

# Medical Malpractice Tort Reform

By Michael W. Ulmer

## INTRODUCTION

On October 8, 2002, during a special session called by Governor Ronnie Musgrove, the Mississippi Legislature passed Medical Malpractice Tort Reform Legislation ("MMTRL"). The reforms, which apply to causes of action filed after January 1, 2003: (a) revise venue in medical malpractice actions; (b) clarify the term "health care practitioner" for the purpose of the Mississippi Torts Claim Act; (c) limit liability for certain health care practitioners who prescribe federal Food and Drug Administration-approved medications; (d) reduce the statute of limitations governing malpractice actions against institutions for the aged or infirm; (e) require a sixty-day notice for medical malpractice actions; (f) revise the limitation of joint and several liability; (g) require the submission of declarations in medical malpractice lawsuits; (h) limit the award of non-economic damages in medical malpractice lawsuits; (i) define the term "medical records" and provide that such records remain property of institutions for the aged and infirm subject to reasonable access; and (j) provide immunity for medical personnel who provide medical services on a voluntary basis. Portions of the MMTRL were later amended by the general civil justice reforms passed by the Mississippi Legislature on November 25, 2002. This article addresses the provisions of the MMTRL that will likely have a significant impact on medical malpractice litigation.

## SECTION 1: VENUE

Prior to the enactment of the MMTRL, venue in medical malpractice cases was governed by Mississippi Code Annotated § 11-11-3, under which venue could properly lie:

[I]n the county in which the defendant or any of them may be found or in the county where the cause of action may occur or accrue and, if the defendant is a domestic corporation, in the county in which said corporation is domiciled or in the county where the cause of action may occur or accrue, except where otherwise provided ...

MISS. CODE ANN. § 11-11-3 (Supp. 2002). Section 1 of the MMTRL provided a venue provision that required any legal action against one of the health care providers listed therein to be commenced in the county "in which the alleged act or omission occurred." H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN. § 11-11-3(2)), *repealed* by H.B. 19, 2002 Miss. Law 3rd Ex. Sess. Ch. 4. The MMTRL was amended by Mississippi House Bill 19 that was passed by the Mississippi Legislature on November 25, 2002. The revised venue statute provides, in relevant part:

Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where

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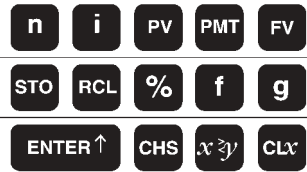
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the defendant resides or in the county where the alleged act or omission occurred or where the event that caused the injury occurred. Civil actions against a nonresident defendant may also be commenced in the county where the plaintiff resides or is domiciled....

H.B. 19, 2002 Miss. Law 3rd Ex. Sess. Ch. 4 (2002) (codified as amended at MISS. CODE ANN. § 11-11-3(1) (2002)).

It does not appear that the newly enacted legislation will significantly impact Mississippi Supreme Court precedent regarding venue in medical malpractice cases. In **Forrest County General Hospital v. Conway**, 700 So. 2d 324 (1997), for example, a lawsuit was filed in the Circuit Court for the First Judicial District of Hinds County on behalf of a child who was injured as a result of the alleged failure by a physician to diagnosis bacterial meningitis. The lower court denied a motion for change of venue upon a finding that, although the cause of action first accrued in Forrest County, Mississippi, at the time of the alleged misdiagnosis, the child's damages continued to occur in Hinds County after the child was transferred and subsequently treated at the University Medical Center Hospital in Jackson, Mississippi. The Mississippi Supreme reversed.

The Court found that a cause of action, for the purpose of establishing venue in medical malpractice claims, occurs or accrues when it comes into existence as an enforceable claim — i.e., when the right to sue becomes vested. **Conway**, 700 So. 2d at 326 (quoting **Forman v. Mississippi Publishers Corp.**, 14 So. 2d 344, 346 (Miss. 1943)). The Court reasoned that although the child sustained further injuries in Hinds County, the plaintiffs' initial damages "occurred or accrued," for the purpose of establishing venue, in Forrest County, at the time of the alleged misdiagnosis. **Id.** at 326-27. This holding is consistent with the recently enacted tort reform legislation under which a medical malpractice claim would have to be commenced in the county in which the negligent act or omission occurred or the event that caused the injury occurred.

