

**ACT 296**

H.B. NO. 1967

A Bill for an Act Relating to Medical Claim Conciliation.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that many claims now filed with medical claim conciliation panels tend to function as inquiries rather than actual claims, and patients or their families tend to use these proceedings to seek in-

formation regarding adverse events that they associate with medical treatment. Most matters filed with medical claim conciliation panels are eventually resolved in favor of the medical provider, but they have unintended consequences for health professionals because the proceedings are treated as claims rather than inquiries for the purposes of reporting incidents to medical malpractice insurers.

The legislature further finds that provisions in the Hawaii Revised Statutes relating to medical claims conciliation should be amended to reflect that many filings, particularly by pro se parties, are inquisitive in nature and are based on a lack of information rather than claims based on substantive analysis of the applicable standard of care. Proceedings with medical claim conciliation panels should be conducted in a non-adversarial way and structured to facilitate the conveying of information rather than assigning blame. Increased transparency and education for those who perceive fault on the part of medical providers will assist in the amicable resolution of their concerns without the need for formal claims. Medical claim conciliation panels should endeavor to provide a prompt exchange of information and serve a facilitation and conciliation role for these inquiries. However, these panel proceedings are intended to provide a forum of last resort and are not intended as a substitute for informal direct communications between patients and providers. Accordingly, statutory provisions relating to filing fees and certificates of consultations should be retained to assure that the panel process is not taken lightly and to encourage patients and providers to attempt informal resolution of their concerns.

The legislature further finds that making medical claim conciliation panel proceedings advisory in nature would allow the panels' role to become more conciliatory rather than adjudicatory. To this end, this Act amends the current law to reflect this practice by deleting the decision-making function of the panels and instead emphasizing conciliation and mediation to resolve matters that are before them.

The legislature further finds that there is much that the medical claim conciliation panel process may do to narrow and define claims when complete resolution cannot be achieved during panel proceedings and litigation subsequently must be commenced. The legislature does not intend to eliminate panels' ability to consider and discuss liability, causation, or damages with the parties, but rather, it intends to focus discussion of those issues in the context of conciliation or mediation that better reflects the panels' advisory nature. This conciliatory approach will better assist parties in fully understanding the nature of claims, defenses, and damages and encourage parties to reach a voluntary settlement. Medical claim conciliation panels should continue to express their opinions on liability, causation, and damages to the parties to assist the parties in evaluating the parties' positions. However, panels should no longer render formal decisions in order to give the panels greater flexibility in handling true claims.

Panels should continue to have the authority to require adversarial proceedings when adversarial proceedings would be more helpful for the ultimate resolution of claims, but only after consultation with or agreement by the parties and only upon a finding that further proceedings would be helpful to the resolution of important claim issues.

The legislature also finds that resolution of medical claims will be encouraged by allowing parties to agree to engage in alternative dispute resolution without the need to first file a claim with a medical claim conciliation panel. This will allow the parties to use moneys for alternative dispute resolution that otherwise would have been spent to pay filing fees. In addition, filing fees for those inquiries initially filed with the panel would be refunded, less a nominal administrative fee, if all parties agree to alternative dispute resolution instead of the medical claim conciliation panel process.

The legislature also finds that medical malpractice insurers should be prohibited from increasing premiums based on medical claim conciliation panel filings since these filings should be properly recognized as inquiries rather than true claims. In addition, panel records should be expunged if there is an insufficient basis to support a finding of a medical tort against a provider.

The purpose of this Act is to amend part II of chapter 671, Hawaii Revised Statutes, relating to medical claim conciliation, to more closely reflect actual practice and the original intent for panels to serve in a conciliatory role.

SECTION 2. Section 453-5, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

“(b) The department shall employ, not subject to chapter 76, an executive secretary to administer the board’s activities and an employee to administer the medical ~~[claim]~~ inquiry and conciliation panels established under chapter 671. The employee responsible for administration of the medical ~~[claim]~~ inquiry and conciliation panels shall have no duties in administration of the board’s activities.”

