



# Ohio Legislative Service Commission

## Bill Analysis

Aida S. Montano

### H.B. 103

130th General Assembly  
(As Introduced)

**Reps.** Huffman, Becker, Buchy, Conditt, Grossman, Hottinger, Pillich, Stebelton, Wachtmann

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## BILL SUMMARY

- Prescribes the manner in which a claimant who allegedly possesses a medical claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim.
- Permits a plaintiff, within 180 days after filing an action upon a medical claim, to conduct discovery, in addition to the discovery permitted by the Rules of Civil Procedure, to seek to discover the existence or identity of other potential medical claims or defendants not named in the complaint.
- Allows a plaintiff within 180 days after filing a complaint to join in the action any additional medical claim or defendant if the period of limitation applicable to that additional claim or defendant had not expired prior to the date the original complaint was filed.
- Provides that if after more than 180 days following the filing of the complaint the plaintiff first discovers the existence or identity of a potential medical claim or defendant, the period of limitation for a medical claim against the potential defendant commences on the earlier of the date the plaintiff discovers that existence or identity or the date on which the plaintiff in the exercise of reasonable care and diligence should have discovered the alleged basis of the claim and the identity of the person against whom the claim could have been asserted.
- Prevents a plaintiff from joining any additional medical claim or defendant after the expiration of 180 days after the filing of the complaint unless the medical claim is for wrongful death and the period of limitation for the claim has not expired or the existence and identification of the additional claim or defendant is discovered in the exercise of reasonable care and diligence.

- Provides that the bill's provisions apply to a civil action upon a medical claim that is filed on or after the act's effective date.

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## CONTENT AND OPERATION

### Notice of intent to bring an action upon a medical claim

Current law provides that, if prior to the expiration of the one-year period of limitations for filing an action upon a medical, dental, optometric, or chiropractic claim a claimant who allegedly possesses such a claim gives to the person who is the subject of that claim written notice that the claimant is considering bringing an action upon that claim, that action may be commenced against the person notified at any time within 180 days after the notice is so given. The bill provides that a claimant who allegedly possesses a "medical claim" (see "**Definition**," below) and who intends to give to the person who is the subject of that claim the written notice described above must send the notice by certified mail, return receipt requested, addressed to any of the following: (1) the person's residence, (2) the person's professional practice, (3) the person's employer, or (4) the address of the person on file with the State Medical Board or other appropriate agency that issued the person's professional license.<sup>1</sup>

### Complaint asserting a medical claim

The bill provides that at the time of filing a complaint asserting a "medical claim" (see "**Definition**," below), the plaintiff must file with the complaint, pursuant to Rule 10(D) of the Rules of Civil Procedure (see "**Background – affidavit of merit**," below), an affidavit of merit relative to each defendant named in the complaint or a motion to extend the period of time to file an affidavit of merit.<sup>2</sup>

### Discovery of additional medical claims or defendants; joinder of additional defendant

The bill specifies that the plaintiff may conduct discovery as permitted by the Rules of Civil Procedure. Additionally, for a period of 180 days following the filing of a complaint asserting a medical claim, the plaintiff may seek to discover the existence or identity of any other potential medical claims or defendants that are not included or named in the complaint. Any defendant named in the complaint must provide the discovery under this provision in accordance with the Rules of Civil Procedure.<sup>3</sup>

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<sup>1</sup> R.C. 2305.113(B)(2).

<sup>2</sup> R.C. 2323.451(B).

<sup>3</sup> R.C. 2323.451(C).

Within 180 days following the filing of a complaint asserting a medical claim, the plaintiff, in an amendment to the complaint pursuant to rule 15 of the Rules of Civil Procedure, may join in the action any additional medical claim or defendant if the period of limitation applicable to that additional medical claim or defendant had not expired prior to the date the original complaint was filed. The plaintiff must file an affidavit of merit supporting the joinder of the additional defendant or a motion to extend the period of time to file an affidavit of merit pursuant to rule 10(D) of the Rules of Civil Procedure.<sup>4</sup>

### **Commencement of period of limitations for medical claim against potential defendant**

Under the bill, if, after more than 180 days following the filing of a complaint asserting a medical claim, the plaintiff first discovers the existence or identity of a potential medical claim or defendant that is not included or named in the complaint, the period of limitation for a medical claim against that potential defendant commences on the earlier of the date the plaintiff discovers the existence of the medical claim and identity of the potential defendant or the date upon which the plaintiff in the exercise of reasonable care and diligence should have discovered the alleged basis of the medical claim and the identity of the person against whom the medical claim could have been asserted.<sup>5</sup>

