

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF WEST VIRGINIA  
CLARKSBURG DIVISION

*In re:*

FAIRMONT GENERAL HOSPITAL, INC.  
*et al.,*

Debtors.

Case No. 1:13-bk-01054

Chapter 11

Jointly Administered

**JOINT OBJECTION OF THE DEBTORS AND THE OFFICIAL  
COMMITTEE OF UNSECURED CREDITORS TO MOTION FOR  
RELIEF FROM STAY FILED BY NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY**

The above captioned debtors and debtors-in-possession (collectively, the “Debtors”) and the official committee of unsecured creditors (the “Committee”) hereby submit their joint objection to the Motion for Relief from Stay (the “Motion”) [Docket No. 425] filed by Nationwide Mutual Fire Insurance Company (“Nationwide”) and respectfully represent as follows:

**PRELIMINARY STATEMENT**<sup>1</sup>

1. Nationwide’s request for relief from the automatic stay to continue a Lawsuit against Fairmont General Hospital, Inc. (“FGH”) and attempt to recover from a self-insurance trust funded by FGH should be denied because (i) Nationwide’s state court lawsuit is stayed and the self-insurance trust is property of the estate, (ii) Nationwide is not entitled to recourse to the trust funds because Nationwide’s claims are excluded under the Trust Agreement, and (iii) even if Nationwide’s claims are covered, there is not “cause” to modify the stay under section 362(d) of the Bankruptcy Code.

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<sup>1</sup> Any capitalized terms otherwise undefined in this preliminary statement shall have the meanings subsequently ascribed to them in this objection.

2. The self-insurance trust is property of the estate because FGH retains an interest in its funds. As set forth in the Trust Agreement, FGH is entitled to any excess funds in the trust at the time of its termination. In addition, for the purposes of determining whether it is property of the estate and protected by the automatic stay, the self-insurance trust is substantially similar to an insurance policy, which the weight of authority has determined is both property of the estate and protected by the stay.

3. Further, Nationwide has no recourse to the self-insurance trust funds because Nationwide's alleged claims are not covered under the Trust Agreement. Nationwide's claims are for damage to property rented to FGH, and the Trust Agreement explicitly excludes from the definition of "Covered Losses" damage to property "owned, occupied, rented or used by FGH[.]" The plain language of the document makes it clear that Nationwide is not entitled to any trust funds.

4. Even if Nationwide's claims are covered by the Trust Agreement, Nationwide's Motion should be denied because there is not cause to modify the stay. The balance of the potential prejudice to FGH's estate against any hardships that might be incurred by Nationwide if its request is not granted weigh heavily in favor of denying the Motion. Specifically, FGH's estate and its creditors will be impaired to the extent that Nationwide is granted recourse to FGH's self-insurance trust. FGH (i) funds the self-insurance trust, (ii) is responsible for maintaining appropriate reserves if claims are made against the trust, and (iii) retains a reversionary interest in funds that remain in the trust upon its termination. Accordingly, any payment from the trust to Nationwide will (x) reduce the funds available to creditors entitled to recover from the trust; (y) reduce the funds that will return to FGH's estate upon the trust's termination, thereby impairing FGH's general unsecured creditors; and (z) potentially force FGH

to make new contributions to the trust, further depleting its estate. Although Nationwide compares FGH's self-insurance trust to an insurance policy issued by a third party that would insulate FGH's estate to the extent of the coverage provided, it is properly viewed as a self-insured retention because the estate and its creditors will be directly impaired to the extent of any payment from the trust.

5. In addition to prejudicing the estate and its creditors, granting the Motion could trigger a default under the Debtors' debtor-in-possession credit agreement (the "DIP Agreement") [Docket No. 250]. Among other things, as set forth more fully below, entry of an order granting relief from the automatic stay to pursue the funds of the self-insurance trust, in which FGH retains an interest, would be an event of default under Sections 7.1(n)(i)(E) and 7.1(n)(ii)(D) of the DIP Agreement.

6. Conversely, denying the Motion would preserve the status quo and would not prejudice any party. To the extent that Nationwide has a valid claim against FGH, its claim and rights with respect to the claim would be preserved, and Nationwide would be treated the same as all similarly-situated creditors under any subsequent bankruptcy plan.

7. For these reasons, as set forth more fully below, the Motion should be denied.

## **BACKGROUND**

### **I. Case Background**

8. On September 3, 2013 (the "Petition Date"), the Debtors filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the Northern District of West Virginia, Clarksburg Division (the "Bankruptcy Court").

9. On September 6, 2013, the Bankruptcy Court entered an order directing the joint administration of the Debtors' chapter 11 cases for procedural and administrative purposes [Docket No. 40].

10. The Debtors continue to operate their businesses and manage their affairs as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these cases.

11. On September 23, 2013, the Office of the United States Trustee appointed the Committee pursuant to sections 1102(a) and 1102(b)(1) of the Bankruptcy Code [Docket No. 103].

## **II. The Motion**

12. On January 29, 2014, Nationwide filed the Motion, by which Nationwide seeks relief from the automatic stay provided for by section 362(a) of the Bankruptcy Code to continue a prepetition lawsuit (the "Lawsuit") against FGH initiated by Nationwide in the West Virginia Circuit Court of Marion County (the "State Court").

13. According to the brief submitted in support of the Motion (the "Brief")<sup>2</sup>, National Union insured Richard Moore, who owned and leased residential real property to FGH at which an FGH employee resided. Brief, p.1. After a fire in 2011 damaged the property, National Union paid \$242,208.07 (subject to a \$500 deductible) to Mr. Moore pursuant to its policy and subrogated to Mr. Moore's rights with respect to FGH and FGH's employee. *Id.* at p.2.

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<sup>2</sup> Any references in this objection to facts alleged in the Brief that are made without citation to an independent source are made for the purpose of argument only. The Debtors and the Committee do not admit, and reserve all rights with respect to, all such alleged facts, including the right to contest such alleged facts at an evidentiary hearing.

14. Nationwide initiated the Lawsuit on April 8, 2013, seeking judgment in the amount of \$242,208.07 and alleging that the fire was caused by a stove burner left on and unattended by the FGH employee residing in the property. *Id.* at pp.1-2.

15. Between the filing of the Lawsuit and the filing of the Motion, the Debtors initiated their bankruptcy cases.

16. Nationwide now seeks relief from the automatic stay to proceed with the Lawsuit against the FGH, arguing that the assets in a self-insurance trust funded by FGH are sufficient to satisfy all claims by Nationwide. *Id.* at p.2.

17. For the reasons set forth in this objection, the Debtors and the Committee respectfully request that that Bankruptcy Court deny the Motion.

### **OBJECTION**

18. The Motion should be denied because (i) the Lawsuit is stayed and the self-insurance trust is property of the estate, (ii) Nationwide is not entitled to recourse to the trust funds because the loss for which Nationwide seeks redress is not covered under the Trust Agreement, and (iii) even if Nationwide's claim is covered by the Trust Agreement, there is not "cause" to modify the stay under section 362(d) of the Bankruptcy Code.

#### **I. The Lawsuit Is Stayed and the Self-Insurance Trust Is Property of the Estate**

19. Section 362(a) of the Bankruptcy Code provides that a bankruptcy petition operates as a stay of, among other things:

(a) "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim against the debtor that arose before the commencement of the [bankruptcy case]" (11 U.S.C.

§ 362(a)(1));

(b) “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate” (11 U.S.C. § 362(a)(3)); and

(c) “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy case]” (11 U.S.C. § 362(a)(6)).

