

FIRST REGULAR SESSION

SENATE BILL NO. 172

96TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR CROWELL.

Read 1st time January 25, 2011, and ordered printed.

TERRY L. SPIELER, Secretary.

0155S.011

AN ACT

To repeal sections 105.711, 105.716, and 105.726, RSMo, and to enact in lieu thereof three new sections relating to the state legal expense fund.

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

Section A. Sections 105.711, 105.716, and 105.726, RSMo, are repealed
2 and three new sections enacted in lieu thereof, to be known as sections 105.711,
3 105.716, and 105.726, to read as follows:

105.711. 1. There is hereby created a "State Legal Expense Fund" which
2 shall consist of moneys appropriated to the fund by the general assembly and
3 moneys otherwise credited to such fund pursuant to section 105.716.

4 2. Moneys in the state legal expense fund shall be available for the
5 payment of any claim or any amount required by any final judgment rendered by
6 a court of competent jurisdiction against:

7 (1) The state of Missouri, or any agency of the state, pursuant to section
8 536.050 or 536.087 or section 537.600;

9 (2) Any officer or employee of the state of Missouri or any agency of the
10 state, including, without limitation, elected officials, appointees, members of state
11 boards or commissions, and members of the Missouri national guard upon conduct
12 of such officer or employee arising out of and performed in connection with his or
13 her official duties on behalf of the state, or any agency of the state, provided that
14 moneys in this fund shall not be available for payment of claims **against such**
15 **officer or employee arising out of conduct for which the officer or**
16 **employee has pleaded guilty to or been found guilty of a misdemeanor**
17 **or felony, nor shall moneys in this fund be available for payment of**
18 **claims** made under chapter 287;

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

19 (3) (a) Any physician, psychiatrist, pharmacist, podiatrist, dentist, nurse,
20 or other health care provider licensed to practice in Missouri under the provisions
21 of chapter 330, 332, 334, 335, 336, 337 or 338 who is employed by the state of
22 Missouri or any agency of the state under formal contract to conduct disability
23 reviews on behalf of the department of elementary and secondary education or
24 provide services to patients or inmates of state correctional facilities on a
25 part-time basis, and any physician, psychiatrist, pharmacist, podiatrist, dentist,
26 nurse, or other health care provider licensed to practice in Missouri under the
27 provisions of chapter 330, 332, 334, 335, 336, 337, or 338 who is under formal
28 contract to provide services to patients or inmates at a county jail on a part-time
29 basis;

30 (b) Any physician licensed to practice medicine in Missouri under the
31 provisions of chapter 334 and his professional corporation organized pursuant to
32 chapter 356 who is employed by or under contract with a city or county health
33 department organized under chapter 192 or chapter 205, or a city health
34 department operating under a city charter, or a combined city-county health
35 department to provide services to patients for medical care caused by pregnancy,
36 delivery, and child care, if such medical services are provided by the physician
37 pursuant to the contract without compensation or the physician is paid from no
38 other source than a governmental agency except for patient co-payments required
39 by federal or state law or local ordinance;

40 (c) Any physician licensed to practice medicine in Missouri under the
41 provisions of chapter 334 who is employed by or under contract with a federally
42 funded community health center organized under Section 315, 329, 330 or 340 of
43 the Public Health Services Act (42 U.S.C. 216, 254c) to provide services to
44 patients for medical care caused by pregnancy, delivery, and child care, if such
45 medical services are provided by the physician pursuant to the contract or
46 employment agreement without compensation or the physician is paid from no
47 other source than a governmental agency or such a federally funded community
48 health center except for patient co-payments required by federal or state law or
49 local ordinance. In the case of any claim or judgment that arises under this
50 paragraph, the aggregate of payments from the state legal expense fund shall be
51 limited to a maximum of one million dollars for all claims arising out of and
52 judgments based upon the same act or acts alleged in a single cause against any
53 such physician, and shall not exceed one million dollars for any one claimant;

