

Opponent Testimony
By Gerry Leeseberg
HB 7 – Joinder Provision
Before the House Civil Justice Committee
March 8, 2017

Good afternoon Chairman Butler, Vice Chairman Hughes, Ranking Member Boggs, and Members of the House Civil Justice Committee.

My name is Gerry Leeseberg. I am a member of the Ohio Association for Justice, and licensed attorney in Ohio for 37 years. I practice primarily in the area of medical malpractice, and have served several terms as Chair of the Medical Negligence Section of the OAJ. I am also a member of the Ohio Medical Malpractice Attorneys Association (OMMA), an informal organization of attorneys from around the state who specialize in medical malpractice litigation.

I appreciate the opportunity to share our concerns with the adverse consequences of HB 7, which will cause an increase, rather than a decrease, in the practice of naming numerous defendants in medical claims, a practice known as “shotgunning”.

The proponents of HB 7 claim that the offered amendment to Sec. 2323.451 provides attorneys for medical claimants “one more tool for their toolbox”: a mechanism to join new defendants after suit is filed. Proponents claim this “new tool” will reduce the practice of “shotgunning”, a necessary evil caused by the short statute of limitations for medical claims. Proponents’ claims are simply not true. Instead, HB 7 takes a *tool* already existing under Ohio law – the very limited ability to join new defendants after a case is filed - and further *restricts its use*.

This restriction includes what is in effect a “poison pill”, that penalizes a plaintiff who uses the 180 day notices to extend a statute and properly investigate a claim. This restriction on the ability to join new defendants will actually result in an *increase* in the amount of “shotgunning” that occurs. For that reason, the proposed amendment to Sec. 2323.451 in HB 7 should be rejected.

Under existing Ohio law, a medical plaintiff can file a complaint against one or more defendants, supported by an affidavit from a qualified medical expert that there is a good

faith basis upon which to file the claim. After filing, a medical plaintiff can, *for the first time*, conduct formal discovery to determine if there are other, unnamed medical care providers who may have been responsible for the patient's injuries. If a medical plaintiff discovers after filing suit that someone different, or in addition to, the named defendants may have been negligent, that person can be joined in the lawsuit if the plaintiff can demonstrate they exercised "due diligence" in identifying any such a person.

Under current Ohio law there is no time limit on when a new defendant can be joined. Contrary to existing law, HB 7 creates an arbitrary 180 day deadline after suit is filed to join any new defendants:

(F) After the expiration of one hundred eighty days following the filing of a complaint asserting a medical claim, the plaintiff shall not join any additional medical claim or defendant....

Therefore, even though Division (E) claims the proposed amendment "does not modify or effect" existing Ohio law, that is simply not accurate.

While 180 days (roughly six months) may seem like a long time to allow additional defendants to be named, in practice it provides very little time. Named defendants often fail to provide the necessary formal discovery within the first 180 days to allow plaintiffs the ability to identify any potential additional defendants. Under HB 7, there is no extension, exception or relief to a plaintiff when defendants or third parties refuse to provide necessary discovery to allow the plaintiff to identify any new defendants. This will result in a plaintiffs' ability to identify and join newly discovered defendants *being cut-off after 180 days*. In order to avoid having the ability to join newly discovered defendants eliminated by HB 7, any and all potential defendants will simply be named at the time of the initial filing, and dismissed from the case later if they are determined to be unnecessary parties. Thus, HB 7 will simply exacerbate the problem of "shotgunning".

The second problem with HB 7 is that it ties the ability to join a new defendant to the question of whether the one-year statute of limitation as to any new defendant had expired at the time the *original* complaint was filed.

Sec. 2323.451 (D) Within one hundred eighty 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 original one-year period of limitation applicable to that*

additional medical claim or defendant had not expired prior to the date the original complaint was filed....

While the question of whether the statute of limitations had expired is a very legitimate concern, the answer to this question is *extremely* complicated and fact-driven. Under current Ohio law, if a “plaintiff knew, or should have known” about the potential defendant’s involvement, they must be joined at the time of the initial filing with any other defendants, or the plaintiff will be later barred from doing so.

What is important to understand is that the attorney for any newly named defendant has a duty to their client to oppose joinder, arguing that the plaintiff “knew, or should have known” about the potential involvement of the physician at the time the original complaint was filed. This occurs under existing law and is the reason shotgunning exists: in order to avoid this argument and potentially having a court refuse to allow the joinder, the plaintiff will simply name the doctor as a defendant in the original complaint.

Worst of all, HB 7 restricts the ability to join any potential defendant who was served 180 day notices: it requires the joinder of any new defendant to occur within 180 days of the *service of 180 day notices*:

(D) Within one hundred eighty 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 amendment to the complaint was filed within one hundred eighty days following service of the written notice applicable to that additional medical claim or defendant....*

This “poison pill”, or penalty for using 180 day notices defeats the purpose of 180 day notices, which is intended to allow additional time to conduct a pre-suit investigation and minimize the filing of non-meritorious claims or naming defendants who may not be necessary parties to the case.

When 180 day notices are used, the entire time period is typically used to conduct a thorough investigation, and suit is filed at the end of the 180 day period. Under HB 7, if a potential defendant is served a 180 day notice, and a decision is made not to name that person, a plaintiff would be *prohibited* from subsequently joining that person as a defendant even if formal discovery following the suit being filed discloses they are a person responsible for the

plaintiff's injuries. This is true even though the statute of limitation for that person had been extended by the 180 day notice beyond the date the original suit is filed.

In order to avoid this prohibition, plaintiffs will simply avoid using 180 day notices altogether, name any potential responsible party, and determine after the suit is filed who should remain in the case and who can be dismissed from the case. This would dramatically increase the "shotgunning" that already occurs, rather than reduce it. Neither the medical profession, nor medical claim attorneys want to exacerbate this problem.

If suit is filed before the expiration of the one year statute without using 180 day extensions, and joinder of a new defendant is desired, that is permitted within 180 days of filing suit. However, it is *extremely rare* that a claim can be investigated and filed within the one year period.

Therefore, when 180 day notices are used to extend the original one year statute in order to investigate the claim thoroughly, joinder of any person having received a 180 day notice *would have to be done within whatever time remains left in the 180 day extension.*

- Since the entire 180 day period is typically needed and used to investigate the claim before filing suit, as a practical matter that would mean no joinder would be permitted of anyone receiving a 180 day notice.
- The result is, either no one would be sent 180 day notices and suit filed without the time and ability to conduct a thorough investigation, or everyone who is sent 180 day notices would be named as defendants at the time of the original filing.

This is completely inconsistent with the beneficial purpose and objective of the 180 day notices which is to allow time to investigate a case to determine if it is meritorious, and if so, who needs to be named as a defendant.

OAJ stands ready to support an alternative amendment, which the OSMA has previously endorsed and which would, in fact, substantially reduce if not eliminate the practice of "shotgunning".

Thank you again for the opportunity to be heard on this important matter.