### SECTION 2: MISSISSIPPI TORT CLAIMS ACT

The Mississippi Tort Claims Act ("MTCA") was amended by Section 2 of

the MMTRL to specifically identify certain health care practitioners as "employees" for the purpose of immunity under the MTCA. The MTCA now provides, in relevant part:

The term "employee" shall also include any physician, dentist or other health care practitioner employed by the University of Mississippi Medical Center (UMMC) and its departmental practice plans who is a faculty member and provides health care services only for patients at UMMC or its affiliated practice sites. The term "employee" shall also include any physician, dentist or other health care practitioner employed by any university under the control of the Board of Trustees of the State Institutions of Higher Learning who practices only on the campus of any university under the control of the Board of Trustees of State Institutions of Higher Learning. The term "employee" shall also include any physician, dentist or other health care practitioner employed by the State Veterans Affairs Board and who provides health care services for patients for the State Veterans Affairs Board.

H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN. § 11-46-1(f) (2002)).

By amending the MTCA to include faculty members who are employed by UMMC and its departmental practice plans, the Mississippi Legislature codified prior decisions of the Mississippi Supreme Court in which similar conclusions were reached. See e.g., **Watts v. Tsang**, 828 So. 2d 785 (Miss. 2002); **Mozingo v. Scharf**, 828 So. 2d 1246 (Miss. 2002); **Sullivan v. Washington**, 768 So. 2d 881 (Miss. 2000). The new legislation, however, clearly provides that health care practitioners are afforded immunity under the MTCA if they provide health care services "only for patients at UMMC or its affiliated practice sites." MISS. CODE ANN. § 11-46-1(f) (as amended) (emphasis added). While the Mississippi Supreme Court has already suggested that certain health care facilities such as the UMMC Pavilion, an outpatient clinic on campus at the UMMC, would qualify as "affiliated practice sites," see **Miller v. Meeks**, 762

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So. 2d 302 (Miss. 2000), this issue will likely be the focus of ongoing litigation.

## SECTION 3: PHARMACEUTICAL LIABILITY

The Mississippi Legislature included in the MMTRL a provision to immunize certain prescribing health care providers who are not actively negligent “from forum-driven lawsuits.” See H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN. § 11-2-62 (2002)). Under the new legislation:

In any civil action alleging damages caused by a prescription drug that has been approved by the federal Food and Drug Administration, a physician, optometrist, nurse practitioner or physician assistant may not be sued unless the plaintiff pleads specific facts, which if proven, amount to negligence on the part of the medical provider.

**Id.** It is unlikely that this heightened pleading standard will have a significant impact on pleading practice as most attorneys recognize that conclusory allegations against a resident defendant/physician in pharmaceutical liability cases are insufficient to warrant remand of a case that has been removed to federal court on the basis of fraudulent joinder. Litigation surrounding this amendment will likely focus on the legislative intent stated therein—“to immunize innocent medical providers ... *who are not actively*

*negligent* from forum-driven lawsuits.” **Id.** (emphasis added). The question to be addressed is whether a health care provider who prescribes FDA-approved medication actively breaches a standard of care by failing to warn of potential side effects of those medications about which he or she allegedly “should have known” even though the side effects are not discovered or reported by the drug manufactures until several months or years after the medication is first marketed.

## SECTION 4: LIMITATION OF JOINT AND SEVERAL LIABILITY

Section 4 of the MMTRL amended Mississippi Code Annotated Section 85-5-7, which governs the apportionment of fault/joint and several liability, to include a specific provision relating to health care providers. H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN. § 85-5-7(8)), *repealed* by H.B. 19, 2002 Miss. Law 3rd Ex. Sess. Ch. 4. This provision was later amended to apply in all cases, unless specifically excepted by the statute, involving joint tortfeasors. See H.B. 19, 2002 Miss. Law 3rd Ex. Sess. Ch. 4 (2002) (codified as amended at MISS. CODE ANN. § 85-5-7(8)) (2002). Prior to this amendment, several liability of joint tortfeasors was based on an apportionment of fault. Regardless of the percent of fault assigned, liability among tortfeasors was joint and several to the extent necessary for the plaintiff to recover fifty-percent of the damages awarded.

Under the amended statute, in civil actions against health care providers that

involve joint tortfeasors, liability for non-economic damages is several only.