54 (d) Any physician licensed pursuant to chapter 334 who is affiliated with

55 and receives no compensation from a nonprofit entity qualified as exempt from
56 federal taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as
57 amended, which offers a free health screening in any setting or any physician,
58 nurse, physician assistant, dental hygienist, dentist, or other health care
59 professional licensed or registered under chapter 330, 331, 332, 334, 335, 336,
60 337, or 338 who provides health care services within the scope of his or her
61 license or registration at a city or county health department organized under
62 chapter 192 or chapter 205, a city health department operating under a city
63 charter, or a combined city-county health department, or a nonprofit community
64 health center qualified as exempt from federal taxation under Section 501(c)(3)
65 of the Internal Revenue Code of 1986, as amended, if such services are restricted
66 to primary care and preventive health services, provided that such services shall
67 not include the performance of an abortion, and if such health services are
68 provided by the health care professional licensed or registered under chapter 330,
69 331, 332, 334, 335, 336, 337, or 338 without compensation. MO HealthNet or
70 Medicare payments for primary care and preventive health services provided by
71 a health care professional licensed or registered under chapter 330, 331, 332, 334,
72 335, 336, 337, or 338 who volunteers at a free health clinic is not compensation
73 for the purpose of this section if the total payment is assigned to the free health
74 clinic. For the purposes of the section, "free health clinic" means a nonprofit
75 community health center qualified as exempt from federal taxation under Section
76 501 (c)(3) of the Internal Revenue Code of 1987, as amended, that provides
77 primary care and preventive health services to people without health insurance
78 coverage for the services provided without charge. In the case of any claim or
79 judgment that arises under this paragraph, the aggregate of payments from the
80 state legal expense fund shall be limited to a maximum of five hundred thousand
81 dollars, for all claims arising out of and judgments based upon the same act or
82 acts alleged in a single cause and shall not exceed five hundred thousand dollars
83 for any one claimant, and insurance policies purchased pursuant to the provisions
84 of section 105.721 shall be limited to five hundred thousand dollars. Liability or
85 malpractice insurance obtained and maintained in force by or on behalf of any
86 health care professional licensed or registered under chapter 330, 331, 332, 334,
87 335, 336, 337, or 338 shall not be considered available to pay that portion of a
88 judgment or claim for which the state legal expense fund is liable under this
89 paragraph;

90 (e) Any physician, nurse, physician assistant, dental hygienist, or dentist

91 licensed or registered to practice medicine, nursing, or dentistry or to act as a
92 physician assistant or dental hygienist in Missouri under the provisions of
93 chapter 332, 334, or 335, or lawfully practicing, who provides medical, nursing,
94 or dental treatment within the scope of his license or registration to students of
95 a school whether a public, private, or parochial elementary or secondary school
96 or summer camp, if such physician's treatment is restricted to primary care and
97 preventive health services and if such medical, dental, or nursing services are
98 provided by the physician, dentist, physician assistant, dental hygienist, or nurse
99 without compensation. In the case of any claim or judgment that arises under
100 this paragraph, the aggregate of payments from the state legal expense fund shall
101 be limited to a maximum of five hundred thousand dollars, for all claims arising
102 out of and judgments based upon the same act or acts alleged in a single cause
103 and shall not exceed five hundred thousand dollars for any one claimant, and
104 insurance policies purchased pursuant to the provisions of section 105.721 shall
105 be limited to five hundred thousand dollars; or

106 (f) Any physician licensed under chapter 334, or dentist licensed under
107 chapter 332, providing medical care without compensation to an individual
108 referred to his or her care by a city or county health department organized under
109 chapter 192 or 205, a city health department operating under a city charter, or
110 a combined city-county health department, or nonprofit health center qualified
111 as exempt from federal taxation under Section 501(c)(3) of the Internal Revenue
112 Code of 1986, as amended, or a federally funded community health center
113 organized under Section 315, 329, 330, or 340 of the Public Health Services Act,
114 42 U.S.C. Section 216, 254c; provided that such treatment shall not include the
115 performance of an abortion. In the case of any claim or judgment that arises
116 under this paragraph, the aggregate of payments from the state legal expense
117 fund shall be limited to a maximum of one million dollars for all claims arising
118 out of and judgments based upon the same act or acts alleged in a single cause
119 and shall not exceed one million dollars for any one claimant, and insurance
120 policies purchased under the provisions of section 105.721 shall be limited to one
121 million dollars. Liability or malpractice insurance obtained and maintained in
122 force by or on behalf of any physician licensed under chapter 334, or any dentist
123 licensed under chapter 332, shall not be considered available to pay that portion
124 of a judgment or claim for which the state legal expense fund is liable under this
125 paragraph;

126 (4) Staff employed by the juvenile division of any judicial circuit;

