Potential Problems with the Medical Review Panel and Issues to be Aware of Once a Case is in the Litigation Phase

Franklin D. Beahm
A. Rebecca Wilmore
Beahm & Green
New Orleans, La

Nakisha Knott
Gainsburgh, Benjamin, David, Meunier & Warshauer
New Orleans, La

Carey Wicker, III
Capitelli & Wicker
New Orleans, LA

Jeffrey A. Mitchell
The Cochran Firm
New Orleans, LA

Louisiana Judicial Council/
National Bar Association Seminar Program
July 2009
Negril, Jamaica

Louisiana Medical Malpractice Act

LSA-R.S. 40:1299.41 et seq.

LSA-R.S.40:1299.47:

A. (1)(a) All malpractice claims against health care providers covered by this Part, other than claims validly agreed for submission to a lawfully binding arbitration procedure, shall be reviewed by a medical review panel established as hereinafter provided for in this Section. The filing of a request for review by a medical review panel as provided for in this Section shall not be reportable by any health care provider, the Louisiana Patient's Compensation Fund, or any other entity to the Louisiana State Board of Medical Examiners, to any licensing authority, committee, or board of any other state, or to any credentialing or similar agency, committee, or board of any clinic, hospital, health insurer, or managed care company.

(b) A request for review of a malpractice claim or malpractice complaint shall contain, at a minimum, all of the following:

(I) A request for the formation of a medical review panel.

(ii) The name of the patient.

(iii) The names of the claimants.

(iv) The names of defendant health care providers.

(v) The dates of the alleged malpractice.

(vi) A brief description of the alleged malpractice as to each named defendant health care provider.

(vii) A brief description of alleged injuries.

A. Issues That Arise During the Medical Review Panel Phase

Delay: The panel process adds months and sometimes years onto the legal process

Filing Fees: Claimant must pay a filing fee in the amount of one hundred dollars per named defendant qualified under this Part.

- Expense discourages claimants from filing medical malpractice complaints.
- Purpose of the panel is to help claimants determine if they have a meritorious claim; per-head fee forces them to limit number of defendants named
- Exceptions; expert affidavit or a pauper ruling from the court

Posting bond for panel costs when filing suit if unanimous opinion in favor of defendant health care provider(s) – LSA-R.S. 40:1299.47 I(2)(c)

Once a panel expires, it's over. The trial court does not have the power to extend the life of the medical review panel dissolved by operation of law. *LeBlanc v. Lakeside Hospital*, 732 So. 2d 576 (La. App. 5 Cir. 03/10/99).

Three-member panel leaves some defendants out in the cold in cases where there are multiple defendants of various specialities – all cannot be represented on panel

If an issue comes up post-panel, claimant has to go through the panel process again to bring that issue before the panel before it can be litigated

Aggregate costs and filing fees to get through panel and into court

Expedited panels - LSA-R.S. 40:1299.47 N

- No party may petition a court for an order extending the twelve month period. If an opinion is not rendered by the panel within the twelve month period, suit may be instituted against the health care provider.

- Speeds up process, but: The report of the expert opinion reached by the expedited medical review panel process pursuant to the provisions of this Subsection *shall not* be admissible as evidence in any action subsequently brought by the claimant in a court of law.

- Neither party shall have the right to call any member of the medical review panel as a witness.

District Court dismissal of a panel proceeding due to failure to comply with a

discovery order

Strike Process to select an attorney chair

LSA- R.S. 40:1299.47 D(2) - Evidence to be considered by the panel may include affidavits and expert reports

Medical review panel opinion is sufficient to show expert testimony is available to establish defendant's prima facie case that defendant met the applicable standard of care; affidavit from panelist not required. *Samaha v. Rau*, 977 So. 2d 880 (La. 2008)

B. Issues That Arise in the Litigation Phase (Post-Panel)

LSA-R.S. 40:1299.42 - Limitation of Recovery

The total amount recoverable for injuries to or death of a patient, with the exception of future medical expenses and related benefits, shall not exceed **$500,000.00** plus interest and cost. The cap applies to each claim, not to each claimant, and includes lost wages.

