

**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: \_\_\_\_\_

---

**LONG TITLE**

**General Description:**

This bill amends the Utah Health Care Malpractice Act.

**Highlighted Provisions:**

This bill:

- ▶ creates a statute of repose so that all claims must be brought within 10 years or they are barred;
- ▶ 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:



26 **78B-3-404**, as renumbered and amended by Laws of Utah 2008, Chapter 3

27 **78B-3-410**, 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 

---

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

33 Section 1. Section **78B-3-404** is amended to read:

34 **78B-3-404. Statute of limitations -- Exceptions -- Application.**

35 (1) A malpractice action against a health care provider shall be commenced within two  
36 years after the plaintiff or patient discovers, or through the use of reasonable diligence should  
37 have discovered the injury, whichever first occurs, but not to exceed four years after the date of  
38 the alleged act, omission, neglect, or occurrence.

39 (2) Notwithstanding Subsection (1):

40 (a) in an action where the allegation against the health care provider is that a foreign  
41 object has been wrongfully left within a patient's body, the claim shall be barred unless  
42 commenced within one year after the plaintiff or patient discovers, or through the use of  
43 reasonable diligence should have discovered, the existence of the foreign object wrongfully left  
44 in the patient's body, whichever first occurs; or

45 (b) in an action where it is alleged that a patient has been prevented from discovering  
46 misconduct on the part of a health care provider because that health care provider has  
47 affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred  
48 unless commenced within one year after the plaintiff or patient discovers, or through the use of  
49 reasonable diligence, should have discovered the fraudulent concealment, whichever first  
50 occurs.

51 (3) The limitations in ~~[this section]~~ Subsections (1) and (2) shall apply to all persons,  
52 regardless of minority or other legal disability under Section 78B-2-108 or any other provision  
53 of the law.

54 (4) (a) A parent or guardian of a minor under the age of 10 years is obligated to file, on  
55 the minor's behalf, before the minor's 14th birthday, any malpractice claim the minor may have  
56 against a health care provider for a claim that occurred before the minor's 10th birthday, unless

57 the parent or guardian has a conflict of interest in filing the claim.

58 (b) Notwithstanding any other law, a minor, or anyone on behalf of a minor, may not  
 59 file a medical malpractice action after the minor's 14th birthday if the malpractice action is  
 60 based on an allegation of malpractice that occurred before the minor was 10 years of age.

61 (c) This Subsection (4) applies to all minors regardless of other legal disability under  
 62 Section 78B-2-108 or any other provision of the law. This Subsection (4) is intended as a  
 63 statute of repose to limit the potential long-term liability of health care providers to minors  
 64 under the age of 14 years.

65 Section 2. Section **78B-3-410** is amended to read:

66 **78B-3-410. Limitation of award of noneconomic damages in malpractice actions.**

67 (1) ~~(a)~~ In a malpractice action against ~~[a health care provider, an injured plaintiff may~~  
 68 ~~recover noneconomic losses]~~ one or more health care providers, all injured plaintiffs asserting a  
 69 claim in the action may recover noneconomic damages, in accordance with Subsection (1)(b),  
 70 to compensate for non-economic losses, such as pain, suffering, ~~[and]~~ inconvenience~~[- The]~~,  
 71 and loss of society and companionship.

72 (b) Regardless of the number of plaintiffs or defendants in a malpractice action, the  
 73 aggregate amount of damages awarded ~~[for]~~ against all defendants in the malpractice action,  
 74 for all types of noneconomic loss, may not exceed:

75 ~~[(a)]~~ (i) for a cause of action arising before July 1, 2001, \$250,000;

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

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

81 (iv) for a cause of action arising on or after May 15, 2010, \$350,000.

82 (2) (a) Beginning July 1, 2002 and each July 1 thereafter until July 1, 2009, the limit  
 83 for damages under Subsection (1)~~[(c)]~~(b) shall be adjusted for inflation by the state treasurer.

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

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

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

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

- 88 (i) be rounded to the nearest \$10,000; and
- 89 (ii) apply to a cause of action arising on or after the date the annual adjustment is made.
- 90 (3) As used in this section, "inflation" means the seasonally adjusted consumer price
- 91 index for all urban consumers as published by the Bureau of Labor Statistics of the United
- 92 States Department of Labor.
- 93 (4) The limit under Subsection (1) does not apply to awards of punitive damages.