127 (5) Any attorney licensed to practice law in the state of Missouri who
128 practices law at or through a nonprofit community social services center qualified
129 as exempt from federal taxation under Section 501(c)(3) of the Internal Revenue
130 Code of 1986, as amended, or through any agency of any federal, state, or local
131 government, if such legal practice is provided by the attorney without
132 compensation. In the case of any claim or judgment that arises under this
133 subdivision, the aggregate of payments from the state legal expense fund shall be
134 limited to a maximum of five hundred thousand dollars for all claims arising out
135 of and judgments based upon the same act or acts alleged in a single cause and
136 shall not exceed five hundred thousand dollars for any one claimant, and
137 insurance policies purchased pursuant to the provisions of section 105.721 shall
138 be limited to five hundred thousand dollars; or

139 (6) Any social welfare board created under section 205.770 and the
140 members and officers thereof upon conduct of such officer or employee while
141 acting in his or her capacity as a board member or officer, and any physician,
142 nurse, physician assistant, dental hygienist, dentist, or other health care
143 professional licensed or registered under chapter 330, 331, 332, 334, 335, 336,
144 337, or 338 who is referred to provide medical care without compensation by the
145 board and who provides health care services within the scope of his or her license
146 or registration as prescribed by the board.

147 3. The department of health and senior services shall promulgate rules
148 regarding contract procedures and the documentation of care provided under
149 paragraphs (b), (c), (d), (e), and (f) of subdivision (3) of subsection 2 of this
150 section. The limitation on payments from the state legal expense fund or any
151 policy of insurance procured pursuant to the provisions of section 105.721,
152 provided in subsection 7 of this section, shall not apply to any claim or judgment
153 arising under paragraph (a), (b), (c), (d), (e), or (f) of subdivision (3) of subsection
154 2 of this section. Any claim or judgment arising under paragraph (a), (b), (c), (d),
155 (e), or (f) of subdivision (3) of subsection 2 of this section shall be paid by the
156 state legal expense fund or any policy of insurance procured pursuant to section
157 105.721, to the extent damages are allowed under sections 538.205 to
158 538.235. Liability or malpractice insurance obtained and maintained in force by
159 any health care professional licensed or registered under chapter 330, 331, 332,
160 334, 335, 336, 337, or 338 for coverage concerning his or her private practice and
161 assets shall not be considered available under subsection 7 of this section to pay
162 that portion of a judgment or claim for which the state legal expense fund is

163 liable under paragraph (a), (b), (c), (d), (e), or (f) of subdivision (3) of subsection
164 2 of this section. However, a health care professional licensed or registered under
165 chapter 330, 331, 332, 334, 335, 336, 337, or 338 may purchase liability or
166 malpractice insurance for coverage of liability claims or judgments based upon
167 care rendered under paragraphs (c), (d), (e), and (f) of subdivision (3) of subsection
168 2 of this section which exceed the amount of liability coverage provided by the
169 state legal expense fund under those paragraphs. Even if paragraph (a), (b), (c),
170 (d), (e), or (f) of subdivision (3) of subsection 2 of this section is repealed or
171 modified, the state legal expense fund shall be available for damages which occur
172 while the pertinent paragraph (a), (b), (c), (d), (e), or (f) of subdivision (3) of
173 subsection 2 of this section is in effect.

174 4. The attorney general shall promulgate rules regarding contract
175 procedures and the documentation of legal practice provided under subdivision
176 (5) of subsection 2 of this section. The limitation on payments from the state
177 legal expense fund or any policy of insurance procured pursuant to section
178 105.721 as provided in subsection 7 of this section shall not apply to any claim
179 or judgment arising under subdivision (5) of subsection 2 of this section. Any
180 claim or judgment arising under subdivision (5) of subsection 2 of this section
181 shall be paid by the state legal expense fund or any policy of insurance procured
182 pursuant to section 105.721 to the extent damages are allowed under sections
183 538.205 to 538.235. Liability or malpractice insurance otherwise obtained and
184 maintained in force shall not be considered available under subsection 7 of this
185 section to pay that portion of a judgment or claim for which the state legal
186 expense fund is liable under subdivision (5) of subsection 2 of this
187 section. However, an attorney may obtain liability or malpractice insurance for
188 coverage of liability claims or judgments based upon legal practice rendered
189 under subdivision (5) of subsection 2 of this section that exceed the amount of
190 liability coverage provided by the state legal expense fund under subdivision (5)
191 of subsection 2 of this section. Even if subdivision (5) of subsection 2 of this
192 section is repealed or amended, the state legal expense fund shall be available for
193 damages that occur while the pertinent subdivision (5) of subsection 2 of this
194 section is in effect.

