

# Medical Malpractice Reform

This Act contains a clause wherein the state legislature asks the state Supreme Court to require a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant and to establish an expedited discovery process in medical liability claims to provide for the timely resolution of the disputes. It requires certain insurers who write malpractice insurance to report information to the state department of insurance at least annually regarding any medical, dental, optometric, or chiropractic claim asserted against a risk located in this state, if the claim resulted in a final judgment in any amount; a settlement in any amount; or a final disposition of the claim resulting in no indemnity payment on behalf of the insured.

This Act regulates defendants' use of affidavits of noninvolvement in medical claims. It establishes qualifications for expert witnesses who provide testimony in a medical liability action and regulates the collection and disclosure of medical claims data by the state department of insurance. It also prohibits using a defendant's statement of sympathy as evidence in a medical liability action.

Submitted as:

Ohio

[HB 215 \(enrolled version\)](#)

Status: Enacted into law in 2004.

## Suggested State Legislation

(Title, enacting clause, etc.)

1           Section 1. [*Short Title.*] This Act may be cited as "An Act to Regulate the Collection and  
2 Disclosure of Medical Claims Data; to Address Using a Defendant's Statement of Sympathy as  
3 Evidence in a Medical Liability Action, and to Establish Qualifications for Expert Witnesses in  
4 Medical Liability Actions."

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6           Section 2. [*Amending State Law to Require a Plaintiff Filing a Medical Liability Claim to*  
7 *Include a Certificate of Expert Review as to Each Defendant.*] The [General Assembly]  
8 respectfully requests the [Supreme Court] to amend the [Rules of Civil Procedure] to require a  
9 plaintiff filing a medical liability claim to include a certificate of expert review as to each  
10 defendant. The [General Assembly] respectfully requests that the certificate of expert review  
11 require the signature of an expert witness from the same specialty as the defendant; said witness  
12 shall be required to meet the statutory evidentiary and case law requirements of a medical expert  
13 capable of testifying at trial. A certificate of expert review should be required to state with  
14 particularity the expert's familiarity with the applicable standard of care, the expert's  
15 qualifications, the expert's opinion as to how the applicable standard of care was breached, and  
16 the expert's opinion as to how the breach resulted in the injury or death.

17  
18           Section 3. [*Amending State Law to Establish an Expedited Discovery Process in Medical*  
19 *Liability Claims to Provide for the Timely Resolution of the Disputes.*] The [General Assembly]  
20 respectfully requests the [Supreme Court] to amend the [Rules of Civil Procedure] to establish an  
21 expedited discovery process in medical liability claims to provide for the timely resolution of the  
22 disputes.

23

24 Section 4. *[Reporting Claims Against a Risk Regarding Medical, Dental, Optometric or*  
 25 *Chiropractic Medical Care.]*

26 (A) The state [superintendent of insurance], by rule adopted in accordance with [insert  
 27 citation] shall require each authorized insurer, surplus lines insurer, risk retention group, self-  
 28 insurer, captive insurer, the medical liability underwriting association if created under [insert  
 29 citation], any other entity that provides medical malpractice insurance to risks located in this  
 30 state, to report information to the [department of insurance] at least annually regarding any  
 31 medical, dental, optometric, or chiropractic claim asserted against a risk located in this state, if  
 32 the claim resulted in any of the following results:

33 (1) A final judgment in any amount;

34 (2) A settlement in any amount;

35 (3) A final disposition of the claim resulting in no indemnity payment on behalf of  
 36 the insured.

37 (B) The report required by division (A) of this section shall contain such information as  
 38 the [superintendent] prescribes by rule adopted in accordance with [insert citation], including,  
 39 but not limited to, the following information:

40 (1) The name, address, and specialty coverage of the insured;

41 (2) The insured's policy number;

42 (3) The date of the occurrence that created the claim;

43 (4) The name and address of the injured person;

44 (5) The date and amount of the judgment, if any, including a description of the  
 45 portion of the judgment that represents economic loss, non-economic loss and, if applicable,  
 46 punitive damages;

47 (6) In the case of a settlement, the date and amount of the settlement;

48 (7) Any allocated loss adjustment expenses;

49 (8) Any other information required by the superintendent pursuant to rules  
 50 adopted in accordance with [insert citation].

51 (C) The [superintendent] may prescribe the format and the manner in which the  
 52 information described in division (B) of this section is reported. The [superintendent] may, by  
 53 rule adopted in accordance with [insert citation], prescribe the frequency that the information  
 54 described in division (B) of this section is reported.

55 (D) The [superintendent] may designate one or more rating organizations licensed  
 56 pursuant to [insert citation] or other agencies to assist the [superintendent] in gathering the  
 57 information, and making compilations thereof, required by this section.