SECTION 3. Section 453-7.5, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) The department of commerce and consumer affairs shall review each complaint, inquiry, and information, as applicable, received under sections 92-17, 329-44, 453-8.7, 663-1.7, and 671-5~~[, and 671-15]~~. The department shall investigate the complaint, inquiry, or information if it appears that the physician or osteopathic physician who is the subject of the complaint, inquiry, or information has violated this chapter. If the department determines that the physician or osteopathic physician has violated this chapter, the department shall present the results of its investigation to the Hawaii medical board for appropriate disciplinary proceedings.”

SECTION 4. Chapter 671, part II, Hawaii Revised Statutes, is amended to read as follows:

**“PART II. MEDICAL ~~[CLAIM]~~ INQUIRY AND CONCILIATION”**

**§671-11 Medical ~~[claim]~~ inquiry and conciliation panels; composition, selection, compensation.** (a) There are established medical ~~[claim]~~ inquiry and conciliation panels which shall ~~[review and render findings and advisory opinions on the issues of liability and damages in medical tort claims against health care providers.]~~ facilitate the resolution of inquiries regarding the rendering of professional services by health care providers that involve injury, death, or other damages to a patient.

(b) A medical ~~[claim]~~ inquiry and conciliation panel shall be formed for each ~~[claim]~~ inquiry filed pursuant to section 671-12 and ~~[after each panel renders its decision or the claim is otherwise disposed of it]~~ shall be disbanded~~[-]~~ after an inquiry is resolved, a notice of termination is filed, or a suit based on the circumstances of the injury is filed in a court of competent jurisdiction. Each medical ~~[claim]~~ inquiry and conciliation panel shall consist of one chairperson ~~[selected from among persons who are familiar with and experienced in the personal injury claims settlement process, one]~~ who shall be an attorney licensed to practice in the courts of the State and experienced in trial practice~~[-]~~ and the personal injury claims settlement process and one physician, osteopathic physician, or surgeon licensed to practice under chapter 453. The chairperson shall be appointed by the director of ~~[the department of]~~ commerce and consumer affairs

from a list of eligible persons approved by the chief justice of the supreme court of Hawaii. ~~[The attorney shall be appointed by the chairperson from a list of not less than thirty-five attorneys experienced in trial practice submitted annually by the supreme court.]~~ The physician, osteopathic physician, or surgeon shall be appointed by the chairperson and shall be ~~[currently]~~ licensed and in good standing under chapter 453.

(c) The chairperson shall preside at the meetings of the panel. The chairperson, ~~[all panel members,]~~ second panel member, and any consultant called by the panel to appear before the panel shall be compensated at the rate of ~~[\$300]~~ \$450 per ~~[claim]~~ inquiry which will become payable ~~[when the decision of the panel is submitted.]~~ at the conclusion of panel proceedings. At the discretion of the director, the chairperson, second panel ~~[members,]~~ member, and any consultant called by the panel to appear before the panel, may be compensated at one-half the amount of compensation specified in this section, if the ~~[claim]~~ inquiry is disposed of by any means prior to ~~[the hearing by]~~ a meeting of the panel[-] and the parties or their legal representatives. The chairperson, ~~[all panel members,]~~ second panel member, and any consultant called by the panel to appear before the panel also shall be paid allowances for travel and living expenses which may be incurred as a result of the performance of their duties on or for the panel. These costs shall be paid by the department of commerce and consumer affairs from the filing fees paid by the parties.

(d) The ~~[claimant]~~ party initiating an inquiry shall pay a filing fee of \$450 to the department upon the filing of the ~~[claim]~~ inquiry, and the failure to do so shall result in the ~~[claim]~~ inquiry being rejected for filing. Each health care provider and other parties to the ~~[claim]~~ inquiry shall pay a filing fee of \$450 to the department within twenty days of being served with the ~~[claim-]~~ inquiry. Each party to ~~[a claim]~~ an inquiry shall be assessed a non-refundable processing fee by the department in the amount of \$50. The non-refundable processing fee shall be retained from each party's filing fee, and shall be used to defray the administrative costs of the medical ~~[claims]~~ inquiry and conciliation panel program.

(e) After the panel has ~~[made a final decision on a claim,]~~ filed a notice of termination, or after a final disposition of the ~~[claim]~~ inquiry has been made without ~~[a hearing]~~ proceedings before the panel, the department shall return any moneys remaining after all panel costs have been paid, to the respective parties on a pro rata basis.