A qualified healthcare provider is not liable in excess of **$100,000.00** plus interest for all malpractice claims because of injuries to or the death of any one patient. Any amount due from a judgment, settlement, or arbitration award in excess of the total liability of all liable healthcare providers shall be paid from the Patient's Compensation Fund (PCF). The total amounts paid by liable healthcare providers and the PCF combined cannot exceed the $500,000.00 cap, with the exception of future medical expenses and related benefits.

Payment of $ 100,000.00 by one qualified health care provider triggers the Fund's liability for excess damages. *Stuka v. Fleming*, 561 So.2d 1371 (La. 1990) cert. denied, 498 U.S., 111 S.Ct. 513, 112 L.Ed.2d 525 (1990). The Fund cannot contest liability when there is a settlement for $ 100,000.00 by a health care provider before or after trial. *Koslowski v. Sanchez,* 576 So.2d 470 (La. 1991). The only remaining issue is the amount of damages. The Fund does not have to be made a party to litigation, nor cast in judgment in order to disburse its funds. The Fund is a creature of the legislature designed to satisfy settlements and/or judgments against health care providers in excess of $ 100,000.00. *Remet v. Martin*, 737 So. 2d 124 (La. App. 4th Cir. 1999). Liability of multiple health care providers, to an aggregate exceeding $ 100,000.00, does not inure to the victim but reduces the excess due from the Fund. LSA-R.S. 40:1299.42(B)(3)(a). *Butler v. Flint Goodrich Hosp. of Dillard University*, 607 So. 2d 517, 519 (La. 1992).

- current cap of $500,000.00 has been in place since 1975 and has not been increased in light of inflation and increased cost of living.

- healthcare providers recently proposed increasing the cap to $750,000.00 (up to one million over 5 years), but included in that proposition was a cap on non-economic damages.

Payment of $100,000.00 does not trigger liability of the PCF

LSA-R.S. 40:1299.43 - Future medical care and related expenses; designation of settlement funds

The only element of damage recoverable by a plaintiff above and beyond the cap is future medical expenses. Future medical expenses are defined in the MMA as including medical expenses incurred after the date of the injury *up to* the date of the settlement, judgment, or arbitration award – thus, past medical expenses – as well as medical expenses incurred *after* the settlement, judgment, or arbitration award. In all medical malpractice claims that proceed to trial, the jury receives a special interrogatory asking if the patient is in need of future medical care and if so, the amount thereof. In claims tried by the court, the court's finding must include a statement whether the patient is in need of future medical care and the amount. Future medical expenses are paid as they become due, from the Patient's Compensation Fund. The Fund may require the patient to undergo a physical examination by a physician of the Fund's choosing from time to time for the purpose of determining the patient's continued need of future medical care and related benefits, subject to certain requirements.

Designation of settlement funds as general damages (i.e., subject to the cap) or future medical expenses (not limited by the cap)

- *Remet v. Martin*, 98-2751 (La.App. 4 Cir. 03/31/99), 737 So. 2d 124 held the MMA does not provide for the dismissal of other health care providers on the basis of a plaintiff's settlement with the first health care provider for its maximum liability. In *Remet*, the doctor-defendant settled with the plaintiff for $100,000.00, and the court disagreed with the co-defendant social worker's assertion she was entitled to automatic dismissal. The court stated the plaintiff was entitled to seek a determination of the remaining health care providers.

LSA-R.S. 40:1299.47 2(a) – Prescription; Reconciliation of Louisiana Civil Code Article 2324 and the MMA

The fountainhead of tort liability is Louisiana Civil Code Art. 2315, which provides in part that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The Medical Malpractice Act constitutes a special legislative provision in derogation of the general rights available to tort victims and therefore must be strictly construed. *Galloway v. Baton Rouge General Hosp*., 602 So. 2d 1003, 1005 (La. 1992).

In1996, the Louisiana Legislature amended Louisiana Civil Code Article 2324 and abolished solidary liability (and therefore, obligations) for tortfeasors in non-intentional conduct cases (i.e. negligence cases such as medical malpractice).

