ESSB 5728 - S AMD **621**
By Senator Kline

Strike everything after the enacting clause and insert the following:

"JOINT AND SEVERAL LIABILITY

Sec. 1. RCW 4.22.070 and 1993 c 496 s 1 are each amended to read as follows:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities ((~~released by~~)) who have entered into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW. Judgment shall be entered against each defendant except those entities who have ((~~been released by~~)) entered into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were

acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the ((~~claimants [claimant's]~~)) claimant's total damages.

(2)(a) A defendant who is jointly and severally liable under one of the exceptions listed in subsection (1)(a) or (b) of this section on the basis of negligent or reckless acts or omissions shall be jointly liable for no more than twice the percentage of fault allocated to that defendant but in no case more than one hundred percent of the sum of the proportionate shares.

(b) A defendant who is jointly and severally liable under one of the exceptions listed in subsection (1)(a) or (b) of this section on the basis of intentional acts or omissions shall be jointly liable for the sum of the proportionate shares of the claimant's total damages.

(c) If a defendant is jointly and severally liable under one of the exceptions listed in subsection((~~s~~)) (1)(a) or ((~~(1)~~))(b) of this section, such defendant's rights to contribution against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3) In all actions for damages under chapter 7.70 RCW, the entities to whom fault may be attributed shall be limited to the claimants, defendants, third-party defendants who are parties to the action, any entities released by the claimant, and any parties that are immune from liability.

(4)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Sec. 2. RCW 4.22.015 and 1981 c 27 s 9 are each amended to read as follows:

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent ((~~or~~)), reckless, or intentional toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through ((~~4.22.060~~)) 4.22.070 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

MEDICAL MALPRACTICE

NEW SECTION. **Sec. 3.** The legislature finds that the unavailability or unaffordability of malpractice insurance has caused hardship to health care providers. The legislature further finds that this hardship has the potential to result in impaired access to critical health care services, especially in high risk areas of practice, for Washington state citizens. The legislature further finds that factors contributing to increasing malpractice insurance rates and restrictions in coverage are numerous and complex. No single solution can address these multiple factors, but changes in the civil liability system can significantly address some of these factors. The legislature intends to improve the performance of the civil liability system with respect to the process by which actions alleging negligence by a health care provider are processed and resolved. These changes are designed to ensure that the legal system functions as fairly as possible and that it appropriately addresses concerns that a bad outcome is too often considered the equivalent of malpractice.

Sec. 4. RCW 4.16.190 and 1993 c 232 s 1 are each amended to read as follows:

(1) Unless otherwise provided in this section, if a person entitled

to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.

(2) Subsection (1) of this section with respect to a person under the age of eighteen years does not apply to the time limited for the commencement of an action under RCW 4.16.350.

NEW SECTION. **Sec. 5.** The legislature intends, by reestablishing the eight-year statute of repose in RCW 4.16.350, to respond to the court's decision in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136 (1998), by expressly stating the legislature's rationale for the eight-year statute of repose.

The legislature recognizes that the eight-year statute of repose alone may not solve the crisis in the medical insurance industry. However, to the extent that the eight-year statute of repose has an effect on medical malpractice insurance, that effect will tend to reduce rather than increase the cost of malpractice insurance.

Whether or not the statute of repose has the actual effect of reducing insurance costs, the legislature finds it will provide protection against claims, however few, that are stale, based on untrustworthy evidence, or that place undue burdens on defendants.

In accordance with the court's opinion in *DeYoung*, the legislature further finds that compelling even one defendant to answer a stale claim is a substantial wrong, and setting an outer limit to the operation of the discovery rule is an appropriate aim.

The legislature further finds that an eight-year statute of repose is a reasonable time period in light of the need to balance the interests of injured plaintiffs and the health care industry.

The legislature intends to reestablish the eight-year statute of repose in section 6 of this act and specifically set forth for the court the legislature's legitimate rationale for adopting the eight-year statute of repose. The legislature further intends that the

eight-year statute of repose reestablished in section 6 of this act be applied to actions commenced on or after the effective date of this section.

Sec. 6. RCW 4.16.350 and 1998 c 147 s 1 are each amended to read as follows:

(1) Any civil action for damages that is based upon alleged professional negligence, that is for an injury or condition occurring as a result of health care which is provided after June 25, 1976, and that is brought against((÷

~~(1)~~)) a person or entity identified in subsection (2) of this section, shall:

(a) With respect to a patient who was eighteen years old or older at the time of the act or omission alleged to have caused the injury or condition, be commenced by the later of:

(i) Three years from the act or omission; or

(ii) One year from the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by the act or omission; and

(b) With respect to a patient who was under the age of eighteen years at the time of the act or omission alleged to have caused the injury or condition, be commenced by the later of:

(i) When the patient reaches age twenty-one or eight years from the act or omission, whichever occurs first; or

(ii) One year from the time the patient or his or her representative discovered or reasonably should have discovered that the injury or condition was caused by the act or omission; and

(c) Notwithstanding (a) or (b) of this subsection, in any event be commenced no later than eight years after the act or omission.

(2) Persons or entities against whom an action is brought under subsection (1) of this section include:

(a) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's

assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

((~~(2)~~)) (b) An employee or agent of a person described in (a) of this subsection ((~~(1) of this section~~)), acting in the course and scope of his or her employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

((~~(3)~~)) (c) An entity, whether or not incorporated, facility, or institution employing one or more persons described in (a) of this subsection ((~~(1) of this section~~)), including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including, in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative((~~;~~

~~based upon alleged professional negligence shall be commenced within three years of the act or omission alleged to have caused the injury or condition, or one year of the time the patient or his representative discovered or reasonably should have discovered that the injury or condition was caused by said act or omission, whichever period expires later, except that in no event shall an action be commenced more than eight years after said act or omission: PROVIDED, That~~)).

(3) The time for commencement of an action is tolled upon proof of fraud, intentional concealment, or the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect, until the date the patient or the patient's representative has actual knowledge of the act of fraud or concealment, or of the presence of the foreign body; the patient or the patient's representative has one year from the date of the actual knowledge in which to commence a civil action for damages.

(4) For purposes of this section, ((~~notwithstanding RCW 4.16.190,~~)) the knowledge of a custodial parent or guardian shall be imputed to a person under the age of eighteen years, and such imputed knowledge shall operate to bar the claim of such minor to the same extent that the claim of an adult would be barred under this section. Any action not commenced in accordance with this section shall be barred.

For purposes of this section, with respect to care provided after June 25, 1976, and before August 1, 1986, the knowledge of a custodial parent or guardian shall be imputed as of April 29, 1987, to persons under the age of eighteen years.

This section does not apply to a civil action based on intentional conduct brought against those individuals or entities specified in this section by a person for recovery of damages for injury occurring as a result of childhood sexual abuse as defined in RCW 4.16.340(5).

