

HOUSE BILL No. 5434

January 8, 1992, Introduced by Reps. Niederstadt, Griffin, Hickner, Hoffman, Rocca, Bartnik, DeMars, Weeks, Alley, Joe Young, Sr., Porreca, Wozniak, Trim, Nye, Bankes, DeLange, Shugars, Jamian, Dalman, Oxender, Walberg, Munsell, Martin, Van Singel, Ostling, Hillegonds, Joe Young, Jr., Varga, Allen, Sikkema, Bodem, Gnodtke, Bryant, Fitzgerald, London, Gilmer, Brackenridge, McBryde, Middleton, Robertson, Bandstra, Harrison, Randall, McNutt, Dolan, Horton, Bobier, Dobb, Hoekman, Johnson, Strand, Bender, Middaugh, Stallworth, Muxlow, Sparks, Jaye, Gernaat, Knight and O'Connor and referred to the Committee on Judiciary.

A bill to create a medical liability determination program as an autonomous agency within the department of commerce; to provide an alternative mechanism for the resolution of medical malpractice disputes; to provide for the appointment of panels; to prescribe the powers and duties of the panels and certain other state agencies and departments; to provide for the promulgation of rules; and to prescribe penalties and remedies.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the
2 "Michigan medical liability determination act".

3 Sec. 2. As used in this act:

4 (a) "Commissioner" means the commissioner of the medical
5 liability determination program.

6 (b) "Court" means a court of competent jurisdiction.

1 (c) "Department" means the department of commerce.

2 (d) "Health professional" means an individual who is
3 licensed or otherwise authorized under article 15 of the public
4 health code, Act No. 368 of the Public Acts of 1978, being
5 sections 333.16101 to 333.18838 of the Michigan Compiled Laws, or
6 the chief administrative officer of a health facility or agency
7 licensed under article 17 of Act No. 368 of the Public Acts of
8 1978, being sections 333.20101 to 333.22260 of the Michigan
9 Compiled Laws.

10 (e) "Panel" means a medical liability determination panel
11 appointed under this act.

12 (f) "Person" means an individual, partnership, cooperative
13 association, private corporation, or other legal entity.

14 (g) "Program" means the medical liability determination pro-
15 gram created under this act.

16 (h) "Substance abuse" means that term as defined in
17 section 6107 of the public health code, Act No. 368 of the Public
18 Acts of 1978, being section 333.6107 of the Michigan Compiled
19 Laws.

20 (i) "Rule" means a rule promulgated under the administrative
21 procedures act of 1969, Act No. 306 of the Public Acts of 1969,
22 being sections 24.201 to 24.328 of the Michigan Compiled Laws.

23 Sec. 3. (1) The medical liability determination program is
24 established as an autonomous agency in the department of
25 commerce. The program shall exercise its powers and duties inde-
26 pendently of the department of commerce, except for budget,
27 procurement, and housekeeping functions. The governor shall

1 appoint a commissioner of the program with the advice and consent
2 of the senate.

3 (2) The commissioner is the head of the program. The com-
4 missioner shall do all of the following:

5 (a) For purposes of this act, divide the state into 5
6 regions, 1 of which consists of the major part of the Upper
7 Peninsula.

8 (b) Establish 3 pools of candidates for membership on the
9 medical liability determination panels for the 5 regions desig-
10 nated under subdivision (a). One pool shall consist of attorney
11 candidates, 1 shall consist of health professional candidates,
12 and 1 shall consist of public member candidates. The commis-
13 sioner shall include in the pool of health professional candi-
14 dates individuals who are hospital administrators.

15 (c) Appoint a panel to hear a medical malpractice action for
16 which the commissioner receives notice pursuant to section 2912f
17 of the revised judicature act of 1961, Act No. 236 of the Public
18 Acts of 1961, being section 600.2912f of the Michigan Compiled
19 Laws. The commissioner shall appoint to the panel 1 attorney
20 member, 1 health professional member, and 1 public member.

21 (3) The legislature annually shall fix the per diem compen-
22 sation of members of the panels and of medical experts retained
23 by the panels under section 10. The department shall reimburse
24 expenses of members and of medical experts retained by the panels
25 under section 10 incurred in the performance of official duties
26 pursuant to the standardized travel regulations of the department
27 of management and budget.

1 (4) The department shall furnish administrative services to
2 the program, shall have charge of the program's offices, records,
3 and accounts, and shall provide secretarial and other staff nec-
4 essary to allow the proper exercise of the powers and duties of
5 the program.

6 Sec. 4. (1) The department shall develop application forms
7 for membership on a medical liability determination panel. The
8 department shall design the application forms to identify poten-
9 tial biases and conflicts of interest among applicants. The
10 department shall include on each application form a disclosure
11 statement and an oath to be signed by the applicant.