20. The Lawsuit, which was commenced before the Petition Date, is therefore stayed, and Nationwide is prohibited from continuing its attempt to assert its prepetition claim against FGH and obtain payment from FGH’s self-insurance trust.

21. Notwithstanding Nationwide’s assertions to the contrary, the self-insurance trust is property of the estate because (i) FGH has an equitable interest in the trust and (ii) for the purposes of section 541, the trust is analogous to an insurance policy (*i.e.*, the reasons that insurance policies are viewed as property of a bankruptcy estate also apply to the self-insurance trust).

22. Section 541(a) provides that the estate is comprised of, among other things, “all legal or equitable interests of the debtor in property as of the commencement of the case.” FGH has an equitable interest in the trust because it retains a reversionary interest in the trust funds. As set forth in Section 10.3 of the Amended and Restated Hospital Professional Liability and General Liability Self-Insurance Trust Agreement (the “Trust Agreement”)<sup>3</sup> entered into between FGH and Huntington Banks (“Huntington”), in the event of the trust’s termination, if the trust contains an amount in excess of appropriate reserves, the excess shall be payable in its entirety to FGH. This reversionary interest brings the self-insurance trust within the definition of property of the estate under section 541. *See, e.g. PNC Bank v. Spring Ford Indus. (In re Spring Ford Indus.)*, 338 B.R. 255, 260 (E.D. Pa. 2006) (“Section 541(a)’s definition of ‘property’ is broad

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<sup>3</sup> A copy of the Trust Agreement provided by the Debtors is attached hereto as Exhibit A.

enough to encompass reversionary interests.”) (citing *In re Wray*, 358 B.R. 777, 785 n.8 (Bankr. D. Idaho 2001); *In re Hernando Healthcare, Inc.*, 157 B.R. 701, 703-704 (Bankr. M.D. Fla. 1993)).

23. In addition, the self-insurance trust is not a true trust for the benefit of a third party. Rather, it is self-insurance against certain defined losses administered according to the mechanisms set forth in the Trust Agreement. It is well-established that insurance policies are property of the estate under section 541 of the Bankruptcy Code and entitled to the protection of the automatic stay. *See, e.g., A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986). FGH’s self-insurance trust should be viewed no differently, since the policies underlying the application of the stay to insurance policies apply to the trust as well. *See, e.g.* 3-362 COLLIER ON BANKRUPTCY P. 362.03 (16th ed. 2013) (“Application of the automatic stay to the recovery of policy proceeds enables the bankruptcy court to assure that available assets are being distributed in an equitable fashion among creditors. When there are multiple claimants to the policy proceeds, the court should be able to oversee the allocation of the proceeds among claimants. . . . The automatic stay assures that the court will be able to determine the sufficiency of the policy proceeds before any particular claimant seeks to recover those funds.”).

24. In holding that liability insurance falls within the scope of § 541(a)(1), the First Circuit observed that “[a]ny contrary holding could start a race to the courthouse whenever a policy is too small to satisfy several potential plaintiffs. Such a race could mean unfair results as between potential plaintiffs; it could also prevent a bankruptcy court from marshalling the insurance proceeds, and, along with other assets, arranging for their distribution so as to

maximize their ability both to satisfy legitimate creditor claims and to preserve the debtor's estate.” *Tringali v. Hathaway Machinery Co.*, 796 F.2d 553 (1st Cir. Mass. 1986)

25. Although Nationwide notes that the self-insurance trust is not listed on FGH's schedules (Brief, p.2), it is well-established that an asset is part of a debtor's estate even if the debtor's interest in the property is not scheduled. *See, e.g., Guar. Residential Lending, Inc. v. Homestead Morg. Co., L.L.C.*, 291 Fed. Appx. 734, 736 (6th Cir. 2008); *Data Mountain Solutions, Inc. v. Giordano (In re Giordano)*, 472 B.R. 313, 335 (Bankr. E.D. Va. 2012). The trust, however, is listed by the Debtors as an asset on their balance sheet.

## **II. Nationwide Is Not Entitled to Recourse to the Self-Insurance Trust Funds**

26. Nationwide states in its Motion that the self-insurance trust “provides sufficient coverage for the satisfaction of all [Nationwide's] claims[.]” Brief, p.2. However, Nationwide is not entitled to recourse to the trust funds. As set forth above, FGH retains an interest in the funds and the self-insurance trust is property of the estate. Moreover, Nationwide's claims are not covered under the Trust Agreement. The Trust Agreement specifically excludes the following from the definition of “Covered Loss”:

Property Damage to property owned, occupied, rented or used by FGH or property in the care, custody or control of FGH or property as to which FGH is for any purpose exercising physical control.

Trust Agreement, Section 4.2(i). “Property Damage” is defined to mean:

(1) physical injury to or destruction of tangible property . . . including the loss of use thereof at any time resulting therefrom or  
(2) loss of use of tangible property which has not been physically injured or destroyed[.]

Trust Agreement, Section 1.15. Nationwide's claim is a claim for physical injury or destruction to property rented by FGH, and therefore, based on the foregoing, is a Property Damage claim



that is not a Covered Loss under the Trust Agreement. By the Trust Agreement's own terms, Nationwide has no recourse to the self-insurance trust funds.

### **III. There Is No "Cause" for Relief from the Stay**

27. Even if Nationwide's claims are not excluded under the Trust Agreement, the Motion should be denied because there is no cause for relief from the stay under section 362(d) of the Bankruptcy Code in this instance.

28. "Cause" is not defined in the Bankruptcy Code. *In re 210 West Liberty Holdings, LLC*, 400 B.R. 510, 514 (Bankr. N.D.W. Va. 2009). Accordingly, whether to lift the automatic stay is left to the courts' discretion, and courts must determine when relief is appropriate on a case-by-case basis. *In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992). When determining whether "cause" to lift the stay has been demonstrated, "[t]he court must balance potential prejudice to the bankruptcy debtor's estate against the hardships that will be incurred by the person seeking relief from the automatic stay if relief is denied." *Id.* See also *210 West Liberty*, 400 B.R. at 514.

29. As stated by the Court of Appeals for the Fourth Circuit, the factors that courts consider in deciding to lift the automatic stay include the following:

(1) whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and (3) whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court.

*Robbins*, 964 F.2d at 345. See also *210 West Liberty*, 400 B.R. at 514.

30. Courts have additionally considered the following, though, as noted by the Court of Appeals for the Second Circuit, not all factors will be relevant in every case:

(1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for a defense; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether the movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) the impact of the stay on the parties and the balance of harms.

*Schneiderman v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 110 (2d Cir. 2002).

31. In this instance, the prejudice to FGH's estate and its creditors outweighs any hardships that might be incurred by Nationwide if stay relief is denied. FGH self-insures for professional and general liability through the self-insurance trust maintained by Huntington. It funds the trust, retains a reversionary interest in the funds, and is responsible for maintaining appropriate reserves. *See* Trust Agreement, Sections 2.1 and 10.3. As a result, any payment from the trust to Nationwide will reduce the funds available to both (i) creditors who are entitled to payment from the trust for professional or general liability claims and (ii) general unsecured creditors who would benefit from a return of trust funds to FGH under the Trust Agreement. In addition, it may trigger an obligation on FGH's part to replenish the fund, further depleting its estate.

32. This case is similar to *In re Carraway Methodist Health Sys.*, in which stay relief was denied in favor of maintenance of the status quo due to the potential burden on the estate because the debtor was self-insured. *See Carraway*, 355 B.R. 853, 855 (Bankr. N.D. Ala. 2006) ("[T]he cost of defense or potential burden on the estate . . . favors maintenance of the status quo.