Louisiana Civil Code Article 2324 provides:

A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

C. **Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors**. (Emphasis added.)

LSA-R.S. 40:1299.47(A)(2)(a) provides, in pertinent part:

The filing of the Request for a Review of a claim shall suspend the time within which suit must be instituted, in accordance with this part, until 90 days following notification, by certified mail, as provided in Subsection J of this Section, to the claimant or his attorney of the opinion by the medical review panel, in the case of those health care providers covered by this Part, or in the case of a health of a health care provider against whom a claim has been filed under the provisions of this Part, but who has not qualified under this Part, until 60 days following notification by certified mail to the claimant or his attorney by the board that the health care provider is not covered by this Part. **The filing of a**

request for review of a claim shall suspend the running of prescription against all joint and solidary obligors, and all joint tortfeasors, including but not limited to health care providers, both qualified and not qualified, to the same extent that prescription is suspended against the party or parties that are the subject of the request for review. Filing a request for review of a malpractice claim as required by this Section with any agency or entity other than the division of administration shall not suspend or interrupt the running of prescription. All requests for review of a malpractice claim identifying additional health care providers shall also be filed with the division of administration. (Emphasis added).

Also, LSA-R.S. 40:1299.41(G) provides the running of prescription against a health care provider who is answerable **in solido** with a qualified health care provider against whom a claim has been filed for review under this Part shall be **suspended** in accordance with the provisions of R.S. 40:1299.47(A)(2)(a). (Emphasis added.)

- The legislature amended La Civ Code Art. 2324, but not the MMA.
- MMA, as special legislation, as an exception to La Civ Code Art. 2324. See, *LeBreton v. Rabito*, 714 So. 2d 1226 (La. 1998): Where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character.

- *Borel v. Young*, 07-0419 (La. 7/1/08) 2008 La. LEXIS 1529: Louisiana Supreme Court held the more specific provisions of the Medical Malpractice Act regarding suspension of prescription against joint tortfeasors apply to the exclusion of the general code article on interruption of prescription against joint tortfeasors, LSA-C.C. art. 2324©. By including special provisions regarding suspension of prescription in the medical malpractice statutes, the legislature excluded the applicability of interruption of prescription.

- Further, under *Borel*, both the one-year and three-year periods set forth in LSA-R.S. 9:5628 are **prescriptive**, with the qualification that the contra non valentem type exception to prescription embodied in the discovery rule is expressly made inapplicable after three years from the act, omission, or neglect. (Originally, the Court had held the plaintiff's suit was extinguished by *preemption*; *Borel v. Young*, 07-0419 (La. 11/27/07) 2007 La. LEXIS 2596. On rehearing, the Court found the plaintiff's suit had prescribed because, as stated above, the one-year and three-year periods in LSA-R.S. 9:5628 are prescriptive, not preemptive.)

- Initial request for a medical review panel suspended prescription as to

the health care providers alleged to be joint tortfeasors and/or solidary obligors with the named health care providers; however, pursuant to LSA-R.S. 40:1299.41(G) and LSA-R.S. 40:1299.47(A)(2)(a), prescription was suspended for only 90 days following notification, by certified mail, of the issuance of the medical review panel's opinion. *Richard v. Tenet Health Systems, Inc.*, 03-1933(La.App. 4 Cir. 4/14/04), 871 So.2d 671, writ denied, 04-1521 (La. 10/29/04), 885 So.2d 587

- But if La Civ Code Art. 2315, the foundation of all tort liability, is abolished, then can you even have an action for medical malpractice under the MMA?

Ex Parte Conferences

- Between defense counsel and treating physicians of the plaintiff
- HIPAA's application

La. C.E. Art. 510 provides in part:

B. General rule of privilege in civil proceedings..

(1) In a non-criminal proceeding, a patient has a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication made for the purpose of advice, diagnosis or treatment of his health condition between or among himself or his representative, his health care provider, or their representatives.

(2) **Exceptions**. --There is no privilege under this Article in a noncriminal proceeding as to a communication:

(a) When the communication relates to the health condition of a patient who brings or asserts a personal injury claim in a judicial or worker's compensation proceeding.

(b) When the communication relates to the health condition of a deceased patient in a wrongful death, survivorship, or worker's compensation proceeding brought or asserted as a consequence of the death or injury of the deceased patient.

© When the communication is relevant to an issue of the health condition of the patient in any proceeding in which the patient is a party and relies upon the condition as

an element of his claim or defense or, after the patient's death, in any proceeding in which a party deriving his right from the patient relies on the patient's health condition as an element of his claim or defense.

****

(h) When the communication is relevant in proceedings held by peer review committees and other disciplinary bodies to determine whether a particular health care provider has deviated from applicable professional standards.