12 (2) The program shall initially screen each candidate for
13 placement into 1 of the candidate pools established by the com-
14 missioner under section 3.

15 (3) Once an applicant is placed into a candidate pool, he or
16 she is eligible for appointment to a panel for 3 years after the
17 date the application is filed with the program.

18 Sec. 5. (1) The qualifications for membership on a medical
19 liability determination panel are as follows:

20 (a) An applicant for an attorney membership on a panel shall
21 meet all of the following:

22 (i) Be licensed as an attorney in this state.

23 (ii) Have engaged in the active practice of law for not less
24 than the 5 years immediately preceding the date of application.
25 For purposes of this subparagraph, active practice of law con-
26 sists of not less than an average of 25 hours per week of active

1 client representation or a combination of knowledge and
2 experience acceptable to the program.

3 (iii) Not have devoted more than 50% of his or her practice
4 to medical malpractice claims during the 2 years immediately pre-
5 ceding the date of application.

6 (iv) If a candidate has devoted more than 20% of his or her
7 practice to medical malpractice claims during the 2 years immedi-
8 ately preceding the date of application, then not more than 75%
9 of the medical malpractice claims shall have involved the exclu-
10 sive representation of either plaintiffs or defendants.

11 (v) Not have been disbarred from the practice of law in any
12 state.

13 (vi) Not have been disciplined by a state licensing body for
14 a breach of professional ethics.

15 (vii) Not have been convicted of a crime involving substance
16 abuse, dishonesty, or a breach of trust.

17 (viii) Not have a family member who is living in the same
18 household with the applicant or financially dependent upon the
19 applicant who is a health professional, graduate of a medical or
20 other health professional school, or employed by or otherwise
21 professionally associated with a health facility or agency, pri-
22 vate medical practice, or the insurance industry.

23 (b) An applicant for a health professional membership on a
24 panel shall meet all of the following:

25 (i) Be a licensed or registered health professional.

26 (ii) If the applicant is a specialist, be certified as such
27 under state law or by a national professional organization.

1 (iii) Be recognized as a competent practitioner by his or
2 her professional peers. An applicant is in compliance with this
3 subparagraph if he or she is a member of a state or local profes-
4 sional association or is a member of a hospital medical staff.

5 (iv) Not have had his or her health professional license or
6 registration suspended or revoked or been placed on probation.

7 (v) Not have been convicted of a crime involving substance
8 abuse, dishonesty, or a breach of trust.

9 (vi) Have been engaged in the active clinical practice of
10 his or her health profession in his or her professed specialty
11 for not less than the 5 years immediately preceding the date of
12 application. For purposes of this subparagraph, active clinical
13 practice of a health profession consists of not less than an
14 average of 25 hours per week of patient care or a combination of
15 knowledge and experience acceptable to the program.

16 (vii) If the applicant is retired, not have been retired for
17 more than the 2 years immediately preceding the date of
18 application.

19 (viii) Not have a family member who is living in the same
20 household with the applicant or financially dependent on the
21 applicant who is an attorney, is a graduate of a law school, or
22 is employed by or otherwise professionally associated with the
23 insurance industry.

24 (ix) If the health professional is employed by or under con-
25 tract to or admitted to practice in a hospital, the hospital is
26 accredited by a national accrediting body.

1 (c) An applicant for a public membership on a panel shall
2 meet all of the following:

3 (i) Be a resident of this state.

4 (ii) Have decision-making or problem-solving experience in
5 an organization as an employee, member, or participant.

6 (iii) Not have been convicted of a crime involving substance
7 abuse, dishonesty, or a breach of trust.

8 (iv) Not be, or have a family member who is living in the
9 same household with the applicant or is financially dependent
10 upon the applicant who is, an attorney, a health professional, a
11 graduate of a law school or a medical school or other health pro-
12 fessional school, or employed by or otherwise professionally
13 associated with a law firm, health facility or agency, private
14 health care practice, or the insurance industry.

15 (2) The commissioner shall appoint the chair of a panel.

16 Sec. 6. (1) The department shall promulgate rules to imple-
17 ment the program including, but not limited to, rules of practice
18 and procedure for the panels.

19 (2) Information obtained by a panel in the performance of
20 its official duties, a record of the proceedings of a panel, and
21 the written findings of a panel are not subject to the freedom of
22 information act, Act No. 442 of the Public Acts of 1976, being
23 sections 15.231 to 15.246 of the Michigan Compiled Laws.

24 (3) A meeting of a panel is not open to the public and is
25 not subject to the open meetings act, Act No. 267 of the Public
26 Acts of 1976, being sections 15.261 to 15.275 of the Michigan
27 Compiled Laws.