NEW SECTION. **Sec. 7.** A new section is added to chapter 7.70 RCW to read as follows:

(1) In an action against a health care provider under this chapter, an expert may not provide testimony at trial, or execute a certificate of merit required under this chapter, unless the expert meets the following criteria:

(a) Has recognized expertise in any area of practice or specialty at issue in the action, as demonstrated by devotion of a significant portion of his or her practice to the area of practice or specialty; and

(b) At the time of the occurrence of the incident at issue in the action, was either:

(i) Engaged in active practice in the same area of practice or specialty as the defendant; or

(ii) Teaching at an accredited medical school or an accredited or affiliated academic or clinical training program in the same area of practice or specialty as the defendant, including instruction regarding the particular condition at issue.

(2) Upon motion of a party, the court may waive the requirements of subsection (1) of this section and allow an expert who does not meet those requirements to testify at trial or execute a certificate of merit required under this chapter if the court finds that:

(a) Extensive efforts were made by the party to locate an expert who meets the criteria under subsection (1) of this section, but none was willing and available to testify; and

(b) The proposed expert is qualified to be an expert witness by virtue of the person's training, experience, and knowledge.

NEW SECTION. **Sec. 8.** A new section is added to chapter 7.70 RCW to read as follows:

An expert opinion provided in the course of an action against a health care provider under this chapter must be corroborated by objective evidence, such as, but not limited to, treatment or practice protocols or guidelines developed by medical specialty organizations, objective academic research, clinical trials or studies, or widely accepted clinical practices.

NEW SECTION. **Sec. 9.** A new section is added to chapter 7.70 RCW to read as follows:

In any action under this chapter, each side shall presumptively be entitled to only two independent experts on an issue, except upon a showing of good cause. Where there are multiple parties on a side and the parties cannot agree as to which independent experts will be called on an issue, the court, upon a showing of good cause, shall allow additional experts on an issue to be called as the court deems appropriate.

NEW SECTION. **Sec. 10.** A new section is added to chapter 7.70 RCW to read as follows:

In an action under this chapter, all parties shall submit a pretrial expert report pursuant to time frames provided in court rules. The expert report must disclose the identity of all expert witnesses and state the nature of the opinions the expert witnesses will present as testimony at trial. Further depositions of these expert witnesses is prohibited. The testimony that an expert witness may present at trial is limited in nature to the opinions disclosed to the court as part of the pretrial expert report. The legislature respectfully requests that the supreme court adopt rules to implement the provisions of this section.

Sec. 11. RCW 7.70.100 and 1993 c 492 s 419 are each amended to read as follows:

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. If

the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the service of the notice.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

((~~(2)~~)) (4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The rules shall require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held; and

(f) ((~~A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and~~

~~(g)~~)) Any other matters deemed necessary by the court.

((~~(3)~~)) (5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arisal of the claim, to submit the claim to arbitration under chapter 7.04 RCW.

(7) The legislature respectfully requests that the supreme court by rule also adopt procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

Sec. 12. RCW 5.64.010 and 1975-'76 2nd ex.s. c 56 s 3 are each amended to read as follows:

(1) In any civil action against a health care provider for personal injuries which is based upon alleged professional negligence ((~~and which is against:~~

~~(1) A person licensed by this state to provide health care or related services, including, but not limited to, a physician, osteopathic physician, dentist, nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, pharmacist, optician, physician's assistant, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his estate or personal representative;~~

~~(2) An employee or agent of a person described in subsection (1) of this section, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his estate or personal representative; or~~

~~(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in subsection (1) of this section, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his employment, including, in the event such officer, director, employee, or agent is deceased, his estate or personal~~

~~representative;~~)), evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

(2) In a civil action against a health care provider for personal injuries which is based upon alleged professional negligence, evidence of an early offer of settlement is inadmissible, not discoverable, and otherwise unavailable for use in the action. An early offer of settlement means an offer that is made before the filing of a claim and that makes an offer of compensation for the injury suffered. An early offer of settlement may include an apology or an admission of fault on the part of the person making the offer, or a statement regarding remedial actions that may be taken to address the act or omission that is the basis for the allegation of negligence, and does not become admissible, discoverable, or otherwise available for use in the action because it contains an apology, admission of fault, or statement of remedial actions that may be taken. Compensation means payment of money or other property to or on behalf of the injured party, rendering of services to the injured party free of charge, or indemnification of expenses incurred by or on behalf of the injured party.

(3) For the purposes of this section, "health care provider" has the same meaning provided in RCW 7.70.020.

Sec. 13. RCW 7.70.080 and 1975-'76 2nd ex.s. c 56 s 13 are each amended to read as follows:

Any party may present evidence to the trier of fact that the ((~~patient~~)) plaintiff has already been compensated for the injury complained of from any source except the assets of the ((~~patient, his~~)) plaintiff, the plaintiff's representative, or ((~~his~~)) the plaintiff's immediate family((~~, or insurance purchased with such assets~~)). In the event such evidence is admitted, the plaintiff may present evidence of an obligation to repay such compensation and evidence of any amount paid by the plaintiff, or his or her representative or immediate family, to secure the right to the compensation. ((~~Insurance bargained for or provided on behalf of an employee shall be considered insurance purchased with the assets of the employee.~~)) Compensation as used in this section shall mean payment of money or other property to or on behalf of the patient, rendering of services to the patient free of

charge to the patient, or indemnification of expenses incurred by or on behalf of the patient. Notwithstanding this section, evidence of compensation by a defendant health care provider may be offered only by that provider.

NEW SECTION. **Sec. 14.** A new section is added to chapter 7.70 RCW to read as follows:

(1) In an action against an individual health care provider under this chapter for personal injury or wrongful death in which the injury is alleged to have been caused by an act or omission that violates the accepted standard of care, the plaintiff must file a certificate of merit at the time of commencing the action.

(2) The certificate of merit must be executed by a health care provider who meets the qualifications of an expert under section 7 of this act. If there is more than one defendant in the action, the person commencing the action must file a certificate of merit for each defendant.

(3) The certificate of merit must contain a statement that the person executing the certificate of merit believes there is a reasonable probability that the defendant's conduct did not follow the accepted standard of care required to be exercised by the defendant.

(4) Upon motion of the plaintiff, the court may grant an additional period of time to file the certificate of merit, not to exceed ninety days, if the court finds there is good cause for the extension.

NEW SECTION. **Sec. 15.** (1) A commission on noneconomic damages is established. The commission shall prepare a study and develop, for consideration by the legislature, a proposed plan for implementation of an advisory schedule of noneconomic damages in actions for injuries resulting from health care under chapter 7.70 RCW. The commission shall present the results of the study and the proposed implementation plan to the relevant policy committees of the legislature by October 31, 2005. If the commission is unable to reach consensus on a proposed implementation plan, it shall submit a minority report along with the proposed plan that clearly delineates the concerns of those commission members who have not endorsed the proposed plan. Implementation of any proposed plan is contingent upon the legislature explicitly

authorizing, by statute, the use of an advisory schedule of noneconomic damages in actions for injuries resulting from health care under chapter 7.70 RCW.

