

**Senator J. Stuart Adams** proposes the following substitute bill:

**MEDICAL MALPRACTICE AMENDMENTS**

2010 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: J. Stuart Adams**

House Sponsor: Bradley G. Last

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**LONG TITLE**

**General Description:**

This bill amends the Utah Health Care Malpractice Act.

**Highlighted Provisions:**

This bill:

- ▶ amends the cap on non-economic damages that may be awarded in a malpractice action;
- ▶ requires an affidavit of merit from a health care professional to proceed with an action if the pre-litigation panel makes a finding of non-meritorious; and
- ▶ limits the liability of a health care provider, in certain circumstances, for the acts or omissions of an ostensible agent.

**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**78B-3-410**, as renumbered and amended by Laws of Utah 2008, Chapter 3

**78B-3-412**, as renumbered and amended by Laws of Utah 2008, Chapter 3



26 78B-3-416, as renumbered and amended by Laws of Utah 2008, Chapter 3

27 78B-3-418, as renumbered and amended by Laws of Utah 2008, Chapter 3

28 ENACTS:

29 78B-3-423, Utah Code Annotated 1953

30 78B-3-424, Utah Code Annotated 1953



31 *Be it enacted by the Legislature of the state of Utah:*

32 Section 1. Section 78B-3-410 is amended to read:

33 **78B-3-410. Limitation of award of noneconomic damages in malpractice actions.**

34 (1) In a malpractice action against a health care provider, an injured plaintiff may  
35 recover noneconomic losses to compensate for pain, suffering, and inconvenience. The amount  
36 of damages awarded for noneconomic loss may not exceed:

37 (a) for a cause of action arising before July 1, 2001, \$250,000;

38 (b) for a cause of action arising on or after July 1, 2001 and before July 1, 2002, the  
39 limitation is adjusted for inflation to \$400,000; ~~and~~

40 (c) for a cause of action arising on or after July 1, 2002, and before May 15, 2010 the  
41 \$400,000 limitation described in Subsection (1)(b) shall be adjusted for inflation as provided in  
42 Subsection (2)~~[-]; and~~

43 (d) for a cause of action arising on or after May 15, 2010, \$450,000.

44 (2) (a) Beginning July 1, 2002 and each July 1 thereafter until July 1, 2009, the limit  
45 for damages under Subsection (1)(c) shall be adjusted for inflation by the state treasurer.

46 (b) By July 15 of each year until July 1, 2009, the state treasurer shall:

47 (i) certify the inflation-adjusted limit calculated under this Subsection (2); and

48 (ii) inform the Administrative Office of the Courts of the certified limit.

49 (c) The amount resulting from Subsection (2)(a) shall:

50 (i) be rounded to the nearest \$10,000; and

51 (ii) apply to a cause of action arising on or after the date the annual adjustment is made.

52 (3) As used in this section, "inflation" means the seasonally adjusted consumer price  
53 index for all urban consumers as published by the Bureau of Labor Statistics of the United  
54 States Department of Labor.

55 (4) The limit under Subsection (1) does not apply to awards of punitive damages.

57 Section 2. Section **78B-3-412** is amended to read:

58 **78B-3-412. Notice of intent to commence action.**

59 (1) A malpractice action against a health care provider may not be initiated unless and  
60 until the plaintiff:

61 (a) gives the prospective defendant or his executor or successor, at least 90 days' prior  
62 notice of intent to commence an action; and

63 (b) except for an action against a dentist, the plaintiff receives a certificate of  
64 compliance from the division in accordance with Section 78B-3-418.

65 (2) The notice shall include:

66 (a) a general statement of the nature of the claim;

67 (b) the persons involved;

68 (c) the date, time, and place of the occurrence;

69 (d) the circumstances surrounding the claim;

70 (e) specific allegations of misconduct on the part of the prospective defendant; and

71 (f) the nature of the alleged injuries and other damages sustained.

72 (3) Notice may be in letter or affidavit form executed by the plaintiff or his attorney.

73 Service shall be accomplished by persons authorized and in the manner prescribed by the Utah  
74 Rules of Civil Procedure for the service of the summons and complaint in a civil action or by  
75 certified mail, return receipt requested, in which case notice shall be considered served on the  
76 date of mailing.

77 (4) Notice shall be served within the time allowed for commencing a malpractice  
78 action against a health care provider. If the notice is served less than 90 days prior to the  
79 expiration of the applicable time period, the time for commencing the malpractice action  
80 against the health care provider shall be extended to 120 days from the date of service of  
81 notice.

