

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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HOUSE BILL 674

Short Title: Malpractice Arbitration.

(Public)

Sponsors: Representatives C. Wilson; Berry, Brawley, Edwards, and Hayes.

Referred to: Judiciary I.

March 30, 1993

A BILL TO BE ENTITLED  
AN ACT TO AUTHORIZE AND ESTABLISH THE PARAMETERS FOR  
VOLUNTARY BINDING ARBITRATION OF MEDICAL MALPRACTICE  
ACTIONS.

Whereas, the practice of defensive medicine often leads to the inappropriate and overuse of expensive diagnostic and treatment procedures; and

Whereas, inappropriate and overuse of medical procedures may expose patients to harm and contributes to the escalation of health care costs; and

Whereas, arbitration proceedings that include incentives to arbitrate and disincentives to litigate, but are not so restrictive as to deny access to the court system, can ultimately reduce the incidence of and costs related to malpractice litigation; and

Whereas, encouraging parties to agree to binding arbitration through the imposition of caps on damages and awarding of attorneys' fees and court costs represents an appropriate balance between the interests of those patients who are injured as a result of medical practice, and all members of society who ultimately pay for medical malpractice litigation and losses through defensive medicine practices and cost-shifting; Now, therefore,

The General Assembly of North Carolina enacts:

Section 1. Effective October 1, 1993, the title of Article 1B of Chapter 90 of the General Statutes reads as rewritten:

**"ARTICLE 1B.**  
**"MEDICAL MALPRACTICE ACTIONS. MEDICAL MALPRACTICE ACTIONS**  
**AND**  
**ARBITRATION."**

1           Sec. 2. Effective October 1, 1993, G.S. 90-21.11 through G.S. 90-21.14 of  
2 Article 1B of Chapter 90 of the General Statutes are redesignated as "Part 1, 'Medical  
3 Malpractice Actions.'"

4           Sec. 3. Article 1B of Chapter 90 of the General Statutes is amended by  
5 adding the following new Part to read:

6           **"PART 2. ARBITRATION OF MEDICAL MALPRACTICE ACTIONS.**

7           **"§ 90-21.15. Voluntary binding arbitration of medical malpractice actions**  
8           **authorized; settlement not precluded.**

9           (a) The parties to a civil action alleging medical malpractice may elect to have  
10 the matters in controversy submitted to an arbitration panel for determination of the  
11 merits of the action or the award of damages, or both. Such election may be initiated by  
12 either party by serving upon the opposing party a request for voluntary binding  
13 arbitration. Service of the request shall be made within 90 days after service upon the  
14 defendant that a civil action alleging medical malpractice has been filed by the claimant.

15           (b) Upon receipt of a party's request for voluntary binding arbitration, the  
16 opposing party may accept the offer of arbitration within 30 days of such receipt.  
17 However, in no event shall the defendant in the action be required to respond to the  
18 request for arbitration sooner than 90 days after service of the notice that a civil action  
19 alleging medical malpractice has been filed. Acceptance of the offer within the time  
20 period provided by this section shall constitute a binding commitment to comply with  
21 the decision of the arbitration panel. The liability of any insurer shall be subject to  
22 applicable insurance policy limits.

23           (c) Within 10 days of the execution of a binding commitment to arbitrate, the  
24 parties shall so notify the Office of Administrative Hearings.

25           (d) This Part shall not preclude settlement at any time by mutual agreement of  
26 the parties.

27           **"§ 90-21.16. Arbitration panel; composition; independence; compensation;**  
28           **decisions; immunity.**

29           (a) Within 30 days of receipt of notice from the parties that a binding  
30 commitment to arbitrate has been executed under this Part, the Office of Administrative  
31 Hearings shall begin proceedings for the appointment of an arbitration panel to hear the  
32 issues to be arbitrated.

33           (b) The arbitration panel shall be composed of three arbitrators. One arbitrator  
34 shall be selected by the claimant, one shall be selected by the defendant, and one shall  
35 be an administrative law judge appointed by the Chief Administrative Law Judge of the  
36 Office of Administrative Hearings, who shall serve as the chief arbitrator. In the event  
37 of multiple claimants or multiple defendants, the arbitrator selected by the side with  
38 multiple parties shall be the choice of those parties. If the multiple parties cannot reach  
39 agreement as to their arbitrator, each of the multiple parties shall submit a nominee, and  
40 the Chief Administrative Law Judge of the Office of Administrative Hearings shall  
41 appoint the arbitrator from among the nominees.