The Creditor asserted, without any evidence or testimony to support the assertion, that insurance was available and that the insurer, whom the Creditor did not identify, was contractually required to provide a defense. It is this Court's understanding . . . that the Debtors are self-insured in some fashion by virtue of a trust (the details and the amount are unknown to the Court at this time). This Court has no evidence before it as to what insurance coverage, if any, is available to pay a judgment obtained in the Lawsuit and who is responsible for the cost of defense. Absent an understanding of how the cost of defense will be borne and if, indeed, there even is insurance to pay any judgment, the Court refuses to allow the Lawsuit to go forward with the possible result of forcing the Debtors to incur defense costs and draining much-needed time and energy from the Debtors' already limited management resources."). The concerns identified by the *Carraway* court are amplified here due to the impact on FGH's estate resulting from FGH's residual interest in the trust funds, and the Motion should be denied on the same basis.

33. Further, granting the Motion could trigger a default under the DIP Agreement, which defines the following, among others, as events of default:

(a) "The entry of an order . . . granting relief from the automatic stay so as to allow a third party to proceed against any asset or assets of any Borrower having an aggregate value in excess of \$100,000" (Trust Agreement, Section 7.1(n)(i)(E)); and

(b) "The entry of an order . . . granting relief from the automatic stay applicable under Section 362 of the Bankruptcy Code . . . (y) to permit any other Person to proceed against any material asset of any Borrower having a value in excess of \$100,000" (*Id.* at Section 7.1(n)(ii)(D)).

Because FGH retains an interest in the self-insurance trust funds and the Lawsuit seeks damages in excess of \$100,000, the entry of an order granting the Motion would arguably trigger an event of default under both of the aforementioned sections.

34. Denying the Motion, on the other hand, would preserve the status quo and ensure that all creditors, including Nationwide, are treated fairly by preventing a premature and improper disbursement of the trust's funds. In that event, Nationwide's claim would be treated like all like claims under any subsequent bankruptcy plan and addressed during the claim resolution process prescribed thereby. The balance of the prejudice to FGH's estate and its creditors against the potential harm to Nationwide, which is minimal, therefore favors denial of the Motion.

35. The Motion should also be denied because factors for determining whether to lift the stay enumerated by the Fourth Circuit in *Robbins* weigh in favor of denial:

(a) Whether the issues in the pending litigation involve only state law, so the expertise of the bankruptcy court is unnecessary: Although the issues pending in the Lawsuit involve state law, they directly impact FGH's bankruptcy estate and its creditors. As set forth above, FGH retains a reversionary interest in the self-insurance trust and any payment from the trust to Nationwide will reduce funds available to other creditors and could trigger a default under the DIP Agreement. The Bankruptcy Court's expertise is necessary due to the interrelationship between the Lawsuit and these bankruptcy cases. Moreover, the Lawsuit is well within the Bankruptcy Court's jurisdiction because the Lawsuit concerns a property damage claim, the determination of which would be a "core" proceeding under 28 U.S.C. § 157(b)(2)(O) (identifying as core proceedings "other

proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship, except personal injury tort or wrongful death claims”).

(b) Whether modifying the stay will promote judicial economy and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court: Modifying the stay will not promote judicial economy, and there will not be greater interference with the bankruptcy case if the stay is not lifted. Because the Lawsuit directly affects FGH’s bankruptcy estate and its creditors, a full resolution of Nationwide’s claims will necessarily involve the Bankruptcy Court. Judicial economy will be promoted by addressing all relevant issues in on forum: the Bankruptcy Court. It would cause greater interference with the bankruptcy case if Nationwide were permitted to influence these bankruptcy cases and impair FGH’s estate and its creditors by litigating in state court.

(c) Whether the estate can be protected properly by a requirement that creditors seek enforcement of any judgment through the bankruptcy court: Such a requirement cannot properly protect the estate because continuing the Lawsuit in state court would result in the resolution of issues directly affecting FGH’s bankruptcy estate and these bankruptcy cases by a court other than the Bankruptcy Court. In addition, the entry of an order granting the Motion may itself be an event of default under the DIP Agreement. This could not be remedied or prevented by a requirement that Nationwide seek enforcement of any judgment through the Bankruptcy Court.

36. In addition, applicable factors enumerated by the Second Circuit in *Bogdanovich* also weigh in favor of denying the Motion:

(a) Whether relief would result in a partial or complete resolution of the issues: Stay relief would result in only partial resolution of the issues and the Bankruptcy Court would be left to address the fallout, including its impact on FGH's estate and its creditors and any default under the DIP Agreement.

(b) Lack of any connection with or interference with the bankruptcy case: As set forth above, the Lawsuit is directly connected to and will interfere with these bankruptcy cases and the administration of the Debtors' estates.

(c) Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action: The cause of action is a simple property damage claim not requiring the expertise of any specialized tribunal except to the extent it is interconnected with these bankruptcy cases and requires the expertise of the Bankruptcy Court.

(d) Whether the debtor's insurer has assumed full responsibility for a defense: No third party insurer has assumed responsibility for a defense. FGH is its own insurer, and, further, the loss for which Nationwide seeks redress is not covered under the Trust Agreement (see Section II, above).

(e) Whether the action primarily involves third parties: The Lawsuit does not primarily involve third parties. FGH is the primary defendant.

(f) Whether litigation in another forum would prejudice the interests of other creditors: Litigation in another forum would prejudice the interests of other creditors because any payment to Nationwide from the self-insurance trust would reduce the funds available for distribution to creditors entitled to distributions from the trust and general unsecured creditors. This consideration is particularly important in this case because (i)

the scope of the coverage under the Trust Agreement is broad, (ii) the number of potential claims against the self-insurance trust is not known, and (iii) FGH's residual interest in the funds means that distributions from the trust will impair FGH's general unsecured creditors as well as creditors whose claims are covered under the Trust Agreement.

(g) The interests of judicial economy and the expeditious and economical resolution of litigation: As set forth in paragraph 35(b), above, the interests of judicial economy favor resolution in the Bankruptcy Court rather than state court.

(h) The impact of the stay on the parties and the balance of harms: As set forth at length above, the balance of the harms favors maintenance of the stay because maintaining the stay will preserve the status quo and the rights of all parties while lifting the stay will prejudice FGH's estate and its creditors.

37. Based on the foregoing, the Motion should be denied for lack of cause under section 362(d) of the Bankruptcy Code.

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WHEREFORE, based on the foregoing, the Debtors and the Committee respectfully request that the Court deny the Motion and grant such other and further relief as it deems just and proper.

Dated: February 12, 2014

Respectfully submitted by:

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the “*Joint Objection of the Debtors and the Official Committee of Unsecured Creditors to Motion for Relief from Stay Filed by Nationwide Mutual Fire Insurance Company*” on the 12th day of February, 2014 with the United States Bankruptcy Court for the Northern District of West Virginia. Epiq Bankruptcy Solutions, LLC will serve this filing on the Core Group and will file a certificate of service of same with the Bankruptcy Court in a timely manner.

