

JAN 21 2011

A BILL FOR AN ACT

RELATING TO MEDICAL TORTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 671, Hawaii Revised Statutes, is
2 amended by adding a new section to part II to be appropriately
3 designated and to read as follows:

4 "§671- Sanctions for failing to prevail in subsequent
5 litigation. (a) After the verdict or the court's decision in
6 subsequent litigation under section 671-16, the court may impose
7 sanctions against the nonprevailing party whose rejection of the
8 medical claim conciliation panel decision resulted in trial. A
9 party's rejection of the panel decision shall be deemed to have
10 resulted in the trial regardless of whether both parties
11 rejected the decision.

12 (b) The sanctions available to the court are as follows:

13 (1) Reasonable costs and fees, other than attorneys' fees
14 actually incurred by the party but not otherwise
15 taxable under the law, including expert witness fees,
16 travel costs, and deposition costs;

17 (2) Costs of jurors; and

18 (3) Attorneys' fees.



1 (c) Sanctions imposed against a plaintiff shall be
2 deducted from any judgment rendered at trial. If the plaintiff
3 does not receive a judgment in the plaintiff's favor, or the
4 judgment is insufficient to pay the sanctions, the plaintiff
5 shall pay the amount of the deficiency. Sanctions imposed
6 against a defendant shall be added to any judgment rendered at
7 trial.

8 (d) In determining sanctions, if any, the court shall
9 consider all the facts and circumstances of the case and the
10 intent and purpose of this part."

11 SECTION 2. Section 671-1, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "**§671-1 Definitions.** As used in this chapter[+], unless
14 the context otherwise requires:

15 "Health care provider" means a physician, osteopathic
16 physician, surgeon, or physician assistant licensed under
17 chapter 453, a podiatrist licensed under chapter 463E, a health
18 care facility as defined in section 323D-2, and the employees of
19 any of them. Health care provider shall not mean any nursing
20 institution or nursing service conducted by and for those who
21 rely upon treatment by spiritual means through prayer alone, or
22 employees of the institution or service.



1 "Medical tort" means professional negligence, the rendering
2 of professional service without informed consent, or an error or
3 omission in professional practice, by a health care provider,
4 which proximately causes death, injury, or other damage to a
5 patient.

6 "Panel" means the medical claim conciliation panel.

7 "Prevailing party" means the party to a medical claim
8 conciliation panel hearing who in subsequent litigation under
9 section 671-16 resulting from a rejection of the panel's
10 decision is:

11 (1) The plaintiff, if the judgment exclusive of any
12 punitive damages increases the panel's award by thirty
13 per cent or more; or

14 (2) The defendant, if the judgment exclusive of any
15 punitive damages fails to improve upon the panel's
16 award by thirty per cent or more."

17 SECTION 3. Section 671-12.5, Hawaii Revised Statutes, is
18 amended to read as follows:

19 "[+]§671-12.5[+] **Certificate of consultation.** (a) Any
20 claim filed with the medical claim conciliation panel under this
21 chapter shall be accompanied by a certificate which declares
22 ~~[one of the following:~~



1 ~~(1) That~~ that the claimant or the claimant's attorney has
2 consulted with at least one physician who is licensed to
3 practice in this State or any other state, and who is
4 knowledgeable or experienced in the same medical specialty as
5 the health care professional against whom the claim is made, and
6 that the claimant or claimant's attorney has concluded on the
7 basis of such consultation that there is a reasonable and
8 meritorious cause for filing the claim. If the claimant or the
9 claimant's attorney is not able to consult with a physician in
10 the same medical specialty as the health care professional
11 against whom the claim is made, the claimant or claimant's
12 attorney may consult with a physician who is licensed in this
13 State or in any other state who is knowledgeable and experienced
14 in a medical specialty that is as closely related as practicable
15 to the medical specialty of the health care professional against
16 whom the claim is made. The physician or physicians consulted
17 by the claimant or the claimant's attorney may not be a party to
18 the case, nor be compelled to testify or otherwise participate
19 in the hearing before the medical claim conciliation panel[+]

20 ~~(2) That the claimant or the claimant's attorney was~~
21 ~~unable to obtain the consultation required by~~
22 ~~paragraph (1) because a statute of limitations would~~



1 ~~impair the action and that the certificate required by~~
2 ~~paragraph (1) could not be obtained before the~~
3 ~~impairment of the action. If a certificate is~~
4 ~~executed pursuant to this paragraph, the certificate~~
5 ~~required by paragraph (1) shall be filed by the~~
6 ~~claimant or the claimant's attorney within ninety days~~
7 ~~after filing the claim; or~~

