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I'D RATHER REMAIN ANONYMOUS, THANK YOU*

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With the new amendments to the Medical Malpractice Act becoming integrated into every day practice, many practical issues are being raised. One issue that is being advanced by the plaintiffs' medical malpractice bar is asking the courts to require defendants to file responsive pleadings, namely Answers, to the anonymous state court complaints permitted by I.C. 34-18-8-7. As I.C. 34-18-8-7(a) states:

> Sec. 7. (a) Notwithstanding section 4 of this chapter, beginning July 1, 1999, a claimant may commence an action in court for malpractice at the same time the claimant's proposed complaint is being considered by a medical review panel. In order to comply with this section, the:
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> > (1) complaint filed in court may not contain any information that would allow a third party to identify the defendant;
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> > (2) claimant is prohibited from pursuing the action; and
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> > (3) court is prohibited from taking any action except setting a date for trial, an action under I.C. 34-18-8-8 … or an action under I.C. 34-18-11
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> until section 4 of this chapter has been satisfied.

Section 4 is the provision requiring a medical review panel opinion prior to commencing an action in state court. Indiana Code 34-18-8-8 is the provision for T.R. 41(E) proceedings if no action is taken, and I.C. 34-18-11 is the section governing motions for preliminary determinations of law.

The plaintiffs' bar's main argument is simple. The amendments were enacted as a reaction to the time it takes a case to get through the medical review panel and to get the case to trial. This is the reason for adding section 7(a)(3) permitting the court to set a trial date. If the defendant(s) are not required to file a responsive pleading (Answer) closing the issues on the merits, then after complying with section 4 and receiving a panel

opinion, subsequently identifying the defendant(s) in the state court action, the defendant(s) can move for a change of venue or judge under Indiana Trial Rule 76 which, practically speaking, removes the trial date obtained in the first court in which the anonymous complaint is filed. If this is permitted, the plaintiffs' bar argues, this undermines the public policy underlying the amendment permitting the filing of the anonymous complaint in the first place. The plaintiffs believe that if no Answer is required then the early trial date obtained by filing the anonymous complaint at the same time as filing the proposed complaint before the IDOI is of no consequence. While this is an enticing argument, it is not one that should pass muster with the trial court.

First, section 7(a) (2) prohibits the claimant from pursuing the action. Asking the trial court to require the anonymous defendant(s) to file an Answer and close the issues on the merits is in effect pursuit of the action. Closing the issues on the merits not only starts the time for the running of a change of venue or judge, it also starts the time running for demanding a jury trial pursuant to Indiana Trial Rule 38. Filing an Answer also starts the time for other deadlines such as: Motions for More Definite Statement pursuant to Indiana Trial Rule12(E), Motions to Strike under Indiana Trial Rule 12(F), Waiver or preservation of certain defenses under Indiana Trial Rule 12(H), the time for Third Party practice by a defendant pursuant to Indiana Trial Rule 14(A), the time for Amending Pleadings as of right under Indiana Trial Rule 15(A), and Interpleader actions pursuant to Indiana Trial Rule 22(C). Also, affirmative defenses must be pled pursuant to Indiana Trial Rule 8 at the time of filing the responsive pleading. Requiring anonymous defendants to take these affirmative steps is, in essence, furtherance of or pursuit of the action in violation of section 7 (a)(2).

Second, section 7 (a) (3) prohibits the court from taking any action except setting a trial date, dismissing a claim for failure to prosecute, or entertaining a motion for preliminary determination of law. The troublesome question for the defense here is what

the court may entertain as a preliminary determination of law. Here, the plaintiffs will rely on *State ex rel Hiland v. Cacdac*, 516 N.E.2d 50 (Ind. 1987), for the proposition that a qualified healthcare provider may be required on a motion for preliminary determination to engage in striking of judges or counties under Indiana Trial Rule 75 (when automatic change of venue existed) in cases where there existed both nonqualified and qualified healthcare providers in the action. Even in *Hiland*, however, the Indiana Supreme Court did not require the qualified healthcare provider defendant to file an Answer in the state court action. Thus, one may argue that the supreme court knew quite well the difference between requiring the qualified healthcare provider to engage in striking for a change of judge or change of venue and requiring the qualified healthcare provider to file an Answer in a state court action before section 4 of the medical malpractice act is complied with. Again, requiring an Answer by a qualified healthcare provider which starts the time running for other deadlines before receipt of a panel opinion is clearly outside the scope of a motion for preliminary determination.

Finally, practically speaking, how can an Answer be filed on behalf of an anonymous entity? [As a general proposition, Indiana courts disfavor the use of fictitious names by litigants. *See Berns Const. Co., Inc. v. Miller*, 491 N.E.2d 565 (Ind. App. 1986). *See also Hupp v. Hill,* 576 N.E.2d 1320 (Ind. App. 1991)(the filing of a John Doe complaint does not toll the statute of limitations as applied to the subsequently named real defendant; court declines to apply T.R. 15 to relate back subsequently named party); *Bratton v. MGK, Inc,* 587 N.E. 2d 134 (Ind. App. 1992)(in order for anonymous entity to be bound by injunction movant must show by clear and convincing evidence anonymous entity had actual notice of injunction).] Rule 11 requires verification by defense counsel that to the best of his or her knowledge and belief there are good grounds to support the averments in the Answer and that they are not interposed for purposes of delay. Affirmative defenses pursuant to Indiana Trial Rule 8 also require necessary investigation. It is circumspect to think that any of this can be done on behalf of an

anonymous defendant. The only action that an anonymous defendant should take is filing a Motion to Enlarge time to file a responsive pleading in order to preserve the time in which to file certain time-limited responses.

The plaintiffs' medical malpractice bar is seeking creative ways to circumvent the new amendments to the Medical Malpractice Act. Attempting to force the anonymous defendant to file a responsive pleading (an Answer) to trigger certain time-sensitive limitations under the trial rules is just one avenue currently being advocated. There are sure to be others in coming months. For now, no Answers should be required to be filed on behalf of anonymous defendants. For now, the anonymous defendants should remain anonymous.

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