58 (E) There shall be no liability on the part of, and no cause of action of any nature shall  
 59 arise against, any person or entity reporting under this section or its agents or employees, or the  
 60 department of insurance or its employees, for any action taken that is authorized under this  
 61 section.

62 (F) The [superintendent] may impose a fine not to exceed [five hundred dollars] against  
 63 any person designated in division (A) of this section that fails to timely submit the report  
 64 required under this section. Fines imposed under this section shall be paid into the [state  
 65 treasury] to the credit of the [department of insurance operating fund] created under [insert  
 66 citation].

67 (G) Except as specifically provided in division (H) of this section, the information  
 68 required by this section shall be confidential and privileged and is not a public record as defined  
 69 in [insert citation]. The information provided under this section is not subject to discovery or  
 70 subpoena and shall not be made public by the [superintendent] or any other person.

71 (H) The [department of insurance] shall prepare an annual report that summarizes the  
 72 closed claims reported under this section. The annual report shall summarize the closed claim

73 reports on a statewide basis, and also by specialty and geographic region. Individual claims data  
74 shall not be released in the annual report. Copies of the report shall be provided to the members  
75 of the [general assembly].

76 (I) As used in this section, medical, dental, optometric, and chiropractic claims include  
77 those claims asserted against a risk located in this state that either:

78 (1) Meet the definition of a "medical claim," "dental claim," "optometric claim,"  
79 or "chiropractic claim" under [insert citation];

80 (2) Have not been asserted in any civil action, but that otherwise meet the  
81 definition of a "medical claim," "dental claim," "optometric claim," or "chiropractic claim" under  
82 [insert citation.]

83

84 Section 5. [*Civil Actions Concerning Unanticipated Outcomes of Medical Care.*]

85 (A) In any civil action brought by an alleged victim of an unanticipated outcome of  
86 medical care or in any arbitration proceeding related to such a civil action, any and all  
87 statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration,  
88 condolence, compassion, or a general sense of benevolence that are made by a health care  
89 provider or an employee of a health care provider to the alleged victim, a relative of the alleged  
90 victim, or a representative of the alleged victim, and that relate to the discomfort, pain, suffering,  
91 injury, or death of the alleged victim as the result of the unanticipated outcome of medical care  
92 are inadmissible as evidence of an admission of liability or as evidence of an admission against  
93 interest.

94 (B) For purposes of this section, unless the context otherwise requires:

95 (1) "Health care provider" has the same meaning as in [insert citation].

96 (2) "Relative" means a victim's spouse, parent, grandparent, stepfather,  
97 stepmother, child, grandchild, brother, sister, half brother, half sister, or spouse's parents. The  
98 term includes said relationships that are created as a result of adoption. In addition, "relative"  
99 includes any person who has a family-type relationship with a victim.

100 (3) "Representative" means a legal guardian, attorney, person designated to make  
101 decisions on behalf of a patient under a medical power of attorney, or any person recognized in  
102 law or custom as a patient's agent.

103 (4) "Unanticipated outcome" means the outcome of a medical treatment or  
104 procedure that differs from an expected result.

105

106 Section 6. [*Affidavit of Noninvolvement.*]

107 (A) (1) A health care provider named as a defendant in a civil action based upon a  
108 medical claim is permitted to file a motion with the court for dismissal of the claim accompanied  
109 by an affidavit of noninvolvement. The defendant shall notify all parties in writing of the filing  
110 of the motion. Prior to ruling on the motion, the court shall allow the parties not less than [thirty  
111 days] from the date that the parties were served with the notice to respond to the motion.

112 (2) An affidavit of noninvolvement shall set forth, with particularity, the facts that  
113 demonstrate that the defendant was misidentified or otherwise not involved individually or  
114 through the action of the defendant's agents or employees in the care and treatment of the  
115 plaintiff, was not obligated individually or through the defendant's agents or employees to  
116 provide for the care and treatment of the plaintiff, and could not have caused the alleged  
117 malpractice individually or through the defendant's agents or employees in any way.

118 (B) (1) The parties shall have the right to challenge the affidavit of noninvolvement  
119 by filing a motion and submitting an affidavit with the court that contradicts the assertions of  
120 noninvolvement made in the defendant's affidavit of noninvolvement.

121 (2) If the affidavit of noninvolvement is challenged, any party may request an oral  
122 hearing on the motion for dismissal. If requested, the court shall hold a hearing to determine if  
123 the defendant was involved, directly or indirectly, in the care and treatment of the plaintiff, or  
124 was obligated, directly or indirectly, for the care and treatment of the plaintiff.