(2) The commission's goal is to develop a proposed plan for use of an advisory schedule of noneconomic damages that will increase the predictability and proportionality of settlements and awards for noneconomic damages in actions for injuries resulting from health care. The commission shall consider:

(a) The information that can most appropriately be used to provide guidance to the trier of fact regarding noneconomic damage awards, giving consideration to: (i) Past noneconomic damage awards for similar injuries, considering severity and duration of the injuries, and other factors deemed appropriate by the commission; (ii) past noneconomic damage awards for similar claims for damages; and (iii) such other information or methodologies the commission finds appropriate;

(b) The most appropriate format in which to present the information to the trier of fact; and

(c) When and under what circumstances an advisory schedule should be utilized in alternative dispute resolution settings and presented to the trier of fact at trial.

(3) A proposed implementation plan shall include, at a minimum:

(a) The information developed under subsection (2)(a), (b), and (c) of this section;

(b) Identification of changes to statutory law, administrative rules, or court rules that would be necessary to implement the advisory schedule;

(c) Identification of forms or other documents that would be necessary or beneficial in implementing the advisory schedule;

(d) Identification of the time that would be required to prepare for and implement an advisory schedule authorized by the legislature; and

(e) Any other information or considerations the commission finds necessary or beneficial to implementation of the advisory schedule.

(4) For the purposes of this section, "noneconomic damages" has the meaning given in RCW 4.56.250.

NEW SECTION. **Sec. 16.** (1) The commission is composed of fifteen members, as follows: (a) One member from each of the two largest caucuses in the senate, to be appointed by the president of the senate, and one member from each of the two largest caucuses in the house of representatives, to be appointed by the speaker of the house of representatives; (b) one health care ethicist; (c) one economist; (d) one actuary; (e) two attorneys with expertise or significant experience in medical malpractice actions, one representing the plaintiff's bar and one representing the insurance defense bar; (f) two superior court judges; (g) one representative of a hospital; (h) two physicians; (i) one representative of a medical malpractice insurer; and (j) two consumers. The governor shall appoint the nonlegislative members of the commission.

(2) The governor shall select a chair of the commission from among those commission members that are not health care providers, medical malpractice insurers, or attorneys.

(3) Legislative members of the commission shall be reimbursed for travel expenses under RCW 44.04.120. Nonlegislative members of the commission shall be reimbursed for travel expenses as provided in RCW 43.03.050 and 43.03.060. Travel expenses of nonlegislative members of the commission shall be paid jointly by the house of representatives and senate.

(4) The office of financial management shall provide support to the commission to enable it to perform its functions, with the assistance of staff from the administrative office of the courts.

Sec. 17. RCW 70.105.112 and 1987 c 528 s 9 are each amended to read as follows:

This chapter does not apply to special incinerator ash regulated under chapter 70.138 RCW except that, for purposes of RCW 4.22.070((~~(3)~~)) (4)(a), special incinerator ash shall be considered hazardous waste.

POSTJUDGMENT INTEREST

Sec. 18. RCW 4.56.115 and 1983 c 147 s 2 are each amended to read as follows:

Judgments founded on the tortious conduct of the state of Washington or of the political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in their governmental or proprietary capacities, shall bear interest from the date of entry at four percentage points above the ((~~maximum rate permitted under RCW 19.52.020 on~~)) equivalent coupon issue yield (as published by the board of governors of the federal reserve system) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry thereof((~~: PROVIDED, That~~)). In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

Sec. 19. RCW 4.56.110 and 1989 c 360 s 19 are each amended to read as follows:

Interest on judgments shall accrue as follows:

(1) Judgments founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in the contracts: PROVIDED, That said interest rate is set forth in the judgment.

(2) All judgments for unpaid child support that have accrued under a superior court order or an order entered under the administrative procedure act shall bear interest at the rate of twelve percent.

(3) Judgments founded on the tortious conduct of individuals or other entities, whether acting in their personal or representative capacities, shall bear interest from the date of entry at four percentage points above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest

on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

(4) Except as provided under subsections (1) ((~~and~~)), (2), and (3) of this section, judgments shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof((~~: PROVIDED, That~~)). In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

NEW SECTION. **Sec. 20.** The rate of interest required by sections 18 and 19(3), chapter . . ., Laws of 2004 (sections 18 and 19(3) of this act) applies to the accrual of interest:

(1) As of the date of entry of judgment with respect to a judgment that is entered on or after the effective date of this section;

(2) As of the effective date of this section with respect to a judgment that was entered before the effective date of this section and that is still accruing interest on the effective date of this section.

Sec. 21. RCW 19.52.025 and 1986 c 60 s 1 are each amended to read as follows:

Each month the state treasurer shall compute the highest rate of interest permissible under RCW 19.52.020(1), and the rate of interest required by RCW 4.56.110(3) and 4.56.115, for the succeeding calendar month. The treasurer shall file ((~~this rate~~)) these rates with the state code reviser for publication in the next available issue of the Washington State Register in compliance with RCW 34.08.020(8).

EMPLOYER REFERENCE

NEW SECTION. **Sec. 22.** The legislature finds that employers are becoming increasingly discouraged from disclosing job reference information. The legislature further finds that full disclosure of such information will increase productivity, enhance the safety of the workplace, and provide greater opportunities to disadvantaged groups

who may not have the educational background or resumes of other workers.

NEW SECTION. **Sec. 23.** A new section is added to chapter 4.24 RCW to read as follows:

(1) An employer who discloses information about a former or current employee's job performance, conduct, or other work-related information to a prospective employer, or employment agency as defined by RCW 49.60.040, at the specific request of that individual employer or employment agency, is presumed to be acting in good faith and is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith may only be rebutted upon a showing by clear and convincing evidence that the employer knew that the information was false or misleading.

(2) The employer must retain a written record of the information disclosed under this section for a minimum of two years from the date of the disclosure. The employee has a right to inspect the written record upon request. The written record shall become part of the employee's personnel file, subject to the provisions of chapter 49.12 RCW.

(3) For the purposes of this section, "job performance" means the manner in which the employee performs the duties of a position of employment and includes an analysis of the employee's attendance at work; conduct, attitude, effort, knowledge, behavior, and skills that are work related; and adherence to the employer's employment policies and to safety and health laws subject to the limitation of RCW 51.48.025.

NEW SECTION. **Sec. 24.** A new section is added to chapter 49.12 RCW to read as follows:

Any written record made under section 23 of this act shall become part of an employee's personnel file.

OBESITY CLAIMS

NEW SECTION. **Sec. 25.** The legislature intends by this act to prevent frivolous lawsuits against manufacturers, packers,

distributors, carriers, holders, sellers, marketers, or advertisers of food products that comply with applicable statutory and regulatory requirements.

NEW SECTION. **Sec. 26.** A new section is added to chapter 7.72 RCW to read as follows:

(1) Except as exempted in subsection (2) of this section, a manufacturer, packer, distributor, carrier, holder, seller, marketer, or advertiser of a food, or an association of one or more such entities, shall not be subject to civil liability arising under any law of this state, including all statutes, regulations, rules, common law, public policies, court or administrative decisions or decrees, or other state action having the effect of law, for any claim arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food.

(2) Subsection (1) of this section does not preclude civil liability where the claim of weight gain, obesity, health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food is based on: (a) A material violation of an adulteration or misbranding requirement prescribed by statute or rule of the state of Washington or the United States and the claimed injury was proximately caused by such violation; or (b) any other material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food, provided that such violation is knowing and willful, and the claimed injury was proximately caused by such violation.