The bill provides that the provisions described in the two preceding paragraphs do not modify or affect and are not to be construed as modifying or affecting any provision of the Revised Code or rule of common law that applies to the commencement of the period of limitation for a medical claim upon a cause of action that arises when the plaintiff discovers, or in the exercise of reasonable care and diligence, should have discovered the alleged basis of the medical claim and the identity of the person against whom the medical claim may be asserted.<sup>6</sup>

### **Nonjoinder of additional medical claim or defendant**

After the expiration of 180 days following the filing of a complaint asserting a medical claim, the bill prohibits the plaintiff from joining any additional medical claim or defendant to the action unless: (1) the medical claim is for wrongful death, and the period of limitation for the claim under R.C. 2125.02 has not expired, or (2) the existence and identification of the additional medical claim or defendant is discovered in the

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<sup>4</sup> R.C. 2323.451(D).

<sup>5</sup> R.C. 2323.451(E).

<sup>6</sup> R.C. 2323.451(F).

exercise of reasonable care and diligence under the provision described in the second preceding paragraph.<sup>7</sup>

## **Definition**

The bill applies the definition of "medical claim" under continuing law to its provisions.<sup>8</sup> "Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:<sup>9</sup>

(1) Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person;

(2) Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies: (i) the claim results from acts or omissions in providing medical care, or (ii) the claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment;

(3) Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under R.C. 3721.17 (grievance procedure for nursing home residents).

## **Background – affidavit of merit**

Under Rule 10(D) of the Rules of Civil Procedure, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim generally must include one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit must be provided by an expert witness pursuant to Rules 601(D) and 702 of the Rules of Evidence. Affidavits of merit must include all of the following:<sup>10</sup>

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<sup>7</sup> R.C. 2323.451(G).

<sup>8</sup> R.C. 2305.113(E)(3) and 2323.451(A).

<sup>9</sup> R.C. 2305.113(E)(3).

<sup>10</sup> Civ. R. 10(D)(2)(a).



(1) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(2) A statement that the affiant is familiar with the applicable standard of care;

(3) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion must be filed by the plaintiff with the complaint. For good cause shown and in accordance with the provision described in the next paragraph, the court must grant the plaintiff a reasonable period of time to file an affidavit of merit, not to exceed 90 days, except the time may be extended beyond 90 days if the court determines that a defendant or nonparty has failed to cooperate with discovery or that other circumstances warrant extension.<sup>11</sup>

In determining whether good cause exists to extend the period of time to file an affidavit of merit, the court must consider the following: (1) a description of any information necessary in order to obtain an affidavit of merit, (2) whether the information is in the possession or control of a defendant or third party, (3) the scope and type of discovery necessary to obtain the information, (4) what efforts, if any, were taken to obtain the information, and (5) any other facts or circumstances relevant to the ability of the plaintiff to obtain an affidavit of merit.<sup>12</sup>

An affidavit of merit is required to establish the adequacy of the complaint and is not otherwise admissible as evidence or used for purposes of impeachment. Any dismissal for the failure to comply with this rule operates as a failure otherwise than on the merits.<sup>13</sup>

If an affidavit of merit has been filed as to any defendant along with the complaint or amended complaint in which claims are first asserted against that defendant, and the affidavit of merit is determined by the court to be defective pursuant to the provision described in the first paragraph above, the court must grant the plaintiff a reasonable time, not to exceed 60 days, to file an affidavit of merit intended to cure the defect.<sup>14</sup>

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<sup>11</sup> Civ. R. 10(D)(2)(b).

<sup>12</sup> Civ. R. 10(D)(2)(c).

<sup>13</sup> Civ. R. 10(D)(2)(d).

<sup>14</sup> Civ. R. 10(D)(2)(e).

## Applicability of bill's provisions

The bill provides that its provisions pertaining to the procedures upon filing a medical claim applies to a civil action based on a medical claim that is filed on or after the act's effective date.<sup>15</sup>

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### HISTORY

ACTION	DATE
Introduced	03-13-13

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<sup>15</sup> Section 3.