(I) When the communication is one regarding the blood alcohol level or other test for the presence of drugs of a patient and an action for damages for injury, death, or loss has been brought against the patient.

(j) When disclosure of the communication is necessary for the defense of the health care provider in a malpractice action brought by the patient.

****

D. Who may claim the privilege. --In both civil and criminal proceedings, the privilege may be claimed by the patient or by his legal representative. The person who was the physician, psychotherapist, or health care provider or their representatives, at the time of the communication is presumed to have authority to claim the privilege on behalf of the patient or deceased patient.

E. Waiver. --The exceptions to the privilege set forth in Paragraph B(2) shall constitute a waiver of the privilege only as to testimony at trial or to discovery of the privileged communication by one of the discovery methods authorized by Code of Civil Procedure Article 1421 et seq., or pursuant to R.S. 40:1299.96 or R.S. 13:3715.1.

F. Medical malpractice.

(1) There shall be no health care provider-patient privilege in medical malpractice claims as defined in R.S. 40:1299.41 et seq. as to information directly and specifically related to the factual issues pertaining to the liability of a health care provider who is a named party in a pending lawsuit or medical review panel proceeding.

(2) In medical malpractice claims information about a patient's current treatment or physical condition may only be disclosed pursuant to testimony at trial, pursuant to one of the discovery methods authorized by Code of Civil Procedure Article 1421 et seq., pursuant to R.S. 40:1299.96 or R.S. 13:3715.1.

G. Sanctions.. --Any attorney who violates a provision of this Article shall be subject to sanctions by the court.

Violations of La.Code Evid. art. 510 can result not only in sanctions against the

attorney violator, but also reversible error or the elimination of testimonial evidence if the violation rises to the level of tainting the integrity of the trial. *Coutee v. Global Marine Drilling Co.*, 04-1293 (La. App. 3 Cir. 02/16/05), 895 So. 2d 631, 643, *writ granted*, 05-756 (La. 5/13/05), 902 So. 2d 1000, *writ reversed on other grounds*, 05-756 (La. 2/22/06) 924 So. 2d 112, citing to *Boutte v. Winn-Dixie La*, 95-1123, (La.App. 3 Cir. 04/17/96), 674 So. 2d 299. Trial court should not admit, "the ill-gotten gains of defense counsel's illicit ex parte communication[.]" *Boutte*, 674 So.2d, 299, 301.

Ernst v. Taylor, 08-1289 (La. App. 3 Cir. 05/06/09), 2009 La. App. LEXIS 686. Defense counsel met in private with a treating physician without giving notice to the plaintiff or her attorney. Defense counsel went over the medical records with the treating physician, an orthopedist, and he reviewed the x-rays. The trial court allowed the doctor to testify at trial, reasoning the doctor had been identified as a treating physician and medical records had been exchanged, and therefore, the privilege had been waived. The Third Circuit disagreed, finding the privilege under La. Code Evid. art 510 had been breached. The court noted there was no doubt defense counsel and the doctor had discussed the plaintiff's physical condition and the doctor's treatment of the plaintiff. Proper notice was not given as required by La. Code Evid. art 510 (F)(2), so the privilege was breached. The court reviewed the case de novo and reversed the jury's finding that the defendant doctor did not breach the standard of care.

C. Potpourri

Medicare/Medicaid Liens – problems with resolution

House Bill No. 671(Act 14) – signed by LA Governor 6/9/09. Effective date: August 15, 2009. Adds "nurse practitioner" and "clinical nurse specialist" to the definition of "health care provider" in the Medical Malpractice Act and the Medical Malpractice Act for State Services

Administrative Decisions – there is a strong jurisprudential presumption of correctness of an administrative agency's actions. The standard of review of an agency's actions is narrower than the standard of review applied to civil and criminal appeals. A reviewing court can reverse an agency's decision only if the grounds listed in La. R.S. 49:964 (G) apply (arbitrary and capricious, unlawful procedure, etc.). Further, due regard is given to the agency's determination of credibility issues. *Lawhead v. Louisiana State Bd. of Practical Nurse Examiners*, 07-1593 (La. App. 4 Cir. 10/28/08), 995 So. 2d 664.