82 (5) This section shall, for purposes of determining its retroactivity, not be construed as  
83 relating to the limitation on the time for commencing any action, and shall apply only to causes  
84 of action arising on or after April 1, 1976. This section shall not apply to third party actions,  
85 counterclaims or crossclaims against a health care provider.

86 Section 3. Section **78B-3-416** is amended to read:

87 **78B-3-416. Division to provide panel -- Exemption -- Procedures -- Statute of**

88 **limitations tolled -- Composition of panel -- Expenses -- Division authorized to set license**  
89 **fees.**

90 (1) (a) The division shall provide a hearing panel in alleged medical liability cases  
91 against health care providers as defined in Section 78B-3-403, except dentists.

92 (b) (i) The division shall establish procedures for prelitigation consideration of medical  
93 liability claims for damages arising out of the provision of or alleged failure to provide health  
94 care.

95 (ii) The division may establish rules necessary to administer the process and  
96 procedures related to prelitigation hearings and the conduct of prelitigation hearings in  
97 accordance with Sections 78B-3-416 through 78B-3-420.

98 (c) The proceedings are informal, nonbinding, and are not subject to Title 63G, Chapter  
99 4, Administrative Procedures Act, but are compulsory as a condition precedent to commencing  
100 litigation.

101 (d) Proceedings conducted under authority of this section are confidential, privileged,  
102 and immune from civil process.

103 (2) (a) The party initiating a medical liability action shall file a request for prelitigation  
104 panel review with the division within 60 days after the service of a statutory notice of intent to  
105 commence action under Section 78B-3-412.

106 (b) The request shall include a copy of the notice of intent to commence action. The  
107 request shall be mailed to all health care providers named in the notice and request.

108 (3) (a) The filing of a request for prelitigation panel review under this section tolls the  
109 applicable statute of limitations until the ~~[earlier]~~ later of:

110 (i) 60 days following the division's issuance of:

111 (A) an opinion by the prelitigation panel[-]; or [60 days following the termination of  
112 jurisdiction by the division as provided in this subsection.]

113 (B) a certificate of compliance under Section 78B-3-418; or

114 (ii) the expiration of the time for holding a hearing under Subsection (3)(b)(ii).

115 (b) The division shall:

116 (i) send any opinion issued by the panel to all parties by regular mail[-]; and

117 [(b) (i)] (ii) [The division shall] complete a prelitigation hearing under this section

118 within:

119           (A) 180 days after the filing of the request for prelitigation panel review[;]; or  
120           (B) within any longer period as agreed upon in writing by all parties to the review.  
121           ~~[(i)]~~ (iii) If the prelitigation hearing has not been completed within the time limits  
122 established in Subsection (3)(b)~~[(i)]~~(ii), the ~~[division has no further jurisdiction over the matter~~  
123 ~~subject to review and the claimant is considered to have complied with all conditions precedent~~  
124 ~~required under this section prior to the commencement of litigation.]~~ claimant shall:  
125           (A) file an affidavit of merit under the provisions of Section 78B-3-423; or  
126           (B) file an affidavit with the division within 180 days of the request for prelitigation  
127 review, in accordance with Subsection (3)(c), alleging that the respondent has failed to  
128 reasonably cooperate in scheduling the hearing.  
129           (c) If the claimant files an affidavit under Subsection (3)(b)(iii)(B):  
130           (i) within 15 days of the filing of the affidavit under Subsection (3)(b)(iii)(B), the  
131 division shall determine whether either the respondent or the claimant failed to reasonably  
132 cooperate in the scheduling of a prelitigation hearing; and  
133           (ii) (A) if the determination is that the respondent failed to reasonably cooperate in the  
134 scheduling of a hearing, and the claimant did not fail to reasonably cooperate, the division  
135 shall, issue a certificate of compliance for the claimant in accordance with Section 78B-3-418;  
136 or  
137           (B) if the division makes a determination other than the determination in Subsection  
138 (3)(c)(ii)(A), the claimant shall file an affidavit of merit in accordance with Section 78B-3-423,  
139 within 30 days of the determination of the division under this Subsection (3).  
140           ~~[(e)]~~ (d) (i) The claimant and any respondent may agree by written stipulation that no  
141 useful purpose would be served by convening a prelitigation panel under this section.  
142           (ii) When the stipulation is filed with the division, the division shall within 10 days  
143 after receipt ~~[enter an order divesting itself of jurisdiction over the claim]~~ issue a certificate of  
144 compliance under Section 78B-3-418, as it concerns the stipulating respondent, and stating that  
145 the claimant has complied with all conditions precedent to the commencement of litigation  
146 regarding the claim.  
147           (4) The division shall provide for and appoint an appropriate panel or panels to hear  
148 complaints of medical liability and damages, made by or on behalf of any patient who is an  
149 alleged victim of medical liability. The panels are composed of:

150 (a) one member who is a resident lawyer currently licensed and in good standing to  
151 practice law in this state and who shall serve as chairman of the panel, who is appointed by the  
152 division from among qualified individuals who have registered with the division indicating a  
153 willingness to serve as panel members, and a willingness to comply with the rules of  
154 professional conduct governing lawyers in the state of Utah, and who has completed division  
155 training regarding conduct of panel hearings;

156 (b) (i) one member who is a licensed health care provider listed under Section  
157 78B-3-403, who is practicing and knowledgeable in the same specialty as the proposed  
158 defendant, and who is appointed by the division in accordance with Subsection (5); or

159 (ii) in claims against only hospitals or their employees, one member who is an  
160 individual currently serving in a hospital administration position directly related to hospital  
161 operations or conduct that includes responsibility for the area of practice that is the subject of  
162 the liability claim, and who is appointed by the division; and

163 (c) a lay panelist who is not a lawyer, doctor, hospital employee, or other health care  
164 provider, and who is a responsible citizen of the state, selected and appointed by the division  
165 from among individuals who have completed division training with respect to panel hearings.

166 (5) (a) Each person listed as a health care provider in Section 78B-3-403 and practicing  
167 under a license issued by the state, is obligated as a condition of holding that license to  
168 participate as a member of a medical liability prelitigation panel at reasonable times, places,  
169 and intervals, upon issuance, with advance notice given in a reasonable time frame, by the  
170 division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

171 (b) A licensee may be excused from appearance and participation as a panel member  
172 upon the division finding participation by the licensee will create an unreasonable burden or  
173 hardship upon the licensee.

174 (c) A licensee whom the division finds failed to appear and participate as a panel  
175 member when so ordered, without adequate explanation or justification and without being  
176 excused for cause by the division, may be assessed an administrative fine not to exceed \$5,000.

177 (d) A licensee whom the division finds intentionally or repeatedly failed to appear and  
178 participate as a panel member when so ordered, without adequate explanation or justification  
179 and without being excused for cause by the division, may be assessed an administrative fine not  
180 to exceed \$5,000, and is guilty of unprofessional conduct.

181 (e) All fines collected under Subsections (5)(c) and (d) shall be deposited in the  
182 Physicians Education Fund created in Section 58-67a-1.

183 (6) Each person selected as a panel member shall certify, under oath, that he has no  
184 bias or conflict of interest with respect to any matter under consideration.

185 (7) Members of the prelitigation hearing panels shall receive per diem compensation  
186 and travel expenses for attending panel hearings as established by rules of the division.

187 (8) (a) In addition to the actual cost of administering the licensure of health care  
188 providers, the division may set license fees of health care providers within the limits  
189 established by law equal to their proportionate costs of administering prelitigation panels.

190 (b) The claimant bears none of the costs of administering the prelitigation panel except  
191 under Section 78B-3-420.

192 Section 4. Section **78B-3-418** is amended to read:

193 **78B-3-418. Decision and recommendations of panel -- No judicial or other review.**

194 (1) (a) The [panel] division shall issue an opinion and issue a certificate of compliance  
195 with the pre-litigation hearing requirements of this part in accordance with this section.

196 (b) A certificate of compliance issued in accordance with this section is proof that the  
197 claimant has complied with all conditions precedent under this part prior to the commencement  
198 of litigation as required in Subsection 78B-3-412(1).

199 (2) (a) The panel shall render its opinion in writing not later than 30 days after the end  
200 of the proceedings[~~-. The panel shall~~]; and

201 (i) determine on the basis of the evidence whether:

202 (A) each claim against each health care provider has merit or has no merit; and[;]

203 (B) if a claim is meritorious, whether the conduct complained of resulted in harm to the  
204 claimant.

205 (b) There is no judicial or other review or appeal of the panel's decision or  
206 recommendations.

