An Act to amend the Code of Virginia by adding in Title 38.2 a chapter numbered 50 consisting of sections numbered 38.2-5000 through 38.2-5021, establishing the Birth-Related Neurological Injury Compensation Act.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 38.2 a chapter numbered 50, consisting of sections numbered 38.2-5000 through 38.2-5021, as follows:

CHAPTER 50.

VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT.

§ 38.2-5000. Short title.—The provisions of this chapter shall be known and may be cited as the Virginia Birth-Related Neurological Injury Compensation Act.

§ 38.2-5001. Definitions.—As used in this Act:

“Birth-related neurological injury” means injury to the brain or spinal cord of an infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital which renders the infant permanently nonambulatory, aphasic, incontinent, and in need of assistance in all phases of daily living. This definition shall apply to live births only.

“Claimant” means any person who files a claim pursuant to § 38.2-5004 for compensation for a birth-related neurological injury to an infant. Such claims may be filed by any legal representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may be filed by an administrator, executor, or other legal representative.

“Commission” means the Industrial Commission of Virginia.

“Participating physician” means a physician licensed in Virginia to practice medicine, who practices obstetrics or performs obstetrical services either full or part time and who at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the physician agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Board of Medicine whereby the physician agreed to submit to review by the Board of Medicine as required by subsection B of § 38.2-5004, and (iii) had paid the assessment required pursuant to this chapter for the year in which the injury occurred.

“Participating hospital” means a hospital licensed in Virginia which at the time of the injury (i) had in force an agreement with the Commissioner of Health or his designee, in a form prescribed by the Commissioner, whereby the hospital agreed to participate in the development of a program to provide obstetrical care to patients eligible for Medical Assistance Services and to patients who are indigent, and upon approval of such program by the Commissioner of Health, to participate in its implementation, (ii) had in force an agreement with the State Department of Health whereby the hospital agreed to submit to review of its obstetrical service, as required by subsection C of § 38.2-5004, and (iii) had paid the assessment required pursuant to this chapter for the year in which the injury occurred.

“Program” means the Virginia Birth-Related Neurological Injury Compensation Program established by this chapter.

§ 38.2-5002. Virginia Birth-Related Neurological Injury Compensation Program; exclusive remedy; exception.—A. There is hereby established the Virginia Birth-Related Neurological Injury Compensation Program.

B. The rights and remedies herein granted to an infant on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, his personal representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a medical malpractice claim with respect to such injury.

C. Notwithstanding anything to the contrary in this section, a civil action shall not be foreclosed against a physician or a hospital where there is clear and convincing evidence that such physician or hospital intentionally or willfully caused or intended to cause a birth-related neurological injury, provided that such suit is filed prior to and in lieu of
payment of an award under this chapter. Such suit shall be filed before the award of the
Commission becomes conclusive and binding as provided for in § 38.2-5011.

§ 38.2-5003. Industrial Commission authorized to hear and determine claims.—The
Industrial Commission is authorized to hear and pass upon all claims filed pursuant to
this chapter. The Commission may exercise the power and authority granted to it in
Chapter 2 (§ 65.1-10 et seq.) of Title 65.1 of this Code as necessary to carry out the
purposes of this chapter.

§ 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of
Health; filing of responses.—A.1. In all claims filed under this chapter, the claimant shall
file with the Commission a petition, setting forth the following information:
   a. The name and address of the legal representative and the basis for his
      representation of the injured infant;
   b. The name and address of the injured infant;
   c. The name and address of any physician providing obstetrical services who was
      present at the birth and the name and address of the hospital at which the birth
      occurred;
   d. A description of the disability for which claim is made;
   e. The time and place where the injury occurred;
   f. A brief statement of the facts and circumstances surrounding the injury and giving
      rise to the claim;
   g. All available relevant medical records relating to the person who allegedly suffered a
      birth-related neurological injury and an identification of any unavailable records known to
      the claimant and the reasons for their unavailability;
   h. Appropriate assessments, evaluations, and prognoses and such other records and
      documents as are reasonably necessary for the determination of the amount of
      compensation to be paid to, or on behalf of, the injured infant on account of a
      birth-related neurological injury;
   i. Documentation of expenses and services incurred to date, which indicates whether
      such expenses and services have been paid for, and if so, by whom; and
   j. Documentation of any applicable private or governmental source of services or
      reimbursement relative to the alleged impairments.