/S/ Janet Smith Holbrook  
Janet Smith Holbrook, WV Bar No. 5853

# **EXHIBIT A**

**AMENDED AND RESTATED  
HOSPITAL PROFESSIONAL LIABILITY AND  
GENERAL LIABILITY SELF-INSURANCE TRUST AGREEMENT**

Fairmont General Hospital Inc. (hereafter "FGH"), a West Virginia, private, not-for-profit corporation, hereby reaffirms its designation of Huntington Banks, a national banking corporation, as Trustee of a liability insurance trust account created by the provisions of that certain Trust Agreement, as revised on June 1, 2001, having an effective date of July 15, 1986. FGH hereby appoints Huntington Banks, as Trustee of FGH's General/ Professional Liability Loss Fund. The objectives of the Fund are exclusively to foster, promote, support and improve patient care and the general health of the community, within the meaning of Section 501(c)(3) of the Internal Revenue Code or as it may be subsequently amended, and in furtherance of this purpose, to provide FGH with cost-effective methods of controlling, reducing and protecting against certain risks of legal liability which arise out of the rendering of care to the sick and injured and the maintenance and operation of institutions devoted to the rendering of care to the sick and injured by FGH, such protection being an integral and necessary part of the functioning of FGH.

**ARTICLE I**

**Definitions**

The following words and phrases shall have the respective meanings stated below unless a different meaning is plainly required by the context:

- 1.1 "Actuary" means an independent actuary experienced in the field of general and medical malpractice liability insurance and selected by FGH.
- 1.2 "Certificate" means a written statement executed on behalf of FGH by an officer of FGH or by any other duly authorized representative of FGH and certifying to the truth of the facts therein stated.
- 1.3 "Claims Management Program" means an ongoing process to determine whether liability may exist in connection with a claim or potential claim based upon general or medical malpractice liability and, if so, its cause and potential cost.
- 1.4 "Covered Losses" means the losses set forth in Article IV, Section 4.2.
- 1.5 "Covered Persons" means the persons listed in Article IV, Section 4.1.
- 1.6 "Fund" means the assets held hereunder from time to time by the Trustee.
- 1.7 "Independent Counsel" means an attorney duly admitted to practice law before the highest court of any state, and may include legal counsel for FGH.
- 1.8 "Fiscal Year" means the 12 consecutive month period commencing on July 15, and ending on July 14 of the following year.
- 1.9 "Medicare Regulations" means all laws, statutes, rulings, regulations, guidelines, comments or other directives of a similar nature directly or indirectly relating to the reimbursement to FGH for costs

incurred or anticipated under Title V (Maternal and Child Health Program), Title VIII (Medicare) and Title XIX (Medicaid) under the Social Security Act or any additional, substitute, or successor program including without limitation any program designated to create a system of national health insurance.

1.10 "Provider Reimbursement Manual" means the Medicare Regulations set forth by the U.S. (Department of Health, Education and Welfare in FGH Reimbursement Manual, Part I. (HIM-15) §2162. et seq., regarding the reimbursability of expenses incurred by a hospital which elects an alternative to commercial insurance.

1.11 "Trust Agreement" means this instrument as originally executed or as it may, from time to time, be amended.

1.12 "Trustee" means Huntington Banks, a national banking corporation.

1.13 The term "occurrence", whenever used herein, means an accident including continuous or repeated exposure to conditions, which results in Bodily Injury, or Property Damage, as those terms are hereinafter defined, neither expected nor intended from the standpoint of Covered Persons, as that term is hereinafter defined.

- (a) For the purpose of determining the limit of Fund's applicability for Bodily Injury, Property Damage; Personal Injury or Malpractice Injury, as those terms are hereinafter defined, arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one "occurrence".
- (b) The limit of liability is set forth in Article V and stated therein as applicable to each "occurrence", is the total amount of the Fund's liability for all damages arising out of all acts or omissions in connection with the same service or activity, regardless of the number of claims or claimants.

1.14 The term "Bodily Injury", whenever used herein, means bodily injury, sickness or disease sustained by any person which occurs during the Annual Period of Participation, as that term is hereinafter defined, including death at any time resulting therefrom, and within the Territory, as that term is hereinafter defined. "Bodily Injury" shall also include care and loss of services sustained by any person or persons during the Annual Period of Participation and within the Territory, but shall not include Personal Injury or Malpractice injury, as those terms are hereinafter defined.

1.15 The term "Property Damage", whenever used herein, shall mean (1) physical injury to or destruction of tangible property which occurs during the Annual Period of Participation, as that term is hereinafter defined, and within the Territory, as that term is hereinafter defined, including the loss of use thereof at any time resulting therefrom or (2) loss of use of tangible property which has not been physically injured or destroyed, provided such loss of use is caused by an occurrence during the Annual Period of Participation, and within the Territory.

1.16 The term "Personal Injury", whenever used herein, shall mean injury sustained by any person or organization arising out of one or more of the following alleged offenses, including false arrest, detention or imprisonment; malicious prosecution; a publication or utterance of a libel or slander or of other defamatory disparaging material; a publication or utterance in violation of an individual's right of privacy; or a wrongful entry or eviction or other invasion of the right of private occupancy, provided that such alleged offense is committed during the Annual Period of Participation, as that term is hereinafter defined, and within the Territory as that term is hereinafter defined.

1.17 The term "Annual Period of Participation", whenever used herein, shall mean that period of twelve (12) months, or such greater or lesser period as FGH may specify, following the date on which coverage for Covered losses begins. For purposes of this trust instrument, the participation period shall run from 7/15/00 to 7/14/01 and then annually thereafter.

1.18 The term "Malpractice Injury", whenever used herein, means injury or damage to any person arising out of the rendering of or failure to render, during the Annual Period of Participation, as that term is hereinafter defined, patient care or professional services by a Covered person.

1.19 The term "Territory", whenever used herein shall mean

- (a) the United States of America, its territories or possessions, or Canada, or
- (b) international waters or air space, provided the injury or damage does not occur in the course of travel or transportation to or from any other country, state or nation; or
- (c) anywhere in the world with respect to a Covered Loss arising out of a product which was sold for use or consumption within the territory described in subsection (a) above, provided the original suit for such damages is brought within such territory.

## **ARTICLE II**

### **Contributions**

2.1 The Trustee shall be accountable for all contributions received by it, but shall have no duty to require that any contributions be made to the Fund, or to determine that the Fund is adequately funded at any time to satisfy any Covered Loss of a Covered Person. FGH does hereby obligate itself to make appropriate contributions based upon actuarial projections and recommendations from its independent audit firm, at least annually, (unless said actuarial projections indicate that adequate assets are then being held by the Trustee) and at other appropriate times as FGH, acting on the advice of its Actuary, shall deem necessary so as to maintain a Fund adequate to support anticipated disbursements in accordance with Article III hereof. FGH, in the exercise of its reasonable discretion, shall select the quartile (confidence factor) at which it desires to fund, acting upon actuarial projections which shall not be lower than the second quartile or the 50<sup>th</sup> percentile. FGH shall be fully protected in relying upon the opinion of its Actuary in making a determination that the monies held by the Trustee are adequate to cover disbursements at any given point in time.

2.2 Additional retrospective contributions, as may be called for or recommended by the Actuary so as to maintain the Fund at a level adequate to support anticipated disbursements, may be made at any time.

2.3 The Actuary shall review at least annually its actuarial projections of FGH's Covered Losses to be anticipated, both for the then current year and for all prior years of the Fund, and, in connection therewith, shall determine the funding needs of the Fund, which determination shall constitute conclusive evidence that the funding levels of the Fund reflect the decisions of prudent management. At the conclusion of each such annual actuarial review, the Actuary shall submit to FGH a certified statement setting forth the funding needs of the Fund and the actuarial basis of coverage used in determining funding needs.

2.4 Any income earned by the Fund shall become a part of the Fund and shall be used in establishing adequate Fund levels.

