



H.B. 476

125th General Assembly
(As Introduced)

Reps. Young, Aslanides, Fessler, Schaffer, Schmidt, Slaby, Wagner

BILL SUMMARY

- Establishes alternate dispute resolution mechanism for medical malpractice claims and amends procedures and awards for those claims taken to court.
- Requires physicians to maintain medical malpractice insurance.
- Imposes liability on plaintiff's attorneys when malpractice claims fail.
- Establishes a Disadvantaged Patients Fund in the state treasury.

CONTENT AND OPERATION

Alternative dispute resolution proceeding for medical malpractice claims

Choice to use review process; definitions

(secs. 2307.90, 2307.91, and 2307.93(A) through (C))

The bill permits a plaintiff with a medical malpractice claim to choose whether to have the claim proceed in civil court or to be reviewed pursuant to the process enacted by the bill [hereinafter, "review process"]. The bill provides that a plaintiff's request to use the review process does not extend the time within which motions must be made or answers filed and served pursuant to the Civil Rules.

As used in the malpractice sections enacted by the bill, a "claim" is a claim that is asserted in a civil action against a physician, a professional corporation or association of physicians, or an employee or agent of a physician or a professional corporation or association of physicians and that arises out of the medical diagnosis, care, or treatment of any person, resulting either from acts or omissions in providing the medical care or from the hiring, training, supervision, retention, or termination of caregivers providing the medical diagnosis, care, or treatment. The

bill defines a "physician" as a person licensed or otherwise authorized to practice medicine and surgery or osteopathic medicine and surgery in Ohio.

A plaintiff that elects to have a claim proceed under the bill's review process is required to include in the caption of the complaint, in conspicuous letters, a request that the claim be decided under the review process in substantially the following form:

"PROCEEDING UNDER R.C. 2307.93 REQUESTED."

The bill provides that if a complaint is filed by a plaintiff who is not represented by an attorney, which complaint requests the use of the review process, the complaint will not be dismissed for its failure to conform to the Civil Rules if the complaint identifies the defendants and the basis of the claim with reasonable certainty and includes an address for each named party.

If the defendant objects to having a claim decided under the bill's review process, the defendant is required to note the objection in the caption on the answer or on the first motion filed prior to the filing of the answer. The objection is required to be in conspicuous letters in substantially the following form:

"REQUEST FOR A PROCEEDING UNDER R.C. 2307.93 DENIED."

The action, as to that defendant, must then proceed as if no request had been made. If the plaintiff does not subsequently withdraw the request for the use of the review process, the review process will proceed for all of the defendants who have not denied the request. To withdraw the request for the use of the review process, the plaintiff is required both to serve written notice on each defendant that the request has been withdrawn and to file written notice of the withdrawal with the clerk of court. The service and filings must be made within ten days after being served with the defendant's objection.

If a defendant does not object to the use of the review process, and the plaintiff does not withdraw the request for the use of the review process subsequent to another defendant's objection, then, within ten days after the defendant's last day for objecting to the use of the review process or the plaintiff's last day for withdrawing the request following an objection from a defendant, the bill requires the judge assigned to the case to order medical records from the defendant related to the diagnosis, treatment, or care of the plaintiff that forms the basis of the claim. If appropriate, the judge also is required to subpoena medical records of this nature from other individuals and entities. A person receiving a request for medical records is required under the bill to provide the court with originals or certified copies of the records within 15 days after receiving the request unless granted an extension by the court for good cause shown.

Additionally, the bill requires the person providing records to provide a typed or printed copy of each handwritten record and an attestation to the accuracy of the typed or printed copy of the record.

Expert report; review and appeals

(sec. 2307.93(C) through (E) and (H))

Under the bill, when all records subpoenaed by the judge under the review process have been received by the court, the court is required to make copies, editing the copies to remove or obscure names, social security numbers, and all other information by which the parties may be identified. The edited copies next are submitted by the court to a medical expert qualified to give an opinion on whether a defendant committed medical malpractice, and, if so, whether the malpractice resulted in damage to the plaintiff. The medical expert is required by the bill to specialize in the same branch of medicine as the defendants. If more than one branch of medicine is involved in the claim, copies of the records received by the court must be submitted to one expert in each branch of medicine involved.