42           (c) The arbitrators shall be independent of all parties, witnesses, and legal  
43 counsel, and no officer, director, affiliate, subsidiary, or employee of a party, witness, or  
44 legal counsel may serve as an arbitrator in the proceeding.

1 (d) The rate of compensation for medical malpractice action arbitrators, other  
2 than the administrative law judge serving as chief arbitrator, shall be set by the chief  
3 judge of the court in which the medical malpractice action was filed. The chief judge  
4 shall set the compensation by schedule, taking into consideration the prevailing rates  
5 charged for the delivery of professional services in the community.

6 (e) The hearing shall be conducted by all of the arbitrators, but a majority may  
7 determine any question of fact and render a final decision. The chief arbitrator shall  
8 decide all evidentiary matters.

9 (f) Arbitrators shall have the same immunity as judges from civil liability for  
10 their official conduct.

11 **"§ 90-21.17. Arbitration the exclusive remedy; limitation on damages.**

12 Arbitration pursuant to this Part shall preclude recourse to any other remedy by the  
13 claimant against any participating defendant, and shall be undertaken with the  
14 agreement and understanding that:

15 (1) Net economic damages shall be awardable, including, but not limited  
16 to, past and future medical expenses and eighty percent (80%) of wage  
17 loss and loss of earning capacity, offset by any collateral source  
18 payments;

19 (2) Noneconomic damages shall be limited to a maximum of two hundred  
20 fifty thousand dollars (\$250,000) per incident;

21 (3) Damages for future economic losses may be awarded to be paid in  
22 periodic payments, as established by the arbitration panel, and shall be  
23 offset by future collateral source payments; and

24 (4) Punitive damages shall not be awarded.

25 **"§ 90-21.18. Defendant's liability for costs, fees, and interest on damages.**

26 (a) The defendant shall pay all costs of the arbitration proceeding and the fees of  
27 all the arbitrators other than the chief arbitrator.

28 (b) The defendant shall pay the claimant's reasonable attorneys' fees and costs, as  
29 determined by the arbitration panel, but in no event more than fifteen percent (15%) of  
30 the award, reduced to present value.

31 (c) The defendant shall be responsible for the payment of interest on all accrued  
32 damages with respect to which interest would be awarded at trial.

33 (d) The defendant's obligation to pay the claimant's damages and costs shall be  
34 for the purposes of arbitration under this Part only.

35 **"§ 90-21.19. Evidence of arbitration not admissible; offer applies to all parties.**

36 (a) A defendant's or claimant's offer to arbitrate shall not be used in evidence or  
37 in argument during any subsequent litigation of the action following rejection of the  
38 offer to arbitrate.

39 (b) The fact of making or accepting an offer to arbitrate shall not be admissible as  
40 evidence of liability in any collateral or subsequent proceeding in the action.

41 (c) Any offer by a claimant to arbitrate must be made to each defendant against  
42 whom the claimant has made a claim. Any offer by a defendant to arbitrate must be  
43 made to each claimant who has joined in the notice that a civil action alleging medical  
44 malpractice has been filed. A defendant who rejects a claimant's offer to arbitrate shall

1 be subject to G.S. 90-21.19C(c). A claimant who rejects a defendant's offer to arbitrate  
2 shall be subject to G.S. 90-21.19C(d).

3 **"§ 90-21.19A. Defense of action; rules by Office of Administrative Hearings;**  
4 **evidence.**

5 (a) Any issue between the defendant and the defendant's insurer or self-insurer as  
6 to who shall control the defense of the action and any responsibility for payment of an  
7 arbitration award shall be determined under existing principles of law; however, the  
8 insurer or self-insurer shall not offer to arbitrate or accept a claimant's offer to arbitrate  
9 without the written consent of the defendant.

10 (b) The Office of Administrative Hearings shall adopt rules to carry out the  
11 orderly and efficient processing of arbitration procedures under this Part.

12 (c) The evidentiary standards for voluntary binding arbitration of medical  
13 malpractice actions shall be as provided in Article 3 of Chapter 150B of the General  
14 Statutes.

15 **"§ 90-21.19B. Arbitration of financial responsibility among multiple defendants.**

16 (a) This section shall apply when more than one defendant to an action has  
17 participated in voluntary binding arbitration pursuant to this Part.