### ARTICLE III

#### **Payments from the Fund**

3.1 The Trustee shall make payments from the Fund on behalf of Covered Persons for Covered Losses only, as such terms are defined in Article IV hereof and for the expenses related thereto as follows:

- (a) Expenses of establishing the Fund;
- (b) Expenses for the administration of the Claims Management Program.
- (c) All allocated claims expenses, as such term is commonly understood, incurred in connection with any Covered Loss defended hereunder, including, but not limited to attorney's fees and all costs incurred in connection with the investigation and defense of any such suit; all expenses and costs taxed against FGH, including interest on any part of a judgment which does not exceed applicable limits referred to Article V and which herein, until the amount of such judgment or part thereof, is paid or tendered by the Fund; premiums on appeal bonds required in any such suits for any amount not in excess of the applicable limits referred to in Article V, but without any obligation to apply for or furnish such bonds; and premiums on bonds to release attachments in any such suit for any amount not in excess of the applicable limits referred to in Article V, but without any obligation to apply for or furnish such bonds.
- (d) Fees and expenses involved with the maintenance of the Fund by the Trustee;
- (e) All legal expenses directly or indirectly incurred by FGH for the establishment, maintenance, or operation of the Trust or in connection with the Claims Management Program;
- (f) Actuarial expenses;
- (g) Cost of excess insurance coverage purchased by FGH; and
- (h) Expenses for the administration of the Risk Management Program performed by or on behalf of FGH.

3.2 With the exception of those expenses described in Paragraph 3.1(d) which may be charged directly against the Fund in accordance with Paragraph 3.4, payment shall be made from the Fund only upon the prior receipt by the Trustee of a written Certificate from FGH which states:

- (a) The amount of the requested disbursement;
- (b) To whom the disbursement is payable;
- (c) A certification by an appropriate official of FGH that such a payment is within the scope of coverage as defined in this Trust Agreement, or is for one of the expenses listed in Paragraph 3.1; and
- (d) A brief description of the nature of the claim or expense to be paid.

Payments shall be made at the earliest possible date which shall be no later than seven (7) days from receipt of said Certificate.

3.3 The expenses listed in Paragraph 3.1 shall be payable and reimbursable by the Fund whether or not FGH uses qualified in-house personnel or independent contractors. To the extent the Fund does not pay such expenses, they shall be paid by FGH.

3.4 The Trustee is hereby empowered to incur, and pay from the Fund all reasonable expenses in connection with the management, preservation and administration of the Fund, including reasonable and agreed upon compensation for the services of the Trustee and including the fees and charges of such agents, attorneys, Investment Advisor, or accountants as the Trustee may in the exercise of its discretion employ in the administration of the Fund hereunder. Such fees, charges, compensation and expenses shall be charged against either income or principal, as the Trustee, in the exercise of its sole and absolute discretion, shall determine.

3.5 Neither the income of the Fund nor the Fund itself shall be liable for the debts of FGH hereof, nor shall the same be subject to seizure by any creditor of FGH under any writ or proceedings at law or in equity, nor shall any direct action be brought against the Fund on account of any cause of action against FGH, and FGH hereunder shall not have the power to sell, assign, transfer, borrow, encumber, hypothecate or in any other manner anticipate or dispose of its interest in the Fund.

3.6 In the event that the Actuary's annual, evaluation of the Fund indicates that the Fund contains reserves in excess of what is actuarially determined to be necessary to support anticipated disbursements hereunder, FGH shall have the option of applying such excess amount to reduce its required future contributions to the Fund, or FGH may direct the Trustee in writing to disburse such excess amount as a rebate to the FGH.

3.7 Subject to the limits of liability of the Fund created hereunder as set forth in Article V, Section 5.1, the expenses enumerated in Paragraph 3.1(c) hereof shall be payable from the Fund with respect to any suit or claim brought against a Covered Person alleging a Covered Loss, even if any of the allegations of the suit or claim are groundless, false or fraudulent.

## ARTICLE IV

### Coverage and Exclusions

4.1 The term "Covered Persons" as used in this Agreement shall mean:

- (a) FGH;
- (b) Any employee of FGH, whether professional, paraprofessional or nonprofessional, whether full time or part time, including interns and residents; and including any salaried; as distinct from fixed fee, hospital based physician or dentist rendering professional services to the Hospital who has no option of billing a patient for such services and to whom normal employee benefits and withholding requirements apply; any member of FGH's Board of Directors or any officer of FGH; or any member of any executive committee or advisory board of FGH;
- (c) Volunteer workers performing their duties on the premises of FGH, or off the premises of FGH if in connection with any corporation, organization or entity which FGH controls, or with which it is affiliated as described in subparagraph (e);
- (d) Any person (whether or not an employee of or a staff member of FGH), while serving at the request or direction of FGH with or without compensation for such services, as a member of any duly constituted medical staff committee, board committee, or other hospital committee, the activities of which in whole or in part relate directly or indirectly to the rendering, or surveillance of the quality of medical care, patient care, hospital utilization, safety, medical - legal responsibility, credentialing, or any other activity affecting in whole or in part any of the above; or any person who is acting with or without compensation for such services and is charged with the duty of executing directives of any such board or committee; or any person who is acting with or without compensation for such services and is responsible for the care, supervision, or surveillance of any department, section, activity, or other area of the involvement of FGH with respect to the liability arising out of such service;
- (e) For purposes of this paragraph, the term "Covered Persons" shall include any subsidiary corporation of or other entity affiliated with FGH, or any school program, educational endeavor (including the students or instructors thereof), out-patient organization or entity, fund-raising organization, shared-service organization, community health planning group representative(s) or any other organization, corporation, or entity controlled by or affiliated with FGH, whether owned in whole or in part by FGH, and any such other additional "Covered Persons" as may, from time to time, be added to this Trust Agreement by FGH in accordance with the provision relating to amendments set forth in Article XI.
- (f) For purposes of this paragraph, the term "Covered Persons" shall also include any trustee under any existing financial arrangement of FGH, or any vendor or any mortgagee, lease holder, landlord, trustee, underwriter, issuing municipality, or any other financial or bonding entity, corporation, or organization, with which FGH has existing arrangements obligating FGH to name such individual or entity as an additional insured under FGH's hospital professional liability or comprehensive general liability policy and such other additional "Covered Persons" as may from time to time be added to this Trust Agreement by FGH in accordance with the provision relating to amendments set forth in Article XI.



- (g) Any person, whether or not an employee or medical staff member of FGH or a professional, paraprofessional or nonprofessional, corporation, organization or other entity which FGH may, from time to time, name as additional "Covered Persons" under this Trust Agreement in accordance with the provision relating to amendments set forth in Article XI.

provided, however, that the persons (and entities) described above shall be deemed to be a Covered Person only to the extent that said person (or entity) was acting within the capacity and scope of his duties, as specified above, when performing the act or omission which is alleged to create a Covered Loss hereunder.

4.2 The term "Covered Loss" as used in this Trust Agreement shall mean:

All sums that any Covered Person, as defined herein, shall become legally obligated to pay as damages, including punitive damages:

- (1) because of Bodily Injury or Property Damage caused by an occurrence, or
- (2) because of Personal Injury, or
- (3) because of Malpractice injury,

to which this Trust Agreement applies, arising directly, or indirectly, out of or in connection with the maintenance or operation of FGH or an allied health facility operated by FGH or the rendering of or failure to render patient care or professional services by a Covered Person.