(3) In any action exempted under subsection (2)(a) of this section, the complaint initiating such action shall state with particularity the following: The statute, regulation, or other law of the state of Washington or of the United States that was allegedly violated; the facts that are alleged to constitute a material violation of such statute or regulation; and the facts alleged to demonstrate that such violation proximately caused actual injury to the plaintiff. In any action exempted under subsection (2)(b) of this section, in addition to the foregoing pleading requirements, the complaint initiating such

action shall state with particularity facts sufficient to support a reasonable inference that the violation was with the intent to deceive or injure consumers or with the actual knowledge that such violation was injurious to consumers. For purposes of applying this section, the pleading requirements of this subsection are hereby deemed part of the substantive law of the state of Washington and not merely in the nature of procedural provisions.

(4) In any action exempted under subsection (2) of this section, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party. During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations including electronically recorded or stored data, and tangible objects that are in the custody or control of such party and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under Washington court rules.

(5) The provisions of this section shall apply to all covered claims pending on the effective date of this section and all claims filed thereafter, regardless of when the claim arose.

(6) For purposes of this section:

(a) "Claim" means any claim by or on behalf of a natural person, as well as any derivative or other claim arising therefrom asserted by or on behalf of any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity or private attorney general.

(b) "Food" means "food" as defined in section 201(f) of the federal food, drug, and cosmetic act (21 U.S.C. 321(f)).

(c) "Generally known condition allegedly caused by or allegedly likely to result from long-term consumption" means a condition generally known to result or to likely result from the cumulative effect of consumption, and not from a single instance of consumption.

(d) "Knowing and willful violation" means that: (i) The conduct constituting the violation was committed with the intent to deceive or

injure consumers or with actual knowledge that such conduct was injurious to consumers; and (ii) the conduct constituting the violation was not required by regulations, orders, rules, or other pronouncement of, or any statute administered by, a federal, state, or local government agency.

NEW SECTION. **Sec. 27.** Sections 25 and 26 of this act may be cited as the commonsense consumption act.

PATIENT SAFETY

Sec. 28. RCW 4.24.250 and 1981 c 181 s 1 are each amended to read as follows:

(1) Any health care provider as defined in RCW 7.70.020 (1) and (2) as now existing or hereafter amended who, in good faith, files charges or presents evidence against another member of their profession based on the claimed incompetency or gross misconduct of such person before a regularly constituted review committee or board of a professional society or hospital whose duty it is to evaluate the competency and qualifications of members of the profession, including limiting the extent of practice of such person in a hospital or similar institution, or before a regularly constituted committee or board of a hospital whose duty it is to review and evaluate the quality of patient care and any person or entity who, in good faith, shares any information or documents with one or more other committees, boards, or programs under subsection (2) of this section, shall be immune from civil action for damages arising out of such activities. For the purposes of this section, sharing information is presumed to be in good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading. The proceedings, reports, and written records of such committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, shall not be subject to subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined above.

(2) A coordinated quality improvement program maintained in accordance with RCW 43.70.510 or 70.41.200 and any committees or boards under subsection (1) of this section may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a coordinated quality improvement committee or committees or boards under subsection (1) of this section, with one or more other coordinated quality improvement programs or committees or boards under subsection (1) of this section for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. Information and documents disclosed by one coordinated quality improvement program or committee or board under subsection (1) of this section to another coordinated quality improvement program or committee or board under subsection (1) of this section and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (1) of this section and by RCW 43.70.510(4) and 70.41.200(3).

Sec. 29. RCW 43.70.510 and 1995 c 267 s 7 are each amended to read as follows:

(1)(a) Health care institutions and medical facilities, other than hospitals, that are licensed by the department, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers approved pursuant to chapter 48.43 RCW, and any other person or entity providing health care coverage under chapter 48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof may maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice as set forth in RCW 70.41.200.

(b) All such programs shall comply with the requirements of RCW 70.41.200(1)(a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the institution, facility, professional societies or organizations, health care service contractors, health maintenance organizations, health carriers, or any other person or entity providing health care coverage under chapter

48.42 RCW that is subject to the jurisdiction and regulation of any state agency or any subdivision thereof, unless an alternative quality improvement program substantially equivalent to RCW 70.41.200(1)(a) is developed. All such programs, whether complying with the requirement set forth in RCW 70.41.200(1)(a) or in the form of an alternative program, must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section shall apply. In reviewing plans submitted by licensed entities that are associated with physicians' offices, the department shall ensure that the exemption under RCW 42.17.310(1)(hh) and the discovery limitations of this section are applied only to information and documents related specifically to quality improvement activities undertaken by the licensed entity.

(2) Health care provider groups of ((~~ten~~)) five or more providers may maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice as set forth in RCW 70.41.200. All such programs shall comply with the requirements of RCW 70.41.200(1)(a), (c), (d), (e), (f), (g), and (h) as modified to reflect the structural organization of the health care provider group. All such programs must be approved by the department before the discovery limitations provided in subsections (3) and (4) of this section and the exemption under RCW 42.17.310(1)(hh) and subsection (5) of this section shall apply.

(3) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (6) of this section is not subject to an action for civil damages or other relief as a result of the activity or its consequences. For the purposes of this section, sharing information is presumed to be in substantial good faith. However, the presumption may

be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.

(4) Information and documents, including complaints and incident reports, created specifically for, and collected, and maintained by a quality improvement committee are not subject to discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts that form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action challenging the termination of a contract by a state agency with any entity maintaining a coordinated quality improvement program under this section if the termination was on the basis of quality of care concerns, introduction into evidence of information created, collected, or maintained by the quality improvement committees of the subject entity, which may be under terms of a protective order as specified by the court; (e) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (f) in any civil action, discovery and introduction into evidence of the patient's medical records required by rule of the department of health to be made regarding the care and treatment received.

(5) Information and documents created specifically for, and collected and maintained by a quality improvement committee are exempt from disclosure under chapter 42.17 RCW.

(6) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or with RCW 70.41.200 or a peer review committee under RCW 4.24.250, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (4) of this section and RCW 4.24.250.

(7) The department of health shall adopt rules as are necessary to implement this section.

Sec. 30. RCW 70.41.200 and 2000 c 6 s 3 are each amended to read as follows:

(1) Every hospital shall maintain a coordinated quality improvement program for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. The program shall include at least the following:

(a) The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice. The committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures;

(b) A medical staff privileges sanction procedure through which

credentials, physical and mental capacity, and competence in delivering health care services are periodically reviewed as part of an evaluation of staff privileges;

(c) The periodic review of the credentials, physical and mental capacity, and competence in delivering health care services of all persons who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to accidents, injuries, treatment, and other events that may result in claims of medical malpractice;

(e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients, patient grievances, professional liability premiums, settlements, awards, costs incurred by the hospital for patient injury prevention, and safety improvement activities;

(f) The maintenance of relevant and appropriate information gathered pursuant to (a) through (e) of this subsection concerning individual physicians within the physician's personnel or credential file maintained by the hospital;

(g) Education programs dealing with quality improvement, patient safety, medication errors, injury prevention, staff responsibility to report professional misconduct, the legal aspects of patient care, improved communication with patients, and causes of malpractice claims for staff personnel engaged in patient care activities; and

(h) Policies to ensure compliance with the reporting requirements of this section.