195 5. All payments shall be made from the state legal expense fund by the
196 commissioner of administration with the approval of the attorney
197 general. Payment from the state legal expense fund of a claim or final judgment
198 award against a health care professional licensed or registered under chapter 330,

199 331, 332, 334, 335, 336, 337, or 338, described in paragraph (a), (b), (c), (d), (e),
200 or (f) of subdivision (3) of subsection 2 of this section, or against an attorney in
201 subdivision (5) of subsection 2 of this section, shall only be made for services
202 rendered in accordance with the conditions of such paragraphs. In the case of
203 any claim or judgment against an officer or employee of the state or any agency
204 of the state based upon conduct of such officer or employee arising out of and
205 performed in connection with his or her official duties on behalf of the state or
206 any agency of the state that would give rise to a cause of action under section
207 537.600, the state legal expense fund shall be liable, excluding punitive damages,
208 for:

209 (1) Economic damages to any one claimant; and
210 (2) Up to three hundred fifty thousand dollars for noneconomic
211 damages. The state legal expense fund shall be the exclusive remedy and shall
212 preclude any other civil actions or proceedings for money damages arising out of
213 or relating to the same subject matter against the state officer or employee, or the
214 officer's or employee's estate. No officer or employee of the state or any agency
215 of the state shall be individually liable in his or her personal capacity for conduct
216 of such officer or employee arising out of and performed in connection with his or
217 her official duties on behalf of the state or any agency of the state. The
218 provisions of this subsection shall not apply to any defendant who is not an officer
219 or employee of the state or any agency of the state in any proceeding against an
220 officer or employee of the state or any agency of the state. Nothing in this
221 subsection shall limit the rights and remedies otherwise available to a claimant
222 under state law or common law in proceedings where one or more defendants is
223 not an officer or employee of the state or any agency of the state.

224 6. The limitation on awards for noneconomic damages provided for in this
225 subsection shall be increased or decreased on an annual basis effective January
226 first of each year in accordance with the Implicit Price Deflator for Personal
227 Consumption Expenditures as published by the Bureau of Economic Analysis of
228 the United States Department of Commerce. The current value of the limitation
229 shall be calculated by the director of the department of insurance, financial
230 institutions and professional registration, who shall furnish that value to the
231 secretary of state, who shall publish such value in the Missouri Register as soon
232 after each January first as practicable, but it shall otherwise be exempt from the
233 provisions of section 536.021.

234 7. Except as provided in subsection 3 of this section, in the case of any

235 claim or judgment that arises under sections 537.600 and 537.610 against the
236 state of Missouri, or an agency of the state, the aggregate of payments from the
237 state legal expense fund and from any policy of insurance procured pursuant to
238 the provisions of section 105.721 shall not exceed the limits of liability as
239 provided in sections 537.600 to 537.610. No payment shall be made from the
240 state legal expense fund or any policy of insurance procured with state funds
241 pursuant to section 105.721 unless and until the benefits provided to pay the
242 claim by any other policy of liability insurance have been exhausted.

243 8. The provisions of section 33.080 notwithstanding, any moneys
244 remaining to the credit of the state legal expense fund at the end of an
245 appropriation period shall not be transferred to general revenue.

246 9. Any rule or portion of a rule, as that term is defined in section 536.010,
247 that is promulgated under the authority delegated in sections 105.711 to 105.726
248 shall become effective only if it has been promulgated pursuant to the provisions
249 of chapter 536. Nothing in this section shall be interpreted to repeal or affect the
250 validity of any rule filed or adopted prior to August 28, 1999, if it fully complied
251 with the provisions of chapter 536. This section and chapter 536 are
252 nonseverable and if any of the powers vested with the general assembly pursuant
253 to chapter 536 to review, to delay the effective date, or to disapprove and annul
254 a rule are subsequently held unconstitutional, then the grant of rulemaking
255 authority and any rule proposed or adopted after August 28, 1999, shall be
256 invalid and void.

105.716. 1. Any investigation, defense, negotiation, or compromise of any
2 claim covered by sections 105.711 to 105.726 shall be conducted by the attorney
3 general; provided, that in the case of any claim against the department of
4 conservation, the department of transportation or a public institution which
5 awards baccalaureate degrees, or any officer or employee of such department or
6 such institution, any investigation, defense, negotiation, or compromise of any
7 claim covered by sections 105.711 to 105.726 shall be conducted by legal counsel
8 provided by the respective entity against which the claim is made or which
9 employs the person against whom the claim is made. In the case of any payment
10 from the state legal expense fund based upon a claim or judgment against the
11 department of conservation, the department of transportation or any officer or
12 employee thereof, the department so affected shall immediately transfer to the
13 state legal expense fund from the department funds a sum equal to the amount
14 expended from the state legal expense fund on its behalf.