(f) The office and meeting space, secretarial and clerical assistance, office equipment, and office supplies for the panel shall be furnished by the department. The chairperson may designate any alternative meeting place or site for the ~~[hearing-]~~ proceedings.

(g) The Hawaii medical board shall prepare a list of physicians, osteopathic physicians, surgeons, and podiatrists, as the case may be, along with their respective specialties. These physicians, osteopathic physicians, ~~[and]~~ surgeons, and podiatrists shall be eligible to serve as consultants to the medical inquiry and conciliation panel in their respective fields. Panel members may consult with other legal, medical, and insurance specialists.

**[[§671-11.5]] Waiver of filing fee.** (a) If any party to ~~[a claim]~~ an inquiry cannot pay the required filing fee, the party may file with the director a motion to waive the filing fee. The motion to waive the filing fee shall be accompanied by an affidavit in a format prescribed by the department, showing in detail:

- (1) The party's inability to pay the filing fee;
- (2) The party's belief that the party is entitled to redress; and

- (3) A statement of the issues that the party intends to present at [the hearing] proceedings before a medical [claims] inquiry and conciliation panel.
- (b) The director shall decide on the motion to waive the filing fee as expeditiously as possible, and no oral arguments shall be permitted.
- (c) If the director grants the motion to waive the filing fee, the party may proceed without further application to the director or panel, and without payment of the filing fee. If the motion is denied, the director shall state the reasons for the denial in writing. The director shall promptly provide the party with a filed copy of the director's order granting or denying the motion.
- (d) If a motion to waive the filing fee is denied by the director, the party may seek judicial review under section 91-14.
- (e) If the director denies a party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the denial of the motion, unless the party has filed an appeal under section 91-14. If the party has filed an appeal under section 91-14, the party may proceed without payment of the filing fee, until [such time as] the time that a final judicial determination is rendered.
- (f) If the party files an appeal under section 91-14, and the court upholds the director's denial of the aggrieved party's motion to waive the filing fee, the party shall pay the filing fee within thirty days after the court's affirmation of the denial. If the court determines that the party's motion for waiver of the filing fee was improperly denied, the party shall be entitled to proceed without payment of the filing fee.

**§671-12 Review by panel required; notice; presentation of [claims] inquiry; request for a more definite statement of the [claim] inquiry.** (a) [Effective July 1, 1976, any] Any person or the person's representative [claiming that a medical tort has been committed] having concerns regarding the existence of a medical tort shall submit [a statement of the claim] an inquiry to the medical [claim] inquiry and conciliation panel before a suit based on the [claim] circumstances of the inquiry may be commenced in any court of this State. [Claims] Inquiries shall be submitted to the medical [claim] inquiry and conciliation panel in writing[. The claimant shall set forth] and shall include the facts upon which the [claim] inquiry is based and [shall include] the names of all parties against whom the [claim] inquiry is or may be made who are then known to the [claimant.] person or the person's representative.

(b) Within five business days [thereafter] after receipt of an inquiry the panel shall give notice of the [claim] inquiry and the statement of the [claim] inquiry, by certified mail, to all health care providers and others who are or may be parties to the [claim] inquiry and shall furnish copies of written [claims] inquiries to [such] those persons. [Such] The notice shall set forth a date, not more than twenty days after the mailing of the notice, within which any health care provider against whom [a claim] an inquiry is made shall file a written response [to the claim,] and a date and time, not less than five days following the last date for filing a response, for [a hearing of] a proceeding upon the inquiry by the panel[. Such] and the parties. The notice shall describe the nature and purpose of the panel's proceedings and shall designate the place of the meeting. The times originally set forth in the notice may be enlarged by the chairperson, on due notice to all parties, for good cause.