(2) Any person who, in substantial good faith, provides information to further the purposes of the quality improvement and medical malpractice prevention program or who, in substantial good faith, participates on the quality improvement committee shall not be subject to an action for civil damages or other relief as a result of such activity. Any person or entity participating in a coordinated quality improvement program that, in substantial good faith, shares information or documents with one or more other programs, committees, or boards under subsection (8) of this section is not subject to an action for civil damages or other relief as a result of the activity. For the purposes of this section, sharing information is presumed to be in

substantial good faith. However, the presumption may be rebutted upon a showing of clear, cogent, and convincing evidence that the information shared was knowingly false or deliberately misleading.

(3) Information and documents, including complaints and incident reports, created specifically for, and collected, and maintained by a quality improvement committee are not subject to discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. This subsection does not preclude: (a) In any civil action, the discovery of the identity of persons involved in the medical care that is the basis of the civil action whose involvement was independent of any quality improvement activity; (b) in any civil action, the testimony of any person concerning the facts which form the basis for the institution of such proceedings of which the person had personal knowledge acquired independently of such proceedings; (c) in any civil action by a health care provider regarding the restriction or revocation of that individual's clinical or staff privileges, introduction into evidence information collected and maintained by quality improvement committees regarding such health care provider; (d) in any civil action, disclosure of the fact that staff privileges were terminated or restricted, including the specific restrictions imposed, if any and the reasons for the restrictions; or (e) in any civil action, discovery and introduction into evidence of the patient's medical records required by regulation of the department of health to be made regarding the care and treatment received.

(4) Each quality improvement committee shall, on at least a semiannual basis, report to the governing board of the hospital in which the committee is located. The report shall review the quality improvement activities conducted by the committee, and any actions taken as a result of those activities.

(5) The department of health shall adopt such rules as are deemed appropriate to effectuate the purposes of this section.

(6) The medical quality assurance commission or the board of osteopathic medicine and surgery, as appropriate, may review and audit the records of committee decisions in which a physician's privileges are terminated or restricted. Each hospital shall produce and make accessible to the commission or board the appropriate records and otherwise facilitate the review and audit. Information so gained shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section. Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars.

(7) The department, the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit.

(8) A coordinated quality improvement program may share information and documents, including complaints and incident reports, created specifically for, and collected and maintained by a quality improvement committee or a peer review committee under RCW 4.24.250 with one or more other coordinated quality improvement programs maintained in accordance with this section or with RCW 43.70.510 or a peer review committee under RCW 4.24.250, for the improvement of the quality of health care services rendered to patients and the identification and prevention of medical malpractice. Information and documents disclosed by one coordinated quality improvement program to another coordinated quality improvement program or a peer review committee under RCW 4.24.250 and any information and documents created or maintained as a result of the sharing of information and documents shall not be subject to the discovery process and confidentiality shall be respected as required by subsection (3) of this section and RCW 4.24.250.

(9) Violation of this section shall not be considered negligence per se.

Sec. 31. RCW 43.70.110 and 1993 sp.s. c 24 s 918 are each amended to read as follows:

(1) The secretary shall charge fees to the licensee for obtaining a license. After June 30, 1995, municipal corporations providing emergency medical care and transportation services pursuant to chapter 18.73 RCW shall be exempt from such fees, provided that such other emergency services shall only be charged for their pro rata share of the cost of licensure and inspection, if appropriate. The secretary may waive the fees when, in the discretion of the secretary, the fees would not be in the best interest of public health and safety, or when the fees would be to the financial disadvantage of the state.

(2) Except as provided in section 33 of this act, fees charged shall be based on, but shall not exceed, the cost to the department for the licensure of the activity or class of activities and may include costs of necessary inspection.

(3) Department of health advisory committees may review fees established by the secretary for licenses and comment upon the appropriateness of the level of such fees.

Sec. 32. RCW 43.70.250 and 1996 c 191 s 1 are each amended to read as follows:

It shall be the policy of the state of Washington that the cost of each professional, occupational, or business licensing program be fully borne by the members of that profession, occupation, or business. The secretary shall from time to time establish the amount of all application fees, license fees, registration fees, examination fees, permit fees, renewal fees, and any other fee associated with licensing or regulation of professions, occupations, or businesses administered by the department. In fixing said fees, the secretary shall set the fees for each program at a sufficient level to defray the costs of administering that program and the patient safety fee established in section 33 of this act. All such fees shall be fixed by rule adopted by the secretary in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW.

NEW SECTION. **Sec. 33.** A new section is added to chapter 43.70 RCW to read as follows:

(1) The secretary shall increase the licensing fee established under RCW 43.70.110 by two dollars per year for the health care professionals designated in subsection (2) of this section and by two dollars per licensed bed per year for the health care facilities designated in subsection (2) of this section. Proceeds of the patient safety fee must be deposited into the patient safety account in section 37 of this act and dedicated to patient safety and medical error reduction efforts that have been proven to improve, or have a substantial likelihood of improving the quality of care provided by health care professionals and facilities.

(2) The health care professionals and facilities subject to the patient safety fee are:

(a) The following health care professionals licensed under Title 18 RCW:

(i) Advanced registered nurse practitioners, registered nurses, and licensed practical nurses licensed under chapter 18.79 RCW;

(ii) Chiropractors licensed under chapter 18.25 RCW;

(iii) Dentists licensed under chapter 18.32 RCW;

(iv) Midwives licensed under chapter 18.50 RCW;

(v) Naturopaths licensed under chapter 18.36A RCW;

(vi) Nursing home administrators licensed under chapter 18.52 RCW;

(vii) Optometrists licensed under chapter 18.53 RCW;

(viii) Osteopathic physicians licensed under chapter 18.57 RCW;

(ix) Osteopathic physicians' assistants licensed under chapter 18.57A RCW;

(x) Pharmacists and pharmacies licensed under chapter 18.64 RCW;

(xi) Physicians licensed under chapter 18.71 RCW;

(xii) Physician assistants licensed under chapter 18.71A RCW;

(xiii) Podiatrists licensed under chapter 18.22 RCW; and

(xiv) Psychologists licensed under chapter 18.83 RCW; and

(b) Hospitals licensed under chapter 70.41 RCW and psychiatric hospitals licensed under chapter 71.12 RCW.

NEW SECTION. **Sec. 34.** A new section is added to chapter 7.70 RCW to read as follows:

(1)(a) One percent of any attorney contingency fee as contracted with a prevailing plaintiff in any action for damages based upon

injuries resulting from health care shall be deducted from the contingency fee as a patient safety set aside. Proceeds of the patient safety set aside will be distributed by the department of health in the form of grants, loans, or other appropriate arrangements to support strategies that have been proven to reduce medical errors and enhance patient safety, or have a substantial likelihood of reducing medical errors and enhancing patient safety, as provided in section 33 of this act.