42 USCS §299b-21 et seq – Patient Safety and Quality Improvement Act (PSQIA)

- The Act provides uniform federal confidentiality and privilege protection to health care providers who share “patient safety work product” through PSO’s

- Patient Safety Organizations (PSO’s) – entities whose primary function is improving patient safety and the quality of health care delivery

- Purpose of Act is to facilitate the creation of, and maintain, a network of patient safety databases that provides an interactive evidence-based management resource for providers, patient safety organizations, and other entities.

- Information reported to and among the network of patient safety databases under subsection (a) shall be used to analyze national and regional statistics, including trends and patterns of health care errors.

- Participation is voluntary

- Once information is provided to a PSO, it cannot be disclosed unless permitted by the Act; it is protected information from that point on

- Ex. – hospitals can’t use information regarding the termination of a physician in defense of a medical malpractice case if that information was reported to a PSO previously

Granting and Refusing Extensions of The Medical Review Panel: Does The Plaintiff Have the Right to Receive Notice of the Dismissal or Dissolution of the Medical Review Panel?

By: Jeffrey A. Mitchell

The Medical Malpractice Act, (hereinafter the "MMA") which is found at La. R.S. 40:1299.41 et. seq. contains specific provisions for how the medical review panel process is to work. Specifically, La. R.S. 40:1299.47 addresses the procedures to be followed for a medical review panel.

La. R.S. 40:1299.47 (A)(2)(a) provides that the filing of a request for review shall suspend the time within which suit must be instituted until ninety days following notification, by certified mail, as provided in Subsection J to the claimant or his attorney of the issuance of the opinion by the medical review panel, if he is a qualified healthcare provider; OR if he is not a qualified healthcare provider, until ninety days following notice by certified mail to the claimant or his attorney that the healthcare provider is not qualified.

La. R.S. 40:1299.47 B (1)(b) allows either party to petition the court, for good cause shown, for an order extending the life of the medical review panel beyond the twelve months following selection of the attorney chairman if a decision has not been rendered by the medical review panel by then. However, if the parties have requested an

expedited panel process pursuant to La. R.S. 40:1299.47 (B)(1)(d), then no party may petition a court for an order extending the twelve month period for the medical review panel to render its decision. See La. R.S. 40:1299.47 (N)(1)(b)(I).

If after the expiration of the twelve month period, the life of the medical review panel is dissolved without the necessity of obtaining a court order for dissolution. See La. R.S. 40:1299.47 (B)(1)(b) and 40:1299.47 (N)(1)(b)(ii) (for an expedited panel). If an opinion has not been rendered within that twelve month period or within any extended period and the panel dissolves as a matter of law, suit may then be instituted against the healthcare provider.

La. R.S. 40:1299.47 (B)(3) provides that Ninety days after the notification to all parties by certified mail by the attorney chairman of the board dissolution of the medical review panel or ninety days after the expiration of any court-ordered extension as authorized by this section, the suspension of the running of prescription shall cease. This provision suggests that if an extension of the medical review panel is not sought by the parties, the attorney chairman must notify the parties by certified mail that the medical review panel has expired before the ninety days starts running. If a court ordered extension has been granted, the ninety days would seem to begin to run after the expiration of the court ordered extension without notification from the attorney chairman.

This sets up a potential huge pitfall in the instance where a motion to extend the life of the medical review panel is filed, but the order granting or denying that motion is not served on the plaintiff or his counsel. Several cases have addressed this scenario.

In Grantham v. Dawson, 27,798 (La. App. 2nd Cir. 1/24/96), 666 So. 2d 1241, the

court held that an attorney chairman of the Medical Review Panel does not have to notify the parties that the panel has dissolved upon the expiration of the court-ordered time extension. In this case, the plaintiff's attorney was sent a certified copy of the filing of the defendant's motion which was promptly signed by the trial court. When the defendant discovered that the plaintiff was no longer represented by that attorney, defendant informed the panel chairman, who attempted to contact the plaintiff through letters.

However, what happens in the instance where neither the plaintiff's attorney nor the plaintiff receive notice from the court, defendant or the attorney chairman that the order on the motion to extend the life of the Medical Review Panel was granted or denied?

When a party moves the court for a order extending the life of the medical review panel and the court either denies or grants that motion outside the presence of counsel, the court must serve a copy of the order granting or denying the motion on all parties. See Williams vs. Louisiana State University Medical Center at Shreveport 34,803 (La.App.2 Cir. 6/22/01), 792 So.2d 846.