For economic damages, for any defendant whose fault is determined to be less than thirty percent (30%), liability shall be several only and for any defendant whose fault is determined to be thirty percent (30%) or more, liability shall be joint and several only to the extent necessary for the person suffering injury, death or loss to recover fifty percent (50%) of his recoverable damages.

H.B. 19, 2002 Miss. Law 3rd Ex. Sess. Ch. 4 (2002) (codified at MISS. CODE ANN. § 5-5-7(8) (2002)). Additionally, fault allocated to an immune tortfeasor or one whose liability is limited by law cannot be reallocated to any of the remaining tortfeasors. **Id.**

The amendments to the joint and several liability statute may change trial strategies in medical malpractice litigation. The Mississippi Supreme Court has held that the term “party,” for the purpose of allocation of fault under Mississippi Code Annotated Section 85-5-7, “refers to any participant to an occurrence which gives rise to a lawsuit, and not merely the parties to a particular lawsuit or trial.” **Estate of Hunter v. General Motors Corp.**, 729 So. 2d 1264, 1276 (Miss. 1999). As recently explained by the Court in **Mack Trucks, Inc. and Cummins Engine Co., Inc. v. Tackett**, 841 So. 2d 1107 (Miss. 2003):

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This State's system of civil justice is based upon the premise that all parties to a lawsuit should be given an opportunity to present their versions of a case to a jury, and the interpretation of § 85-5-7- urged by the plaintiffs [i.e., excluding parties not in the suit] would seriously infringe upon a defendant's rights in this regard in many cases.

(quoting *Hunter*, 729 So. 2d at 1274). Although doubtful, it is possible that the amended statute will provide an impetus for health care providers to raise challenges during trial regarding the actions taken by others who administered simultaneous or subsequent medical treatment, regardless of the latter's immune status, in an attempt to decrease their own liability, particularly below the thirty-percent threshold.

## SECTION 5: STATUTE OF LIMITATIONS/NOTICE

The MMTRL amended Mississippi Code Annotated § 15-1-36, which prescribes a two-year statute of limitations for

malpractice actions arising from medical, surgical or other professional services, to include institutions for the aged or infirm. Accordingly, claims against institutions for the aged or infirm must be commenced within two years from the date on which the alleged act, omission or neglect was, or with reasonable diligence might have been discovered, but in no event more than seven years after the date on which the alleged act, omission or neglect occurred.

The MMTRL also amended Mississippi Code Annotated § 15-1-36 to include the following notice provision:

No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.

H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN.

§ 15-1-36(15) (2002)). If the notice is served within sixty days prior to the expiration of the applicable statute of limitations, the time period in which to commence an action is extended for a period of sixty days from the date on which the notice is served.

The language of the notice provision suggests that it is procedural, not jurisdictional, in nature. Accordingly, failure to provide the requisite notice will likely result, at most, in a dismissal of the lawsuit without prejudice. Failure to raise an objection on the basis of lack of notice or insufficient notice prior to answering the complaint will likely result in a waiver of this procedural defense.

## SECTION 6: AFFIDAVIT REQUIREMENT

Section 6 of the MMTRL requires that the complaint, "[i]n any action against a licensed physician, health care provider or health care practitioner, for injuries or wrongful death arising out of the course of medical, surgical or other professional services where expert testimony is otherwise required by law," be accompanied by



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a certificate executed by the attorney of the plaintiff declaring that he or she:

- (a) Has concluded that there exists a reasonable basis for filing the complaint based on a consultation with at least one qualified expert who meets the criteria set forth in the statute;
- (b) Was unable to obtain such consultation because of the applicable statute of limitations<sup>1</sup>; or
- (c) Was unable, after three good faith attempts with three different experts, to obtain such consultation.

The declaration provisions do not apply to plaintiffs who are proceeding *pro se*, in cases in which the attorney declares that the plaintiff is proceeding solely on the doctrines of *res ipsa loquitur* or informed consent, or in cases in which the plaintiff's attorney elects to provide the defendant(s) with expert information in the form required by the Mississippi Rules of Civil Procedure. The plaintiff's attorney is generally not required to disclose the identity of those he consulted or the contents of the consultation. An exception is made which may require an *in camera* disclosure to the court of the experts consulted in cases in which the plaintiff's attorney declares that he was unable to obtain the required certification of consultation despite three good faith attempts to do so.

