness possessed by such covered person; except that no rule or regulation may place limitations or restrictions on the amount of premium an association may write or on the amount of insurance or limit of liability an association may provide.

5. Other than as provided in this section, no other insurance law of the state of Missouri shall apply to an association licensed pursuant to the provisions of this chapter, unless such law shall expressly state it is applicable to such associations.

6. If, after August 28, 1992, and after its second full calendar year of operation, any association licensed under the provisions of sections 383.010 to 383.040 shall file an annual statement which shows a surplus as regards policyholders of less than zero dollars, or if the director of the department of insurance has other conclusive and credible evidence more recent than the last annual statement indicating the surplus as regards policyholders of an association is less than zero dollars, the director of the department of insurance [may] **shall** order such association to submit, within ninety days following such order, a voluntary plan under which the association will restore its surplus as regards policyholders to at least zero dollars. The director of the department of insurance [may] **shall** monitor the performance of the association's plan and [may] **shall** order modifications thereto, including assessments **upon its members liable to assessment in accordance with the articles and bylaws of the association** or rate or premium increases, if the association fails to meet any targets proposed in such plan for three consecutive quarters. **It shall be an unfair trade practice within the meaning of sections 375.930 to 975.948, RSMo, for any association or agent thereof to make any assertion or statements, orally or in writing, contrary to the articles and bylaws of the association to members liable to assessment that assessments shall not be made.**

7. If the director of the department of insurance issues an order in accordance with subsection 6 of this section, the association may, in accordance with chapter 536, RSMo, file a petition for review of such order. Any association subject to an order issued in accordance with subsection 6 of this section shall be allowed a period of three years[, or such longer period as the director may allow,] to accomplish its plan to restore its surplus as regards policyholders to at least zero dollars. If at the end of the authorized period of time the association has failed to restore its surplus to at least zero dollars, or if the director of the department of insurance has ordered modifications of the voluntary plan **in accordance with subsection 6 of this section** and the [association's surplus] **association** has failed

to [increase] **restore its surplus to at least zero dollars** within three consecutive quarters after such modification, the director of the department of insurance [may allow an additional time for the implementation of the voluntary plan] **shall order the association to make an assessment upon its members liable to assessment** or may exercise his powers to take charge of the association as he would a mutual casualty company pursuant to sections 375.1150 to 375.1246, RSMo. Sections 375.1150 to 375.1246, RSMo, shall apply to associations licensed pursuant to sections 383.010 to 383.040 only after the conditions set forth in this section are met. When the surplus as regards policyholders of an association subject to subsection 6 of this section has been restored to at least zero dollars, the authority and jurisdiction of the director of the department of insurance under subsections 6 and 7 of this section shall terminate, but this subsection may again thereafter apply to such association if the conditions set forth in subsection 6 of this section for its application are again satisfied.

8. Any association licensed pursuant to the provisions of sections 383.010 to 383.040 shall place on file with the director of the department of insurance, except as to excess liability risks which by general custom are not written according to manual rates or rating plans, a copy of every manual of classifications, rules, underwriting rules and rates, every rating plan and every modification of the foregoing which it uses. Filing with the director of the department of insurance within ten days after such manuals, rating plans or modifications thereof are effective shall be sufficient compliance with this subsection. Any rates, rating plans, rules, classifications or systems in effect or in use by an association on August 28, 1992, may continue to be used by the association. Upon written application of a member of an association **and the director of the department of insurance in accordance with subsection 6 of section 379.321, RSMo**, stating his reasons therefor, filed with the association, a rate in excess of that provided by a filing otherwise applicable may be used by the association for that member.

383.600. 1. Beginning January 1, 2005, any person may form a corporation, association or company for the purpose of issuing medical malpractice insurance, as that term is defined in section 383.100, under the provisions of this section. Any corporation, association, or company formed under the provisions of this section shall be organized and operated as a stock company. The incorporators of such a stock company shall also meet the requirements of chapter 379, RSMo, relating to the organization of insurance companies and the laws of this state governing the organization of private corporations unless the provisions of this section provide otherwise. All insurance laws of this state shall apply to any corporation, association, or company formed under the provisions of this section unless the provisions of this section provide otherwise. No company, corporation or association authorized to issue medical malpractice insurance pursuant to chapter

379 prior to August 28, 2004, shall incorporate under the provisions of this section.

2. In addition to the requirements set forth in section 379.035, RSMo, the declaration and the articles of incorporation filed by the incorporators of the proposed stock company shall provide that the stock insurance company shall issue medical malpractice insurance to health care providers in Missouri.

3. Any company formed under the provisions of this section shall be subject to all provisions of the statutes that relate to private insurance carriers and to the jurisdiction of the department of insurance in the same manner as private insurance carriers, except as provided by the director. The director of the department of insurance may waive the capital and surplus requirements of chapter 379 solely for medical malpractice for any company formed under the provisions of this section for a period of five years after its incorporation.

4. Notwithstanding section 375.772, RSMo, any stock company incorporated or formed under this section shall not be a member of the Missouri property and casualty insurance guarantee association, be subject to assessments from such association, nor be classified as an insolvent insurer under sections 375.771 to 375.779, RSMo, unless the company meets the capital and surplus requirements provided in chapter 379, RSMo, and maintains such capital and surplus requirements for a period of not less than three consecutive years. After the three-year period has expired, the stock company incorporated under the provisions of this section shall participate in the Missouri property and casualty insurance guarantee association pursuant to sections 375.771 to 375.779, RSMo, provided that the company shall continue to meet the capital and surplus requirements provided in chapter 379, RSMo.

5. Any association formed pursuant to sections 383.020 to 383.040 for the purpose of providing medical malpractice insurance to its members, may be merged into one of the stock companies formed under this section.

6. As used in this section, the term "person" shall mean an individual, group of individuals, corporation, public corporation, partnership, committee, proprietorship, joint venture, any department, agency, board, institution, or other entity of the state or any political subdivisions, or any trade or professional or business association.