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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;
- reduces a malpractice award by an amount equal to settlement awards;
- amends the cap on non-economic damages that may be awarded in a malpractice action;
- limits the amount of the malpractice damages an attorney may keep as fees;
- requires an affidavit of merit from a health care professional before a malpractice action is started; 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:

S.B. 145

78B-3-404, as renumbered and amended by Laws of Utah 2008, Chapter 3
78B-3-410, as renumbered and amended by Laws of Utah 2008, Chapter 3
78B-3-411, 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
ENACTS:
78B-3-405.5, Utah Code Annotated 1953
78B-3-423, Utah Code Annotated 1953
78B-3-424, Utah Code Annotated 1953

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

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

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

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

(2) Notwithstanding Subsection (1):

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

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

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

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

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

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

Section 2. Section **78B-3-405.5** is enacted to read:

78B-3-405.5. Amount of award reduced by settlements with other parties.

(1) If the plaintiff has settled with one or more persons in a malpractice action against a health care provider as defined in Section 78B-3-403 in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of the award by an amount equal to one of the following, as elected by the defendant:

(a) the sum of the dollar amounts of all settlements; or

(b) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

(2) An election made under Subsection (1) shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected Subsection (1)(a).

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

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

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

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

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

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

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

(iv) for a cause of action arising on or after May 1, 2010, $250,000.

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

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

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

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

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

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

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

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

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

Section 4. Section **78B-3-411** is amended to read:

78B-3-411. Limitation on attorney contingency fee in malpractice action.

(1) In any malpractice action against a health care provider as defined in Section 78B-3-403, an attorney may not collect a contingent fee for representing a client seeking damages in connection with or arising out of personal injury or wrongful death caused by the negligence of another which exceeds:

(a) 33-1/3% of the first $100,000 amount recovered[~~.~~];

(b) 25% of the next $500,000 amount recovered; and

(c) 15% of any amount recovered over $600,000.

(2) [~~This~~] (a) The limitation on attorney fees in Subsection (1) applies regardless of whether the recovery is by settlement, arbitration, judgment, or whether appeal is involved.

(b) A retainer agreement or contract between a person and an attorney which contains a provision for recovery of attorney fees that exceed the amount provided for in Subsection (1) is void as a matter of law.

Section 5. Section **78B-3-412** is amended to read:

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

(1) A malpractice action against a health care provider may not be initiated unless and until the plaintiff gives the prospective defendant or his executor or successor, at least 90 days' prior notice of intent to commence an action.

(2) The notice shall include:

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

(b) the persons involved;

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

(d) the circumstances surrounding the claim;

(e) specific allegations of misconduct on the part of the prospective defendant; [~~and~~]

(f) the nature of the alleged injuries and other damages sustained[~~.~~]; and

(g) an affidavit of merit as provided in Section 78B-3-423.

(3) Notice may be in letter or affidavit form executed by the plaintiff or his attorney. Service shall be accomplished by persons authorized and in the manner prescribed by the Utah Rules of Civil Procedure for the service of the summons and complaint in a civil action or by certified mail, return receipt requested, in which case notice shall be considered served on the date of mailing.

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

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

counterclaims or crossclaims against a health care provider.

Section 6. Section **78B-3-423** is enacted to read:

78B-3-423. Affidavit of merit.

(1) Except as provided in Subsection (4), the party initiating a medical liability action through the notice of intent to commence action under Section 78B-3-412 shall in accordance with this section:

(a) prepare an affidavit of merit for each named defendant;

(b) include the affidavit of merit for each named defendant with the notice of intent to commence action; and

(c) serve the notice of intent to commence action and the accompanying affidavit of merit in accordance with Subsection 78B-3-412(3).

(2) The affidavit of merit shall:

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

(b) include a statement signed by a health care provider who meets the requirements of Subsection (3), which:

(i) states that in the health care provider's opinion:

(A) there are reasonable grounds to believe that the applicable standard of care was breached by the named defendant;

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

(C) the reasons for the health care provider's opinion; and

(ii) clearly identifies:

(A) the name and address of:

(I) the plaintiff;

(II) the defendant; and

(III) the reviewing health care provider; and

(B) the reviewing health care provider's:

(I) profession or specialty;

(II) board certifications;

(III) state of licensure and license number; and

(IV) whether the health care provider currently treats patients or teaches in an academic setting in the same or similar field of medicine as the defendant in both the year immediately preceding the alleged negligent act and in the past five years prior to signing the affidavit.

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

(a) if the defendant is not a physician licensed under Title 58, Chapter 67, Utah Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state in the same specialty or of the same class of license as the defendant; or

(b) if the defendant is a physician licensed under Title 58, Chapter 67, Utah Medical Practice Act, or an osteopathic physician licensed under Title 58, Chapter 68, Utah Osteopathic Medical Practice Act, hold a current unrestricted license issued by the appropriate licensing authority of Utah or another state to practice medicine in all its branches, and qualified by experience with the standard of care, methods, procedures, and treatments relevant to the allegations at issue in the case.

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

(a) the plaintiff or the plaintiff's attorney submits a signed affidavit with the notice of intent to commence action attesting to the fact that the plaintiff is unable to submit an affidavit of merit as required by this section because:

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

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

(b) the plaintiff or plaintiff's attorney submits the affidavit of merit to each named defendant in accordance with Subsection 78B-3-412(3) no later than 60 days after service of the notice of intent to commence action.

(5) (a) A plaintiff or plaintiff's attorney who submits allegations in an affidavit of merit that are found to be without reasonable cause and untrue is liable to the named defendant for

the payment of reasonable expenses and reasonable attorney fees actually incurred by the named defendant or the named defendant's insurer.

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

(6) If a plaintiff or the plaintiff's attorney does not file an affidavit of merit as required by this section for a particular defendant, the malpractice action against the defendant shall be dismissed.

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

Section 7. Section **78B-3-424** is enacted to read:

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

(1) For purposes of this section:

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

(b) "Ostensible agent" means a person:

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

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

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

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

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

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

(b) the insurance required in Subsection (2)(a) is in effect at the time of the alleged act or omission of the ostensible agent.

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

Legislative Review Note
as of 2-2-10 10:08 AM

Office of Legislative Research and General Counsel

S.B. 145 - 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.