18 (b) Within 20 days after the determination of damages by the arbitration panel in  
19 the initial arbitration proceeding, those defendants who have agreed to voluntary  
20 binding arbitration shall submit any dispute among them regarding the apportionment of  
21 financial responsibility to a separate binding arbitration proceeding. Such proceeding  
22 shall be with an allocation panel of three arbitrators. The chief arbitrator of the first  
23 arbitration proceeding shall serve as chief arbitrator on the allocation panel. The other  
24 allocation panel members shall be two medical practitioners appointed by the  
25 defendants, except that if a hospital licensed under Article 5 of Chapter 131E of the  
26 General Statutes is involved in the arbitration proceeding, one arbitrator appointed by  
27 the defendants shall be a certified hospital risk manager. In the event the defendants  
28 cannot agree on their selection of arbitrators within 20 days after the determination of  
29 damages by the arbitration panel in the first arbitration proceeding, a list of not more  
30 than five nominees shall be submitted by each defendant to the Chief Administrative  
31 Law Judge of the Office of Administrative Hearings, who shall select the other  
32 arbitrators but shall not select more than one from the list of nominees of any defendant.  
33 Except for the chief arbitrator, an arbitrator who served on the panel in the first  
34 arbitration proceeding may not serve on the allocation panel.

35 (c) Within 65 days after the determination of damages by the arbitration panel in  
36 the first arbitration proceeding, the chief arbitrator shall convene the allocation panel for  
37 the purpose of determining allocation of responsibility among multiple defendants.

38 (d) The allocation panel shall allocate financial responsibility among all  
39 defendants named in the notice that a civil action alleging medical malpractice has been  
40 filed, regardless of whether the defendant has submitted to arbitration. The defendants  
41 in the arbitration proceeding shall pay their proportionate share of the economic and  
42 noneconomic damages awarded by the arbitration panel. The determination of the  
43 percentage of fault of any defendant not in the arbitration case shall not be binding  
44 against that defendant, nor shall it be admissible in any subsequent legal proceeding.

1 (e) Payment by the defendants of the damages awarded by the arbitration panel  
2 in the initial arbitration proceeding shall extinguish those defendants' liability to the  
3 claimant and shall also extinguish those defendants' liability for contribution to any  
4 defendants who did not participate in arbitration.

5 (f) Any defendant paying damages assessed pursuant to this section or to G.S.  
6 90-21.15 shall have an action for contribution against any nonarbitrating person whose  
7 negligence contributed to the injury.

8 **"§ 90-21.19C. Effects of failure to offer or accept voluntary binding arbitration.**

9 (a) A proceeding for voluntary binding arbitration is an alternative to jury trial  
10 and shall not supersede the right of any party to a jury trial.

11 (b) If neither party requests or agrees to voluntary binding arbitration, the action  
12 shall proceed to trial or to any available legal alternative such as offer of and demand  
13 for judgment, or offer of settlement.

14 (c) If the defendant refuses a claimant's offer of voluntary binding arbitration,  
15 then the action shall proceed to trial without limitation on damages, and the claimant,  
16 upon proving medical negligence with respect to the standard of health care required  
17 under G.S. 90-21.12, shall be entitled to recover prejudgment interest, and reasonable  
18 attorneys' fees up to twenty-five percent (25%) of the award, reduced to present value.

19 (d) If the claimant rejects a defendant's offer to enter voluntary binding  
20 arbitration, then:

21 (1) The damages awardable at trial shall be limited to net economic  
22 damages, plus noneconomic damages not to exceed three hundred fifty  
23 thousand dollars (\$350,000) per incident.

24 (2) Net economic damages reduced to present value shall be awardable,  
25 including, but not limited to, past and future medical expenses and  
26 eighty percent (80%) of wage loss and loss of earning capacity.

27 (3) Damages for future economic losses shall be awarded to be paid by  
28 periodic payments and shall be offset by future collateral source  
29 payments.

30 **"§ 90-21.19D. Misarbitration.**

31 (a) At any time during the course of voluntary binding arbitration of a medical  
32 malpractice action pursuant to this Part, the chief arbitrator on the arbitration panel,  
33 upon determining that agreement cannot be reached, may dissolve the arbitration panel  
34 and request the Chief Administrative Law Judge of the Office of Administrative  
35 Hearings to appoint two new arbitrators from lists of three to five names provided in a  
36 timely manner by each party to the arbitration. Not more than one arbitrator may be  
37 appointed from the list provided by any party, unless only one list is filed.