(c) If the statement of the [claim] inquiry in the notice is so vague or ambiguous that any party receiving notice of the [claim] inquiry cannot reasonably be required to frame a written response, the party may submit a written request to the director of commerce and consumer affairs for a more definite statement before filing the written response. Copies of the request shall be pro-

vided to the panel~~[- the claimant,]~~ and ~~[other]~~ all affected parties. The request, which shall be ex parte and stay the proceedings of the panel until notice of the director's decision is given to the panel and all parties, shall specify the defects complained of and the details desired. The director may deny, grant, or modify the request at the director's own discretion, without the necessity of a hearing, although the director may reach a decision after consulting with the panel or ~~[the claimant:] any party or parties.~~ The director shall provide notice of the decision to the panel~~[- the claimant,]~~ and ~~[other]~~ all affected parties. If the request is granted and ~~[the claimant]~~ any party so directed fails to provide a more definite statement of the ~~[claim]~~ inquiry within five days after notice of the decision, the panel may make ~~[such]~~ an order as it deems just. This subsection shall not be used as a tactic to delay the proceedings.

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

- (1) That the ~~[claimant or the claimant's]~~ party initiating the inquiry or the party's attorney has consulted with at least one physician who is licensed to practice in this State or any other state, and who is knowledgeable or experienced in the same medical specialty as the health care professional against whom the ~~[claim]~~ inquiry is made, and that the ~~[claimant or claimant's]~~ party or the party's attorney has concluded on the basis of ~~[such]~~ the consultation that there is a reasonable and meritorious cause for filing the ~~[claim-]~~ inquiry. If the ~~[claimant or the claimant's]~~ party initiating the inquiry or the party's attorney is not able to consult with a physician in the same medical specialty as the health care professional against whom the ~~[claim]~~ inquiry is made, ~~[the claimant or claimant's]~~ that party or the party's attorney may consult with a physician who is licensed in this State or in any other state who is knowledgeable and experienced in a medical specialty that is as closely related as practicable to the medical specialty of the health care professional against whom the ~~[claim]~~ inquiry is made. The physician or physicians consulted ~~[by the claimant or the claimant's attorney]~~ may not be a party to the ~~[ease,]~~ inquiry, nor be compelled to testify or otherwise participate in ~~[the hearing before]~~ proceedings related to the medical ~~[claim]~~ inquiry and conciliation panel;
- (2) That the ~~[claimant or the claimant's]~~ party initiating the inquiry or the party's attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed by the ~~[claimant or the claimant's]~~ party initiating the inquiry or the party's attorney within ninety days after filing the ~~[claim;]~~ inquiry; or
- (3) That the ~~[claimant or the claimant's]~~ party initiating the inquiry or the party's attorney was unable to obtain the consultation required by paragraph (1) after the ~~[claimant or the claimant's]~~ party or the party's attorney had made a good faith attempt to obtain ~~[such]~~ the consultation and the physician contacted would not agree to ~~[such]~~ a the consultation. For purposes of this paragraph, "good faith attempt" refers to the responsibility of a ~~[claimant or claimant's]~~ party initiating an inquiry or the party's attorney to make reasonable ef-

forts to contact a physician for the purpose of reviewing the circumstances upon which ~~[a claim]~~ an inquiry is based. The ~~[claimant or claimant's]~~ party initiating the inquiry or the party's attorney may contact physicians by letter, telephone, facsimile, or other electronic means of communication. If the physician does not respond within a reasonable time, the ~~[claimant or claimant's]~~ party initiating the inquiry or the party's attorney may submit ~~[its claim]~~ the inquiry to the medical [claim] inquiry and conciliation panel along with a certificate declaring ~~[such]~~ the nonresponse to [claimant's] the party or the party's attorney's good faith attempt. A "good faith attempt" shall ultimately be evaluated in light of the goal of having a qualified physician assist the ~~[claimant or claimant's]~~ party initiating the inquiry or the party's attorney in understanding the basis of the ~~[claim,]~~ inquiry and ~~[such]~~ the determination shall depend upon the circumstances of each individual case.

(b) Where a ~~[claimant or the claimant's]~~ party initiating an inquiry or the party's attorney intends to rely solely on a failure to inform of the consequences of a procedure (informed consent), this section shall be inapplicable. The ~~[claimant or the claimant's]~~ party initiating an inquiry or the party's attorney shall certify upon filing of the ~~[claim]~~ inquiry that ~~[the claimant or the claimant's attorney is]~~ the party or the party's attorney is relying solely on the failure to inform of the consequences of a procedure and for that reason is not filing a certificate as required by this section.

