

By: Representative Ishee

To: Judiciary A

HOUSE BILL NO. 85

1 AN ACT TO PROVIDE FOR THE SUBMISSION OF MEDICAL MALPRACTICE
2 CLAIMS TO MEDICAL REVIEW PANELS; TO PROVIDE FOR FILING OF REQUESTS
3 FOR REVIEW; TO PROVIDE NOTICE REQUIREMENTS; TO PROVIDE FOR THE
4 SELECTION OF MEDICAL REVIEW PANEL MEMBERS AND CHAIRMEN; TO PROVIDE
5 FOR THE QUALIFICATIONS OF THE MEMBERS; TO PROVIDE PROCEDURAL
6 GUIDELINES FOR MEDICAL REVIEW PANELS; TO PROVIDE FOR COMPENSATION
7 OF MEDICAL REVIEW PANEL MEMBERS; TO PROVIDE FOR THE SUBMISSION OF
8 THE REPORT OF THE MEDICAL REVIEW PANEL; AND FOR RELATED PURPOSES.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

10 **SECTION 1.** (1) (a) All malpractice claims against health
11 care providers covered by this act, other than claims validly
12 agreed for submission to a lawfully binding arbitration procedure,
13 shall be reviewed by a medical review panel established as
14 hereinafter provided for in this section.

15 (b) (i) The filing of the request for a review of a
16 claim shall suspend the time within which suit must be instituted,
17 in accordance with this act, until ninety (90) days following
18 notification, by certified mail, as provided in subsection (10) of
19 this section, to the claimant or his attorney of the issuance of
20 the opinion by the medical review panel, in the case of those
21 health care providers covered by this act, or in the case of a
22 health care provider against whom a claim has been filed under the
23 provisions of this act, but who has not qualified under this act,
24 until sixty (60) days following notification by certified mail to
25 the claimant or his attorney by the board that the health care
26 provider is not covered by this act. The filing of a request for
27 review of a claim shall suspend the running of prescription
28 against all joint and solidary obligors, and all joint
29 tort-feasors, including, but not limited to, health care
30 providers, both qualified and not qualified, to the same extent

31 that prescription is suspended against the party or parties that
32 are the subject of the request for review. Filing a request for
33 review of a malpractice claim as required by this section with any
34 agency or entity other than the division of administration shall
35 not suspend or interrupt the running of prescription.

36 (ii) The request for review of the claim under
37 this section shall be deemed filed on the date of receipt of the
38 complaint stamped and certified by the board or on the date of
39 mailing of the complaint if mailed to the board by certified or
40 registered mail.

41 (iii) The board shall dismiss a claim ninety (90)
42 days after giving notice by certified mail to the claimant or the
43 claimant's attorney if no action has been taken by the claimant or
44 the claimant's attorney to secure the appointment of an attorney
45 chairman for the medical review panel within two (2) years from
46 the date the request for review of the claim was filed.

47 (c) It shall be the duty of the board within fifteen
48 (15) days of the receipt of the claim to:

49 (i) Confirm to the claimant that the filing has
50 been officially received and whether or not the named defendant or
51 defendants have qualified under this act; and

52 (ii) Notify all named defendants, whether or not
53 qualified under the provisions of this act, that a filing has been
54 made against them and request made for the formation of a medical
55 review panel; and forward a copy of the proposed complaint to each
56 named defendant at his last and usual place of residence or his
57 office.

58 (2) (a) (i) 1. No action against a health care provider
59 covered by this act, or his insurer, may be commenced in any court
60 before the claimant's proposed complaint has been presented to a
61 medical review panel established pursuant to this section.

62 2. A certificate of enrollment issued by the
63 board shall be admitted in evidence.

