

SENATE BILL No. 248

April 10, 1991, Introduced by Senators SCHWARZ, DE GROW, EHLERS, CISKY, WARTNER, EMMONS, MC MANUS, DILLINGHAM, N. SMITH, POSTHUMUS, GAST, PRIDNIA, DUNASKISS, KOIVISTO, WELBORN, BARCIA, DI NELLO and GEAKE and referred to the Committee on Judiciary.

A bill to create a medical liability determination board; 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 board and the panels; to provide for judicial appeal; to provide for the promulgation of rules; and to prescribe penalties.

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) "Board" means the medical liability determination board
5 established in section 4.

6 (b) "Claimant" means an individual who files a complaint
7 with the medical liability determination board or a complaint
8 with a court, including, but not limited to, an individual who

1 files such a complaint as a successor in interest, guardian, or
2 legal representative.

3 (c) "Court" means a court of competent jurisdiction.

4 (d) "Department" means the department of commerce.

5 (e) "Health care provider" or "provider" means either of the
6 following:

7 (i) An individual who is licensed or otherwise authorized
8 under article 15 of the public health code, Act No. 368 of the
9 Public Acts of 1978, being sections 333.16101 to 333.18838 of the
10 Michigan Compiled Laws, to provide a health care service.

11 (ii) A health facility licensed under article 17 of Act
12 No. 368 of the Public Acts of 1978, being sections 333.20101 to
13 333.22260 of the Michigan Compiled Laws.

14 (f) "Health care service" means the undertaking by a health
15 care provider of health maintenance, diagnosis, or treatment of
16 human disease, pain, injury, disability, deformity, or physical
17 or mental condition.

18 (g) "Person" means an individual, partnership, cooperative
19 association, private corporation, or other legal entity.

20 (h) "Respondent", unless specifically stated otherwise,
21 means a health care provider or other person named in a complaint
22 before the board or subsequently joined to the action.

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

26 (j) "Treatment related injury" means sickness, disease,
27 injury, or other bodily harm caused by a health care provider who

1 fails to provide health care services in accordance with the
2 standards required under applicable law.

3 (k) "Panel" means a medical liability determination panel
4 appointed by the board under section 5.

5 Sec. 3. (1) An individual claiming to have a treatment
6 related injury may, either personally or through his or her
7 attorney, make, sign, and file a complaint with the board, or may
8 institute a civil action for damages in a court. A claimant who
9 files a complaint with the board is barred from instituting a
10 civil action in any court relating to the same incident or treat-
11 ment related injury or based on facts related to the facts
12 alleged before the board. A claimant who files a civil action
13 for damages in a court is barred from filing a complaint with the
14 board relating to the same incident or treatment related injury
15 or based on facts alleged before the court.

16 (2) The respondent named in the complaint filed under sub-
17 section (1) or a respondent who is subsequently joined may remove
18 the claim filed with the board to a court.

19 Sec. 4. (1) The medical liability determination board is
20 established as an autonomous agency in the department of
21 commerce. The board shall exercise its powers and duties inde-
22 pendently of the department of commerce, except for budget, pro-
23 curement, and housekeeping functions. The governor shall appoint
24 the board with the advice and consent of the senate. The board
25 shall be composed of 9 members, as follows:

26 (a) Five public members.

1 (b) One representative from each of the following:

2 (i) Health facilities.

3 (ii) Physicians.

4 (iii) Insurers of health care providers.

5 (iv) Attorneys licensed to practice in this state.

6 (2) Except for initial members, a member of the board shall
7 serve for a term of 3 years or until a successor is appointed.
8 Of the members initially appointed, 3 of the members shall be
9 appointed for a term of 1 year, 3 of the members shall be
10 appointed for a term of 2 years, and 3 of the members shall be
11 appointed for a term of 3 years. The governor shall fill a
12 vacancy on the board for the balance of the unexpired term in the
13 same manner as the original appointment.

14 (3) Pursuant to section 33 of the administrative procedures
15 act of 1969, Act No. 306 of the Public Acts of 1969, being sec-
16 tion 24.233 of the Michigan Compiled Laws, the board shall
17 promulgate rules for the operation of the board. The rules shall
18 include, but are not limited to, voting procedures that protect
19 against conflict of interest and minimum requirements for
20 attendance at meetings.