(c) For the purposes of this section, the ~~[claimant or the claimant's]~~ party initiating an inquiry or the party's attorney shall not be required to disclose the names of any physician consulted to fulfill the requirements of subsection (a) to any of the other parties to the ~~[claim,]~~ inquiry. The medical ~~[claim]~~ inquiry and conciliation panel may require the ~~[claimant or the claimant's]~~ party initiating an inquiry or the party's attorney to disclose the name of any physician consulted to fulfill the requirements of subsection (a). No disclosure of the name of any physician consulted to fulfill the requirements of subsection (a) shall be made to any of the other parties to the ~~[claim,]~~ inquiry; provided that the medical ~~[claim]~~ inquiry and conciliation panel may contact ~~[any such]~~ the physician to determine if the requirements of subsection (a) were met.

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

**§671-13 Medical [claim] inquiry and conciliation panel [hearing; fact-finding; evidences] proceedings; voluntary settlement.** Every ~~[claim of]~~ inquiry regarding a medical tort shall be ~~[heard]~~ processed by the medical ~~[claim]~~ inquiry and conciliation panel within thirty days after the last date for filing a response. No persons other than the panel, witnesses, and consultants called by the panel, and the persons listed in section 671-14 shall be present except with the permission of the chairperson. The panel may, in its discretion, conduct an inquiry of a party, witness, or consultant without the presence of any or all parties.

The ~~[hearing]~~ proceedings shall be informal. Chapters 91 and 92 shall not apply. The panel may require a stenographic record of all or part of its proceedings for the use of the panel, but ~~[such]~~ the record shall not be made available to the parties. The panel may receive any oral or documentary evidence. ~~[Questioning of parties, witnesses, and consultants may be conducted by the panel, and the panel may, in its discretion, permit any party, or any counsel for a party to question other parties, witnesses, or consultants. The panel may designate who, among the parties, shall have the burden of going forward with the evidence with~~

respect to such issues as it may consider, and unless otherwise designated by the panel, when medical and hospital records have been provided to the claimant for the claimant's proper review, such burden shall initially rest with the claimant at the commencement of the hearing.] The panel shall conduct proceedings in a manner appropriate to the circumstances of the inquiry and to facilitate resolution of the matter. The panel shall conduct proceedings in a non-adversarial manner consistent with the primary purpose of conciliation.

The panel shall have the power to require by subpoena the appearance and testimony of witnesses and the production of documentary evidence. When [such] the subpoena power is utilized, notice shall be given to all parties. The testimony of witnesses may be taken either orally before the panel or by deposition. In cases of refusal to obey a subpoena issued by the panel, the panel may invoke the aid of any circuit court in the State, which may issue an order requiring compliance with the subpoena. Failure to obey [such] an order may be punished by the court as a contempt thereof. Any member of the panel, the director of [the department,] commerce and consumer affairs, or any person designated by the director [of the department] may sign subpoenas. Any member of the panel may administer oaths and affirmations, examine witnesses, and receive evidence. Notwithstanding [such] these powers, the panel shall attempt to secure the voluntary appearance, testimony, and cooperation of parties, witnesses, and consultants without coercion.

At [the hearing of the] panel proceedings and [in arriving at its opinion] to assist its conciliation role, the panel [shall] may consider, but not be limited to, statements or testimony of witnesses, hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider without the necessity for other identification or authentication, statement of fact, or opinion on a subject contained in a published treatise, periodical, book, or pamphlet, or statements of experts without the necessity of the experts appearing at the [hearing,] proceeding. The panel may upon the application of any party or upon its own decision appoint as a consultant, an impartial and qualified physician, surgeon, physician and surgeon, or other professional person or expert to testify before the panel or to conduct any necessary professional or expert examination of the [claimant] party initiating the inquiry or relevant evidentiary matter and to report to or testify as a witness thereto. [Such a] The consultant shall not be compensated or reimbursed except for travel and living expenses to be paid as provided in section 671-11. Except for the production of hospital and medical records, nurses' notes, x-rays, and other records kept in the usual course of the practice of the health care provider, discovery by the parties shall not be allowed.