64 (ii) However, with respect to an act of
65 malpractice which occurs after July 1, 2003, if an opinion is not
66 rendered by the panel within twelve (12) months after the date of
67 notification of the selection of the attorney chairman by the
68 executive director to the selected attorney and all other parties
69 pursuant to paragraph (a) of subsection (3) of this section, suit
70 may be instituted against a health care provider covered by this
71 act. However, either party may petition a court of competent
72 jurisdiction for an order extending the twelve-month period
73 provided in this subsection for good cause shown. After the
74 twelve-month period provided for in this subsection or any
75 court-ordered extension thereof, the medical review panel
76 established to review the claimant's complaint shall be dissolved
77 without the necessity of obtaining a court order of dissolution.

78 (iii) By agreement of both parties, the use of the
79 medical review panel may be waived.

80 (b) (i) A health care provider, against whom a claim
81 has been filed under the provisions of this act, may raise any
82 exception or defenses available in a court of competent
83 jurisdiction and proper venue at any time without need for
84 completion of the review process by the medical review panel.

85 (ii) If the court finds that the claim had
86 prescribed or otherwise was preempted prior to being filed, the
87 panel, if established, shall be dissolved.

88 (c) Ninety (90) days after the notification to all
89 parties by certified mail by the attorney chairman of the board of
90 the dissolution of the medical review panel or ninety (90) days
91 after the expiration of any court-ordered extension as authorized
92 by paragraph (a) of this subsection, the suspension of the running
93 of prescription with respect to a qualified health care provider
94 shall cease.

95 (3) The medical review panel shall consist of three (3)
96 health care providers who hold unlimited licenses to practice

97 their profession in Mississippi and one (1) attorney. The parties
98 may agree on the attorney member of the medical review panel or if
99 no agreement can be reached, then the attorney member of the
100 medical review panel shall be selected in the following manner:

101 (a) (i) The Office of the Clerk of the Mississippi
102 Supreme Court, upon receipt of notification from the board, shall
103 draw five (5) names at random from the list of attorneys who
104 reside or maintain an office in the county which would be proper
105 venue for the action in a court of law. The names of judges,
106 magistrates, district attorneys and assistant district attorneys
107 shall be excluded if drawn and new names drawn in their place.
108 After selection of the attorney names, the office of the Clerk of
109 the Supreme Court shall notify the board of the names so selected.
110 It shall be the duty of the board to notify the parties of the
111 attorney names from which the parties may choose the attorney
112 member of the panel within five (5) days. If no agreement can be
113 reached within five (5) days, the parties shall immediately
114 initiate a procedure of selecting the attorney by each striking
115 two (2) names alternately, with the claimant striking first and so
116 advising the health care provider of the name of the attorney so
117 stricken; thereafter, the health care provider and the claimant
118 shall alternately strike until both sides have stricken two (2)
119 names and the remaining name shall be the attorney member of the
120 panel. If either the plaintiff or defendant fails to strike, the
121 Clerk of the Mississippi Supreme Court shall strike for that party
122 within five (5) additional days.

123 (ii) After the striking, the office of the board
124 shall notify the attorney and all other parties of the name of the
125 selected attorney.

126 (b) The attorney shall act as chairman of the panel and
127 in an advisory capacity but shall have no vote. It is the duty of
128 the chairman to expedite the selection of the other panel members,
129 to convene the panel, and expedite the panel's review of the

130 proposed complaint. The chairman shall establish a reasonable
131 schedule for submission of evidence to the medical review panel
132 but must allow sufficient time for the parties to make full and
133 adequate presentation of related facts and authorities within
134 ninety (90) days following selection of the panel.

135 (c) (i) The plaintiff shall notify the attorney
136 chairman and the named defendants of his choice of a health care
137 provider member of the medical review panel within thirty (30)
138 days of the date of certification of his filing by the board.

139 (ii) The named defendant shall then have fifteen
140 (15) days after notification by the plaintiff of the plaintiff's
141 choice of his health care provider panelist to name the
142 defendant's health care provider panelist.

143 (iii) If either the plaintiff or defendant fails
144 to make a selection of health care provider panelist within the
145 time provided, the attorney chairman shall notify by certified
146 mail the failing party to make such selection within five (5) days
147 of the receipt of the notice.