### **EXCLUSIONS**

As used herein, the term "Covered Loss" does not include claims for damages arising out of:

- (a) Bodily Injury or Property Damage arising out of ownership, maintenance, operation, use, loading or unloading of
  - (1) any automobile or aircraft owned or operated by or rented or loaned to FGH, or
  - (2) any other automobile or aircraft operated by any person in the course of his employment by FGH;

this exclusion does not apply to any automobile or aircraft used as an ambulance, or other vehicles used for the purpose of transporting patients, blood, medical supplies, equipment, and the like, nor to the parking of any automobile on premises owned by, rented to or controlled by FGH or the ways immediately adjoining, if such automobile is not owned by a rented or loaned to any Covered Person;

- (b) Bodily injury or Property Damage arising out of (i) the ownership, maintenance, operation, use, loading or unloading of an mobile equipment while being used in any prearranged or organized racing, speed or demolition contest or in any stunting activity or in practice or preparation for any such contest or activity or (ii) the operation or use of any snowmobile or trailer designed for use therewith;
- (c) Bodily Injury or Property Damage arising out of and in the course of the transportation of mobile equipment by an automobile owned or operated by or rented or loaned to FGH;
- (d) Property Damage or Bodily Injury arising out of the discharge, dispersion, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;
- (e) Bodily Injury or Property Damage due to war, whether or not declared civil war, insurrection, rebellion or revolution onto any act or condition incident to any of the foregoing;
- (f) any obligation for which FGH or any insurance carrier, as its insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
- (g) Bodily Injury to any person employed by FGH arising out of and in the course of his employment by FGH, or any obligation of FGH to indemnify another because of damages arising out of such injury;
- (h) Any claim for damages against any physician or dentist arising out of said person's personal risk for direct medical care services. This exclusion shall not apply to those Covered Persons described in Section 4.1 (b), nor to the derivative, vicarious or other imputed liability of FGH;
- (i) Property Damage to property owned, occupied, rented or used by FGH or property in the care, custody or control of FGH or property as to which FGH is for any purpose exercising physical control. This exclusion shall not apply to liability arising out of the rendering or failure to render patient care or professional services, including the handling of or performing post-mortem examinations on human bodies;
- (j) Any liability assumed by FGH under any contract or agreement which relates in whole or in part to an undertaking by FGH to indemnify or hold harmless physicians or other health care practitioners who are not Covered Persons as described in Section 4.1(b);
- (k) Bodily Injury or Property Damage resulting from the hazardous properties of nuclear materials, except when such Bodily Injury or Property Damage is claimed by a patient of FGH to have been due to or a result of the rendering of or failure to render treatment involving the use of nuclear materials;
- (l) Personal Injury arising out of the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of any Covered Person;

- m) Personal Injury arising out of any publication or utterance described in Article I, Section 1.16 if the first injurious publication or utterance of the same or similar material by or on behalf of any Covered Person was made prior to the first day of the Annual Period of Participation in 1986;
- n) Any claim for damages based upon an alleged violation of any state or federal securities, antitrust, fair trade, deceptive practices or consumer law or laws.

4.3 FGH is hereby authorized, from time to time and at any time, to notify the Trustee in writing with respect to a deductible from first dollar losses payable from the Fund for any one occurrence or any one Annual Period of Participation. As respects losses arising under this Trust document, there shall be no deductible.

4.4 The protection afforded hereunder is primary, except when stated to apply in excess of or contingent upon the absence of other insurance. If any insurance or self-insurance retention fund is available to any Covered Person, which is stated to be applicable to any Covered Loss on the same basis as the protection afforded hereunder, whether primary, excess or contingent, there shall be no obligation upon the Fund to make any payment for said Covered Loss until all said insurance proceeds are exhausted.

In no event shall any provision of this Paragraph 4.4 in any way impair or affect FGH's ability to submit a written Certificate to the Trustee pursuant to Paragraph 3.2 with respect to the Covered Loss for which other insurance is available nor in anyway impair or affect the Trustee's authority to disburse in accordance with the terms of any such Certificate, and any such Disbursement shall not in any way impair or effect a waiver of FGH's right to pursue any remedy against such other insurer.

4.5 In the event of any payment pursuant to this Agreement, the Trustee agrees that FGH, and not the Trustee, shall have the sole and complete right of recovery therefore against any person or organization, by way of subrogation or indemnity or otherwise.

## **ARTICLE V**

### **Limitations and Hospital Retention**

5.1 Regardless of (1) the number of Covered Persons hereunder, or (2) the number of persons or organizations who sustain, injury or damage, or (3) the number of claims made or suits brought on account of injury or damage, or (4) whether said injury or damage arises out of Bodily Injury, Property Damage, Personal Injury or Malpractice Injury or any of all of these four combined, the Fund's liability under this Agreement shall be limited as follows:

- (a) The total Disbursements, including-related expenses as defined in Part III. Paragraph 3.1(c), from the Fund for all Covered Losses because of Bodily Injury, Property Damage, Personal Injury or Malpractice Injury, or any or all of these four combined, sustained by one or more persons or organizations as a result of each occurrence shall not exceed \$1,500,000. \*\*\*\*\*

- (b) Subject to the limitation set forth in subsection (a) above respecting each occurrence, the total Disbursements, including related expenses as defined in Part III, Paragraph 3.1(c), from the Fund for all damages because of Bodily, Property Damage, Personal Injury or Malpractice Injury, or any or all four of these combined, sustained during any one Annual Period of Participation shall not exceed \$3,000,000. \*\*\*\*\*

5.2 For the purpose of determining the limit of the Fund's liability applicable in accordance with this Article V, Bodily Injury and Property Damage arising out of continuous or repeated exposure of substantially the same general conditions shall be considered as arising out of one occurrence.

5.3 The limit of liability set forth in Section 5.1 and stated therein as applicable to "each occurrence" is the total amount of the Fund's liability to all damages arising out of all acts or omissions in connection with the same service or activity regardless of the number of claims or claimants.

5.4 FGH's current retention for self insured liability losses, as more particularly described in Article IV herein is \$1,500,000 per occurrence subject to an annual aggregate retention of \$3,000,000. The \$3,000,000 aggregate retention applies separately to medical malpractice losses in contrast to all other liability losses set forth in Article IV herein which carry a separate \$3,000,000 annual aggregate retention.

## ARTICLE VI

### Investments of The Fund

6.1 The Trustee is hereby authorized to make such investments and reinvestments of the Fund as are approved under the laws of the State of West Virginia at the time of the purchase, including, but not limited to, securities which are direct obligations of the United States of America, obligations issued, guaranteed or sponsored by Federal agencies or enterprises; corporate bonds and notes; savings and time deposit accounts (including time deposit open accounts) in federally insured financial institutions, including the Trustee. The Trustee shall invest in such property as the Trustee, in its opinion, shall consider to be consistent with the investment policy of FGH. Prior to making any such investments, the Trustee may consult with FGH.

6.2 FGH shall, at least sixty (60) days following the commencement of each Fiscal Year or at such other time as FGH and Trustee may agree, furnish the Trustee with a schedule (the "Schedule of Expected Contributions and Disbursements") which shall list the expected contributions to be made by FGH to the Fund in accordance with Article II hereof and the expected disbursements to be made by the Trustee in accordance with Article III hereof for each of the succeeding quarters during such Fiscal Year. FGH shall be provided guidance by, or may delegate the preparation of the schedule to, the Actuary selected by FGH. Said schedule may be amended at any time as FGH in its sole discretion considers appropriate. A corporate trustee acting hereunder shall be liable or responsible to the degree required by the laws of the State wherein it is authorized to act as trustee. In any contract or agreement made by Trustee on behalf of the Fund, such Trustee may, and is authorized to, stipulate and provide against personal liability on such contracts.