2. The claimant shall furnish the Commission with as many copies of the petition as
   required for service upon the Program, any physician and hospital named in the petition,
   the Board of Medicine and the Department of Health, along with a fifteen dollar filing fee.
   Upon receipt of the petition the Commission shall immediately serve the program by
   service upon the agent designated to accept service on behalf of the Program in the plan
   of operation by registered or certified mail, and shall mail copies of the petition to any
   physician and hospital named in the petition, the Board of Medicine and the Department
   of Health.

B. Upon receipt of the petition, the Board of Medicine shall evaluate the claim, and if
   it determines that there is reason to believe that the alleged injury resulted from, or was
   aggravated by, substandard care on the part of the physician, it shall take any
   appropriate action consistent with the authority granted to the Board in §§ 54-316 through
   54-325.

C. Upon receipt of the petition, the Department of Health shall evaluate the claim, and
   if it determines that there is reason to believe that the alleged injury resulted from, or was
   aggravated by, substandard care on the part of the hospital at which the birth
   occurred, it shall take any appropriate action consistent with the authority granted to the
   Department of Health in Title 32.1 of this Code.

D. The program shall have thirty days from the date of service in which to file a
   response to the petition, and to submit relevant written information relating to the issue
   of whether the injury alleged is a birth-related neurological injury, within the meaning of
   this chapter.

§ 38.2-5005. Tolling of statute of limitations.—The statute of limitations with respect to
any civil action that may be brought by or on behalf of an injured infant allegedly arising
out of or related to a birth-related injury shall be tolled by the filing of a claim in
accordance with this section, and the time such claim is pending shall not be computed as
part of the period within which such civil action may be brought.

§ 38.2-5006. Hearing; parties.—A. Immediately after such petition has been received, the
Commission shall set the date for a hearing, which shall be held no sooner than 45 days
and no later than 120 days after the filing of a petition, and shall notify the parties
thereof the time and place of such hearing. The hearing shall be held in the city or
county where the injury occurred, or in a contiguous city or county, unless otherwise
agreed to by the parties and authorized by the Commission.

B. The parties to the hearing required under this section shall include the claimant and the program.

§ 38.2-5007. Interrogatories and depositions.—Any party to a proceeding under this chapter may, upon application to the Commission setting forth the materiality of the evidence to be given, serve interrogatories or cause the depositions of witnesses residing within or without the Commonwealth to be taken, the costs to be taxed as expenses incurred in connection with the filing of a claim, in accordance with subdivision 2 of § 38.2-5009. Such depositions shall be taken after giving notice and in the manner prescribed by law, for depositions in actions at law, except that they shall be directed to the Commission, the Commissioner or the deputy commissioner before whom the proceedings may be pending.

§ 38.2-5008. Determination of claims; presumption; finding of Industrial Commission binding on participants; medical advisory panel.—A. The Commission shall determine, on the basis of the evidence presented to it, the following issues:

1. Whether the injuries claimed are birth-related neurological injuries as defined in § 38.2-5001. A rebuttable presumption shall arise that the injury alleged is a birth-related neurological injury where it has been demonstrated, to the satisfaction of the Industrial Commission, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that the infant was thereby rendered permanently nonambulatory, aphasic and incontinent.

If either party disagrees with such presumption, that party shall have the burden of proving that the injuries alleged are not birth-related neurological injuries within the meaning of the Act.

2. Whether obstetrical services were delivered by a participating physician at the birth.

3. Whether the birth occurred in a participating hospital.

4. How much compensation, if any, is awardable pursuant to § 38.2-5008.

5. If the Commission determines (i) that the injury alleged is not a birth-related neurological injury within the meaning of this chapter, (ii) that obstetrical services were not delivered by a participating physician at the birth, or (iii) that the birth did not occur in a participating hospital, it shall cause a copy of such determination to be sent immediately to the parties by registered or certified mail.

6. By becoming a participating physician or hospital each participant is bound for all purposes including any suit at law against a participating physician or participating hospital, by the finding of the Industrial Commission (or any appeal therefrom) with respect to whether such injury is birth related.

B. The Deans of the medical schools of the Commonwealth shall develop a plan whereby each claim filed with the Commission is reviewed by a panel of three qualified and impartial physicians. This panel shall file its report and recommendations as to whether the injury alleged is a birth-related neurological injury within the meaning of this Act with the Commission at least ten days prior to the date set for hearing pursuant to § 38.2-5006. At the request of the Commission, at least one member of the panel shall be available to testify at the hearing. The Commission must consider, but shall not be bound by, the recommendation of the panel.