(b) A patient safety set aside shall be transmitted to the secretary of the department of health by the person or entity paying the claim, settlement, or verdict for deposit into the patient safety account established in section 37 of this act.

(c) The supreme court shall by rule adopt procedures to implement this section.

(2) If the patient safety set aside established by this section is invalidated by the Washington state supreme court, then any attorney representing a claimant who receives a settlement or verdict in any action for damages based upon injuries resulting from health care under this chapter shall provide information to the claimant regarding the existence and purpose of the patient safety account and notify the claimant that he or she may make a contribution to that account under section 36 of this act.

NEW SECTION. **Sec. 35.** A new section is added to chapter 43.70 RCW to read as follows:

(1)(a) Patient safety fee and set aside proceeds shall be administered by the department, after seeking input from health care providers engaged in direct patient care activities, health care facilities, and other interested parties. In developing criteria for the award of grants, loans, or other appropriate arrangements under this section, the department shall rely primarily upon evidence-based practices to improve patient safety that have been identified and recommended by governmental and private organizations, including, but not limited to:

(i) The federal agency for health care quality and research;

(ii) The institute of medicine of the national academy of sciences;

(iii) The joint commission on accreditation of health care organizations; and

(iv) The national quality forum.

(b) The department shall award grants, loans, or other appropriate arrangements for at least two strategies that are designed to meet the goals and recommendations of the federal institute of medicine's report, "Keeping Patients Safe: Transforming the Work Environment of Nurses."

(2) Projects that have been proven to reduce medical errors and enhance patient safety shall receive priority for funding over those that are not proven, but have a substantial likelihood of reducing medical errors and enhancing patient safety. All project proposals must include specific performance and outcome measures by which to evaluate the effectiveness of the project. Project proposals that do not propose to use a proven patient safety strategy must include, in addition to performance and outcome measures, a detailed description of the anticipated outcomes of the project based upon any available related research and the steps for achieving those outcomes.

(3) The department may use a portion of the patient safety fee proceeds for the costs of administering the program.

NEW SECTION. **Sec. 36.** A new section is added to chapter 43.70 RCW to read as follows:

The secretary may solicit and accept grants or other funds from public and private sources to support patient safety and medical error reduction efforts under this act. Any grants or funds received may be used to enhance these activities as long as program standards established by the secretary are followed.

NEW SECTION. **Sec. 37.** A new section is added to chapter 43.70 RCW to read as follows:

The patient safety account is created in the custody of the state treasurer. All receipts from the fees and set asides created in sections 33 and 34 of this act must be deposited into the account. Expenditures from the account may be used only for the purposes of this act. Only the secretary or the secretary's designee may authorize

expenditures from the account. The account is subject to allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

NEW SECTION. **Sec. 38.** A new section is added to chapter 43.70 RCW to read as follows:

By December 1, 2007, the department shall report the following information to the governor and the health policy and fiscal committees of the legislature:

(1) The amount of patient safety fees and set asides deposited to date in the patient safety account;

(2) The criteria for distribution of grants, loans, or other appropriate arrangements under this act; and

(3) A description of the medical error reduction and patient safety grants and loans distributed to date, including the stated performance measures, activities, timelines, and detailed information regarding outcomes for each project.

HEALTH PROFESSIONS DISCIPLINE

NEW SECTION. **Sec. 39.** The legislature finds that:

(1) The protection of the health and safety of the people of Washington state is a paramount responsibility entrusted to the state. One of the means for achieving such protection is through regulation of health professionals and effective discipline of those health care professionals who engage in unprofessional conduct. The vast majority of health professionals are dedicated to their profession, and provide quality services to those in their care. However, effective mechanisms are needed to ensure that the small minority of health professionals who engage in unprofessional conduct are reported and disciplined in a timely and effective manner.

(2) Jurisdiction for health professions disciplinary processes is divided between the secretary of health and fourteen independent boards and commissions. While the presence of a board or commission consisting of members of the profession that they regulate may add value to some steps of the disciplinary process, in other instances their involvement may be unnecessary, or even an impediment, to

safeguarding the public's health and safety. It is in the interests of both public health and safety and credentialed health care professionals that the health professions disciplinary system operate effectively and appropriately.

NEW SECTION. **Sec. 40.** (1) The task force on improvement of health professions discipline is established. The governor must appoint its members, and shall include:

(a) A representative of a medicare contracted professional review organization in Washington state;

(b) One or more representatives of the University of Washington school of health sciences or school of public health with expertise in health professions regulation;

(c) A representative of the foundation for health care quality;

(d) Two representatives of health care professionals, including one physician, neither of whom currently serve, or have served in the past, on a health professions disciplinary board or commission;

(e) A representative of hospital-based continuous quality improvement programs under RCW 70.41.200;

(f) A representative of a hospital peer review committee;

(g) The secretary of the department of health;

(h) A representative of the superior court judges association;

(i) A representative of the Washington state bar association who is an attorney with expertise in defending health professionals in health professions disciplinary proceedings in Washington;

(j) A representative of health care consumers, who does not currently serve and has not in the past served, on a health professions disciplinary board or commission;

(k) The attorney general or his or her designee; and

(l) A current or former public member of a disciplining authority included in chapter 18.130 RCW.

(2) The task force shall conduct an independent review of the funding of the health professions and all phases of the current health professions disciplinary process, from report intake through final case closure, and shall, at a minimum, examine and address the following issues:

(a) The ability of the disciplining authorities identified in RCW 18.130.040 to effectively safeguard the public from potentially harmful health care practitioners while also ensuring the due process rights of credentialed health care practitioners;

(b) The feasibility of developing a uniform performance measurement system for health professions discipline;

(c) Whether there are components to the current health professions discipline system that serve as impediments to improving the quality of health professions discipline, including consideration of:

(i) The value of boards and commissions in the health professions disciplinary process; and

(ii) The respective roles of the secretary and boards and commissions in health professions disciplinary functions;

(d) The feasibility of allowing law enforcement agencies to share information from criminal investigations of credentialed health care providers regardless of whether the provider was not ultimately convicted;

(e) The extent to which sanctions deviate from advisory guidelines regarding sanctions and the circumstances behind those deviations; and

(f) Alternative fee structures for health care professionals to simplify funding and the use of those funds across all health care professions.

(3) The task force may establish technical advisory committees to assist in its efforts, and shall provide opportunities for interested parties to comment upon the task force's findings and recommendations prior to being finalized.

(4) Staff support to the task force shall be provided by the department of health and the office of financial management.

(5) The task force shall submit its report and recommendations for improvement of health professions discipline to the relevant committees of the legislature and the governor by October 1, 2005.

(6) Nothing in this act limits the secretary of health's authority to modify the internal processes or organizational framework of the department.

(7) Members of the task force shall be reimbursed for travel expenses as provided in RCW 43.03.050 and 43.03.060.