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

95 **78B-3-423. Affidavit of merit.**

96 (1) Except as provided in Subsection (4), a party in a medical liability action who has  
97 received a non-meritorious finding from the pre-litigation panel, and who intends to proceed  
98 with the medical malpractice action, shall within 60 days of the non-meritorious finding of the  
99 pre-litigation panel:

100 (a) submit an affidavit of merit to the Division of Occupational and Professional  
101 Licensing in accordance with this section; and

102 (b) serve the defendants with the affidavit of merit in accordance with Subsection  
103 78B-3-412(3).

104 (2) The affidavit of merit shall:

105 (a) be executed by the plaintiff's attorney or the plaintiff if the plaintiff is proceeding  
106 pro se, stating that the affiant has consulted with and reviewed the facts of the case with a  
107 health care provider who has determined after a review of the medical record and other relevant  
108 material involved in the particular action that there is a reasonable and meritorious cause for  
109 the filing of a medical liability action; and

110 (b) include a statement signed by a health care provider who meets the requirements of  
111 Subsection (3), which states that in the health care provider's opinion:

112 (i) there are reasonable grounds to believe that the applicable standard of care was  
113 breached;

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

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

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

118 (a) if none of the defendants are a physician licensed under Title 58, Chapter 67, Utah

119 Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68, Utah  
120 Osteopathic Medical Practice Act, hold a current unrestricted license issued by the appropriate  
121 licensing authority of Utah or another state in the same specialty or of the same class of license  
122 as the defendants; or

123 (b) if one of the defendants is a physician licensed under Title 58, Chapter 67, Utah  
124 Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68, Utah  
125 Osteopathic Medical Practice Act, hold a current unrestricted license issued by the appropriate  
126 licensing authority of Utah or another state to practice medicine in all its branches.

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

129 (a) the plaintiff or the plaintiff's attorney submits a signed affidavit with notice to the  
130 Division of Occupational and Professional Licensing attesting to the fact that the plaintiff is  
131 unable to submit an affidavit of merit as required by this section because:

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

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

135 (b) the plaintiff or plaintiff's attorney submits the affidavit of merit to each named  
136 defendant in accordance with Subsection 78B-3-412(3) no later than 60 days after the  
137 prelitigation panel's non-meritorious finding.

138 (5) (a) A plaintiff or plaintiff's attorney who submits allegations in an affidavit of merit  
139 that are found to be without reasonable cause and untrue is liable to the named defendants for  
140 the payment of reasonable expenses and reasonable attorney fees actually incurred by the  
141 named defendants or the named defendants' insurer.

142 (b) An affidavit of merit is not admissible in a subsequent lawsuit, except for the  
143 purpose of establishing the right to recovery under this Subsection (5).

144 (c) A court, or arbitrator under Section 78B-3-421, may award costs and attorney fees  
145 under Subsection (5)(a) if the defendant files a motion for cost and attorney fees within 30 days  
146 of the judgment or dismissal of the action. The person making a motion for attorney fees and  
147 costs may depose and examine the health care provider who prepared the affidavit of merit.

148 (6) If a plaintiff or the plaintiff's attorney does not file an affidavit of merit as required  
149 by this section, the Division of Occupational and Professional Licensing shall not issue a

150 certificate of compliance for the plaintiff and the malpractice action shall be dismissed by the  
151 court.

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

153 Section 4. Section **78B-3-424** is enacted to read:

154 **78B-3-424. Limitation of liability for ostensible agent.**

155 (1) For purposes of this section:

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

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

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

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

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

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

167 (b) the health care provider has by policy or practice, ensured that a person providing  
168 independent professional services has insurance of a type and amount required by the rules or  
169 regulations for the medical staff as established in:

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

171 (ii) other similar health care facility rules or regulations;

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

174 (d) if there is a claim of ostensible agency in a plaintiff's notice of intent to commence  
175 an action, the healthcare provider, within 60 days of the notice of intent to commence an  
176 action, identifies each person involved in the alleged act or omission whom the provider claims  
177 is an ostensible agent.

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

---

---

**S.B. 145 1st Sub. (Green) - Medical Malpractice Amendments**

**Fiscal Note**

2010 General Session

State of Utah

---

---

**State Impact**

Enactment of this bill may slightly lower provider reimbursement rates and could potentially reduce costs to Medicaid and public employee health insurance; however, the exact impact cannot currently be calculated. Enactment of this bill may also reduce recovery of Medicaid claims by the Office of Recovery Services, which would in turn reduce Medicaid revenue; however, the frequency of claims that would be impacted and the exact dollar impact in each case cannot currently be predicted.

---

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

Enactment of this bill may benefit certain individuals and businesses and may reduce revenues of other individuals and businesses. Local governments may benefit from provisions of this bill.