15 2. All persons and entities protected by the state legal expense fund shall
16 cooperate with the attorneys conducting any investigation and preparing any
17 defense under the provisions of sections 105.711 to 105.726 by assisting such
18 attorneys in all respects, including the making of settlements, the securing and
19 giving of evidence, and the attending and obtaining witness to attend hearings
20 and trials. Funds in the state legal expense fund shall not be used to pay claims
21 and judgments against those persons and entities who do not cooperate as
22 required by this subsection.

23 3. The provisions of sections 105.711 to 105.726 notwithstanding, the
24 attorney general may investigate, defend, negotiate, or compromise any claim
25 covered by sections 105.711 to 105.726 against any public institution which
26 awards baccalaureate degrees whose governing body has declared a state of
27 financial exigency.

28 4. Notwithstanding the provisions of subsection 2 of section 105.711, funds
29 in the state legal expense fund may be expended prior to the payment of any
30 claim or any final judgment to pay costs of defense, including reasonable
31 attorney's fees for retention of legal counsel, when the attorney general
32 determines that a conflict exists or particular expertise is required, and also to
33 pay for related legal expenses including medical examination fees, expert witness
34 fees, court reporter expenses, travel costs and ancillary legal expenses incurred
35 prior to the payment of a claim or any final judgment. **The reasonableness of**
36 **attorney's fees for retention of legal counsel shall be based on a matrix**
37 **developed jointly by the office of administration and the attorney**
38 **general's office. When legal counsel is retained due to a determination**
39 **of conflict with the attorney general's office, such fees shall be**
40 **monitored by legal counsel for the office of administration or for a**
41 **state agency not involved in the conflict.**

105.726. 1. Nothing in sections 105.711 to 105.726 shall be construed to
2 broaden the liability of the state of Missouri beyond the provisions of sections
3 537.600 to 537.610, nor to abolish or waive any defense at law which might
4 otherwise be available to any agency, officer, or employee of the state of
5 Missouri. Sections 105.711 to 105.726 do not waive the sovereign immunity of the
6 state of Missouri.

7 2. The creation of the state legal expense fund and the payment therefrom
8 of such amounts as may be necessary for the benefit of any person covered
9 thereby are deemed necessary and proper public purposes for which funds of this

10 state may be expended.

11 3. Moneys in the state legal expense fund shall not be available for the
12 payment of any claim or any amount required by any final judgment rendered by
13 a court of competent jurisdiction against a board of police commissioners
14 established under chapter 84, including the commissioners, any police officer,
15 notwithstanding sections 84.330 and 84.710, or other provisions of law, other
16 employees, agents, representative, or any other individual or entity acting or
17 purporting to act on its or their behalf. Such was the intent of the general
18 assembly in the original enactment of sections 105.711 to 105.726, and it is made
19 express by this section in light of the decision in *Wayman Smith, III, et al. v.*
20 *State of Missouri*, 152 S.W.3d 275. [Except that the commissioner of
21 administration shall reimburse from the legal expense fund any board of police
22 commissioners established under chapter 84 for liability claims otherwise eligible
23 for payment under section 105.711 paid by such boards on an equal share basis
24 per claim up to a maximum of one million dollars per fiscal year.]

25 4. If the representation of the attorney general is requested by a board of
26 police commissioners, the attorney general shall represent, investigate, defend,
27 negotiate, or compromise [all] claims [under sections 105.711 to 105.726] for the
28 board of police commissioners, any police officer, other employees, agents,
29 representatives, or any other individual or entity acting or purporting to act on
30 their behalf. The attorney general may establish procedures by rules
31 promulgated under chapter 536 under which claims must be referred for the
32 attorney general's representation. The attorney general and the officials of the
33 city which the police board represents shall meet and negotiate reasonable
34 expenses or charges that will fairly compensate the attorney general and the
35 office of administration for the cost of the representation of the claims under this
36 section.

37 5. Claims tendered to the attorney general promptly after the claim was
38 asserted as required by section 105.716 and prior to August 28, 2005, may be
39 investigated, defended, negotiated, or compromised by the attorney general and
40 full payments may be made from the state legal expense fund on behalf of the
41 entities and individuals described in this section as a result of the holding in
42 *Wayman Smith, III, et al. v. State of Missouri*, 152 S.W.3d 275.