1 (4) A hearing conducted by a panel is not subject to the
2 administrative procedures act of 1969, Act No. 306 of the Public
3 Acts of 1969, being sections 24.201 to 24.328 of the Michigan
4 Compiled Laws.

5 (5) A member of a panel is not civilly liable for official
6 actions of the panel.

7 Sec. 7. (1) Except as otherwise provided in subsection (5),
8 upon receipt of a copy of the notice required under section 2912f
9 of the revised judicature act of 1961, Act No. 236 of the Public
10 Acts of 1961, being section 600.2912f of the Michigan Compiled
11 Laws, the commissioner shall select a panel by blind draw from
12 the pool of candidates for that region. The commissioner shall
13 complete selection of the panel within 15 days of receipt of the
14 notice under section 2912f of Act No. 236 of the Public Acts of
15 1961.

16 (2) The commissioner shall require the plaintiff to provide
17 a copy of the notice described in subsection (1) to the
18 defendant. The commissioner shall require both parties to pro-
19 vide a copy of the affidavit of merit required under
20 section 2912f of Act No. 236 of the Public Acts of 1961, being
21 section 600.2912f of the Michigan Compiled Laws, to each other
22 and to the program.

23 (3) The commissioner shall require both parties to provide
24 copies of pertinent medical records to the panel.

25 (4) A party shall provide the information required under
26 subsections (2) and (3) within 30 days after the commissioner
27 completes selection of the panel under subsection (1).

1 (5) If all parties to a claim agree in writing, the parties
2 may waive the proceedings before the panel and proceed under the
3 revised judicature act of 1961, Act No. 236 of the Public Acts of
4 1961, being sections 600.101 to 600.9947 of the Michigan Compiled
5 Laws. The parties shall file a copy of the written waiver agree-
6 ment with the commissioner.

7 Sec. 8. (1) The chair of the panel shall convene the panel
8 within 15 days after the panel is selected under section 7.

9 (2) At the initial meeting, the parties shall appear before
10 the panel for a conference to evaluate the claim, to identify
11 unresolved issues, and to schedule panel proceedings.

12 Sec. 9. (1) All parties to the claim shall have full access
13 to all materials submitted to and reviewed by a panel.

14 (2) A panel may determine the extent of discovery for pur-
15 poses of understanding the case before it. A panel shall not
16 allow discovery of a defendant's professional liability insurance
17 coverage.

18 Sec. 10. (1) A panel shall retain a neutral medical expert
19 to review medical records and to provide to the panel a detailed
20 written expert opinion regarding the claim. The expert retained
21 by the panel under this subsection shall meet the requirements of
22 section 2169 of the revised judicature act of 1961, Act No. 236
23 of the Public Acts of 1961, being section 600.2169 of the
24 Michigan Compiled Laws.

25 (2) Each party to the claim may retain at its own expense a
26 medical expert to review medical records and render a written
27 expert opinion to the panel. An expert retained under this

1 subsection shall meet the requirements of section 2169 of Act
2 No. 236 of the Public Acts of 1961.

3 (3) A medical expert retained by the panel under
4 subsection (1) shall not vote as a panel member. The panel may
5 determine the extent of the expert's participation in the pro-
6 ceedings beyond rendering an expert opinion.

7 Sec. 11. (1) A panel shall conduct a hearing at which the
8 parties to the claim appear and present their respective cases.
9 The parties to a hearing held under this subsection shall not
10 call witnesses or present evidence at the hearing, but the panel
11 may require the attendance of witnesses for questioning by the
12 panel and the submission of additional information by the
13 parties.

14 (2) Each party shall furnish a written summary of its case
15 to the panel before the hearing held under subsection (1). A
16 party shall include in its summary the legal and detailed factual
17 basis of its claim or defense.

18 (3) A panel shall not make a record of a hearing held under
19 this section. A party to the case may record the hearing at his
20 or her own expense.

21 Sec. 12. (1) Not more than 145 days after the commissioner
22 receives notice under section 2912f of the revised judicature act
23 of 1961, Act No. 236 of the Public Acts of 1961, being section
24 600.2912f of the Michigan Compiled Laws, a panel shall make and
25 deliver to the parties to the claim detailed, written findings on
26 all of the following:

1 (a) Whether or not each defendant failed to provide the
2 recognized standard of care, as described in section 2912a of Act
3 No. 236 of the Public Acts of 1961, being section 600.2912a of
4 the Michigan Compiled Laws.

5 (b) The percentage of negligence attributable to each
6 party.

7 (c) Whether or not each defendant's actions or omissions
8 were the proximate cause of the plaintiff's injury.

9 (d) The amount of damages to be awarded the plaintiff.

10 (2) A party shall accept or reject each of the panel's find-
11 ings under subsection (1) in writing within 180 days after the
12 commissioner receives notice under section 2912f of Act No. 236
13 of the Public Acts of 1961. A party shall file his or her accep-
14 tance or rejection with the panel. If a party fails to accept or
15 reject a finding under this subsection, the party is presumed to
16 have rejected that finding.