6.3 All investments made by the Trustee shall be made with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent individual acting in like capacity and familiar with such matters would use. The Trustee shall use all reasonable care, skill, prudence and diligence to assure that assets in the Fund are not left uninvested, and in that regard, the Trustee may consult with FGH in determining whether to leave any portion of the assets of the Fund uninvested. The Trustee shall, however, retain the final authority to make such decisions.

6.4 The net income and earnings of the Fund shall be accumulated, added to the principal of the Fund and invested and reinvested.

## **ARTICLE VII**

### **Powers, Rights and Duties of Trustee**

7.1 The Trustee shall have the power to receive and hold all contributions paid to it under this Trust Agreement, provided, however, that the Trustee shall have no duty to require that any contributions be made to it, or to determine that the Fund is adequate at any time to satisfy any Covered Losses of FGH or any expenses listed in Section 3.1.

7.2 The Trustee shall have the power to sell, convey, transfer, and otherwise dispose of all property at any time forming part of the Fund from time to time and in such manner, and for such consideration and upon such terms and conditions as the Trustee shall determine, and to collect and receive the moneys, interests, profits and income arising therefrom, with full power in the

Trustee to manage, administer and control the Fund, except as otherwise provided in this Trust Agreement.

7.3 The Trustee shall have the power to vote, in person or by proxy, with respect to any and all securities; to exercise, or sell, options, conversion privileges or rights to subscribe for additional securities and to make payments therefore; to consent to or join in any voting trusts, reorganizations, consolidations, mergers, foreclosures, and liquidations, and in connection therewith to deposit securities with or under the direction of any protective committee under such terms as may be advisable, and to accept and hold any securities or other property received through the exercise of any of the foregoing powers.

7.4 Notwithstanding anything herein contained to the contrary, no powers enumerated herein or granted to the Trustee generally or pursuant to law shall be construed to enable FGH or the Trustee, or any other person, to purchase, exchange, or otherwise deal with or dispose of the principal or income of the Fund for less than an adequate or full consideration in money or moneys worth, nor to permit FGH or any related person as defined by the then current Medicare Regulations, to borrow the income or principal of the Trust Fund, directly or indirectly.

7.5 The Trustee shall not have the power to appoint or engage the services of auditors, financial advisers, or any other agents or to pay compensation to such appointees, except upon the prior written approval of FGH. The Trustee shall use FGH's legal counsel, unless the Trustee notifies FGH in writing that it deems FGH's counsel not to be independent or for other valid reasons. All expenses incurred pursuant to this Section shall be deemed related expenses within the meaning of Section 3.1 hereof.

7.6 The Trustee shall not have the power to delegate to a co-trustee or any agent for any period of time any or all of the Trustee's rights, powers and duties under this Trust Agreement.

7.7 The Trustee shall not have the power to compromise, contest, prosecute, or abandon claims or other charges in favor of or against the Fund.

7.8 The Trustee is hereby authorized and empowered, as directed by a Certificate from FGH, to make annuity payments to claimants from the Fund, or in the alternative to purchase an annuity on behalf of such claimant from a commercial insurer. In addition, the Trustee is hereby authorized and empowered to make other forms of installment payments, or to make such other commitments or obligations as directed in order to settle or otherwise dispose of claims for Covered Losses. The cost of obtaining and/or maintaining any such annuity or other form of installment payment shall be deemed to be a cost of maintaining the Fund in accordance with Section 3.1.

7.9 All duties and obligations imposed upon the Trustee by this Trust Agreement shall be carried out with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent individual acting in like capacity and familiar with such matter would use.

7.10 The Trustee is hereby authorized and empowered to cause any property of the Fund to be issued, held or registered in the individual name of the Trustee, or its nominee, or in such form

that title will pass by delivery, provided the records of the Trustee shall indicate the true ownership of such property.

7.11 The Trustee is hereby authorized and empowered to charge any premium on bonds purchased above par value to the principal of the Fund without amortization from the income of the Fund, regardless of any law relating thereto.

## **ARTICLE VIII**

### **Accounts of Trustee**

8.1 The Trustee shall maintain accurate and detailed records and accounts of all transactions hereunder.

8.2 The Trustee shall, at the request of FGH, submit to FGH's auditors and to the Actuary such evaluations, reports or other information as they may reasonably require.

8.3 Following the close of each month after the effective date of this Trust Agreement, or following the close of such other reporting period as may be mutually agreed upon by the Trustee and FGH, and following the effective date of the removal or resignation of the Trustee, the Trustee shall file with the Investment Advisor, the Hospital Administrator and the Hospital controller a written account, hereinafter called "Financial Statement", setting forth the balance in the Fund at the beginning of the period, current period contributions, the amount and nature of final payments, including a separate accounting for claims management, legal expenses, claims paid, actuarial expenses, excess insurance coverage costs, risk management expenses, expenses involved with maintenance of the fund by the Trustee, the Fund balance, and such other matters as FGH may request from time to time and at any time.

8.4 The books of accounts of the Trustee shall at all reasonable times be available to FGH for inspection and copying and to such other person or persons as FGH may designate for that purpose.

## **ARTICLE IX**

### **RESIGNATION, REMOVAL AND SUCCESSION OF TRUSTEE**

9.1 FGH may remove the Trustee at any time and appoint a Successor Trustee, and such removal or appointment shall become effective when a notice, certified by an officer of FGH; and an acceptance of the Trust signed by the Successor Trustee so appointed, is delivered to the Trustee. Notwithstanding the aforementioned, FGH may appoint, as Successor Trustee, only an individual or entity who qualifies under the then current Medicare Regulations and who is not a related person within the definition of such Regulations.

9.2 The Trustee may resign by delivering to FGH a written resignation to take effect one hundred twenty (120) days after the delivery thereof to FGH unless prior thereto FGH shall have appointed a Successor Trustee and shall have delivered notice to the Trustee certified by an officer of FGH and an acceptance of the Trust signed by the Successor Trustee so appointed.

9.3 All of the provisions set forth herein with respect to the Trustee shall relate to each Successor Trustee with the same force and effect as if such Successor Trustee originally had been named herein as Trustee.

9.4 Upon the appointment of a Successor Trustee, the removed or resigning Trustee shall transfer and deliver the Fund to such Successor Trustee, after reserving such reasonable amount as it shall deem necessary and as FGH shall approve by way of the Disbursement Certificate described above in Part III, Paragraph 3.2, for the payment of any incurred expenses chargeable against the Fund in accordance with Paragraph 3.1, hereof, which remain unpaid as of the effective date of said transfer. Further, the removed or resigning Trustee may reserve and charge to the Fund the amount necessary for the payment of any incurred Trustee's fees chargeable against the Fund in accordance with Paragraph 3.4 hereof, which remain unpaid as of the effective date of said transfer. No Successor Trustee shall be liable for acts or omissions of any prior Trustee or be obliged to examine the accounts, records or acts of any prior Trustee or Trustees.

9.5 Any corporation or association into which the Trustee may be converted or merged, or with which it may be consolidated, or which it may sell or transfer its corporate Trustee business and assets as a whole, or any corporation or association resulting from any such conversion, sale, merger, consolidation or transfer to which it is a party, ipso facto, shall be and become Successor Trustee hereunder with the same effect as though originally so named, provided that such corporation or association, or such resulting corporation or association, qualifies, in the opinion of independent counsel, under the then current Medicare Regulations and is not a related person within the definition of such Regulations.