207 (3) The division shall issue a certificate of compliance to the claimant, for each  
208 respondent named in the intent to file a claim under this part, if:

209 (a) for a named respondent, the panel issues an opinion of merit under Subsections

210 (2)(a)(i)(A) and (B);

211 (b) for a named respondent, the claimant files an affidavit of merit in accordance with

212 Section 78B-3-423 if the opinion under Subsection (1)(a) is non-meritorious under either  
213 Subsection (2)(a)(i)(A) or (B);

214 (c) the claimant has complied with the provisions of Subsections 78B-3-416(3)(b)(iii)  
215 and (c); or

216 (d) the parties submitted a stipulation under Subsection 78B-3-416(3)(d).

217 Section 5. Section **78B-3-423** is enacted to read:

218 **78B-3-423. Affidavit of merit.**

219 (1) (a) Before a claimant may receive a certificate of compliance under Sections  
220 78B-3-416 and 78B-3-418, a claimant shall file an affidavit of merit under this section if:

221 (i) the claimant receives a finding from the pre-litigation panel in accordance with  
222 Section 78B-3-418 of non-meritorious for either:

223 (A) the claim of breach of applicable standard of care; or

224 (B) that the breach of care was the proximate cause of injury;

225 (ii) a pre-litigation hearing is not held within the time limits under Section  
226 78B-3-416(3)(b)(ii); or

227 (iii) the division makes a determination under Section 78B-3-416(3)(c)(ii)(B)

228 (b) A claimant who is required to file an affidavit of merit under Subsection (1)(a)  
229 shall:

230 (i) file the affidavit of merit with the division within:

231 (A) 60 days of:

232 (I) the expiration of the time limit in Section 78B-3-416(3)(b)(i);

233 (II) the date of the panel's opinion under Subsection 78B-3-418(2)(b); or

234 (B) within 30 days of the division's determination under Subsection 78B-3-416(3)(c);

235 and

236 (ii) serve each defendant with the affidavit of merit in accordance with Subsection  
237 78B-3-412(3).

238 (2) The affidavit of merit shall:

239 (a) be executed by the claimant's attorney or the claimant if the claimant is proceeding

240 pro se, stating that the affiant has consulted with and reviewed the facts of the case with a

241 health care provider who has determined after a review of the medical record and other relevant

242 material involved in the particular action that there is a reasonable and meritorious cause for



243 the filing of a medical liability action; and

244 (b) include an affidavit signed by a health care provider who meets the requirements of  
245 Subsection (3), which states that in the health care provider's opinion:

246 (i) if the claimant received a finding that there was no breach of the applicable standard  
247 of care, that there are reasonable grounds to believe that the applicable standard of care was  
248 breached;

249 (ii) the breach was a proximate cause of the injury claimed in the notice of intent to  
250 commence action; and

251 (iii) the reasons for the health care provider's opinion.

252 (c) The statement required in Subsection (2)(b)(i) shall be waived if the claimant  
253 received an opinion that there was a breach of the applicable standard of care under Subsection  
254 78B-3-418(2)(a)(i)(A).

255 (3) A health care provider who signs the affidavit of merit under Subsection (2) shall:

256 (a) if none of the respondents is a physician licensed under Title 58, Chapter 67, Utah  
257 Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68, Utah  
258 Osteopathic Medical Practice Act, hold a current unrestricted license issued by the appropriate  
259 licensing authority of Utah or another state in the same specialty or of the same class of license  
260 as the respondents; or

261 (b) if at least one of the respondents is a physician licensed under Title 58, Chapter 67,  
262 Utah Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68,  
263 Utah Osteopathic Medical Practice Act, hold a current unrestricted license issued by the  
264 appropriate licensing authority of Utah or another state to practice medicine in all its branches.

265 (4) A claimant's attorney or claimant may obtain up to a 60-day extension to file the  
266 affidavit of merit if:

267 (a) the claimant or the claimant's attorney submits a signed affidavit for extension with  
268 notice to the division attesting to the fact that the claimant is unable to submit an affidavit of  
269 merit as required by this section because:

270 (i) a statute of limitations would impair the action; and

271 (ii) the affidavit of merit could not be obtained before the expiration of the statute of  
272 limitations; and

273 (b) the claimant or claimant's attorney submits the affidavit for extension to each

274 named respondent in accordance with Subsection 78B-3-412(3) no later than 60 days after the  
275 date specified in Subsection (1)(b)(i).

