

MEDICAL MALPRACTICE AMENDMENTS

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: J. Stuart Adams

House Sponsor: Bradley G. Last

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

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

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

ENACTS:

78B-3-423, Utah Code Annotated 1953

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

31

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

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

34 **78B-3-410. Limitation of award of noneconomic damages in malpractice actions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59 **78B-3-412. Notice of intent to commence action.**

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

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

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

66 (2) The notice shall include:

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

68 (b) the persons involved;

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

70 (d) the circumstances surrounding the claim;

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

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

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

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

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

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

86 actions, counterclaims or crossclaims against a health care provider.

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

88 **78B-3-416. Division to provide panel -- Exemption -- Procedures -- Statute of**
89 **limitations tolled -- Composition of panel -- Expenses -- Division authorized to set license**
90 **fees.**

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

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

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

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

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

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

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

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

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

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

114 (B) a certificate of compliance under Section 78B-3-418; or
115 (ii) the expiration of the time for holding a hearing under Subsection (3)(b)(ii).
116 (b) The division shall:
117 (i) send any opinion issued by the panel to all parties by regular mail[-]; and
118 ~~[(b)-(i)]~~ (ii) [The division shall] complete a prelitigation hearing under this section
119 within:
120 (A) 180 days after the filing of the request for prelitigation panel review[-]; or [within]
121 (B) any longer period as agreed upon in writing by all parties to the review.
122 ~~[(ii)]~~ (c) If the prelitigation hearing has not been completed within the time limits
123 established in Subsection (3)(b)[(i)](ii), the [division has no further jurisdiction over the
124 matter subject to review and the claimant is considered to have complied with all conditions
125 precedent required under this section prior to the commencement of litigation-] claimant shall:
126 (i) file an affidavit of merit under the provisions of Section 78B-3-423; or
127 (ii) file an affidavit with the division within 180 days of the request for pre-litigation
128 review, in accordance with Subsection (3)(d), alleging that the respondent has failed to
129 reasonably cooperate in scheduling the hearing.
130 (d) If the claimant files an affidavit under Subsection (3)(c)(ii):
131 (i) within 15 days of the filing of the affidavit under Subsection (3)(c)(ii), the division
132 shall determine whether either the respondent or the claimant failed to reasonably cooperate in
133 the scheduling of a pre-litigation hearing; and
134 (ii) (A) if the determination is that the respondent failed to reasonably cooperate in the
135 scheduling of a hearing, and the claimant did not fail to reasonably cooperate, the division
136 shall, issue a certificate of compliance for the claimant in accordance with Section 78B-3-418;
137 or
138 (B) if the division makes a determination other than the determination in Subsection
139 (3)(d)(ii)(A), the claimant shall file an affidavit of merit in accordance with Section
140 78B-3-423, within 30 days of the determination of the division under this Subsection (3).
141 ~~[(c)]~~ (e) (i) The claimant and any respondent may agree by written stipulation that no

142 useful purpose would be served by convening a prelitigation panel under this section.

143 (ii) When the stipulation is filed with the division, the division shall within 10 days
144 after receipt [~~enter an order divesting itself of jurisdiction over the claim~~] issue a certificate of
145 compliance under Section 78B-3-418, as it concerns the stipulating respondent, and stating
146 that the claimant has complied with all conditions precedent to the commencement of
147 litigation regarding the claim.

148 (4) The division shall provide for and appoint an appropriate panel or panels to hear
149 complaints of medical liability and damages, made by or on behalf of any patient who is an
150 alleged victim of medical liability. The panels are composed of:

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

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

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

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

167 (5) (a) Each person listed as a health care provider in Section 78B-3-403 and
168 practicing under a license issued by the state, is obligated as a condition of holding that license
169 to participate as a member of a medical liability prelitigation panel at reasonable times, places,

170 and intervals, upon issuance, with advance notice given in a reasonable time frame, by the
171 division of an Order to Participate as a Medical Liability Prelitigation Panel Member.