During the [hearing and at any time prior to the rendition of an advisory decision pursuant to section 671-15,] proceedings or at any time before termination, the panel may encourage the parties to settle or otherwise dispose of the [ease] inquiry voluntarily.

**§671-14 Same; persons attending [hearings] proceedings of panel.** Unless excluded or excused by the panel, the following persons shall attend [hearings] proceedings before the panel:

- (1) The party or parties [making the claim,] submitting the inquiry;
- (2) The health care provider or providers against whom the [claim is made] inquiry is submitted or representatives thereof, other than counsel, authorized to act for [such] the health care provider or providers; and
- (3) Counsel for the parties, if any.



**§671-15 [Same, decisions.] Panel termination.** ~~[(a) Within thirty days after the completion of a hearing, the medical claim conciliation panel shall file a written advisory decision with the insurance commissioner who shall thereupon mail copies to all parties concerned, their counsel, and the representative of each health care provider's liability insurance carrier authorized to act for such carrier, as appropriate. The insurance commissioner also shall mail copies of the advisory decision to the department of commerce and consumer affairs, if the claim is against a physician, osteopathic physician, or surgeon licensed under chapter 453 or a podiatrist licensed under chapter 463E. The panel shall decide the issue of liability and shall state its conclusions in substantially the following language: "We find the health care provider was actionably negligent in his or her care and treatment of the patient and we, therefore, find for the claimant"; or "We find the health care provider was not actionably negligent in his or her care and treatment of the patient and we, therefore, find for the health care provider".~~

~~(b) After a finding of liability, the medical claim conciliation panel shall decide the amount of damages, if any, which should be awarded in the case. The decision as to damages shall include in simple, concise terms a division as to which portion of the damages recommended are attributable to economic losses and which to noneconomic losses; provided the panel may not recommend punitive damages.~~

~~(c) The decisions shall be signed by all members of the medical claim conciliation panel; provided that any member of the panel may file a written concurring or dissenting opinion.~~

~~(d) The advisory decision required by this section need not be filed if the claim is settled or otherwise disposed of before the decision is written or filed.] The director of commerce and consumer affairs or the panel shall notify all affected parties upon termination of panel proceedings. At the discretion of the director or the panel, a notice of termination may state whether any party or parties to the matter failed to meet the requirements of this part or meaningfully participate in panel proceedings.~~

**[[§671-15.5]] Expungement of records; malpractice insurance rates.** ~~(a) [Upon a decision by the medical claim conciliation panel finding for the health care provider pursuant to section 671-15(a), the] A health care provider may apply to the panel for expungement of all records of the related proceedings. The panel shall expunge all records if [a majority of] the panel [finds that the complaint is fraudulent or frivolous.] agrees that the inquiry did not provide a sufficient basis to support the finding of a medical tort against the health care provider applying for expungement.~~

~~(b) No insurer providing professional liability insurance for a health care provider shall increase any premium rate for the health care provider on the basis of the filing of [a medical tort claim against] an inquiry involving the health care provider [that is determined by] with the medical [claim] inquiry and conciliation panel [to be fraudulent or frivolous.] unless an indemnity payment is made to the party initiating the inquiry or the party initiating the inquiry institutes litigation in a court of competent jurisdiction based on the circumstances of the inquiry.~~

**§671-16 Subsequent litigation; excluded evidence.** ~~The [claimant] party initiating the inquiry may institute litigation based upon the [claim] circumstances of the inquiry in an appropriate court only after [a party to a] the medical [claim] inquiry and conciliation panel [hearing rejects the decision of the panel,] proceedings were terminated pursuant to section 671-15; a party has partici-~~

pated in alternative dispute resolution pursuant to section 671-16.6; or [after] the twelve-month period under section 671-18 has expired.

No statement made in the course of the [hearing] proceedings of the medical [claim] inquiry and conciliation panel shall be admissible in evidence either as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action; provided that [such] the statements may be admissible for the purpose of section 671-19[, hereof]. No decision, conclusion, finding, statement, or recommendation of the medical [claim] inquiry and conciliation panel on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the medical [claim] inquiry and conciliation panel [hearing,] proceeding, or the counsel or other representative of [such] a party, refer or comment thereon in an opening statement, an argument, or at any other time, to the court or jury; provided that [such] the decision, conclusion, finding, or recommendation may be admissible for the purpose of section 671-19[, hereof].