8 ~~(3) That the claimant or the claimant's attorney was~~
9 ~~unable to obtain the consultation required by~~
10 ~~paragraph (1) after the claimant or the claimant's~~
11 ~~attorney had made a good faith attempt to obtain such~~
12 ~~consultation and the physician contacted would not~~
13 ~~agree to such a consultation. For purposes of this~~
14 ~~paragraph, "good faith attempt" refers to the~~
15 ~~responsibility of a claimant or claimant's attorney to~~
16 ~~make reasonable efforts to contact a physician for the~~
17 ~~purpose of reviewing the circumstances upon which a~~
18 ~~claim is based. The claimant or claimant's attorney~~
19 ~~may contact physicians by letter, telephone,~~
20 ~~facsimile, or other electronic means of communication.~~
21 ~~If the physician does not respond within a reasonable~~
22 ~~time, the claimant or claimant's attorney may submit~~



1 ~~its claim to the medical claim conciliation panel~~
2 ~~along with a certificate declaring such nonresponse to~~
3 ~~claimant's good faith attempt. A "good faith attempt"~~
4 ~~shall ultimately be evaluated in light of the goal of~~
5 ~~having a qualified physician assist the claimant or~~
6 ~~claimant's attorney in understanding the basis of the~~
7 ~~claim, and such determination shall depend upon the~~
8 ~~circumstances of each individual case.~~

9 ~~(b) Where a claimant or the claimant's attorney intends to~~
10 ~~rely solely on a failure to inform of the consequences of a~~
11 ~~procedure (informed consent), this section shall be~~
12 ~~inapplicable. The claimant or the claimant's attorney shall~~
13 ~~certify upon filing of the claim that the claimant or the~~
14 ~~claimant's attorney is relying solely on the failure to inform~~
15 ~~of the consequences of a procedure and for that reason is not~~
16 ~~filing a certificate as required by this section].~~

17 ~~[-e)]~~ (b) For the purposes of this section, the claimant
18 or the claimant's attorney shall not be required to disclose the
19 names of any physician consulted to fulfill the requirements of
20 subsection (a) to any of the other parties to the claim. The
21 medical claim conciliation panel may require the claimant or the
22 claimant's attorney to disclose the name of any physician



1 consulted to fulfill the requirements of subsection (a). No
2 disclosure of the name of any physician consulted to fulfill the
3 requirements of subsection (a) shall be made to any of the other
4 parties to the claim; provided that the medical claim
5 conciliation panel may contact any such physician to determine
6 if the requirements of subsection (a) were met.

7 ~~[(d)]~~ (c) Unless a certificate is filed pursuant to
8 subsection (a) ~~[or (b)]~~, the claim shall not be received for
9 filing by the medical claim conciliation panel."

10 SECTION 4. Section 671-16, Hawaii Revised Statutes, is
11 amended to read as follows:

12 "**§671-16 Subsequent litigation; excluded evidence.** The
13 claimant may institute litigation based upon the claim in an
14 appropriate court only after a party to a medical claim
15 conciliation panel hearing rejects the decision of the panel, or
16 after the twelve-month period under section 671-18 has expired.
17 A party's rejection of the panel's decision shall be recorded
18 with the panel before the litigation may be instituted.

19 No statement made in the course of the hearing of the
20 medical claim conciliation panel shall be admissible in evidence
21 either as an admission, to impeach the credibility of a witness,
22 or for any other purpose in any trial of the action; provided



1 that [~~such~~] the statements may be admissible for the [~~purpose~~]
2 purposes of [~~section~~] sections 671-19 [~~, hereof.~~] and 671- . No
3 decision, conclusion, finding, or recommendation of the medical
4 claim conciliation panel on the issue of liability or on the
5 issue of damages shall be admitted into evidence in any
6 subsequent trial, nor shall any party to the medical claim
7 conciliation panel hearing, or the counsel or other
8 representative of such party, refer or comment thereon in an
9 opening statement, an argument, or at any other time, to the
10 court or jury; provided that such decision, conclusion, finding,
11 or recommendation may be admissible for the [~~purpose~~] purposes
12 of [~~section~~] sections 671-19 [~~, hereof.~~] and 671- ."

13 SECTION 5. This Act does not affect rights and duties that
14 matured, penalties that were incurred, and proceedings that were
15 begun before its effective date.

16 SECTION 6. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 7. This Act shall take effect upon its approval.

19

INTRODUCED BY: _____

John Bree MD

Will Eyring



Report Title:

Medical Torts; Medical Claim Conciliation Panel

Description:

Authorizes the court, in medical tort litigation, to impose sanctions on a nonprevailing party whose rejection of the medical claim conciliation panel's decision resulted in the subsequent litigation. Amends requirements for the certificate accompanying any claim filed with the medical claim conciliation panel.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