Sec. 41. RCW 4.24.260 and 1994 sp.s. c 9 s 701 are each amended to read as follows:

((~~Physicians licensed under chapter 18.71 RCW, dentists licensed under chapter 18.32 RCW, and pharmacists licensed under chapter 18.64 RCW~~)) Any member of a health profession listed under RCW 18.130.040 who, in good faith, makes a report, files charges, or presents evidence against another member of ((~~their~~)) a health profession based on the claimed ((~~incompetency or gross misconduct~~)) unprofessional conduct as provided in RCW 18.130.180 or inability to practice with reasonable skill and safety to consumers by reason of any physical or mental condition as provided in RCW 18.130.170 of such person before the ((~~medical quality assurance commission established under chapter 18.71 RCW, in a proceeding under chapter 18.32 RCW, or to the board of pharmacy under RCW 18.64.160~~)) agency, board, or commission responsible for disciplinary activities for the person's profession under chapter 18.130 RCW, shall be immune from civil action for damages arising out of such activities. A person prevailing upon the good faith defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense.

Sec. 42. RCW 18.71.0193 and 1994 sp.s. c 9 s 327 are each amended to read as follows:

(1) A ((~~licensed health care professional~~)) physician licensed under this chapter shall report to the commission when he or she has personal knowledge that a practicing physician has either committed an act or acts which may constitute statutorily defined unprofessional conduct or that a practicing physician may be unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material, or as a result of any mental or physical conditions.

(2) Reporting under this section is not required by:

(a) An appropriately appointed peer review committee member of a licensed hospital or by an appropriately designated professional review committee member of a county or state medical society during the investigative phase of their respective operations if these investigations are completed in a timely manner; or

(b) A treating licensed health care professional of a physician currently involved in a treatment program as long as the physician patient actively participates in the treatment program and the physician patient's impairment does not constitute a clear and present danger to the public health, safety, or welfare.

(3) The commission may impose disciplinary sanctions, including license suspension or revocation, on any ((~~health care professional subject to the jurisdiction of the commission~~)) physician licensed under this chapter who has failed to comply with this section.

(4) Every physician licensed under this chapter who reports to the commission as required under subsection (1) of this section in good faith is immune from civil liability for damages arising out of the report, whether direct or derivative. A person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense.

Sec. 43. RCW 18.130.010 and 1994 sp.s. c 9 s 601 are each amended to read as follows:

It is the intent of the legislature to strengthen and consolidate disciplinary and licensure procedures for the licensed health and health-related professions and businesses by providing a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to ((~~assure the public of the adequacy of professional competence and conduct in the healing arts~~)) reduce unprofessional conduct and unsafe practices in health care, protect the public health, safety, and welfare, and promote patient safety.

It is also the intent of the legislature that all health and health-related professions newly credentialed by the state come under the Uniform Disciplinary Act.

Further, the legislature declares that the addition of public members on all health care commissions and boards can give both the state and the public, which it has a paramount statutory responsibility to protect, assurances of accountability and confidence in the various practices of health care.

Sec. 44. RCW 18.130.180 and 1995 c 336 s 9 are each amended to read as follows:

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder or applicant under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder or applicant of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(2) Misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof;

(3) All advertising which is false, fraudulent, or misleading;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an unreasonable risk that a patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice any health care profession by competent authority in any state, federal, or foreign jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive evidence of the revocation, suspension, or restriction. Full faith and credit will be extended to the action by the competent authority, even if procedures or standards of proof vary in the other jurisdiction;

(6) The possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for

legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

(8) Failure to cooperate with the disciplining authority by:

(a) Not furnishing any papers or documents;

(b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority;

(c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding; or

(d) Not providing reasonable and timely access for authorized representatives of the disciplining authority seeking to perform practice reviews at facilities utilized by the license holder;

(9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority;

(10) Aiding or abetting an unlicensed person to practice when a license is required;

(11) Violations of rules established by any health agency;

(12) Practice beyond the scope of practice as defined by law or rule;

(13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;

(14) Failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk;

(15) Engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health;

(16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the purposes of this

subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(18) The procuring, or aiding or abetting in procuring, a criminal abortion;

(19) The offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the disciplining authority;

(20) The willful betrayal of a practitioner-patient privilege as recognized by law;

(21) Violation of chapter 19.68 RCW;

(22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action, or by the use of financial inducements to any patient or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary proceeding;

(23) Current misuse of:

(a) Alcohol;

(b) Controlled substances; or

(c) Legend drugs;

(24) Abuse of a client or patient or sexual contact with a client or patient;

(25) Acceptance of more than a nominal gratuity, hospitality, or subsidy offered by a representative or vendor of medical or health-related products or services intended for patients, in contemplation of a sale or for use in research publishable in professional journals, where a conflict of interest is presented, as defined by rules of the disciplining authority, in consultation with the department, based on recognized professional ethical standards.

REPORTING OBLIGATIONS

NEW SECTION. **Sec. 45.** (1) Beginning on March 1, 2005, every insuring entity or self-insurer that provides medical malpractice insurance to any facility or provider in Washington state must report to the commissioner by the 1st of each month any claim related to medical malpractice, if the claim resulted in a final:

(a) Judgment in any amount;

(b) Settlement in any amount; or

(c) Disposition of a medical malpractice claim resulting in no indemnity payment on behalf of an insured.

(2) If a claim is not reported by an entity listed in subsection (1) of this section, the facility or provider must report the claim to the commissioner.

(a) Reports under this subsection must be filed with the commissioner within thirty days after the claim is resolved.

(b) If a facility or provider violates the requirements of this subsection, the facility or provider license is subject to a fine or disciplinary action by the department.

(3) The reporting requirements under this section apply to all:

(a) Insuring entities and self-insurers; and

(b) Providers and facilities, regardless of whether they buy coverage from the program.

(4) The commissioner may impose a fine of two hundred fifty dollars per day per case against any insuring entity or surplus lines producer that violates the requirements of this subsection. The total fine per case may not exceed ten thousand dollars.

(5) The commissioner will provide the department with electronic access to all information received under this section related to licensed facilities and providers.

NEW SECTION. **Sec. 46.** The reports required under section 45 of this act must contain the following data in a form prescribed by the commissioner:

(1) The health care provider's name, address, provider professional license number, and type of medical specialty for which the provider is insured;

(2) The provider or facility policy number or numbers;

(3) The name of the facility, if any, and the location within the facility where the injury occurred;

(4) The date of the loss;

(5) The date the claim was reported to the insuring entity, self-insurer, facility, or provider;

(6) The name and address of the claimant. This information is confidential and exempt from public disclosure, but may be disclosed:

(a) Publicly, if the claimant provides written consent;

(b) To the department at any time; or

(c) To the commissioner at any time for purpose of identifying multiple or duplicate claims arising out of the same occurrence;

(7) The date of suit, if filed;

(8) The claimant's age and sex;

(9) The names, and professional license numbers if applicable, of all defendants involved in the claim;

(10) Specific information about the judgment or settlement including:

(a) The date and amount of any judgment or settlement;

(b) Whether the settlement:

(i) Was the result of an arbitration, judgment, or mediation; and

(ii) Occurred before or after trial;

(c) An itemization of:

(i) Economic damages, such as incurred and anticipated medical expense and lost wages;

(ii) Noneconomic damages;

(iii) The loss adjustment expense paid to defense counsel; and

(iv) All other paid allocated loss adjustment expense;

(d) If there is no judgment or settlement:

(i) The date and reason for final disposition; and

(ii) The date the claim was closed; and

(e) Any other information required by the commissioner;

(11) A summary of the occurrence that created the claim, which must include:

(a) The final diagnosis for which the patient sought or received treatment, including the actual condition of the patient;

(b) A description of any misdiagnosis made by the provider of the actual condition of the patient;

(c) The operation, diagnostic, or treatment procedure that caused the injury;

(d) A description of the principal injury that led to the claim; and

(e) The safety management steps the facility or provider has taken to make similar occurrences or injuries less likely in the future; and

(12) Any other information required by the commissioner, by rule, that helps the commissioner or department analyze and evaluate the nature, causes, location, cost, and damages involved in medical malpractice cases.