38 (b) Upon appointment of the new arbitrators, arbitration shall proceed at the  
39 direction of the chief arbitrator in accordance with the provisions of this Part.

40 (c) At any time after the allocation arbitration hearing under G.S. 90-21.19B has  
41 concluded, the chief arbitrator on the allocation panel may, upon determining that  
42 agreement among the arbitrators cannot be reached, dissolve the allocation panel and  
43 declare the proceedings concluded.

44 **"§ 90-21.19E. Decision of arbitration panel.**

1        Except as provided in G.S. 90-21.19D, within 20 days of the conclusion of the  
2 hearing of all issues in controversy, the arbitration panel shall render its decision in  
3 writing to the parties.

4 **"§ 90-21.19F. Payment of arbitration award; interest.**

5        Within 20 days after the determination of damages by the arbitration panel pursuant  
6 to G.S. 90-21.15, the defendant shall:

7            (1) Pay the arbitration award, including interest at the legal rate, to the  
8                claimant; or

9            (2) Submit any dispute among multiple defendants to arbitration pursuant  
10 to G.S. 90-21.19B.

11 **"§ 90-21.19G. Appeal of arbitration awards and allocation of financial**  
12 **responsibility.**

13        (a) An arbitration award and an allocation of financial responsibility are final  
14 agency action for purposes of judicial review of the panel's decision. Any person  
15 seeking review under this section must file, within 30 days of the final action, a petition  
16 in the superior court of the county in which the civil action that is the subject of the  
17 arbitration was filed, and shall be limited to review of the record. The amount of an  
18 arbitration award or an order allocating financial responsibility, the evidence in support  
19 of either, and the procedure by which either is determined are subject to judicial  
20 scrutiny only in a proceeding instituted pursuant to this section.

21        (b) No appeal shall operate to stay an arbitration award, nor shall any arbitration  
22 panel, arbitration panel member, or court stay an arbitration award. The superior court  
23 may order a stay to prevent manifest injustice, but no court shall abrogate the provisions  
24 of G.S. 90-21.19F.

25        (c) Any party to an arbitration proceeding may enforce an arbitration award or an  
26 allocation of financial responsibility by filing a petition in the superior court in the  
27 county in which the civil action that is the subject of arbitration was filed. A petition  
28 may not be granted unless the time for appeal has expired. If an appeal has been taken,  
29 a petition may not be granted with respect to an arbitration award or an allocation of  
30 financial responsibility that has been stayed.

31        (d) If the petitioner establishes the authenticity of the arbitration award or of the  
32 allocation of financial responsibility, shows that the time for appeal has expired, and  
33 demonstrates that no stay is in place, the court shall enter such orders and judgments as  
34 are required to carry out the terms of the arbitration award or allocation of financial  
35 responsibility. Such orders are enforceable by the contempt powers of the court; and  
36 execution will issue, upon the request of a party, for such judgments."

37        Sec. 4. Effective October 1, 1993, G.S. 1-567.2 reads as rewritten:

38 **"§ 1-567.2. Arbitration agreements made valid, irrevocable and enforceable;**  
39 **scope.**

40        (a) Two or more parties may agree in writing to submit to arbitration any  
41 controversy existing between them at the time of the agreement, or they may include in  
42 a written contract a provision for the settlement by arbitration of any controversy  
43 thereafter arising between them relating to such contract or the failure or refusal to  
44 perform the whole or any part thereof. Such agreement or provision shall be valid,

1 enforceable, and irrevocable except with the consent of all the parties, without regard to  
2 the justiciable character of the controversy.

3 (b) This Article shall not apply to:

4 (1) Any agreement or provision to arbitrate in which it is stipulated that  
5 this Article shall not apply or to any arbitration or award thereunder;

6 (2) Arbitration agreements between employers and employees or between  
7 their respective representatives, unless the agreement provides that this  
8 Article shall ~~apply~~-apply;

9 (3) Agreements to voluntary binding arbitration of medical malpractice  
10 actions executed pursuant to the provisions of Part 2 of Article 1B of  
11 Chapter 90 of the General Statutes."

12 Sec. 5. This act is effective upon ratification and applies to malpractice  
13 actions filed on or after that date.