148 (iv) If no selection is made within the five-day
149 period, then the chairman shall make the selection on behalf of
150 the failing party. The two (2) health care provider panel members
151 selected by the parties or on their behalf shall be notified by
152 the chairman to select the third health care provider panel member
153 within fifteen (15) days of their receipt of such notice.

154 (v) If the two (2) health care provider panel
155 members fail to make such selection within the fifteen-day period
156 allowed, the chairman shall then make the selection of the third
157 panel member and thereby complete the panel.

158 (vi) The qualification and selection of physician
159 members of the medical review panel shall be as follows:

160 1. All physicians who hold a license to
161 practice medicine in the State of Mississippi and who are engaged
162 in the active practice of medicine in this state, whether in the

163 teaching profession or otherwise, shall be available for
164 selection.

165 2. Each party to the action shall have the
166 right to select one (1) physician and upon selection the physician
167 shall be required to serve.

168 3. When there are multiple plaintiffs or
169 defendants, there shall be only one (1) physician selected per
170 side. The plaintiff, whether single or multiple, shall have the
171 right to select one (1) physician, and the defendant, whether
172 single or multiple, shall have the right to select one (1)
173 physician.

174 4. A panelist so selected and the attorney
175 member selected in accordance with this subsection shall serve
176 unless for good cause shown may be excused. To show good cause
177 for relief from serving, the panelist shall present an affidavit
178 to a judge of a court of competent jurisdiction and proper venue
179 which shall set out the facts showing that service would
180 constitute an unreasonable burden or undue hardship. A health
181 care provider panelist may also be excused from serving by the
182 attorney chairman if during the previous twelve-month period he
183 has been appointed to four (4) other medical review panels. In
184 either such event, a replacement panelist shall be selected within
185 fifteen (15) days in the same manner as the excused panelist.

186 5. If there is only one (1) party defendant
187 which is not a hospital, community blood center, tissue bank, or
188 ambulance service, all panelists except the attorney shall be from
189 the same class and specialty of practice of health care provider
190 as the defendant. If there is only one (1) party defendant which
191 is a hospital, community blood center, tissue bank or ambulance
192 service, all panelists except the attorney shall be physicians.
193 If there are claims against multiple defendants, one or more of
194 whom are health care providers other than a hospital, community
195 blood center, tissue bank or ambulance service, the panelists

196 selected in accordance with this subsection may also be selected
197 from health care providers who are from the same class and
198 specialty of practice of health care providers as are any of the
199 defendants other than a hospital, community blood center, tissue
200 bank or ambulance service.

201 (d) When the medical review panel is formed, the
202 chairman shall within five (5) days notify the board and the
203 parties by registered or certified mail of the names and addresses
204 of the panel members and the date on which the last member was
205 selected.

206 (e) Before entering upon their duties, each voting
207 panelist shall subscribe before a notary public the following
208 oath:

209 "I, (name), do solemnly swear/affirm that I will
210 faithfully perform the duties of medical review panel
211 member to the best of my ability and without partiality
212 or favoritism of any kind. I acknowledge that I
213 represent neither side and that it is my lawful duty to
214 serve with complete impartiality and to render a
215 decision in accordance with law and the evidence."

216 The attorney panel member shall subscribe to the same oath
217 except that in lieu of the last sentence thereof the attorney's
218 oath shall state:

219 "I acknowledge that I represent neither side and that it
220 is my lawful duty to advise the panel members concerning
221 matters of law and procedure and to serve as chairman."

222 The original of each oath shall be attached to the opinion
223 rendered by the panel.

224 (f) The party aggrieved by the alleged failure or
225 refusal of another to perform according to the provisions of this
226 section may petition any district court of proper venue over the
227 parties for an order directing that the parties comply with the
228 medical review panel provisions of this act.