17 (3) A party is not bound by his or her acceptance or rejec-
18 tion of a panel finding under this section, unless all parties
19 accept the finding. If the parties agree on 1 or more findings
20 under this section, the parties may stipulate that they will pro-
21 ceed in a civil action only on those findings upon which the par-
22 ties disagree.

23 (4) If a settlement is reached as a result of the findings
24 of a panel under this section, the parties shall report the set-
25 tlement to the panel and the panel shall transmit that informa-
26 tion to the insurance bureau.

1 (5) A finding by a panel under this section is admissible in
2 evidence in a civil action for medical malpractice brought under
3 section 2912 of Act No. 236 of the Public Acts of 1961, being
4 section 600.2912 of the Michigan Compiled Laws.

5 (6) The program shall retain copies of a panel's written
6 findings under this section, but shall not retain copies of medi-
7 cal records and other information reviewed by a panel.

8 Sec. 13. (1) Subject to subsection (2), if a written offer
9 of settlement is made by a defendant as a result of a panel's
10 findings under this act and if the offer of settlement is
11 rejected by the plaintiff within 180 days after the commissioner
12 receives notice under section 2912f of the revised judicature act
13 of 1961, Act No. 236 of the Public Acts of 1961, being section
14 600.2912f of the Michigan Compiled Laws, then subsections (2) and
15 (3) apply.

16 (2) If the plaintiff subsequently files a civil action for
17 medical malpractice under section 2912 of Act No. 236 of the
18 Public Acts of 1961, being section 600.2912 of the Michigan
19 Compiled Laws, and if there is a settlement or judgment in the
20 action in favor of the plaintiff that is at least 20% less than
21 the offer of settlement described in subsection (1), then the
22 court that conducts the action shall award to the defendant rea-
23 sonable attorney fees and the costs incurred by the defendant in
24 connection with the action by assessing the attorney fees and
25 costs against the plaintiff.

26 (3) If the plaintiff subsequently files a civil action as
27 described in subsection (2) and if a settlement or judgment in

1 the action in favor of the plaintiff is 120% or more of the offer
2 of settlement described in subsection (1), then the court that
3 conducts the action shall award to the plaintiff reasonable
4 attorney fees and the costs incurred by the plaintiff in connec-
5 tion with the action by assessing the attorney fees and costs
6 against the defendant.

7 (4) For purposes of subsection (1), if a plaintiff does not
8 accept a written offer of settlement within 21 days after the
9 offer is made or within the 180-day period, the offer is consid-
10 ered to be rejected.

11 Sec. 14. The commissioner shall charge a filing fee for the
12 notice required under section 2912f of the revised judicature act
13 of 1961, Act No. 236 of the Public Acts of 1961, being section
14 600.2912f of the Michigan Compiled Laws. The commissioner shall
15 charge an amount equal to the fee for filing a civil action with
16 the circuit court.

17 Sec. 15. (1) A person who files notice with the commis-
18 sioner as required under section 2912f of the revised judicature
19 act of 1961, Act No. 236 of the Public Acts of 1961, being sec-
20 tion 600.2912f of the Michigan Compiled Laws, waives for purposes
21 of that action the privilege created by section 2157 of Act
22 No. 236 of the Public Acts of 1961, being section 600.2157 of the
23 Michigan Compiled Laws, and any other similar privilege created
24 by law with respect to a person specified in section 5838a of Act
25 No. 236 of the Public Acts of 1961, being section 600.5838a of
26 the Michigan Compiled Laws, who was involved in the acts,
27 transactions, events, or occurrences that are the basis for the

1 action or who provided care or treatment to the claimant in the
2 proposed action either before or after those acts, transactions,
3 events, or occurrences.

4 (2) Pursuant to subsection (1), a person who is the subject
5 of a notice filed with the commissioner or that person's attorney
6 of record may communicate with a person described in
7 subsection (1) in order to obtain all information relevant to the
8 subject matter of the claim or to prepare the defense to the
9 claim.

10 (3) A person who discloses information under subsection (2)
11 to a person who is the subject of a notice filed with the commis-
12 sioner or that person's attorney of record does not violate
13 section 2157 of Act No. 236 of the Public Acts of 1961 or any
14 other similar duty or obligation created by law and owed to the
15 claimant.

16 Sec. 21. This act shall not take effect unless all of the
17 following bills of the 86th Legislature are enacted into law:

18 (a) Senate Bill No. 249.

19 (b) Senate Bill No. 413.

20 (c) Senate Bill No. 414.

21 (d) Senate Bill No. 418.

22 (e) Senate Bill No. 419.