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

175 (c) A licensee whom the division finds failed to appear and participate as a panel
176 member when so ordered, without adequate explanation or justification and without being
177 excused for cause by the division, may be assessed an administrative fine not to exceed
178 \$5,000.

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

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

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

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

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

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

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

195 **78B-3-418. Decision and recommendations of panel -- No judicial or other**
196 **review.**

197 (1) (a) The panel shall issue an opinion and the division shall issue a certificate of

198 compliance with the pre-litigation hearing requirements of this part in accordance with this
199 section.

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

203 (2) (a) The panel shall render its opinion in writing not later than 30 days after the end
204 of the proceedings[~~. The panel shall~~], and determine on the basis of the evidence whether:

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

206 (ii) if a claim is meritorious, whether the conduct complained of resulted in harm to
207 the claimant.

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

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

212 (a) for a named respondent, the panel issues an opinion of merit under Subsections
213 (2)(a)(i) and (ii);

214 (b) for a named respondent, the claimant files an affidavit of merit in accordance with
215 Section 78B-3-423 if the opinion under Subsection (1)(a) is non-meritorious under either
216 Subsection (2)(a)(i) or (ii);

217 (c) the claimant has complied with the provisions of Subsections 78B-3-416(3)(c) and
218 (d); or

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

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

221 **78B-3-423. Affidavit of merit.**

222 (1) (a) Before a claimant may receive a certificate of compliance under Sections
223 78B-3-416 and 78B-3-418, a claimant shall file an affidavit of merit under this section:

224 (i) within 60 days of the date of the panel's opinion, if the claimant receives a finding
225 from the pre-litigation panel in accordance with Section 78B-3-418 of non-meritorious for

226 either:
227 (A) the claim of breach of applicable standard of care; or
228 (B) that the breach of care was the proximate cause of injury;
229 (ii) within 60 days of the expiration of the time limit in Subsection
230 78B-3-416(3)(b)(ii), if a pre-litigation hearing is not held within the time limits under Section
231 78B-3-416(3)(b)(ii); or
232 (iii) within 30 days of the division's determination under Subsection
233 78B-3-416(3)(d)(ii)(B), if the division makes a determination under Section
234 78B-3-416(3)(d)(ii)(B).
235 (b) A claimant who is required to file an affidavit of merit under Subsection (1)(a)
236 shall:
237 (i) file the affidavit of merit with the division; and
238 (ii) serve each defendant with the affidavit of merit in accordance with Subsection
239 78B-3-412(3).
240 (2) The affidavit of merit shall:
241 (a) be executed by the claimant's attorney or the claimant if the claimant is proceeding
242 pro se, stating that the affiant has consulted with and reviewed the facts of the case with a
243 health care provider who has determined after a review of the medical record and other
244 relevant material involved in the particular action that there is a reasonable and meritorious
245 cause for the filing of a medical liability action; and
246 (b) include an affidavit signed by a health care provider who meets the requirements
247 of Subsection (3), which states that in the health care provider's opinion:
248 (i) there are reasonable grounds to believe that the applicable standard of care was
249 breached;
250 (ii) the breach was a proximate cause of the injury claimed in the notice of intent to
251 commence action; and
252 (iii) the reasons for the health care provider's opinion.
253 (c) The statement required in Subsection (2)(b)(i) shall be waived if the claimant

254 received an opinion that there was a breach of the applicable standard of care under
255 Subsection 78B-3-418(2)(a)(i).

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

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

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

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

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

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

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

274 (b) the claimant or claimant's attorney submits the affidavit for extension to each
275 named respondent in accordance with Subsection 78B-3-412(3) no later than 60 days after the
276 date specified in Subsection (1)(a)(i).

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

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

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

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

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

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

295 **78B-3-424. Limitation of liability for ostensible agent.**

296 (1) For purposes of this section:

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

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

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

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

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

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

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

310 rules or regulations as established in:

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

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

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

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

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