

Ins 3.35 Wisconsin health care liability insurance plan. (1) **FINDINGS.** (a) Legislation has been enacted authorizing the commissioner of insurance to promulgate a plan to provide health care liability insurance for risks in this state which are equitably entitled to but otherwise unable to obtain such coverage, or to call upon the insurance industry to prepare plans for his approval.

(b) Health care liability insurance for physicians, surgeons and osteopaths is not readily available in the voluntary market.

(c) A facility for providing such health care liability insurance should be enacted pursuant to chapter 619, Wis. Stats.

(d) Health care liability insurance for nurses and hospitals may not be readily available in the voluntary market in the near future.

(e) The facility created to provide health care liability insurance for physicians, surgeons and osteopaths should prepare plans to provide health care liability insurance to nurses and hospitals in the event such coverage were not readily available in the voluntary market.

(2) **PURPOSE.** This rule is intended to implement and interpret chapter 619, Wis. Stats., for the purpose of establishing procedures and requirements for a mandatory risk sharing plan to provide health care liability insurance coverage for eligible physicians and surgeons and osteopaths on a self-supporting basis. This rule is also intended to encourage the improvement in reasonable loss prevention measures and to encourage the maximum use of the existing voluntary market.

(3) **SCOPE.** This rule shall apply to all insurers authorized to transact in this state on a direct basis insurance against liability resulting from personal injuries, except for Town Mutuals authorized to transact insurance under chapter 612, Wis. Stats.

(4) **DEFINITIONS.** (a) The *Wisconsin Health Care Liability Insurance Plan*, hereinafter referred to as the Plan, means the statutory, nonprofit, unincorporated association established by this rule to provide for the issuance of health care liability insurance at adequate rate levels for risk sharing subject to the right of recoupment and to assist qualified applicants in securing health care liability insurance.

(b) Insurance against liability resulting from personal injuries means all insurance coverages against loss by the personal injury or death of any person for which loss the insured is liable. It includes the personal injury liability component of multi-peril policies, but it does not include steam boiler insurance authorized under section 201.04 (6), Wis. Stats., workmen's compensation insurance authorized under section 201.04 (16), Wis. Stats., or coverage authorized under section 201.04 (18), Wis. Stats.

(c) Health care liability insurance means insurance against loss, expense and liability resulting from errors, omissions or neglect in the performance of any professional service by any person authorized to practice medicine, surgery or osteopathy under the provisions of chapter 448, Wis. Stats.

(d) Premiums written means gross direct premiums less return premiums, dividends paid or credited to policyholders, or the unused or unabsorbed portions of premium deposits, with respect to

insurance against liability resulting from personal injuries covering insureds or risks resident or located in this state excluding premiums on risks insured under the Plan.

(e) Servicing company means an insurer which services policies issued on behalf of the Plan.

(5) INSURANCE COVERAGE. (a) All authorized physicians, surgeons and osteopaths who are equitably entitled to but otherwise unable to obtain health care liability insurance in the voluntary market shall be eligible to apply for insurance under this Plan.

(b) The maximum limits of coverage for the type of health care liability insurance defined in subsection (4) (c) which may initially be placed under the Plan are \$200,000 per claim and \$600,000 aggregate for all claims in any one policy year.

(c) In the event that such coverage does not prove sufficient for an applicant's needs, the Plan shall offer assistance to applicants in obtaining further coverage in the voluntary market.

(d) The commissioner may establish higher or lower maximum limits of coverage in accordance with section 619.01 (1) (b) and section 619.01 (7), Wis. Stats.

(e) The coverage shall be provided and the policies issued on a modified claims made basis, under forms approved by the commissioner, subject to a provision in the policy that:

1. In event of death of an individual insured, the insured's estate shall not be required to pay additional premium to obtain coverage for all future claims arising out of incidents which occurred during the time when a Plan policy was in force and at the same limits of the previous policy;

2. In event of total and permanent disability of an individual insured who is therefore unable to engage in any gainful employment and who has not yet reached his 65th birthday, the insured shall not be required to pay additional premium to obtain coverage for all future claims arising out of incidents which occurred during the time when a Plan policy was in force and at the same limits of the previous policy;

3. In the event of termination of coverage under the Plan for any reason other than non-payment of premium, the insured shall be guaranteed the right to purchase coverage upon payment of a single premium to protect him for all future claims arising out of incidents which occurred during the time when a Plan policy was in force and at not less than the same limits of the previous policy;

4. In response to changing conditions and circumstances, the Plan may, subject to the approval of the commissioner and consistent with section 619.01 (1) (b), Wis. Stats., modify the coverage it affords.

(f) Coverage may include such ancillary coverages as are customarily offered in the voluntary market.