Under the bill, medical experts are given 30 days from receiving the records to review the records and return the records to the court with a written report expressing the expert's opinion and reasons therefore. The bill provides that the report must state whether the defendant did or did not commit malpractice, or state that the expert is unable to give a firm opinion and recommends a review by reviewing physicians as provided for later in the review process.

The bill requires the court to provide copies of the expert's report to all parties upon receiving the report. The parties may accept the report's opinion, request a review, or, in the case of the plaintiff, proceed to prosecute a civil action. If the plaintiff and one or more of the defendants accept the report, the court must render a judgment in favor of the defendants if the report found no liability on the part of any defendant, or alternately, award damages in accordance with the schedule of compensation established by the Superintendent of Insurance against any defendant that is found liable but who accepts the report. The bill provides that the court is to apply the criteria applicable in medical malpractice civil actions in making the award of punitive damages.

However, if any party requests a review of the medical expert's report, the court is required pursuant to the bill to send copies of the medical records to three reviewing physicians on a list that has been established elsewhere under the bill. The reviewing physicians must be selected at random from among those on the list who specialize in the same branch of medicine as the defendant whose liability is being reviewed. The name of each reviewing physician chosen is confidential and

may not be released even to the other reviewing physicians chosen. The bill requires each reviewing physician to return the records within 30 days after receiving the records from the court, together with a written report stating an opinion as to whether the defendant committed malpractice, a detailed scientific basis for the opinion, and, if the reviewing physician believes the defendant committed malpractice, whether the malpractice resulted in damage to the plaintiff.

Upon receiving the reviewing physicians' reports, the court is required pursuant to the bill to set a hearing date and to notify all parties and reviewing physicians of the time and place of the hearing. At the hearing, which is regulated by the bill's provisions, each reviewing physician is required to restate the physician's previously given opinion, including its basis, and to discuss the plaintiff's case with the other reviewing physicians. The reviewing physicians are required to answer any questions asked by the court. Parties to the claim are then given an opportunity to comment on the evidence and argue the merits of the case. The plaintiff may retain a physician to attend the hearing, at the plaintiff's expense. The bill allows the plaintiff's physician to comment on the evidence and argue the merits of the plaintiff's case. Court rules of evidence are not applicable to the hearing. No party may be represented by an attorney or introduce new evidence at the hearing.

The bill requires the court to render a written decision and judgment setting forth each defendant's liability, if any, and the amount of any award, within ten days after the hearing. If the court finds more than one defendant liable, the court must apportion each defendant's liability for the amount of the award according to the defendant's fault. Each defendant is liable only for that portion of the award assigned to that defendant. The court's decision must include the court's reasons for the decision and judgment.

At the discretion of the court, the amount of an award to the plaintiff in excess of \$50,000 may be placed in an escrow account under the control of the court and paid periodically to the plaintiff. The bill requires that the interest on money kept in the account be credited to the Disadvantaged Patients Fund created by the bill.

Under the bill, a party is permitted to take an appeal from a decision, order, or judgment of a court under the review process only on the issue of liability. The party is required to take the appeal to the court of appeals of the district in which the plaintiff resides. The party is required by the bill to take the appeal in the same manner as an appeal taken in a civil action. No party is allowed to take an appeal from that part of the decision, order, or judgment that fixes the amount of an award.

Costs

(sec. 2307.93(F), (G), and (I))

If an expert report submitted to the court in the review process finds in favor of one or more defendants, and the plaintiff elects to have a review of the report conducted by reviewing physicians as provided for by the bill, the court is required to allocate the expenses incurred in the review process and hearing in the following manner:

(1) If the court later finds in favor of one or more defendants, the expenses are allocated among all parties.

(2) If the court finds that one or more defendants committed malpractice, regardless as to whether the court awards damages, the plaintiff is required to bear the lesser of 1/3 of the expenses of the review process or 1/3 of the expenses of the defendant who incurred the highest expenses in the review process, with the defendant bearing the remaining expenses for the review.