229 (g) A panelist or a representative or attorney for any
230 interested party shall not discuss with other members of a medical
231 review panel on which he serves a claim which is to be reviewed by
232 the panel until all evidence to be considered by the panel has
233 been submitted. A panelist or a representative or attorney for
234 any interested party shall not discuss the pending claim with the
235 claimant or his attorney asserting the claim or with a health care
236 provider or his attorney against whom a claim has been asserted
237 under this section. A panelist or the attorney chairman shall
238 disclose in writing to the parties prior to the hearing any
239 employment relationship or financial relationship with the
240 claimant, the health care provider against whom a claim is
241 asserted, or the attorneys representing the claimant or health
242 care provider, or any other relationship that might give rise to a
243 conflict of interest for the panelists.

244 (4) (a) The evidence to be considered by the medical review
245 panel shall be promptly submitted by the respective parties in
246 written form only.

247 (b) The evidence may consist of medical charts, x-rays,
248 lab tests, excerpts of treatises, depositions of witnesses
249 including parties, affidavits and reports of medical experts, and
250 any other form of evidence allowable by the medical review panel.

251 (c) Depositions of the parties and witnesses may be
252 taken prior to the convening of the panel.

253 (d) Upon request of any party, or upon request of any
254 two (2) panel members, the clerk of any district court shall issue
255 subpoenas and subpoenas duces tecum in aid of the taking of
256 depositions and the production of documentary evidence for
257 inspection and/or copying.

258 (e) The chairman of the panel shall advise the panel
259 relative to any legal question involved in the review proceeding
260 and shall prepare the opinion of the panel as provided in
261 subsection (7).

262 (f) A copy of the evidence shall be sent to each member
263 of the panel.

264 (5) Either party, after submission of all evidence and upon
265 ten (10) days notice to the other side, shall have the right to
266 convene the panel at a time and place agreeable to the members of
267 the panel. Either party may question the panel concerning any
268 matters relevant to issues to be decided by the panel before the
269 issuance of their report. The chairman of the panel shall preside
270 at all meetings. Meetings shall be informal.

271 (6) The panel shall have the right and duty to request and
272 procure all necessary information. The panel may consult with
273 medical authorities, provided the names of such authorities are
274 submitted to the parties with a synopsis of their opinions and
275 provided further that the parties may then obtain their testimony
276 by deposition. The panel may examine reports of such other health
277 care providers necessary to fully inform itself regarding the
278 issue to be decided. Both parties shall have full access to any
279 material submitted to the panel.

280 (7) The panel shall have the sole duty to express its expert
281 opinion as to whether or not the evidence supports the conclusion
282 that the defendant or defendants acted or failed to act within the
283 appropriate standards of care. After reviewing all evidence and
284 after any examination of the panel by counsel representing either
285 party, the panel shall, within thirty (30) days but in all events
286 within one hundred eighty (180) days after the selection of the
287 last panel member, render one or more of the following expert
288 opinions, which shall be in writing and signed by the panelists,
289 together with written reasons for their conclusions:

290 (a) The evidence supports the conclusion that the
291 defendant or defendants failed to comply with the appropriate
292 standard of care as charged in the complaint.

293 (b) The evidence does not support the conclusion that
294 the defendant or defendants failed to meet the applicable standard
295 of care as charged in the complaint.

296 (c) That there is a material issue of fact, not
297 requiring expert opinion, bearing on liability for consideration
298 by the court.

299 (d) Where paragraph (b) above is answered in the
300 affirmative, that the conduct complained of was or was not a
301 factor of the resultant damages. If such conduct was a factor,
302 whether the plaintiff suffered: (i) any disability and the extent
303 and duration of the disability, and (ii) any permanent impairment
304 and the percentage of the impairment.

305 (8) Any report of the expert opinion reached by the medical
306 review panel shall be admissible as evidence in any action
307 subsequently brought by the claimant in a court of law, but such
308 expert opinion shall not be conclusive and either party shall have
309 the right to call, at his cost, any member of the medical review
310 panel as a witness. If called, the witness shall be required to
311 appear and testify. A panelist shall have absolute immunity from
312 civil liability for all communications, findings, opinions and
313 conclusions made in the course and scope of duties prescribed by
314 this act.