276 (5) (a) A claimant or claimant's attorney who submits allegations in an affidavit of  
277 merit that are found to be without reasonable cause and untrue, based on information available  
278 to the plaintiff at the time the affidavit was submitted to the division, is liable to the defendant  
279 for the payment of reasonable expenses and reasonable attorney fees actually incurred by the  
280 defendant or the defendant's insurer.

281 (b) An affidavit of merit is not admissible, and cannot be used for any purpose, in a  
282 subsequent lawsuit based on the claim that is the subject of the affidavit, except for the purpose  
283 of establishing the right to recovery under Subsection (5)(c).

284 (c) A court, or arbitrator under Section 78B-3-421, may award costs and attorney fees  
285 under Subsection (5)(a) if the defendant files a motion for costs and attorney fees within 60  
286 days of the judgment or dismissal of the action in favor of the defendant. The person making a  
287 motion for attorney fees and costs may depose and examine the health care provider who  
288 prepared the affidavit of merit.

289 (6) If a claimant or the claimant's attorney does not file an affidavit of merit as required  
290 by this section, the division may not issue a certificate of compliance for the claimant and the  
291 malpractice action shall be dismissed by the court.

292 (7) This section applies to a cause of action that arises on or after July 1, 2010.

293 Section 6. Section **78B-3-424** is enacted to read:

294 **78B-3-424. Limitation of liability for ostensible agent.**

295 (1) For purposes of this section:

296 (a) "Agent" means a person who is an "employee," "worker," or "operative," as defined  
297 in Section 34A-2-104, of a health care provider.

298 (b) "Ostensible agent" means a person:

299 (i) who is not an agent of the health care provider; and

300 (ii) who the plaintiff reasonably believes is an agent of the health care provider because  
301 the health care provider intentionally, or as a result of a lack of ordinary care, caused the  
302 plaintiff to believe that the person was an agent of the health care provider.

303 (2) A health care provider named as a defendant in a medical malpractice action is not  
304 liable for the acts or omissions of an ostensible agent if:

305           (a) the ostensible agent has privileges with the health care provider, but is not an agent  
306 of the healthcare provider;

307           (b) the health care provider has by policy or practice, ensured that a person providing  
308 professional services has insurance of a type and amount required, if any is required, by the  
309 rules or regulations as established in:

310           (i) medical staff by-laws for a health care facility; or

311           (ii) other health care facility contracts, indemnification agreements, rules or  
312 regulations;

313           (c) the insurance required in Subsection (2)(a) is in effect at the time of the alleged act  
314 or omission of the ostensible agent; and

315           (d) there is a claim of agency or ostensible agency in a plaintiff's notice of intent to  
316 commence an action, the healthcare provider, within 60 days of the service of the notice of  
317 intent to commence an action, lists each person identified by the plaintiff who the provider  
318 claims is not an agent or ostensible agent of the provider.

319           (3) This section applies to a cause of action that arises on or after July 1, 2010.

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**S.B. 145 3rd Sub. (Ivory) - Medical Malpractice Amendments**

**Fiscal Note**

2010 General Session  
State of Utah

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**State Impact**

Enactment of this bill will require an ongoing appropriation of \$8,500 from the Commerce Service Fund to the Department of Commerce. Commerce Service Fund spending affects the annual transfer to the General Fund.

|                       | <u>FY 2010</u><br><u>Approp.</u> | <u>FY 2011</u><br><u>Approp.</u> | <u>FY 2012</u><br><u>Approp.</u> | <u>FY 2010</u><br><u>Revenue</u> | <u>FY 2011</u><br><u>Revenue</u> | <u>FY 2012</u><br><u>Revenue</u> |
|-----------------------|----------------------------------|----------------------------------|----------------------------------|----------------------------------|----------------------------------|----------------------------------|
| General Fund          | \$0                              | \$0                              | \$0                              | \$0                              | (\$8,500)                        | (\$8,500)                        |
| Commerce Service Fund | \$0                              | \$8,500                          | \$8,500                          | \$0                              | \$0                              | \$0                              |
| <b>Total</b>          | <b>\$0</b>                       | <b>\$8,500</b>                   | <b>\$8,500</b>                   | <b>\$0</b>                       | <b>(\$8,500)</b>                 | <b>(\$8,500)</b>                 |

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**Individual, Business and/or Local Impact**

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.

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