The Louisiana Code of Civil Procedure, Article 1914, provides in pertinent part:

(A) "When a case has been taken under advisement by the court for the purpose of deciding whether an interlocutory order or judgment should be rendered, the clerk shall make an entry in the minutes of the court of any such interlocutory order or judgment rendered thereafter.

(B) The Clerk shall mail notice of the rendition of the interlocutory order or judgment to the counsel of record for each party and to each party not represented by counsel; and each party shall have ten (10) days from the date of the mailing of the notice

to take any action or file any pleadings as he deems necessary, except as provided in the next paragraph."

If an order is not signed in the presence of counsel, the motion is deemed "taken under advisement". Succession of Schulz, 612 So.2d 247 (La.App. 4th Cir. 1992).

In Williams, the plaintiffs filed a medical malpractice complaint with the State Commissioner of Administration. The attorney chairman was picked and the defendant later filed an ex parte motion to extend the life of the medical review panel. That motion was granted on July 31, 1998, and extended the life of the medical review panel to February 8, 1999. Plaintiff's did not receive notice from the court or counsel that the order was signed extending the life of the medical review panel. On June 26, 1999, plaintiffs received notice of the dissolution of the medical review panel. On September 22, 1999, within ninety (90) days of that notice, plaintiffs filed a medical malpractice suit against LSUMC.

LSUMC filed an exception of prescription arguing that pursuant to L.A. R.S. 40:1299.47(B), the panel was automatically dissolved on February 8, 1999, and plaintiffs had ninety (90) days from then to file suit. The trial court granted LSUMC's exception. On appeal, plaintiffs asserted that their prescription date did not begin to run until their receipt of the notice that the medical review panel had been dissolved. Plaintiffs argued that through error, the petition for extension of the panel and the order were not requested to be served on the Commissioner of Administration, the plaintiffs or their attorney. When the order was signed, it was not sent to the Commissioner of Administration, the plaintiffs or their attorney. As such plaintiffs asserted that the matter had not prescribed.

The Court of Appeal found that although the plaintiffs were aware and served with a copy of the ex parte motion for extension filed by LSUMC, they had never received or been served with a copy of the order granting the extension. Since the motion for extension was filed on July 29, and the order was not signed by the district judge until ten (10) days later, it was not signed in the presence of counsel and thus, considered to be "taken under advisement".

The Court specifically found:

> "As such, pursuant to article 1914, the Williamses should have received notice of the rendition of the order extending the panel. Although they knew the extension was being requested, under the facts and circumstances of this case, this was insufficient to inform them that an extension had been granted".
>
> * * *
>
> In sum, the Williamses did not receive the required notice of the issuance of an opinion, the selection of the attorney chairman by the commissioner, or an order granting an extension of the Medical Review Panel.
>
> * * *
>
> …As such, the Williamses did not receive the requisite notice of when the panel would be dissolved and they were therefore deprived of their procedural due process right of notice. Id. at

850.

The court further held that when the Williamses were provided with adequate notice, as required by the statute, of the dissolution of panel, they instituted a suit within ninety (90) days. Accordingly, the court held the Williamses' suit was timely and the exception of prescription was reversed and the case was remanded to the trial court for further proceedings.

Significantly, the Williams court distinguished the Grantham decision on the basis that the plaintiff in Grantham received notice of the extension through the attorney of record and through several attempts at direct contact.

In May Yen v. Avoyelles Parish Police Jury, 2007-0225, (La. App. 3rd Cir. 4/15/09); 5 So. 3d 1002, the court addressed whether the ninety day suspension of prescription provision of the MMA applied in light of the Louisiana Supreme Court's decision in Borel v. Young, 07-419, (La. 11/27/07), 989 So. 2d 42.

In Borel, the court determined that La. 9:5628, the prescription statute governing medical malpractice claims was prescriptive, instead of preemptive thereby allowing for a suspension of prescription during the pendency of a Medical Review Panel. Previously, the lower court, (and the Supreme Court in its original hearing) had held that the provisions of 9:5628 were preemptive and could not be interrupted or suspended. Under that logic, that statute would be at odds with the MMA's provision suspending prescription during the pendency of the Medical Review Panel proceedings. If that decision had stood, the result would have been that cases could become preempted before the medical review panel process had run its course. On rehearing the Louisiana

Supreme Court reversed itself and held that 9:5628 was prescriptive, with preemptive components (the three year provision).