§ 38.2-5009. Commission awards for birth-related neurological injuries; notice of award.—Upon determining (i) that an infant has sustained a birth-related neurological injury, (ii) that obstetrical services were delivered by a participating physician at the birth, and (iii) that the birth occurred in a participating hospital, the Commission shall make an award providing compensation for the following items relative to such injury:

1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, residential and custodial care and service, special equipment or facilities, and related travel. However, such expenses shall not include:
   a. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the federal government except to the extent prohibited by federal law;
   b. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity;
   c. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or federal government except to the extent prohibited by federal law; and
   d. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health
or sickness insurance policy or other private insurance program.

2. Expenses of medical and hospital services under subdivision 1 of this section shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person.

3. Loss of earnings from the age of eighteen. - An infant found to have sustained a birth-related neurological injury shall be conclusively presumed to have been able to earn income from work from the age of eighteen through the age of sixty-five, if he had not been injured, in the amount of fifty percent of the average weekly wage in the Commonwealth of workers in the private, nonfarm sector.

4. Reasonable expenses incurred in connection with the filing of a claim under this chapter, including reasonable attorneys fees, which shall be subject to the approval and award of the Commission.

5. A copy of the award shall be sent immediately by registered or certified mail to the parties.

§ 38.2-5010. Rehearing on Commission determination or award.—If an application for review is made to the Commission within twenty days from the date of a determination pursuant to subdivisions 1 through 3 of § 38.2-5008, or within twenty days from the date of an award by the Commission pursuant to § 38.2-5009, the full Commission, excluding any member of the Commission who made the determination or award, if the first hearing was not held before the full Commission, shall review the evidence. If deemed advisable and as soon as practicable, the Commission instead may hear the parties, their representatives and witnesses and shall make a determination or award, as appropriate. Such review or determination, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, shall be filed with the record of the proceedings and shall be sent immediately to the parties.

§ 38.2-5011. Conclusiveness of determination or award; appeal.—A. The determination of the Commission pursuant to subdivisions 1 through 3 of § 38.2-5008, or the award of the Commission, as provided in § 38.2-5009, if not reviewed in due time, or a determination or award of the Commission upon such review, as provided in § 38.2-5010, shall be conclusive and binding as to all questions of fact. No appeal shall be taken from the decision of one commissioner until a review of the case has been had before the full Commission, as provided in § 38.2-5010. Appeals shall lie from the full Commission to the Court of Appeals in the manner provided in the Rules of the Supreme Court.

B. The notice of appeal shall be filed with the clerk of the Commission within thirty days from the date of such determination or award or within thirty days after receipt by registered or certified mail of such determination or award. A copy of the notice of appeal shall be filed in the office of the clerk of the Court of Appeals as provided in the Rules of the Supreme Court.

C. Cases so appealed shall be placed upon the privileged docket of the Court and be heard at the next ensuing term thereof. In case of an appeal from an award of the Commission to the Court of Appeals, the appeal shall operate as a suspension of the award, and the program shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined in accordance with the provisions of this chapter.

§ 38.2-5012. Enforcement, etc. of orders and awards.—The Commission has full authority to enforce its orders and protect itself from deception. While the language of this section is permissive and provides that a party may enforce an award in court, it must be read and considered in pari materia with the Commission's power pursuant to § 65.1-20 to punish for disobedience of its orders.

§ 38.2-5013. Limitation on claims.—Any claim under this chapter that is filed more than ten years after the birth of an infant alleged to have a birth-related neurological injury is barred.

§ 38.2-5014. Scope.—This chapter applies to all claims for birth-related neurological injuries occurring in this Commonwealth on and after January 1, 1988. The chapter shall not apply to disability or death caused by genetic or congenital abnormalities.

§ 38.2-5015. Birth-Related Neurological Injury Compensation Fund.—There is established the Birth-Related Neurological Injury Compensation Fund to finance the Virginia Birth-Related Neurological Injury Compensation Program created by this chapter.

§ 38.2-5016. Board of directors; appointment; vacancies; term.—A. The Birth-Related Neurological Injury Compensation Program shall be governed by a board of five directors.

