

## OHIO HOUSE BILL 215 HAS NOW TAKEN EFFECT

On June 14, 2004, Governor Taft signed into law House Bill (H.B.) 215 to help curb the threat that the ongoing escalation of medical malpractice insurance rates has presented to Ohio doctors and their patients. The act, which went into effect on **September 13, 2004**, represents one part of Governor Taft's five-point plan to stabilize Ohio's volatile medical malpractice insurance market. This act does not contain a specific provision specifying the extent to which it applies to pending lawsuits or pre-September 13, 2004 occurrences, though there is existing constitutional/statutory authority and case law on this "retroactivity" issue.

H.B. 215 does not contain the sweeping changes provided by Ohio's 2003 Tort Reform laws (S.B. 120, S.B. 281 and S.B. 179). However, H.B. 215 does contain a number of narrower provisions and reporting requirements which should be noted by litigants in Ohio medical malpractice cases.

H.B. 215 requires medical malpractice insurers (including captive insurers and self-insured entities) to report costs of defending claims, judgment payouts, settlements, and loss adjustment expenses to the Ohio Department of Insurance, in order to gauge how the tort system is affecting medical malpractice premiums. H.B. 215 also provides for the use of "affidavits of noninvolvement," and has provisions expanding the required qualifications for medical expert witnesses. Medical expert witnesses testifying in Ohio also become subject to the jurisdiction of the Ohio State Medical Board. The act makes statements of apology, sympathy or compassion by a physician to the alleged victim inadmissible in a lawsuit or arbitration. Further, the act requests that the Supreme Court require plaintiffs to file, along with their medical malpractice

lawsuits, a certificate (signed by a medical expert in the same medical specialty as the defendant) that states how the standard of care was breached and how the breach resulted in injury or death.

### House Bill 215 Statutory Changes

#### **I. Prohibits the use of a Defendant's statements of sympathy as evidence in a medical liability action. (O.R.C. § 2317.43)**

- Applies to civil actions and arbitrations.
- Applies to health care providers and their employees.
- Applies to statements made to the alleged victim, or to a relative or representative of the alleged victim.
- Inadmissible as evidence of an admission of liability, or as evidence of an admission against interest.

#### **II. Establishes qualifications for expert witnesses in medical liability actions. (O.R.C. § 2743.43)**

- No person shall be deemed competent to give expert testimony on liability issues in a medical claim unless the person: (1) is licensed by the state; (2) devotes three-fourths of his/her professional time to the active clinical practice, or to instruction in an accredited university<sup>1</sup>; (3) practices in

<sup>1</sup> Please note that the "three-fourths of his/her professional time" provision in this amended statute conflicts with Ohio Rule of Evidence 601 (D), which requires only "one-half of his or her professional time..."

the same or substantially similar specialty as defendant unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties; and (4) if the person is certified in a specialty, that person must be certified by a board recognized by the American board of medical specialties or the American board of osteopathic specialties in a specialty having acknowledged expertise and training directly related to the particular health care matter at issue.

**III. Provides for the use of affidavits of noninvolvement in medical claims. (O.R.C. § 2323.45)**

- Defendant-health-care-provider in a medical malpractice suit is permitted to file a motion with the court for dismissal of the claim accompanied by an affidavit of noninvolvement. The affidavit must set forth facts that demonstrate that the defendant was misidentified, or otherwise not involved, or was not obligated to provide for the care and treatment of the plaintiff, and thus could not have caused the alleged malpractice. Plaintiff can file his/her own motion, plus an affidavit, contradicting the defendant’s affidavit.

**IV. Out-of-state expert considered to have temporary license. (O.R.C. § 2323.421)**

- An expert witness, licensed to practice medicine in another state, who testifies against a physician in an Ohio medical malpractice case shall be deemed to have a temporary license to practice medicine in Ohio solely for the purpose of providing such testimony. The expert is thus subject to the authority of the State Medical Board of Ohio and the provisions of O.R.C. § 4731. The conclusion of the action against the physician does not affect the board's authority to take action against the expert witness.

**V. Regulates the collection and disclosure of medical claim data. (O.R.C. § 3929.302)**

- Requires medical malpractice insurers to report costs of defending claims, judgment payouts, settlements and loss adjustment expenses to the Ohio Department of Insurance (ODI). This allows ODI and the legislature to gauge how the tort system is affecting medical malpractice premiums. This provision also applies to every “self insurer, [and] captive insurer.”

**VI. Section 3 of the Act requests that the Ohio Supreme Court amend the Rules of Civil Procedure to require a plaintiff filing a medical claim to include a certificate of expert review as to each defendant.**

- An expert from the same specialty as the defendant must sign the certificate. The expert must meet all the requirements of a medical expert capable of testifying at trial. The certificate must state the expert's familiarity with the applicable standard of care, the expert's qualifications, the expert's opinion regarding breach of the standard of care, and how the breach resulted in the injury or death.

**VII. Section 4 of the Act requests that the Ohio Supreme Court amend the Rules of Civil Procedure to establish an expedited discovery process in medical liability claims to provide for the timely resolution of disputes.**

- Both this Section and Section 3 of the act do not appear to have any effect at this point, unless and until the Ohio Supreme Court responds to these “requests” from the legislature.

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*For more information, please contact a member of Tucker Ellis & West's Medical Malpractice Group.*

1150 Huntington Building, 925 Euclid Avenue  
Cleveland, OH 44115  
216.592.5000 (phone) 216.592.5009 (facsimile)

*www.tuckerellis.com*