315 (9) (a) (i) Each physician member of the medical review
316 panel shall be paid a per diem, as provided in Section 25-3-69,
317 for all work performed as a member of the panel exclusive of time
318 involved if called as a witness to testify in a court of law
319 regarding the communications, findings and conclusions made in the
320 course and scope of duties as a member of the medical review
321 panel, and in addition thereto, as reasonable travel expenses as
322 provided in Section 25-3-41.

323 (ii) The attorney chairman of the medical review
324 panel shall be paid a per diem, as provided in Section 25-3-69,
325 for all work performed as a member of the panel exclusive of time

326 involved if called as a witness to testify in a court of law
327 regarding the communications, findings and conclusions made in the
328 course and scope of duties as a member of the medical review
329 panel, and in addition thereto, reasonable travel expenses as
330 provided in Section 25-3-41. Additionally, the attorney chairman
331 shall be reimbursed for all reasonable out-of-pocket expenses
332 incurred in performing his duties for each medical review panel.
333 The attorney chairman shall submit the amount due him for all work
334 performed as a member of the panel by affidavit, which shall
335 attest that he has performed in the capacity of chairman of the
336 medical review panel and that he was personally present at all the
337 panel's meetings or deliberations.

338 (b) (i) The costs of the medical review panel shall be
339 paid by the health care provider if the opinion of the medical
340 review panel is in favor of said defendant health care provider.

341 (ii) The claimant shall pay the costs of the
342 medical review panel if the opinion of the medical review panel is
343 in favor of said claimant. However, if the claimant is unable to
344 pay, the claimant shall swear under oath to the attorney chairman
345 of the medical review panel that said claimant cannot afford the
346 costs of the medical review panel as they accrue, then the costs
347 of the medical review panel shall be paid by the health care
348 provider, with the proviso that if the claimant subsequently
349 receives a settlement or receives a judgment, the advance payment
350 of the medical review panel costs will be offset.

351 (c) If the medical review panel decides that there is a
352 material issue of fact bearing on liability for consideration by
353 the court, the claimant and the health care provider shall split
354 the costs of the medical review panel. However, in those
355 instances in which the claimant is unable to pay his share of the
356 costs of the medical review panel, the claimant shall swear under
357 oath by the attorney chairman of the medical review panel that
358 said claimant cannot pay his share of the costs of the medical

359 review panel as they accrue. The claimant's share of the costs of
360 the medical review panel shall then be paid by the health care
361 provider with the proviso that if the claimant subsequently
362 receives a settlement or receives a judgment, the advance payment
363 of the claimant's share of the costs of the medical review panel
364 will be offset.

365 (10) The chairman shall submit a copy of the panel's report
366 to the board and all parties and attorneys by registered or
367 certified mail within five (5) days after the panel renders its
368 opinion.

369 (11) In the event the medical review panel after a good
370 faith effort has been unable to carry out its duties by the end of
371 the one-hundred-eighty-day period, either party or the board,
372 after exhausting all remedies available to them under this
373 section, may petition the appropriate court of competent
374 jurisdiction for an order to show cause why the panel should not
375 be dissolved and the panelists relieved of their duties. The
376 suspension of the running of prescription shall cease sixty (60)
377 days after the receipt by the claimant or his attorney of the
378 final order dissolving the medical review panel, which order shall
379 be mailed to the claimant or his attorney by certified mail.

380 (12) Where the medical review panel issues its opinion after
381 the one hundred eighty (180) days required by this section, the
382 suspension of the running of prescription shall not cease until
383 ninety (90) days following notification by certified mail to the
384 claimant or his attorney of the issuance of the opinion as
385 required by subsection (10) of this section.

386 (13) Legal interest shall accrue from the date of filing of
387 the complaint with the board on a judgment rendered by a court in
388 a suit for medical malpractice brought after compliance with this
389 act.

390 **SECTION 2.** This act shall take effect and be in force from
391 and after July 1, 2004.