B. Directors shall be appointed for a term of three years or until their successors are appointed and have qualified.
C. 1. The directors shall be appointed by the Governor as follows:
   a. One citizen representative;
   b. One representative of participating physicians;
   c. One representative of participating hospitals;
   d. One representative of liability insurers; and
   e. One representative of physicians other than participating physicians.

2. The Governor may select the representative of the participating physicians from a
   list of at least three names to be recommended by the Virginia Society of Obstetrics and
   Gynecology; the representative of participating hospitals from a list of at least three
   names to be recommended by the Virginia Hospital Association; the representative
   of liability insurers from a list of at least three names, one of which is recommended by the
   American Insurance Association, one by the Alliance of American Insurers, and one by the
   National Association of Independent Insurers; and the representative of physicians other
   than participating physicians from a list of at least three names to be recommended by
   the Medical Society of Virginia. In no case shall the Governor be bound to make any
   appointment from among the nominees of the respective associations.

D. The Governor shall promptly notify the association, which may make nominations,
   of any vacancy other than by expiration among the members of the Board representing a
   particular interest and like nominations may be made for the filling of the vacancy.

E. The directors shall act by majority vote with five directors constituting a quorum
   for the transaction of any business or the exercise of any power of the program. The
   directors shall serve without salary, but each director shall be reimbursed for actual and
   necessary expenses incurred in the performance of his official duties as a director of the
   program. The directors shall not be subject to any personal liability with respect to the
   administration of the program.

F. The Board established by this section shall have the power to (i) administer the
   program, (ii) administer the Birth-Related Neurological Injury Compensation Fund, (iii)
   appoint a service company or companies to administer the payment of claims on behalf of
   the program, (iv) direct the investment and reinvestment of any surplus in the fund over
   losses and expenses, provided any investment income generated thereby remains in the
   fund, and (v) reinsure the risks of the fund in whole or in part.

§ 38.2-5017. Plan of operation.—A. On or before September 30, 1987, the directors of the
program shall submit to the State Corporation Commission for review a proposed plan of
operation consistent with this chapter.

B. The plan of operation shall provide for the efficient administration of the program
and for the prompt processing of claims made against the fund pursuant to an award
under this Act. The plan shall contain other provisions including:
   1. Establishment of necessary facilities;
   2. Management of the fund;
   3. Appointment of servicing carriers or other servicing arrangements to administer the
      processing of claims against the fund;
   4. Initial and annual assessment of the persons and entities listed in § 38.2-5019 to pay
      awards and expenses, which assessments shall be on an actuarially sound basis subject to
      the limits set forth in § 38.2-5019; and
   5. Any other matters necessary for the efficient operation of the program.

C. The plan of operation shall be subject to approval by the State Corporation
Commission after consultation with representatives of interested individuals and
organizations. If the State Corporation Commission disapproves all or any part of the
proposed plan of operation, the directors shall within thirty days submit for review an
appropriate revised plan of operation. If the directors fail to do so, the State Corporation
Commission shall promulgate a plan of operation. The plan of operation approved or
promulgated by the State Corporation Commission shall become effective and operational
upon order of the State Corporation Commission.

D. Amendments to the plan of operation may be made by the directors of the
program, subject to the approval of the State Corporation Commission.

§ 38.2-5018. Assessments to be held in restricted cash account.—All assessments paid
pursuant to the plan of operation, shall be held in a separate restricted cash account
under the sole control of an independent fund manager to be selected by the directors.
The Fund, and any income from it, shall be disbursed for the payment of awards as
provided in this Act and for the payment of the expenses of administration of the fund.

§ 38.2-5019. Initial assessments.—A. On or before January 1, 1988, the following persons
and entities shall pay into the fund an initial assessment in accordance with the plan of
operation:
1. Physicians who wish to participate in the Virginia Birth-Related Neurological Injury Compensation Program and who otherwise qualify as participating physicians under this chapter shall pay an initial assessment of $5,000. Physicians who are employed by the Commonwealth who wish to participate in the program and who otherwise qualify as participating physicians may pay the assessment required by this subsection on or before July 31, 1988, provided they have notified the program on or before January 1, 1988, of their desire to participate in the program. Such participation shall become effective retroactive to January 1, 1988, at the time the assessment is received by the program.

