ENACTMENT NEWS

House Bill 7
Medical Malpractice

Effective March 20, 2019

On December 19, 2018, the Governor signed into law HB 7 (Rep. Cupp), which made changes to medical malpractice processes. The bill was introduced February 2, 2017; it passed the House on June 27, 2018. It was amended in the Senate and passed the Senate unanimously on December 5, 2018, with House concurrence on Senate amendments on December 6. The bill will go into effect March 20, 2019.

The bill makes changes to what is admissible as evidence in civil actions based on medical claims:

- Under current law, Sec. 2317.43 does not allow health care providers' (or their employers') statements of compassion, condolence, compassion and other similar sentiments to be admissible as evidence of an admission of liability or as an admission against interest. Under the bill, statements of *error or fault* from health care providers, their employers, or their *representatives* are similarly inadmissible.
- A new subsection in Sec. 2317.43 (subsection (B)) makes certain communications, made as part of a review after an "unanticipated outcome," inadmissible. The statute clarifies that such a review is not required. The communications are: (1) statements made by a health care provider, or an employee or representative of a health care provider to an alleged victim or to a relative, acquaintance, or representative of an alleged victim and (2) statements made by an alleged victim, or a relative, acquaintance, or representative of a victim to a health care provider or a health care provider's employee or representative. The definition of "representative of a health care provider," at Sec. 2317.43(C)(4), is broad.
- Under the bill, at Sec. 2317.44(B), guidelines, regulations, or standards under the ACA do not establish a standard of care or duty of care and are not admissible as evidence in civil cases. Under Sec. 2317.45(B), Medicare and Medicaid reimbursement guidelines and determinations are similarly not admissible.
- Under current law, Sec. 2317.421 outlines that bills or statements are prima-facie evidence of reasonableness of charges or fees. Under the bill, a new subsection states that in a medical claim, a bill or statement (or any portion of a bill or statement) is *not* admissible as evidence of reasonableness of charges. Only evidence of the amount accepted as full payment for medical services is admissible as evidence. (Sec. 2323.41(D)).

The bill adds procedural guidelines for filing medical claims:

- Under current law, a claimant with an alleged medical claim may give written notice of an intention to file a claim and may commence the action within 180 days of giving

notice (prior to the expiration of the 1 year statute of limitations). Under the bill, a person with an alleged *medical* claim must give notice by certified mail addressed to (1) residence, (2) professional practice, (3) employer, or (4) address on file with the state medical board (Sec. 2305.113(B)(2))

- A new section, Sec. 2323.451, requires a plaintiff, when asserting a medical claim, to file along with the complaint an affidavit of merit per CivR 10(D). Discovery may take place, and, for a period of 180 days after the filing, the parties may try to discover the existence or identity of any other potential claims or defendants. Within 180 days of filing the complaint, it may be amended per CivR 15, if within either (1) the 1 year statute of limitations or (2) the 180 days after service of written notice. An affidavit of merit is to accompany any joinder. After 180 days after the filing of the complaint asserting a medical claim, the defendant cannot join any additional medical claims or defendants, except for a wrongful death claim.
- Under current law, derivative claims can arise from a plan of care, a medical diagnosis, or treatment. Under the bill, derivative claims can arise from a medical diagnosis, care, or treatment; a derivative claim arising from a plan of care is specific to residents of a home (Sec. 2305.113(E)(3)(a)-(c))
- Sec. 4 of the uncodified language of the bill states that the bill applies to a civil action based on a medical claim that is filed on or after the effective date of the bill.

The bill creates additional civil and professional immunities for medical professionals and hospitals through the duration of a disaster:

- The bill creates a new section, 2305.2311, which extends immunity from civil liability to EMTs, physicians, physician assistants, dentists, optometrists, and hospitals providing treatment as a result of a disaster, as long as acting within the scope of authority and without *reckless disregard* – defined in the section as:
    - Conduct that the person knew or should have known
    - At the time the services were rendered
    - Created an unreasonable risk of injury, death, or loss to person or property
    - And the risk was substantially greater than negligent conduct

  The section specifically does not apply to wrongful death claims (Sec. 2305.2311(D)), but the immunity mentioned in 2305.2311(B) refers to tort actions for injury, death, or loss
- Under current law, Sec. 2305.51 outlines steps to be taken when a medical professional knows or discovers that a mental health client or patient is making threats and may be a danger to an identifiable person (or building). Under the bill, a new subsection provides that a physician, physician assistant, advanced practice registered nurse, or hospital is not civilly or professionally liable for either (1) failing to discharge or to allow a mental health patient to leave or (2) discharging a mental health patient, as long as a good faith determination was made according to professional standards
- Under the bill, a peer review committee may share its records with law enforcement, licensing boards, and regulatory agencies, but sharing with these entities does not affect the confidentiality of the records under the current Sec. 2305.252(A) (Sec. 2305.252(C))