The May Yen decision was one of the first cases to review the notice provisions of the MMA and the State Medical Malpractice Act, the MLSSA. In May Yen, plaintiffs sued the State in two capacities: one for negligence of its prison healthcare providers and two for negligence of Huey P. Long ("HPL'), healthcare providers, a State owned hospital. These actions were brought as the result of a young prisoner's death caused by an untreated sickle cell crisis.

Initially, the plaintiff requested a medical review panel against HPL under the MLSSA because it was a state qualified healthcare provider. Plaintiff then filed a suit in district court against the State for the negligence of the prison. Previously, the Louisiana Supreme Court had declared the Correctional Administrative Procedures Act, the act dealing with suits by prisoners, to be unconstitutional and thus, prisoner's claims should proceed directly in district court. (See Pope v. State, 99-2559 (La. 6/29/01); 792 So. 2d 713). The State filed an exception of prematurity on the prison claim and the district court and court of appeals held that prisoner's claims are not governed by the procedures of the MLSSA and need not be submitted to a medical review panel. See May Yen v. Avoyelles Parish Police Jury, 03-603, (La. App. 3rd Cir. 11/5/03); 858 So.2d 786, (hereinafter " May Yen I").

The State, through HPL then sought to use the May Yen I decision against the plaintiffs in the medical review panel case and moved to strike the medical review panel. The district court agreed and struck the panel under the authority of May Yen I. As

expected, the State then filed an exception of prescription on the HPL claim stating that it was supposed to be brought in the district court within a year and was not. The State argued that the suspension provisions of the MLSSA (which are the same as the MMA), did not apply to suspend prescription during the pendency of the medical review panel up until the time the district court dismissed the medical review panel because May Yen I said that the MLSSA did not apply to prisoner claims.

On remand from the Louisiana Supreme Court, the Third Circuit Court of Appeal held that since Borel determined that 9:5628 was prescriptive and capable of being suspended by the provisions of the MMA, plaintiff's filing of a request for review for HPL suspended prescription for ninety days following notice by the district court that it had dismissed the Medical Review Panel Proceedings. The court took specific notice of the provision of the MMA which states that if the defendant is not a qualified healthcare provider, prescription is suspended until ninety days following notice by certified mail to the claimant or his attorney that the healthcare provider is not qualified. La. R.S. 40:1299.47 (A)(2)(a).

See Also: In Re: Medical Review Panel of Ruth Jones, 2000-1290, (La. App. 1st Cir. 6/22/01); 801 So. 2d 471, where the court held that if the attorney chairman is not appointed within two years from the date the medical review panel request was made, the case is dismissed for abandonment. However, plaintiff or his counsel has ninety days from notice by the Division of Administration that no action was taken to appoint an attorney chairman before the case could be dismissed.

These cases make it abundantly clear that in order to pass constitutional muster,

the plaintiff and/or his attorney must be given the proper notice that the medical review panel has been dissolved before the ninety day period for filing suit can begin to run. That notice is required regardless of whether it is an order denying the extension of the life of the medical review panel or an order dissolving the medical review panel.

CASE FACTS: Defendant seeks extension of the Medical Review Panel. He sends plaintiff's counsel and the attorney chairman a copy of his motion to extend and states that he will provide a copy of the executed order once received. The court signs the order and extends the life of the medical review panel for another three months. Defendant sends that signed order to plaintiff's counsel and the attorney chairman. Defendant then seeks a second extension just before the medical review panel is set to expire and again sends a copy with a letter to plaintiff's counsel and the attorney chairman that he will send the signed order when received. Court denies extension. Court does not send order denying extension to counsel for plaintiff or to the attorney chairman. Defendant receives order and does not forward it to counsel for plaintiff or to the attorney chairman. Unaware that the medical review panel is dissolved as a matter of law, the attorney chairman convenes the medical review panel months later and it renders a decision.

Plaintiff files suit within ninety days from the receipt of the panel's decision. Defendant files an exception of prescription alleging that the case is prescribed because plaintiff did not file suit within ninety days of dissolution of the medical review panel as a matter of law.

1. Is the case prescribed?

2. Can the defendant use the panel opinion at a subsequent trial of the matter?