21 (4) The board annually shall elect a chairperson and
22 vice-chairperson.

23 (5) The board shall hold regular quarterly meetings at
24 places and on dates fixed by the board. Special meetings may be
25 called by the chairperson or by not less than 5 board members.

26 (6) A majority of the board members appointed and serving
27 constitute a quorum. The board shall take final action only by

1 affirmative vote of a majority of the board members appointed and
2 serving. A board member shall not vote by proxy.

3 (7) The legislature annually shall fix the per diem compen-
4 sation of members of the board. The department shall reimburse
5 expenses of members incurred in the performance of official
6 duties pursuant to the standardized travel regulations of the
7 department of management and budget.

8 (8) The department shall furnish administrative services to
9 the board, shall have charge of the board's offices, records, and
10 accounts, and shall provide secretarial and other staff necessary
11 to allow the proper exercise of the powers and duties of the
12 board. The department shall make available the times and places
13 of board meetings and keep minutes of the meetings and a record
14 of the actions of the board.

15 (9) The board shall file a report with the governor as
16 required by the governor from time to time.

17 Sec. 5. (1) The board shall establish an adequate number of
18 medical liability determination panels to consider claims coming
19 before the board. The panels shall conduct hearings and deter-
20 mine matters of fact and law pursuant to this act and the rules
21 promulgated by the board.

22 (2) The board shall appoint 3 members to each panel, 2 per-
23 manent members and 1 temporary, rotating member. The board shall
24 appoint a circuit court judge and a member of the general public
25 as the permanent members of the panel. The board shall appoint
26 as the temporary, rotating member of the panel an individual who
27 is licensed or registered in the same profession as the health

1 professional who is the respondent in the claim before the
2 board. If there are multiple respondents in a claim before the
3 board, the board may appoint as the temporary, rotating member of
4 the panel an individual who is licensed or registered under arti-
5 cle 15 of the public health code, Act No. 368 of the Public Acts
6 of 1978, being sections 333.16101 to 333.18838 of the Michigan
7 Compiled Laws, as considered appropriate by the board. The board
8 shall appoint as the public member of each panel an individual
9 who is neither an attorney nor a health professional, has no
10 financial interest in a health care provider, and whose occupa-
11 tion, experience, and prior activities indicate no evidence of
12 bias or partiality toward or against health care providers in
13 professional liability matters. The board shall appoint the
14 member who is a circuit court judge from a list of candidates
15 submitted by the chief justice of the supreme court. The board
16 shall appoint the health professional member of each panel from a
17 list of candidates submitted by associations of health profes-
18 sionals in the state. The judge sitting on the panel shall serve
19 as chairperson. The terms and conditions of membership on a
20 panel shall be determined by the board, except that the board
21 shall require each permanent panel member to serve a minimum term
22 of 3 years.

23 Sec. 7. (1) A person seeking to institute an action before
24 the board shall file a complaint with the board that describes
25 the nature of the claim. The board shall prescribe a form for
26 the filing of a complaint that requires, at a minimum,
27 information relating to all of the following:

1 (a) The date and place of the treatment related injury.

2 (b) The name of each health care provider from whom damages
3 are sought.

4 (c) The nature of the alleged treatment related injury.

5 (d) A description of the damages sought.

6 (2) The institution of an action before the board consti-
7 tutes a waiver by the plaintiff of any patient-physician privi-
8 lege and authorization by the plaintiff for the disclosure of all
9 relevant information from any source as to those matters before
10 the board.

11 (3) The board shall transmit a copy of the complaint to each
12 respondent named in the complaint either by registered mail,
13 return receipt requested, or by personally serving a copy of the
14 complaint on each respondent within 10 days after the complaint
15 is filed with the board.

16 (4) Each respondent shall file an answer within 30 days
17 after receipt of the complaint in the manner and form prescribed
18 by the board. A respondent shall set forth in the answer his or
19 her defense to each claim asserted and shall include each coun-
20 terclaim, cross-claim, claim for contribution or indemnity, and
21 claim against any person not a party to the action known to the
22 respondent.