(3) If the expert report found in favor of the plaintiff and recommends review of the report by reviewing physicians, the plaintiff is required to bear 1/3 of the expenses of the review process, with the defendants bearing 2/3 of the expenses.

In the allocation of expenses, all plaintiffs are regarded as a single party.

The bill gives the court permission to use money from the Disadvantaged Patients Fund to pay all or any part of the costs incurred by the plaintiff, if the plaintiff's income is no greater than 300% of the current poverty line as defined by the United States Office of Management and Budget and revised pursuant to section 673(2) of the federal Omnibus Budget Reconciliation Act of 1981.

The bill sets compensation for medical experts at \$100 per hour, not exceeding \$1,000 in the aggregate for any one proceeding, for services rendered. A reviewing physician's compensation is increased to \$150 per hour, not exceeding \$1,000 in the aggregate, for services rendered at a review hearing.

All parties are required to share the expenses incurred in the examination of medical records under the review process. If the plaintiff retains a physician to assist at a review hearing, the bill prohibits the court from considering that expense in allocating expenses between the parties. The expense for that physician is the sole responsibility of the plaintiff.

Choosing to proceed with a medical claim in a civil action

(sec. 2307.92)

The bill allows a plaintiff to elect to have a medical claim decided in an action at law, without the use of the alternate review process. However, if the plaintiff chooses to proceed in a civil action, the plaintiff is required to send, prior to filing the complaint, a written request to the defendant and any other person involved in the diagnosis, treatment, or care of the plaintiff that forms the basis of the plaintiff's claim, for all medical records pertaining to that diagnosis, treatment, or care. Persons receiving the request are given 14 days from receipt to comply. The bill requires the plaintiff or the plaintiff's attorney to personally review the records received. The records may be reviewed with any potential expert witness that may be called to testify on the plaintiff's behalf.

If the plaintiff decides to proceed with an action, after reviewing the medical records obtained according to the bill, the plaintiff or the plaintiff's attorney is required to notify each defendant in writing of the plaintiff's decision, within statutory time limits. The notice given under the bill is required to specify separately the amount of economic, noneconomic, and punitive damages and other relief sought from each defendant. Until that notice is provided, a plaintiff's attorney, if any, is prohibited from making contact with the defendant or any other person involved in the relevant diagnosis, treatment, or care of the plaintiff.

The bill provides that if a court finds that a defendant notified of a plaintiff's intent to proceed against them in a civil action was not involved in the diagnosis, treatment, or care of the plaintiff that formed the basis of the plaintiff's claim, the plaintiff's attorney, if any, is personally liable for the total amount of damages alleged in the notice as due from that defendant. If a defendant notified by the plaintiff actually was involved in the plaintiff's diagnosis, treatment, or care, but is dismissed from the action without the mutual consent of the parties, the plaintiff's attorney, if any, is personally liable to the defendant under the bill for one half of the total amount of damages alleged in the notice as due from that defendant, plus 2% per month of the total amount of damages alleged in the notice as due from the defendant calculated from the date the defendant was notified by the plaintiff to the date the defendant is dismissed from the action. If the claim proceeds to trial before the trier of fact finds that the defendant did not commit malpractice, under the bill, the plaintiff's attorney, if any, is personally liable for the total amount of damages alleged in the notice as due from that defendant; however, there is no liability if the trier of fact finds that the defendant committed malpractice but did not cause damage to the plaintiff. Any money for which the plaintiff's attorney is liable pursuant to the bill must be paid by the attorney to the clerk of court. The clerk is required to pay that money in equal parts to the defendant and to the Disadvantaged Patients Fund.

The bill provides that a court may appoint a qualified attorney with significant experience in medical malpractice cases to represent a plaintiff, and may pay reasonable expenses in the prosecution of the action from the Disadvantaged Patients Fund, if the plaintiff elects to have a claim decided in a civil action, but does not demand a trial by jury, but the defendant demands a trial by jury and the plaintiff is unable to secure the services of a qualified attorney willing to work on a contingency fee basis. Also, an attorney may be appointed by the court and expenses paid if the plaintiff requests to have a claim decided in a proceeding under the alternate review process described above, but the defendant denies the request and the plaintiff is unable to secure the services of a qualified attorney willing to work on a contingency fee basis. Attorneys appointed by the court in these circumstances are not personally liable under the bill for amounts alleged by a plaintiff in a notice of intent to proceed with an action against a defendant.