2. Hospitals which wish to participate in the Virginia Birth-Related Neurological Injury program and that otherwise qualify as participating hospitals under this chapter shall pay an initial assessment of $50 per delivery for the prior year, as reported to the Department of Health in the most recent Annual Licensure Survey of Hospitals, not to exceed $150,000 per hospital in any one twelve-month period. State hospitals which wish to participate in the program and which otherwise qualify as participating hospitals may pay the assessment required by this subsection on or before July 31, 1988, provided they have notified the program on or before January 1, 1988, of their desire to participate. Such participation shall become effective retroactive to January 1, 1988, at the time the assessment is received by the program.

3. All physicians licensed by and practicing in the Commonwealth as of September 30, 1987, other than participating physicians, shall pay into the fund an initial assessment of $250, in the manner required by the plan of operation.

B. Upon so certifying to the program, any physician who comes within one of the following categories shall be exempt from paying the initial and annual assessments imposed upon physicians other than participating physicians pursuant to this chapter:

1. A physician who is employed by the Commonwealth and whose income from professional fees is less than an amount equal to ten percent of his annual salary.

2. A physician who is enrolled in a full-time graduate medical education program accredited by the American Council for Graduate Medical Education.

3. A physician who has retired from active clinical practice.

§ 38.2-5020. Annual assessments.-A. Beginning January 1, 1989, the persons and entities listed in subdivisions 1 through 3 of subsection A of § 38.2-5019, as of the date determined in accordance with the plan of operation, shall pay an annual assessment in the amount equal to their initial assessments, in the manner required by the plan of operation.

B. Taking into account the assessments collected pursuant to subsection A of this section, if required to maintain the fund on an actuarially sound basis, all insurance carriers licensed to write and engaged in writing liability insurance in the Commonwealth as of September 30, 1988, shall pay into the fund an annual assessment, in an amount determined by the State Corporation Commission pursuant to subsection A of § 38.2-5021, in the manner required by the plan of operation. Liability insurance for the purposes of this provision shall include the classes of insurance defined in §§ 38.2-117 through 38.2-119 and the liability portions of the insurance defined in §§ 38.2-124, 38.2-125 and 38.2-130 through 38.2-132.

1. All annual assessments against liability insurance carriers shall be made on the basis of net direct premiums written for the business activity which forms the basis for each such entity's inclusion as a funding source for the program in the Commonwealth during the prior year ending December 31, as reported to the State Corporation Commission, and shall be in the proportion that the net direct premiums written by each on account of the business activity forming the basis for their inclusion in the program bears to the aggregate net direct premiums for all such business activity written in this Commonwealth by all such entities. For purposes of this chapter "net direct premiums written" means gross direct premiums written in this Commonwealth on all policies of liability insurance less (i) all return premiums on the policy, (ii) dividends paid or credited to policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability insurance.

2. The entities listed in this subsection shall not be individually liable for an annual assessment in excess of one quarter of one percent of that entity's net direct premiums written.

3. Liability insurance carriers shall be entitled to recover their initial and annual assessments through (i) a surcharge on future policies, (ii) a rate increase applicable prospectively, or (iii) a combination of the two, at the discretion of the State Corporation Commission.

§ 38.2-5021. Actuarial investigation, valuations, gain/loss analysis; notice if assessments prove insufficient.—A. The Bureau of Insurance of the State Corporation Commission shall
undertake an actuarial investigation of the requirements of the fund based on the fund's experience in the first year of operation, including without limitation the assets and liabilities of the fund. Pursuant to such investigation, the State Corporation Commission shall establish the rate of contribution of the entities listed in subsection B of § 38.2-5020 for the tax year beginning January 1, 1989.

Following the initial valuation, the State Corporation Commission shall cause an actuarial valuation to be made of the assets and liabilities of the fund no less frequently than biennially. Pursuant to the results of such valuations, the State Corporation Commission shall prepare a statement as to the contribution rate applicable to contributors listed in subsection B of § 38.2-5020. However, at no time shall the rate be greater than one quarter of one percent of net direct premiums written.

B. In the event that the State Corporation Commission finds that the fund cannot be maintained on an actuarially sound basis subject to the maximum assessments listed in §§ 38.2-5019 and 38.2-5020, the Commission shall promptly notify the Speaker of the House of Delegates, the President of the Senate, and the Industrial Commission.

2. That the provisions of §§ 38.2-5002 through 38.2-5014 shall become effective on January 1, 1988.