NEW SECTION. **Sec. 47.** The commissioner must prepare aggregate statistical summaries of closed claims based on calendar year data submitted under section 45 of this act.

(1) At a minimum, data must be sorted by calendar year and calendar-accident year. The commissioner may also decide to display data in other ways.

(2) The summaries must be available by March 31st of each year.

NEW SECTION. **Sec. 48.** Beginning in 2006, the commissioner must prepare an annual report by June 30th that summarizes and analyzes the closed claim reports for medical malpractice filed under section 45 of this act and the annual financial reports filed by insurers writing medical malpractice insurance in this state. The report must include:

(1) An analysis of closed claim reports of prior years for which data are collected and show:

(a) Trends in the frequency and severity of claims payments;

(b) An itemization of economic and noneconomic damages;

(c) The types of medical malpractice for which claims have been paid; and

(d) Any other information the commissioner determines illustrates trends in closed claims;

(2) An analysis of the medical malpractice insurance market in Washington state, including:

(a) An analysis of the financial reports of the insurers with a combined market share of at least ninety percent of net written medical malpractice premium in Washington state for the prior calendar year;

(b) A loss ratio analysis of medical malpractice insurance written in Washington state; and

(c) A profitability analysis of each insurer writing medical malpractice insurance;

(3) A comparison of loss ratios and the profitability of medical malpractice insurance in Washington state to other states based on financial reports filed with the national association of insurance commissioners and any other source of information the commissioner deems relevant;

(4) A summary of the rate filings for medical malpractice that have been approved by the commissioner for the prior calendar year, including an analysis of the trend of direct and incurred losses as compared to prior years;

(5) The commissioner must post reports required by this section on the internet no later than thirty days after they are due; and

(6) The commissioner may adopt rules that require persons and entities required to report under section 45 of this act to report data related to:

(a) The frequency and severity of open claims for the reporting period;

(b) The amounts reserved for incurred claims;

(c) Changes in reserves from the previous reporting period;

(d) Any other information that helps the commissioner monitor losses and claims development in the Washington state medical malpractice insurance market; and

(e) Any additional information requested by the department or the board.

NEW SECTION. **Sec. 49.** The commissioner may adopt all rules needed to implement sections 45 through 48 of this act.

NEW SECTION. **Sec. 50.** A new section is added to chapter 48.19 RCW to read as follows:

(1) For the purposes of this section, "underwrite" means the process of selecting, rejecting, or pricing a risk, and includes each of these processes:

(a) Evaluation, selection, and classification of risk;

(b) Application of rates, rating rules, and classification plans to risks that are accepted; and

(c) Determining eligibility for:

(i) Coverage provisions;

(ii) Providing or limiting the amount of coverage or policy limits; or

(iii) Premium payment plans.

(2) Each medical malpractice insurer must file its underwriting rules, guidelines, criteria, standards, or other information the insurer uses to underwrite medical malpractice coverage. However, an insurer is excluded from this requirement if the insurer is ordered into rehabilitation under chapter 48.31 or 48.99 RCW.

(a) Every filing of underwriting information must identify and explain:

(i) The class, type, and extent of coverage provided by the insurer;

(ii) Any changes that have occurred to the underwriting standards; and

(iii) How underwriting changes are expected to affect future losses.

(b) The information under (a) of this subsection must be filed with the commissioner at least thirty days before it becomes effective and is subject to public disclosure upon receipt by the commissioner.

NEW SECTION. **Sec. 51.** A new section is added to chapter 48.18 RCW to read as follows:

(1) For the purposes of this section:

(a) "Adverse action" includes, but is not limited to, the following:

(i) Cancellation, denial, or nonrenewal of medical malpractice insurance coverage;

(ii) Charging a higher insurance premium for medical malpractice insurance than would have been charged, whether the charge is by any of the following:

(A) Application of a rating rule;

(B) Assignment to a rating tier that does not have the lowest available rates; or

(C) Placement with an affiliate company that does not offer the lowest rates available to the insured within the affiliate group of insurance companies; or

(iii) Any reduction or adverse or unfavorable change in the terms of coverage or amount of any medical malpractice insurance, including, but not limited to, the following: Coverage provided to the insured physician is not as broad in scope as coverage requested by the insured physician but is available to other insured physicians of the insurer or any affiliate.

(b) "Affiliate" has the same meaning as in RCW 48.31B.005(1).

(c) "Claim" means a demand for payment by an allegedly injured third party under the terms and conditions of an insurance contract.

(d) "Tier" has the same meaning as in RCW 48.18.545(1)(h).

(2) When an insurer takes adverse action against an insured, the insurer may consider the following factors only in combination with other substantive underwriting factors:

(a) An insured has inquired about the nature or scope of coverage under a medical malpractice insurance policy;

(b) An insured has notified the insurer, pursuant to the provisions of the insurance contract, about a potential claim, which did not ultimately result in the filing of a claim; or

(c) A claim was closed without payment.

MISCELLANEOUS PROVISIONS

NEW SECTION. **Sec. 52.** Subheadings used in this act are not any part of the law.

NEW SECTION. **Sec. 53.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately, except section 33 of this act takes effect July 1, 2004.

NEW SECTION. **Sec. 54.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 55.** (1) Sections 15 and 16 of this act expire July 1, 2006.

(2) Sections 31 through 38 of this act expire December 31, 2010.

NEW SECTION. **Sec. 56.** Sections 45 through 49 of this act are each added to chapter 48.02 RCW."

ESSB 5728 - S AMD **621**
By Senator Kline

On page 1, line 1 of the title, after "reform;" strike the remainder of the title and insert "amending RCW 4.22.070, 4.22.015, 4.16.190, 4.16.350, 7.70.100, 5.64.010, 7.70.080, 70.105.112, 4.56.115, 4.56.110, 19.52.025, 4.24.250, 43.70.510, 70.41.200, 43.70.110, 43.70.250, 4.24.260, 18.71.0193, 18.130.010, and 18.130.180; adding new sections to chapter 7.70 RCW; adding a new section to chapter 4.24 RCW; adding a new section to chapter 49.12 RCW; adding a new section to chapter 7.72 RCW; adding new sections to chapter 43.70 RCW; adding a new section to chapter 48.19 RCW; adding a new section to chapter 48.18 RCW; adding new sections to chapter 48.02 RCW; creating new sections; prescribing penalties; providing an effective date; providing expiration dates; and declaring an emergency."

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