If the plaintiff's expenses are paid in whole or part from the Disadvantaged Patients Fund and the trier of fact awards monetary damages to the plaintiff, an amount equal to one fourth of the amount of the award collected by the plaintiff, not to exceed the amount disbursed from the Fund, must be repaid to the Fund under the bill.

Disadvantaged Patients Fund

(sec. 2307.95; Section 6)

The bill creates the Disadvantaged Patients Fund in the state treasury, consisting of money received from plaintiffs' attorneys relating to failed actions at law, interest on awards placed in escrow accounts, proceeds from the sale of books compiled by the State Medical Board on medical malpractice cases, and all other money earned, appropriated or donated to the Fund. The bill requires, in uncodified law, for persons holding a certificate to practice medicine and surgery or osteopathic medicine and surgery on the effective date of the act, to pay an additional one-time-only fee of \$250 not more than 30 days after the person applies for a renewal of their certificate. All additional fees received from this one-time-only fee will be deposited into the state treasury to the credit of the Disadvantaged Patients Fund. The State Medical Board is required to notify all certificate holders of the additional fee within ten days after the effective date of the act. A physician's failure to pay the additional fee is reason for discipline by the State Medical Board under Chapter 4731. of the Revised Code.

Money in the Fund must be used solely for the legal costs of disadvantaged patients with claims in the alternate review process or in actions at law, according to the conditions provided for in the bill.

Award of damages to plaintiff

(secs. 2307.94 and 4731.37)

The bill assigns responsibility, both under the review process and in civil actions, to the trier of fact to determine the proportion of each defendant's liability for the plaintiff's harm caused by medical malpractice. Each defendant is liable only for the amount of damages allocated to that defendant. In determining the amount of damages, if any, suffered by the plaintiff, the trier of fact, if other than a jury, is required to award damages in accordance with the schedule of compensation established by the Superintendent of Insurance. The bill requires the Superintendent to develop a schedule of compensation for use in determining economic and noneconomic compensatory damages in proceedings under the bill's review process and in medical malpractice actions heard by a judge without a jury. The Superintendent is required to consult the guides to the evaluation of permanent impairment published by the American Medical Association in developing the schedule of compensation, the standards for compensation of workers in case of injury, disease, or death set forth in Workers' Compensation Law and rules adopted thereunder, and other professionally or legally established standards for the determination of awards in cases of personal injury, disease, or death.

Each party, attorney, insurance company, or other person responsible for damages, attorney fees, costs, expenses, or other items pursuant to a decision, order, or judgment of a court in a proceeding under the bill's review process or in a civil action based on a medical claim, is required to submit to the Superintendent an itemized statement of the amounts due and amounts paid. The Superintendent must use the statements to help assess and address problems related to the availability and cost of medical malpractice insurance.

The Superintendent is authorized to adopt rules as necessary for these provisions pursuant to the Administrative Procedure Act.

State Medical Board

(sec. 4731.05)

The bill requires that the State Medical Board create, maintain, and make available to judges, a list of medical specialists who are qualified and willing to serve as experts to review medical records, submit reports, and testify at hearings in proceedings under the bill's review process. The State Medical Board also, annually, must compile and make available for sale a book of selected medical malpractice cases for the continuing education of physicians in medical

malpractice law. The net proceeds from sales of the book must be deposited into the Disadvantaged Patients Fund created by this bill.

Mandatory medical malpractice insurance

(sec. 4731.143)

Current law requires persons authorized in Ohio to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery to provide their patients with notice if the health care providers do not maintain medical malpractice insurance coverage. The bill limits the applicability of this provision solely to podiatric physicians and surgeons and mandates that persons authorized to practice medicine and surgery or osteopathic medicine and surgery maintain in effect medical malpractice insurance in amounts not less than \$500,000 per occurrence and \$1,500,000 in the aggregate.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	04-27-04	pp. 1790-1791

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