(6) MEMBERSHIP. (a) Every insurer, subject to subsection (3) shall be a member of this Plan.

(b) An insurer's membership terminates when the insurer is no longer authorized to write personal injury liability insurance in Wisconsin, but the effective date of termination shall be the last day of the fiscal year of the Plan in which termination occurs. Any insurer so terminated shall continue to be governed by the provisions of this rule until it completes all of its obligations under the Plan.

(c) Subject to the approval of the commissioner, the governing committee may charge a reasonable membership fee, not to exceed \$50.00.

(7) ADMINISTRATION. (a) This Plan shall be administered by a governing committee, subject to the supervision of the commissioner.

(b) The governing committee shall consist of 8 members, each of whom shall serve for a period of one year or until a successor is designated. Each shall have one vote.

1. The following associations shall appoint or elect:
American Insurance Association—one member
American Mutual Insurance Alliance—one member
National Association of Independent Insurers—one member
Wisconsin Insurance Alliance—three members

2. The commissioner shall appoint 2 members to represent other insurers not members of the associations in subparagraph 1.

3. Not more than one insurer in a group under the same management or ownership shall serve on the governing committee at the same time.

4. All members of advisory committees established under subsection (8) (g) shall be non-voting ex officio members of the governing committee.

(8) DUTIES OF THE GOVERNING COMMITTEE. (a) The governing committee shall meet as often as may be required to perform the general duties of the administration of the Plan or on the call of the commissioner. Five members of the committee shall constitute a quorum.

(b) The governing committee shall be empowered to invest, borrow and disburse funds, budget expenses, levy assessments, cede and assume reinsurance, and perform all other duties provided herein as necessary or incidental to the proper administration of the Plan. The governing committee may appoint a manager or one or more agents to perform such duties as may be designated by the committee.

(c) The governing committee shall develop rates, rating Plans, rating and underwriting rules, rate classifications, rate territories, and policy forms in accordance with sections 619.01 (1) (c) 2 and 625.12, Wis. Stats.

(d) The governing committee shall cause all policies written pursuant to this Plan to be separately coded so that appropriate records may be compiled for purposes of calculating the adequate premium level for each classification of risk, and performing loss prevention and other studies of the operation of the Plan.

(e) The governing committee shall determine, subject to the approval of the commissioner, the eligibility of an insurer to act as a

servicing company. If no qualified insurer elects to be a servicing company, the governing committee shall assume such duties on behalf of member companies.

(f) The governing committee shall enter into agreements and contracts as may be necessary for the execution of this rule consistent with its provisions.

(g) The governing committee shall appoint 2 advisory committees, the first consisting of no more than 4 health care representatives selected after nomination by appropriate professional societies, and the second consisting of no more than 4 representatives of insurance agents and the health care consumer, to advise the committee in the fulfillment of its duties and functions, and to serve as non-voting ex officio members of the governing committee.

(h) The governing committee may appoint additional advisory committees of interested persons not limited to members of the Plan, to advise the committee in the fulfillment of its duties and functions.

(i) The governing committee shall be empowered to develop, at its option, an assessment credit Plan, subject to the approval of the commissioner, wherein a member of the Plan receives a credit against an assessment levied, based upon the Wisconsin voluntarily written health care liability insurance premiums.

(j) The governing committee shall prepare such procedures, policy forms, underwriting rules, rates and rating Plans as would be necessary to provide health care liability insurance under the Plan to nurses and hospitals in the event such coverage were not readily available in the voluntary market.

(k) The governing committee of the Plan shall be authorized to take such actions as are consistent with law to provide the state medical examining board or other health care licensing bodies with such claims information as may be appropriate.

(9) ANNUAL REPORT TO MEMBERS. By May 1 of each year, the governing committee shall make a report to the members of the Plan summarizing the activities of the Plan in the preceding calendar year.

(10) APPLICATION FOR INSURANCE. (a) Any person authorized to practice medicine, surgery or osteopathy under chapter 448, Wis. Stats., may submit an application for insurance by the Plan either directly or through any licensed agent.

(b) The Plan may bind coverage.

(c) The Plan shall, within 8 business days from receipt of an application, notify the applicant of the acceptance, rejection or the holding in abeyance of the application pending further investigation. Any individuals rejected by the Plan shall have the right to appeal that judgment within 30 days to the governing committee in accordance with subsection (16).

(d) If the risk is accepted by the Plan, a policy shall be delivered to the applicant upon payment of the premium. The Plan shall remit any commission to the licensed agent designated by the applicant; if no licensed agent is so designated, such commission shall be retained by the Plan.