9.6 Every Successor Trustee appointed hereunder shall execute, acknowledge and deliver to its predecessor and also to FGH an instrument in writing accepting such appointment and thereupon Successor Trustee; without any further act, deed or conveyance, shall become fully vested with all the estates, properties, rights, powers, trusts, duties and obligations of its predecessor; but such predecessor shall, nevertheless, upon the request of FGH, execute and deliver an instrument transferring to such Successor Trustee all the estates, properties, rights, powers and trusts of such predecessor hereunder; and every predecessor Trustee shall deliver all securities and monies held by it as Trustee hereunder to its successor. Should any instrument in writing from FGH be required by any Successor Trustee for more fully and certainly vesting in such Successor Trustee the estates, rights, powers and duties hereby vested or intended to be vested in the predecessor, any and all such instruments in writing shall, upon request, be executed, acknowledged and delivered by FGH.

## **ARTICLE X**

### **Termination**

10.1 FGH may at any time notify the Trustee of its intent to terminate the Fund by delivering to the Trustee, at least 30 days prior to the effective date of termination, notice as outlined in Article IX, Section 9.1. After receipt of such notice, the Trustee shall continue to hold, invest, administer, liquidate and distribute the Fund pursuant to the provisions of this Trust Agreement. Such termination shall be in accordance with the provisions of Paragraph 10.3 hereof.

10.2 In no event shall any assets be returned to FGH except such, if any, which remain after the satisfaction of all fixed and contingent liabilities to persons entitled to payments from the Fund, or



unless adequate provisions have been made for the satisfaction of all fixed and contingent liability in accordance with an actuarial determination described in the Paragraph immediately following.

10.3 In the event of discontinuance of self-insurance by FGH, an independent Actuary shall be commissioned by FGH to analyze the balance in the Fund and to determine the adequacy of the Fund. If he concludes that future claims may arise because of incidents occurring while payments into the Fund were allowable costs, then appropriate reserves will remain in the Fund or, at the option of FGH, be remitted to FGH to be held by it for the payment of such future claims or incidents. In the event that such reserves are remitted to FGH, FGH shall segregate such reserves in a specially designated account, approved by its governing board, and shall draw on such account solely for the purpose of satisfying those payments and disbursements authorized to be made hereunder, until such time as all future claims or incidents have been eliminated, or have been adequately provided for; provided, however, that the Trustee shall have no obligation to see that the same is done once it has remitted such reserves to FGH. Further, the Trustee shall not be liable for any loss of reimbursement by FGH because of such transfer, or any claim for reimbursement or contribution by any reimbursement entity described below. Prior to such transfer, FGH shall deliver a certificate to the Trustee requesting such transfer and stating that such request is being made only after due and careful deliberation by FGH that such transfer is in the best interest of FGH, because the possibility of adverse reimbursement treatment is less than the anticipated cost of maintaining the Trust, or because of other valid reasons. If said Actuary concludes that the Fund contains an amount in excess of appropriate reserves, then said excess shall be payable in its entirety to FGH, which shall thereafter remit to third party payers or intermediaries in any manner permitted by applicable regulations then in effect that portion of such rebate required to be returned to such payers or intermediaries in accordance with applicable regulations then in effect.

10.4 In the event of termination of FGH's participation in the Medicare program, an independent Actuary shall be commissioned by FGH to analyze the balance in the Fund and to determine the adequacy of the Fund as of the date of said termination. If said Actuary concludes that the Fund contains an amount in excess of reserves necessary to satisfy the anticipated disbursements authorized to be made hereunder in connection with incidents occurring while contributions into the Fund were allowable costs, then the entire amount of said excess shall be paid to FGH, which shall thereafter remit to third party payers or intermediaries in any manner permitted by applicable regulations then in effect that portion of such rebate required to be returned to such payers or intermediaries in accordance with applicable regulations then in effect.

## ARTICLE XI

### Amendments

11.1 It is the intent of FGH and the Trustee that this Trust Agreement conform to the provisions of the Medicare Act, as amended from time to time, and the parties hereto agree that FGH shall have the right to amend said Agreement in any way that conforms to the then current Regulations covering the reimbursement of contributions contemplated by this Trust Agreement, whether Federal or State. Such amendments may be made of retroactive or prospective application, in order to comply in full with such Regulations.

11.2 Each amendment of this Trust Agreement shall become effective on the date specified in the resolution of FGH's governing board setting forth such amendment, a certified copy of which shall be delivered to the Trustee. The certified copy of the resolution shall constitute the instrument of amendment.

11.3 No amendment shall be made to this Trust Agreement pursuant to the foregoing provisions which shall increase the duties or liabilities of the Trustee without its written consent.

## **ARTICLE XII**

### **CONTROLLING LAW AND LEGAL ACTIONS**

12.1 The Trust created hereunder has been established in the State of West Virginia and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of that State, and the Trustee is authorized and empowered to invoke the jurisdiction of the Circuit Court of Marion County, State of West Virginia, whenever the Trustee deems such action necessary in connection with the interpretation of the Trust Agreement or for instructions, or with relation to any matters arising out of the administration of this Trust.

12.2 In case any provisions of this Trust Agreement shall be held illegal or invalid for any reason, or the Trustee is advised in writing by FGH, or independent counsel for FGH, that any provision is or may be held to violate current or proposed Medicare Regulations covering the reimbursement of contributions anticipated to be made hereunder, that illegality or invalidity shall not affect the remaining portions of this Trust Agreement but shall be fully severable, and the Trust Agreement shall be construed and enforced as if said illegal or invalid provisions had never been inserted herein.

12.3 FGH shall have the authority to enforce this Trust Agreement on behalf of any and all persons having or claiming any interest in the Fund.

## **ARTICLE XIII**

### **MISCELLANEOUS**

13.1 No person or entity other than FGH dealing with the Trustee shall be required or entitled to see to the application of any money paid or property delivered to the Trustee, or to determine whether or not the Trustee is acting pursuant to authorities granted to it hereunder or to authorizations or directions herein required. The certificate of the Trustee that it is acting in accordance with this Agreement shall protect any person relying thereon.

13.2 Neither the creation of this Trust nor anything contained in this Trust Agreement shall be construed as giving any person entitled to benefit hereunder an equity or other interest in the assets, business or affairs of FGH.

13.3 FGH intends that the Trust herein created shall qualify as a tax-exempt organization and until advised to the contrary, the Trustee may assume that the Trust is so qualified and is entitled to tax exemption.

13.4 This Agreement shall inure to and be binding upon any successor assign, heir, devisee, or any successor or resulting corporation in the event of a merger or consolidation to the same extent to which FGH is obligated or benefited hereunder.

13.5 This restated Trust Agreement shall have retroactive effect. As respects Covered Losses because of Malpractice Injury, this Agreement shall have application and effect as of July 15, 1986. As respects Covered Losses because of Bodily Injury, Property Damage or Personal Injury this Agreement shall have application and effect as of July 15, 1986.

IN WITNESS WHEREOF, FGH, to evidence the establishment of the Trust, and the Trustee, to evidence its acceptance of the Trust, have caused this Trust Agreement to be signed and their seals hereto affixed, by their duly authorized officers, as of the \_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, West Virginia.

\_\_\_\_\_  
**FAIRMONT GENERAL HOSPITAL**

\_\_\_\_\_  
**Chief Financial Officer**

**Trustee**

By \_\_\_\_\_  
Its \_\_\_\_\_