The statutory language requiring that "the complaint shall be accompanied" by a certificate of consultation suggests that this requirement is jurisdictional in nature. This conclusion is supported by language in the statute that mandates the dismissal of lawsuits in which a plaintiff's attorney originally declares that he was unable to obtain the required consultation because of the applicable statute of limitations but fails to supplement his declaration with such certificate within sixty days from the date on which the complaint is served. The issue as to whether the certification requirement is jurisdictional or procedural, and the consequences of failing to comply with this requirement, will ultimately be decided by the courts.

## SECTION 7: DAMAGE CAPS

Under the MMTRL:

In any action for injury based on malpractice or breach of standard of

care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than the following for non-economic damages:

(i) For claims for causes of action filed on or after passage of House Bill No. 2, 3rd Extraordinary Session 2002, but before July 1, 2011, the sum of Five Hundred Thousand Dollars (\$500,000.00);

(ii) For claims for causes of action filed on or after July 1, 2011, but before July 1, 2017, the sum of Seven Hundred Fifty Thousand Dollars (\$750,000.00);

(iii) For claims for causes of action filed on or after July 1, 2017, the sum of One Million Dollars (\$1,000,000.00).

The trier of fact shall not be advised of the statutory caps on non-economic damages; instead, the judge is required to reduce any award of non-economic damages that

exceeds the applicable limitation. The damages caps do not apply to damages for disfigurement or actual economic damages, or in cases in which the judge, in his or her discretion, determines that a jury may impose punitive damages.

The specific language that the cap on non-economic damages applies to claims filed on or after passage of the MMTRL is in direct conflict with the general provision that the MMTRL applies to causes of action filed on or after January 1, 2003. Based on the plain language of the statute, it can be argued that the cap on non-economic damages applies to medical malpractice actions filed on or after October 8, 2002, the date on which the Bill was approved by the Mississippi Legislature. Further, it can be argued that, had the Legislature intended the damage cap prescribed by Section 7 of the MMTRL to take effect on January 1, 2003, it would not have included language to the contrary in this provision. Ultimately, absent clarification by the Legislature, the Mississippi Supreme Court will have to resolve this issue of statutory construction.

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## SECTIONS 9 AND 10: INSTITUTIONS FOR THE AGED AND INFIRM

Mississippi Code Annotated § 43-11-1, which applies to institutions for the aged or infirm, was amended by the MMTRL to define medical records as:

[W]ithout restriction, those medical histories, records, reports, summaries, diagnoses and prognoses, records of treatment and medication ordered and given, notes, entries, x-rays and other written or graphic data prepared, kept, made or maintained in institutions for the aged or infirm that pertain to residency in, or services rendered to residents of, an institution for the aged or infirm.

H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN. § 43-11-1 (2002)). The MMTRL also amended Title 43 to include a provision under which medical records of institutions for the aged and infirm:

[S]hall remain the property of the various institutions for the aged or infirm, subject, however, to reasonable access to the information contained therein upon written request by the resident, his legally appointed representatives, his attending medical personnel and his duly authorized nominees, and upon payment of any reasonable charges for such service.

H.B. 2, 2002 Miss. Law 3rd Ex. Sess. Ch. 2 (2002) (codified at MISS. CODE ANN. § 43-11-16 (2002)).

## SECTION 11: VOLUNTEER SERVICES

Under Section 11 of the MMTRL, certain health care providers are granted immunity for rendering volunteer, non-compensated medical or health services (1) to any program at an accredited school in the state or (2) under a special volunteer medical license authorized under Mississippi Code Annotated § 73-25-18. Immunity under the first category is con-

ditioned upon the execution of a written waiver by the patient prior to the time medical services are rendered. With regard to the second category, a health care provider is afforded immunity provided a written or oral agreement to provide voluntary medical services is entered before such services are rendered. Neither statute provides immunity for acts or omissions that constitute gross negligence or willful misconduct.

## CONCLUSION

The MMTRL will provide some well-deserved relief to health care providers. Its full impact will await interpretation by the Mississippi Supreme Court. ■

<sup>1</sup> A declaration submitted pursuant to this section must be supplemented by a certificate of consultation in accordance with sections (a) or (c) within sixty days of service of the complaint. Failure to supplement should result in the dismissal of the cause of action.

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