125 (3) The court shall consider all evidence submitted by the parties and the parties'  
126 arguments and may dismiss the civil action based upon the defendant's lack of involvement in  
127 the elements of the plaintiff's medical claim. The court shall rule on all challenges to the affidavit  
128 of noninvolvement within [seventy-five days] after the filing of the affidavit of noninvolvement.

129 (4) A court's dismissal of a claim against a defendant pursuant to this section shall  
130 be deemed otherwise than upon the merits and without prejudice pursuant to [insert citation].

131 (C) If the court determines that a health care provider named as a defendant has falsely  
132 filed or made false or inaccurate statements in an affidavit of noninvolvement, the court, upon a  
133 motion or upon its own initiative, shall immediately reinstate the claim against that defendant, if  
134 previously dismissed. Reinstatement of a party pursuant to this [division] shall not be barred by  
135 any statute of limitations defense that was not valid at the time the original affidavit was filed.

136 (D) In any action in which the defendant is found by the court to have knowingly filed a  
137 false or inaccurate affidavit of noninvolvement, the court shall impose upon the person who  
138 signed the affidavit or represented the defendant, or both, an appropriate sanction, including, but  
139 not limited to, an order to pay to other parties to the claim the amount of the reasonable expenses  
140 that the parties incurred as a result of the filing of the false or inaccurate affidavit, including  
141 reasonable attorney's fees.

142 (E) In any action in which the court determines that a party falsely objected to a  
143 defendant's affidavit of noninvolvement, or knowingly provided an inaccurate statement  
144 regarding a defendant's affidavit, the court shall impose upon the party or the party's counsel, or  
145 both, an appropriate sanction, including, but not limited to, an order to pay to the other parties to  
146 the claim the amount of the reasonable expenses that the parties incurred as a result of the  
147 submission of the false objection or inaccurate statement, including reasonable attorney's fees.

148 (F) As used in this section:

149 (1) "Health care provider" has the same meaning as in [insert citation].

150 (2) "Medical claim" means any claim that is asserted in any civil action against a  
151 health care provider and that arises out of the medical diagnosis, care, or treatment of any person.  
152 "Medical claim" includes derivative claims for relief.

153  
154 Section 7. [*Competency for Giving Expert Testimony on Liability Issues in Medical*  
155 *Claims.*]

156 (A) No person shall be deemed competent to give expert testimony on the liability issues  
157 in a medical claim, as defined in [insert citation] unless:

158 (1) Such person is licensed to practice medicine and surgery, osteopathic  
159 medicine and surgery, or podiatric medicine and surgery by the state medical board or by the  
160 licensing authority of any state;

161 (2) Such person devotes three-fourths of the person's professional time to the  
162 active clinical practice of medicine or surgery, osteopathic medicine and surgery, or podiatric  
163 medicine and surgery, or to its instruction in an accredited university;

164 (3) The person practices in the same or a substantially similar specialty as the  
165 defendant. The court shall not permit an expert in one medical specialty to testify against a health  
166 care provider in another medical specialty unless the expert shows both that the standards of care  
167 and practice in the two specialties are similar and that the expert has substantial familiarity  
168 between the specialties.

169 (4) If the person is certified in a specialty, the person must be certified by a board  
170 recognized by the American board of medical specialties or the American board of osteopathic  
171 specialties in a specialty having acknowledged expertise and training directly related to the  
172 particular health care matter at issue.

173 (B) Nothing in division (A) of this section shall be construed to limit the power of the  
174 trial court to adjudge the testimony of any expert witness incompetent on any other ground.

175 (C) Nothing in division (A) of this section shall be construed to limit the power of the  
176 trial court to allow the testimony of any other witness, on a matter unrelated to the liability issues  
177 in the medical claim, when that testimony is relevant to the medical claim involved.

178

179 Section 8. [*Temporary Medical License for People Who Testify as Expert Witnesses in*  
180 *Actions Against a Physician.*] A person licensed in another state to practice medicine, who  
181 testifies as an expert witness on behalf of any party in this state in any action against a physician  
182 for injury or death, whether in contract or tort, arising out of the provision of or failure to provide  
183 health care services, shall be deemed to have a temporary license to practice medicine in this  
184 state solely for the purpose of providing such testimony and is subject to the authority of the state  
185 medical board and the provisions of [insert citation]. The conclusion of an action against a  
186 physician shall not be construed to have any effect on the board's authority to take action against  
187 a physician who testifies as an expert witness under this section.

188

189 Section 9. [*Severability.*] [Insert severability clause.]

190

191 Section 10. [*Repealer.*] [Insert repealer clause.]

192

193 Section 11. [*Effective Date.*] [Insert effective date.]