



Office of the Speaker  
**THERESE M. TERLAJE**

*I Mina'trentai Sais na Liheslaturan Guåhan* | 36th Guam Legislature  
Committee on Health, Land, Justice, and Culture

December 14, 2022

**Transmitted via Electronic Mail**

Honorable Senators

*I Mina'trentai Sais na Liheslaturan Guåhan*

36th Guam Legislature

**SUBJECT: Bill No. 112-36 (COR)- As Substituted and further Amended by the Committee**

Dear Colleagues,

I write to you today, to respectfully request your review and thoughtful consideration of the facts of what the bill proposes. Amended Substitute Bill 112 addresses several major concerns expressed by the medical community and that of patients and their families, who remain unable to access the current process mandated by law, because of the cost barriers.

The bill had two public hearings and two roundtable/public hearings and was substituted and further amended to address many of the concerns. The bottom line is that if the bill does not get passed, patients who have been harmed by negligence will remain unable to access justice. Patients and their families have been waiting and relying on us. The Legislature is their last recourse.

It was determined in the U.S. District Court cases, *Nicholas v. Guam Healthcare Dev. Inc. et al.* Civil Case Nos. 1:20-cv-00004, ECF No.45; *DelaRosa v. Arqfiles, et al.*, 1:20-cv-00015, ECF No.33. by Chief Judge Mangloña that Guam's current mandatory arbitration law does not explain what to do when an indigent plaintiff is incapable of paying his or her half of the cost of arbitration. Judge Mangloña further stated: *"It would be manifestly unfair to enforce the statutory requirement against a person financially incapable of arbitrating. Doing so would have the absurd result of prohibiting the poor from recovering on a claim they might be otherwise entitled to. It would likewise shield the healthcare industry from ever owing liability to the underprivileged. There is no evidence to indicate that the Guam legislature enacted the MMMAA with such a draconian purpose in mind."*

Over the past two legislative terms, the Committee on Health has conducted extensive research, examining the different medical malpractice laws across the nation, and has held

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numerous public hearings, and meetings with medical professionals, and families, to hear concerns and recommendations to formulate an alternative model that is affordable and accessible, and that considers the unique healthcare system and challenges on Guam. In the 36th Guam Legislature, a subcommittee chaired by Senator Telo T. Taitague was established, specifically to assist with these efforts.

We have heard the concerns of healthcare providers practicing in our very fragile medical community, and we have heard the very personal and painful stories of our people, who were victims of alleged medical malpractice, or lost loved ones to alleged medical malpractice, who till this day, are not able to resolve their claims, and move on with their lives. The extensive dialogue that has taken place on this issue has been difficult but necessary and has illuminated the impact of this systemic inequality on our people.

It is abundantly clear that the current law which mandates a very specific and highly expensive type of arbitration through a specific company is unaffordable to most people, and even more so for those who are financially challenged. It is also clear that we have a very fragile healthcare system, where providers are compelled daily to practice outside of their specialized scope of care because of a lack of specialists practicing on island and the unaffordability of off-island care for many patients.

To the fears expressed by doctors that this bill may increase liability and force them to practice defensive medicine or refuse patient care because of the lack of specialists on island that compel them to practice outside of their specialized scope of care daily, it again needs to be clarified that the current Standard of Care in Guam law is not touched by this bill. It is not a stateside standard. It's a community-based standard. The standard is *the duty, practice, or care by a reasonable physician in the same field as the practitioner, practicing medicine in the community at the time of the alleged malpractice*. It accounts for the supplies and equipment and lack of specialists that we have in our community at the time of the alleged malpractice.

Nonetheless, to address these fears, additional landmark protections have been added to the definition of the Standard of Care, to include that it shall be an affirmative defense that can be disputed for a physician who in good faith with the informed consent in writing of the patient, provided care in another specialty because of the unavailability of a practitioner on island,

who offers said specialty, when the failure to provide said care would have adverse consequences for the patient.

We cannot raise the standard of care without an unbiased, equitable and accessible process for the review and adjudication of medical malpractice claims, that will hold both sides accountable for their actions. This is evident now at the board level with the licensure of medical professionals that have had pending multiple complaints against them for alleged malpractice, sexual harassment or assault in other jurisdictions, and multiple complaints filed at the board level against certain providers practicing on Guam, where the handling, review and adjudication of these complaints have been a challenge, amongst other issues.

Additional amendments were made to ensure that the pre-screening process is confidential from start to finish unless the case proceeds to trial. And that a pre-screening determination and conclusion shall be preliminary and not be considered a civil judgement or a court-ordered action, finding, admission or statement of liability, and not meant to be reportable to the National Practitioners Data Bank.

The Amended Substitute Bill No. 112 maintains the ability under current law of a healthcare provider to, prior to a pre-screening, be able to may make an offer of reparations to a claimant in full confidentiality and continues to keep all communications regarding reparations privileged and not permissible as evidence by any party to establish liability or the measure of damages attributable to the offeror.