23 (5) The board shall promulgate rules providing for the man-
24 datory joinder of parties and claims to ensure that all aspects
25 of the claim are adjudicated concurrently. A plaintiff or
26 respondent who fails to comply with the rules promulgated under
27 this subsection is barred from filing a civil action in a court

1 or a claim with the board against any party, whether or not such
2 party has been joined in the action, relating to the same inci-
3 dent or treatment related injury or based on facts related to the
4 facts alleged before the board.

5 (6) Upon receipt by the board of each respondent's answer,
6 the board shall assign the matter to a panel. The chairperson of
7 the panel shall preside over and decide all nondispositive dis-
8 putes or issues arising before the hearing.

9 (7) The board shall promulgate rules regarding the circum-
10 stances under which the amendment of a complaint, answer, or
11 other pleading may be permitted.

12 Sec. 9. Discovery in matters before the board is limited as
13 follows:

14 (a) Within 90 days of the filing of respondent's answer,
15 each party shall file with the board and serve on all parties all
16 of the following information:

17 (i) All relevant medical records.

18 (ii) An existing medical report from a health care provider
19 who has treated the claimant for a condition related to the
20 alleged treatment related injury.

21 (iii) An affidavit describing the facts and circumstances of
22 the claim and the nature of alleged damages.

23 (iv) Answers to a uniform set of interrogatories provided by
24 the board.

25 (b) Except in unusual circumstances approved by a panel, the
26 board shall not permit depositions during the 90-day period

1 prescribed in subdivision (a). Depositions may be otherwise
2 scheduled at the settlement conference.

3 (c) Each party may serve upon any other party interrogato-
4 ries or requests for admissions within 20 days of the beginning
5 of the 90-day period prescribed in subdivision (a), if the inter-
6 rogatories or requests for admissions do not exceed 30
7 questions. A response to an interrogatory or request for admis-
8 sions in compliance with this subdivision shall be served upon
9 the party seeking the response before the end of the 90-day
10 period prescribed in subdivision (a).

11 Sec. 11. (1) During the 90-day period prescribed in
12 section 9(a), the panel shall consider the appointment of 1 or
13 more impartial qualified experts whose opinions would materially
14 aid the panel in its determination of the claim. The board shall
15 maintain a list of qualified medical, vocational, and actuarial
16 experts. Except as otherwise provided in subsection (5), for
17 purposes of this section the qualifications of an expert are gov-
18 erned by section 2169 of the revised judicature act of 1961, Act
19 No. 236 of the Public Acts of 1961, being section 600.2169 of the
20 Michigan Compiled Laws.

21 (2) The panel shall notify the parties of the qualified
22 expert or experts appointed by the panel and shall give the par-
23 ties a reasonable opportunity to object to the appointment of the
24 qualified expert or experts for good cause. As used in this sub-
25 section, "good cause" includes, but is not limited to, qualifica-
26 tion of an expert or conflict of interest.

1 (3) The panel shall provide the qualified expert or experts
2 appointed by the panel with copies of all pleadings and
3 discovery. A qualified expert may request additional information
4 from a party or require the claimant to submit to a physical
5 examination.

6 (4) Each qualified expert appointed by the panel shall
7 submit a written report to the panel setting forth his or her
8 findings of fact and conclusions of law and opinions within 30
9 days of his or her appointment. This report is admissible into
10 evidence at the hearing. The findings of fact and conclusions of
11 law contained in the report are not binding upon the panel. The
12 panel shall accord to the findings of fact and conclusions of law
13 such weight as the panel, sitting as the trier of facts, chooses
14 to ascribe to them in view of all the relevant evidence intro-
15 duced at the hearing. The panel shall forward a copy of the
16 qualified expert's report to each party. The board shall reason-
17 ably compensate each qualified expert for conducting an examina-
18 tion, if any, and preparing a report. A party may depose a qual-
19 ified expert appointed by the panel or require the qualified
20 expert to testify as to the findings of fact and conclusions of
21 law and opinions stated in his or her report. The party taking
22 the qualified expert's deposition or requiring his or her
23 attendance at the hearing shall pay the qualified expert a rea-
24 sonable fee. If the qualified expert and party involved cannot
25 agree on reasonable compensation, the panel shall determine the
26 fee. A qualified expert shall not testify on a contingency fee

1 basis. A qualified expert who testifies on a contingency fee
2 basis is guilty of a misdemeanor.

