

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 636

(Senator Cassilly)

Judicial Proceedings

Medical Malpractice - Discovery

This bill clarifies that the discovery available as to the basis of a certificate of a qualified expert in a health care malpractice action includes a deposition of the attesting expert. The defendant may also seek discovery as to the basis of a certificate of a qualified expert filed by the claimant or plaintiff without prejudice to later discovery if the attesting expert is designated as a trial expert. Additionally, in an arbitration proceeding, a defendant health care provider's deposition is not required until the claimant has filed a certificate of a qualified expert and served the certificate on all other parties to the claim or action or on the attorneys of record in accordance with the Maryland Rules.

The bill applies prospectively and may not be applied or interpreted to have any effect on or application to any claim filed before the bill's October 1, 2016 effective date.

Fiscal Summary

State Effect: None. The changes are procedural in nature and are not expected to materially affect governmental finances.

Local Effect: None.

Small Business Effect: None.

Analysis

Current Law: Except for a claim seeking damages within the limit of the District Court's concurrent civil jurisdiction (\$30,000 or less), a claim for medical injury against a health care provider is required to be filed with the Director of the Health Care Alternative Dispute

Resolution Office (HCADRO), although the parties may elect mutually or unilaterally to waive arbitration of the claim. The director must serve a copy of the claim on the health care provider by the appropriate sheriff in accordance with the Maryland Rules. If the claim is against a physician, the director must also forward a copy of the claim to the State Board of Physicians. The health care provider must file a timely response with the director and serve a copy of the response on the claimant and any other named health care providers. Claims may be decided through the arbitration process or may proceed to trial.

Unless the sole issue in a health care malpractice claim is lack of informed consent, a claim before HCADRO or an action filed in a court must be dismissed without prejudice if the claimant or plaintiff fails to file with the director, within 90 days from the date of the complaint, a certificate of a qualified expert attesting (1) to a departure from standards of care and (2) that the departure is the proximate cause of the alleged injury. (This certificate is commonly referred to as a “certificate of merit.”) However, an extension of at most 90 days for filing the certificate must be granted if (1) the limitations period applicable to the claim or action has expired and (2) the failure to file the certificate was neither willful nor the result of gross negligence. Each party must file the appropriate certificate with an attached report of the attesting expert.

A health care malpractice claim may be adjudicated in favor of the claimant or plaintiff on the issue of liability if the defendant disputes liability and fails to timely file a certificate of a qualified expert attesting (1) to compliance with standards of care or (2) that the departure from standards of care is not the proximate cause of the alleged injury. (This is commonly referred to as a “certificate of meritorious defense.”)

A party is required to file with the court, within 15 days after the discovery deadline, a supplemental certificate of a qualified expert, for each defendant, that attests specifically to various matters. An extension of time for filing a supplemental certificate must be granted for good cause shown. On motion by a defendant, the court may dismiss without prejudice the action as to the defendant if a plaintiff fails to file a supplemental certificate. On motion by a plaintiff, the court may adjudicate in favor of the plaintiff on the issue of liability if a defendant fails to file a supplemental certificate.

A health care provider who attests in a certificate of a qualified expert (or who testifies in relation to a proceeding before an arbitration panel or a court concerning compliance with or departure from standards of care) may not devote annually more than 20% of the expert’s professional activities to activities that directly involve testimony in personal injury claims. A party may not serve as a party’s expert, and the certificate may not be signed by a party, an employee or partner of a party, or an employee or stockholder of any professional corporation of which the party is a stockholder.

Failure to file a proper certificate of a qualified expert is tantamount to not having filed a certificate at all. *D'Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, cert. denied, 384 Md. 158 (2004). A certificate of a qualified expert is a condition precedent to a medical malpractice action and must, at a minimum, identify with specificity the licensed professionals against whom the claims are brought, a statement that the licensed professionals breached the standards of care, and that this breach was the proximate cause of the plaintiff's injury; if the certificate is insufficient, the action must be dismissed. *Carroll v. Konits*, 400 Md. 167 (2007).

Background: Maryland courts have repeatedly interpreted the State's health care malpractice claims statute as the General Assembly's attempt to limit the filing of frivolous malpractice claims. *Carroll v. Konits*, 400 Md. 167 (2007). The certificate of a qualified expert, in particular, is intended to help "weed out" nonmeritorious medical malpractice claims. *D'Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, cert. denied, 384 Md. 158 (2004). According to the National Conference of State Legislatures, 28 states have requirements for filing an affidavit or certificate of merit in order for a medical liability and malpractice claim to move forward.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Maryland Health Care Alternative Dispute Resolution Office, National Conference of State Legislatures, Department of Legislative Services

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