(11) ASSESSMENTS AND PARTICIPATION. (a) In the event that sufficient funds are not available for the sound financial operation of the Plan, and pending recoupment pursuant to section 619.01 (1) (c) 2, Wis. Stats., all members shall, on a temporary basis, contribute to the financial needs of the Plan in the manner prescribed in paragraph (b). When such assessment contribution is recouped, it shall be reimbursed to members as their total share of the assessment contribution bears to the aggregate outstanding contributions.

(b) All members of the Plan shall participate in all premiums, other income, losses, expenses, and costs of the Plan in the proportion that the premiums written of each such member [excluding that portion of premiums attributable to the operation of the Plan and giving effect to any assessment credit Plan under paragraph (8) (i)] during the preceding calendar year bears to the aggregate premiums written in this state by all members of the Plan. Each member's participation in the Plan shall be determined annually on the basis of such premiums written during the preceding calendar year, as reported in the annual statements and other reports filed by the member with the commissioner of insurance.

(12) RATES. All rates shall be on an actuarially sound basis and shall be calculated to be self-supporting. Any deficit incurred by the Plan in any one year shall be recouped by rate increases applicable prospectively. Any surplus over the loss reserves of the Plan in any one year shall be distributed by rate decreases applicable prospectively.

(13) VOLUNTARY BUSINESS—CANCELLATION AND NONRENEWAL. Any member cancelling or not renewing voluntarily written health care liability insurance covering any risk eligible under this Plan shall inform the policyholder of the availability of insurance under the Plan. Any such notice of cancellation or nonrenewal shall allow ample time for application to the Plan and for the issuance of coverage. A copy of such cancellation or non-renewal notice shall be filed with the office of the commissioner of insurance.

(14) PLAN BUSINESS—CANCELLATION AND NONRENEWAL. (a) The Plan shall not cancel or refuse to renew a policy issued under the Plan except for:

1. Nonpayment of premium; or
2. Facts as confirmed by inspection which would have been grounds for nonacceptance of the risk under the Plan had they been known to the Plan at the time of acceptance; or
3. Changes in the physical or mental condition of the risk or other changed conditions as confirmed by investigation that makes the risk uninsurable under the Plan.

(b) No action shall be taken under paragraph (a) 2 and 3 until the health care representatives advisory committee has been notified of that prospective action and has been offered 5 working days in which to review and comment upon that action.

(c) Notice of cancellation or nonrenewal under paragraph (a), containing a statement of the reasons therefor, shall be sent to the insured with a copy to the Plan. Any cancellation or nonrenewal notice to the insured shall be accompanied by a conspicuous

statement that the insured has a right of appeal as provided in subsection (16).

(15) COMMISSION. (a) Commission to the licensed agent designated by the applicant shall be \$50.00 per new and renewal policy issued. The agent need not be licensed by the servicing company.

(b) Paragraph (a) shall be reviewed by the governing committee after this rule has been in effect for 6 months. If a determination is made that a larger commission is required, the governing committee may authorize such commission as may be appropriate, but in no case may such commission exceed 5% of the policy premium.

(c) In the event of cancellation of a policy, or if an endorsement is issued which requires premium to be returned to the insured, the agent shall refund ratably to the Plan commissions on the return premium at the same rate at which such commissions were originally paid.

(16) RIGHT OF APPEAL. Any affected person may appeal to the governing committee within 30 days after notice of any final ruling, action, or decision of the Plan. If the appeal involves rejection of an application, or cancellation or nonrenewal of a policy, the health care representatives advisory committee shall be notified of such appeal and given 5 working days in which to review and comment upon the appeal and make a recommendation to the governing committee. The governing committee must consider the appeal and render a decision promptly after receipt of any such appeal. Any decision of the governing committee may be further appealed to the commissioner within 30 days after notice thereof. Orders of the commissioner shall be subject to review pursuant to chapter 227, Wis. Stats.

(17) REVIEW BY COMMISSIONER. The governing committee shall report to the commissioner the name of any member or agent which fails to comply with the provisions of the Plan or with any rules prescribed thereunder by the governing committee or to pay within 30 days any assessment levied.

(18) INDEMNIFICATION. Each person serving on the governing committee or any subcommittee thereof, each member of the Plan, and the manager and each officer and employe of the Plan shall be indemnified by the Plan against all cost, settlement, judgment, and expense actually and necessarily incurred by him or it in connection with the defense of any action, suit, or proceeding in which he or it is made a party by reason of his or its being or having been a member of the governing committee, or a member or manager or officer or employe of the Plan except in relation to matters as to which he or it has been judged in such action, suit, or proceeding to be liable by reason of willful misconduct in the performance of his or its duties as a member of such governing committee, or a member or manager or officer or employe of the Plan. This indemnification shall not apply to any loss, cost, or expense on insurance policy claims under the Plan. Indemnification hereunder shall not be exclusive of other rights to which the member, manager, officer, or employe may be entitled as a matter of law.

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