3 (5) A party may submit a report or testimony of its own
4 expert to the panel in support of a claim. The qualifications of
5 such an expert are not subject to section 2169 of Act No. 236 of
6 the Public Acts of 1961. However, the panel may in its discre-
7 tion disregard or ascribe limited weight to the findings of fact
8 and conclusions of law and opinions of such an expert. The party
9 engaging his or her own expert shall submit a copy of the
10 expert's report to the expert or experts appointed by the panel.
11 Within 30 days after receipt of the report, the expert or experts
12 appointed by the panel may submit a supplemental report with
13 respect to the qualifications of the party's expert and the
14 expert's findings of fact and conclusions of law and opinions.

15 Sec. 13. Within 180 days of the filing of respondents'
16 answers, the chairperson of the panel shall hold a settlement
17 conference with the parties. If the parties are unable to com-
18 pletely resolve their dispute, the chairperson shall schedule a
19 hearing date for no later than 225 days after the filing of
20 respondents' answers. At the settlement conference, the parties
21 shall advise the chairperson of the need, if any, for further
22 discovery before the hearing. The chairperson may grant reason-
23 able discovery requests and shall fix the scope and time dead-
24 lines for any further discovery.

25 Sec. 15. At any time subsequent to the conclusion of the
26 90-day period prescribed in section 9(a), a party may move before
27 the panel for a summary decision upon all or any part of a claim

1 or as to any defense. The panel shall grant a motion for a
2 summary decision if the pleadings and discovery, together with
3 the affidavits, show that there is no genuine issue as to any
4 material fact and that the moving party is entitled to prevail as
5 a matter of law.

6 Sec. 17. (1) Except as otherwise provided in
7 subsection (2), the panel shall conduct hearings in compliance
8 with the rules of procedure and evidence promulgated by the
9 board. The panel may, in the interests of efficiency or encour-
10 aging settlement of a claim, conduct separate hearings on liabil-
11 ity, damages, and allocation of fault among parties.

12 (2) If there is a conflict between the rules promulgated by
13 the board and the revised judicature act of 1961, Act No. 236 of
14 the Public Acts of 1961, being sections 600.101 to 600.9947 of
15 the Michigan Compiled Laws, the revised judicature act of 1961
16 governs.

17 Sec. 19. (1) As used in this section, "mixed action" means
18 an action brought before the board in which claims against a
19 health care provider for treatment related injuries are asserted
20 along with claims against a person who is not a health care
21 provider.

22 (2) Except as otherwise provided in this subsection, this
23 act applies to mixed actions. The board shall transfer a mixed
24 action to a court if all claims against respondents who are
25 health care providers are dismissed or settled or if the panel,
26 on its own motion or on motion of any party, determines that the
27 claims against the respondents who are health care providers were

1 asserted solely for the purpose of invoking the board's
2 jurisdiction. A party is barred from instituting a claim before
3 the board if the claim was dismissed, settled, or transferred by
4 the board or a panel to a court.

5 Sec. 21. (1) After a panel transmits its proposed decision
6 to the board, the board shall provide a party the opportunity to
7 file exceptions to the decision of the panel in a manner and
8 subject to such rules as prescribed by the board. The record
9 reviewed by the board shall include the exceptions, replies, if
10 any, transcript of the hearing, evidence introduced at the hear-
11 ing, and may, in the board's discretion, be enlarged to include
12 additional documentary evidence or a supplemental hearing.

13 Within the time prescribed by rule of the board, the board shall
14 enter an order adopting, rejecting, or modifying the panel's pro-
15 posed decision. The board's order constitutes a final decision.

16 (2) A party may appeal the final decision of the board to
17 the court of appeals in the same manner as if the appeal were
18 from a decision of the circuit court. The court of appeals shall
19 affirm the board's decision unless the court of appeals finds
20 either or both of the following:

21 (a) The decision could not reasonably have been made or is
22 not based upon sufficient credible evidence in the record as a
23 whole and giving due regard to the board's expertise.

24 (b) The decision was not in accordance with applicable state
25 law.

Sec. 23. This act shall not take effect unless Senate Bill
No. 249 _____ of the
86th Legislature is enacted into law.