**[[§671-16.5]] Arbitration; subsequent litigation.** Any person or the person's representative claiming that a medical tort has been committed or any health care provider against whom [a claim] an inquiry has been made may elect to bypass the court annexed arbitration program under section 601-20 after the [claim] inquiry has been submitted to the medical [claim] inquiry and conciliation panel and the panel has [rendered a decision or] been terminated pursuant to section 671-15 if the party meaningfully participated in panel proceedings, an alternative dispute resolution process has been terminated pursuant to section 671-16.6, or the panel or alternative dispute resolution process has not [reached a decision] completed proceedings within the tolling period of the statute of limitations under section 671-18.

**[[§671-16.6]] Submission of [claim] inquiry to an alternative dispute resolution provider.** (a) Any [claim] inquiry initially filed with the medical [claim] inquiry and conciliation panel may be subsequently submitted to an alternative dispute resolution provider upon the written agreement of all of the parties [to the claim] and with the written approval of the director[-] of commerce and consumer affairs. The director shall approve the alternative dispute resolution provider and the alternative dispute resolution procedures. All filing fees, less a processing fee of \$50, shall be refunded to the appropriate parties if the panel was not constituted or had not taken any action related to the inquiry prior to the submission of the inquiry to an alternative dispute resolution provider. If the panel was constituted or took any action prior to the submission of the inquiry to an alternative dispute resolution provider, the remaining balance of any filing fees shall be refunded to the appropriate parties, less a processing fee of \$50 and a pro-rata amount to be determined by the director.

(b) The parties shall comply with the procedures established by the alternative dispute resolution provider and approved by the director. If a party does not comply with those procedures, any other party may file a motion with the director to have the [claim] inquiry resubmitted to the medical [claim] inquiry and conciliation panel. The director may collect any filing fees that were refunded pursuant to subsection (a) from a party that resubmits its inquiry.

(c) Notwithstanding section 671-12, any inquiry may be submitted directly to an alternative dispute resolution process upon the written agreement of all parties without first submitting the inquiry to a medical inquiry and conciliation panel. A written agreement shall be effective as of the date of its execution by the parties. Any inquiry submitted directly to alternative dispute resolution need not be subsequently submitted to a medical inquiry and conciliation panel

and shall not be subject to filing fees assessed by the director for the medical inquiry and conciliation panel.

~~[(e)]~~ (d) Within thirty days after the completion of the alternative dispute resolution process, the alternative dispute resolution provider shall notify all parties concerned, their counsel, and the representative of each health care provider's liability insurance carrier authorized to act for the carrier, as appropriate, that the alternative dispute resolution process has been completed.

~~[(d)]~~ (e) The [claimant] party submitting the inquiry may institute litigation based upon the [claim] inquiry in an appropriate court only if:

- (1) The parties were not able to resolve the entire [claim] matter through the alternative dispute resolution process and the matter has not been resubmitted to the medical [claim] inquiry and conciliation panel pursuant to subsection (b) of this section; or
- (2) The [claim] matter has not been resolved through the alternative dispute resolution process after twelve months from the date the [claim] matter was filed with the approved or agreed upon alternative dispute resolution provider.

~~[(e)]~~ (f) No statement made in the course of the approved or agreed upon alternative dispute resolution process shall be admissible in evidence as an admission, to impeach the credibility of a witness, or for any other purpose in any trial of the action. No decision, conclusion, finding, or recommendation of the approved or agreed upon alternative dispute resolution provider on the issue of liability or on the issue of damages shall be admitted into evidence in any subsequent trial, nor shall any party to the approved or agreed upon alternative dispute resolution hearing, their counsel, or other representative of ~~[such]~~ the party, refer or comment thereon in an opening statement, in an argument, or at any time, to the court or jury.