With regard to the fear that frivolous claims will increase should this bill pass, additional language was added to restate the protections already in current law to ensure that during the pre-screening process, and after a trial verdict is received and filed, or the court's decision rendered in a trial, that the trial court that shall issue findings of fact and conclusions of law announcing whether a plaintiff filed a frivolous suit and if so, impose sanctions, as appropriate, against the plaintiff in addition to any sanctions imposed on their counsel.

There were also fears that Bill 112 will add to the challenge of recruiting specialists to the island. Recruitment of doctors has been an on-going challenge in our community prior to this bill, and elsewhere, as shortages in varying health fields is a nationwide challenge. But I ask

you to consider, if the answer to this issue should be an almost complete immunity from being held accountable for potentially legitimate medical malpractice claims.

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The Amended Substitute Bill No. 112 continues to require that should a party pursue civil trial, that the 40% or more standard will remain intact. This means that a party pursuing an award in a civil trial will need to improve upon the pre-screening award by 40% or more. If a party appeals and fails to do so, the prevailing party will be entitled to the costs of trial and all other remedies as provided by law. This was put into place previously to discourage appeals from arbitration. This will remain in place to discourage appeals from pre-screening as well.

On the criticism of the competency of a judge to examine medical evidence and expert testimony, to decide if malpractice has occurred, and that this should be left to a medical professional- please consider that in the justice system, a judge or jury is the ultimate fact finder and makes final determinations of whether malpractice occurred under our current system. A judge, by training, and in his daily practice, screens evidence of cases to determine merit before and after trials. Should a medical malpractice lawsuit be held in a jury trial, a jury, many of whom may not be medical professionals, will also be responsible for weighing the evidence presented before making a judgement. A few doctors have recommended that a hearing officer appointed by the Office of the Attorney General along with representatives of a claimant and defendant be responsible for determining if a claim is meritorious, as well as recommendations that this determination be made at the Board levels instead.

I have considered the testimony of the Judiciary requesting additional funding to take on the additional responsibility of pre-screening and noting that training will be needed to perform the functions of a pre-screening judge. Amended Substitute Bill 112 authorizes the Judiciary to enact rules and procedures implementing the pre-screening provisions of the bill.

Since FY2021, when this bill was introduced, the Judiciary's budget was increased by \$4.2 Million dollars. They received \$908,038 above fiscal year 2022 appropriations in FY2023.

Other criticisms brought to this committee were regarding a potential increase in insurance premiums should this bill pass, and a threat by insurance companies that they will not provide insurance should this bill pass. This assertion is based on speculation of an increase in frivolous claims with the passage of this bill. Again, I want to reiterate the safeguards in place in current law and the additions provided in this bill to address potential frivolous claims.

Furthermore, it was clarified during the hearing, that statements made regarding insurance providers notifying doctors that coverage would cease should this bill be enacted in law, was allegedly made by at least one insurance company- Lloyds of London, but not all insurance providers on Guam. The Committee has requested evidence of this notice which has still not been received. It is also not clear that this particular insurance company is fully aware of the provisions of the substitute bill and the proposed additional protections in the bill. Insurance is available in other jurisdictions where there is easier access to courts.

Again, I recognize the fear and anxiety that this bill may be causing for some in the medical community who believe that this bill will open the floodgate for litigation, and hence want to keep the current system intact, while providing a funding mechanism to assist indigent patients with paying for the process. What I do not appreciate is the steady campaign to promote inaccuracies of what this bill intends to do, and the fear tactics and retribution that has been employed since my committee began examining the issues with our current law. Rather than contribute to a balanced solution, it has further polarized our community, and further contributed to silencing legitimate concerns of our people out of fear based on outright threats of losing access to healthcare.

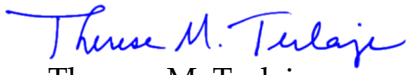
I want to reiterate that should this bill become law, doctors, and patients, though mutual agreement can access any type of arbitration instead of the pre-screening process. There is also nothing in law that bars the Guam Medical Society, the Guam Medical Association, or any other medical association from establishing a fund to assist indigent claimants.

According to the late Dr. Chris Perez in his testimony, the current law was intended to, *"benefit Guam by offering a modality to resolve medical malpractice claims more efficiently, with less expense,*

*with less emotional trauma, in a more timely manner and with equity, thus protecting all parties concerned.*" It was not intended to prevent poor people, working class people, or middle-income people from being able to file claims. But that is the reality today. How long are we going to let our people live without a fair and accessible process for claims of harm from medical malpractice?

I respectfully request your thoughtful consideration of Bill No. 112-36 (COR) As substituted and further amended. It is imperative that the current Mandatory Medical Malpractice Act be changed, to provide access to justice that has become unattainable through current law. The people of Guam should not have to choose between access to health care or access to justice. They deserve and have the right to both.

*Si Yu'os Ma'åse',*

  
Therese M. Terlaje