~~[[§671-17]]~~ **Immunity of panel members from liability.** No member of a medical [claim] inquiry and conciliation panel shall be liable in damages for libel, slander, or other defamation of character of any party to a medical [claim] inquiry and conciliation panel proceeding for any action taken or any decision, conclusion, finding, or recommendation made by the member while acting within the member's capacity as a member of a medical [claim] inquiry and conciliation panel under this ~~[Act.]~~ part.

**§671-18 Statute of limitations tolled.** The filing of the [claim] inquiry with the medical [claim] inquiry and conciliation panel or with an approved or agreed upon alternative dispute resolution provider shall toll any applicable statute of limitations, and ~~[any such]~~ the statute of limitations shall remain tolled until sixty days after the ~~[date the decision]~~ termination of the panel or the notification of completion from the approved or agreed upon alternative dispute resolution provider is mailed or delivered to the parties. If ~~[a decision by the medical claim conciliation panel is not reached]~~ panel proceedings are not completed within twelve months, or the alternative dispute resolution process is not completed within twelve months, the statute of limitations shall resume running and the party filing the [claim] inquiry may commence a suit based on the [claim] circumstances related to the inquiry in any appropriate court of this State. The panel or the approved or agreed upon alternative dispute resolution provider shall notify all parties in writing of this provision.

**§671-19 Duty to cooperate; assessment of costs and fees.** It shall be the duty of every person who files ~~[a claim]~~ an inquiry with the medical [claim] inquiry and conciliation panel, every health care provider against whom the

[claim] inquiry is made, and every insurance carrier or other person providing medical tort liability insurance for the health care provider, to cooperate with the medical [claim] inquiry and conciliation panel and meaningfully participate in panel proceedings for the purpose of achieving a prompt, fair, and just resolution, disposition, or settlement of the [claim,] inquiry, provided that cooperation and participation shall not prejudice the substantive rights of those persons.

Any party may apply to the panel to have the costs of the action assessed against any party for failure to cooperate with the panel~~[-]~~ or meaningfully participate in panel proceedings. The panel may award costs, or a portion thereof, including attorney's fees, witness fees~~[-]~~ including those of expert witnesses, filing fees, and costs of the medical [claim] inquiry and conciliation panel [hearing] proceedings to the party applying therefor.

In determining whether any person has failed to cooperate or meaningfully participate in good faith, the panel shall consider, but is not limited to, the following:

- (1) The attendance of the persons at ~~[the hearing]~~ proceedings of the medical [claim] inquiry and conciliation panel;
- (2) The extent to which representatives of parties and counsel representing parties came to panel ~~[hearings]~~ proceedings with knowledge of the claims and defenses and authority to negotiate a settlement or other disposition of the ~~[claim,] matter~~;
- (3) The testimony of members of the panel as to the facts of the person's participation in the panel ~~[hearing,] proceeding~~;
- (4) The extent of the person's cooperation in providing the panel with documents and testimony called for by the panel;
- (5) The reasons advanced by the person so charged for not fully cooperating, participating, or negotiating; and
- (6) The failure of the person to submit any required fees to the department of commerce and consumer affairs, as required by this chapter.

The party against whom costs are awarded may appeal the award to the circuit court. The court may affirm or remand the case with instructions for further proceedings; or it may reverse or modify the award if the substantial rights of the petitioners may have been prejudiced because the award is characterized as abuse of discretion.

**[[§671-20]] Annual report.** The director of commerce and consumer affairs shall prepare and submit to the legislature annually, twenty days prior to the convening of each regular session, a report containing the director's evaluation of the operation and effects of this chapter. The report shall include a summary of the ~~[claims]~~ inquiries brought before the medical [claim] inquiry and conciliation panel and the disposition of ~~[such claims,] those inquiries~~, a description and summary of the work of the panel under this chapter, an appraisal of the effectiveness of this chapter in securing prompt and fair disposition of ~~[medical tort claims,] inquiries regarding the rendering of professional services by health care providers that involved injury, death, or other damages to a patient~~, a review of the number and outcomes of ~~[claims]~~ inquiries brought under section 671-12, and recommendations for changes, modifications, or repeal of this chapter or parts thereof with accompanying reasons and data."

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

**ACT 296**

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

SECTION 7. This Act shall take effect on January 1, 2013.

(Approved July 9, 2012.)