



**S.B. 88**

126th General Assembly  
(As Introduced)

**Sens. Coughlin, Goodman**

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**BILL SUMMARY**

- Requires the Superintendent of Insurance to establish a pilot program to determine the benefits of using arbitration in medical negligence disputes.
- Suspends the provisions in existing law concerning arbitration of medical claims and requires the parties to a medical negligence claim to arbitrate the claim in accordance with the bill's provisions prior to filing a complaint.
- Prohibits commencing any action for medical negligence claims contrary to the provisions of the bill.
- Potentially lengthens or shortens (depending on the particular case) the statute of limitations for filing a complaint with a court following the arbitration panel's evaluation.
- Requires the claimant to provide notice to the hospital or health care facility or professional prior to filing a complaint.
- Requires the hospital or health care facility or professional to provide a written response to the notice or file a motion to dismiss the claim.
- Creates procedural requirements for arbitration hearings concerning a party's attendance at the hearing, the rules of evidence, and the admissibility of the panel's evaluation and depositions.
- Modifies the existing law's requirements regarding the chairperson's duty to serve copies of the evaluation to the parties and a party's acceptance and rejection of the evaluation.

- Stipulates additional procedural requirements for party communication, discovery, expert testimony, and settlement agreements for medical negligence claims.
- Modifies current law's provisions regarding arbitration agreements.

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## CONTENT AND OPERATION

### *Establishing the pilot program, suspending existing law, and defining medical negligence and the entities covered under the pilot program*

Under the bill, the Superintendent of Insurance must establish a pilot program to determine the benefits of using arbitration in disputes concerning the medical negligence of a health care professional, hospital, or health care facility (hereafter referred to as "entities"). Five years after the effective date of the program, the Superintendent must submit a preliminary written report to the Governor, the Speaker of the House of Representatives, and the President of the Senate. Within one year after the conclusion of the program, the Superintendent must submit a final written report to the above persons. (R.C. 2339.02.)

The bill suspends the medical claims arbitration provisions under existing law (R.C. 2711.21 to 2711.24, explained in "*Existing law's arbitration provisions*" below) for nine years. The pilot program applies to medical negligence claims that accrue during a period commencing on the effective date of the program and expiring nine years thereafter. No civil action based upon a claim of medical negligence may be taken during this period except pursuant to the provisions of the bill. The pilot program established by the bill is repealed ten years after its effective date. (R.C. 2339.06; Sections 3 and 4 of the bill.)

"Medical negligence" is defined as a negligent act or omission to act by an entity when rendering health care services that are within the scope of services the entity is licensed or accredited to provide. The negligent act or omission must be the proximate cause of the personal injury or wrongful death. "Health care professional" means a physician authorized to practice medicine, osteopathic medicine, or podiatric medicine, and surgery. "Health care facility" means a clinic, ambulatory surgical or trauma facility, emergency department, office of one or more health care professionals, training institution for health care professionals, or any other place where health care is provided to persons. "Hospital" means any person, corporation, association, board, or authority that is responsible for the operation of any hospital licensed or registered in the state. "Hospital" includes hospitals owned or operated by the state or any political subdivision, but does not include any hospital operated by the federal government or any of its branches. (R.C. 2339.01.)

## **Preliminary medical negligence requirements**

### **Initial 180-day notice requirement and exceptions**

Under the bill, the claimant may not commence an action for medical negligence against an entity unless the claimant provides the entity with written notice of the claimant's intent to file a complaint not less than 180 days before commencing the action. (R.C. 2339.03.)

A claimant may give notice up to 90 days before commencing an action if all of the following conditions apply: (1) The claimant gave timely written notice to other entities involved in the claim, (2) The 180-day notice period expired for the other entities that received notice under the above condition, (3) The claimant has filed a complaint and commenced an action against one or more of the other entities, (4) Before filing the complaint against one or more of the other entities, the claimant did not and could not reasonably have been expected to identify the entity that the claimant is providing 90-day notice to under this provision. (*Id.*)

Except for the 90-day exception, no other time period set out in the bill can alter this 180-day requirement. After the claimant provides 90-day notice to the entity in accordance with the above provisions, no additional days may be added to the 180 days regardless of the number of parties subsequently notified. (*Id.*)

### **Requirements of the notice**

Under the bill, any written notice a claimant provides under the provisions of the bill must be mailed by certified mail to the entity's last known business or residential address. Proof of receipt of the notice constitutes prima facie evidence that the claimant complied with this notice provision. (*Id.*)

The written notice must contain the factual basis for the claim, the standard of practice or care the claimant alleges is applicable to the claim, how the standard of care was breached by the entity, the action that allegedly should have taken place to comply with the standard of care, how the breach of the standard of care was the proximate cause of the claimant's injury, and the names of all the entities the claimant is notifying pursuant to the provisions in the bill. (*Id.*)

### **After the claimant gives the initial notice**

Under the bill, within 50 days after the claimant gives timely notice, the claimant must allow the entities access to all medical records related to the claim in the claimant's control. The claimant also must furnish releases for any medical records related to the claim of which the claimant has knowledge that are not in the claimant's control. Also within 50 days after the claimant gives timely notice, the entity must allow the claimant access to all medical records related to the claim

within the entity's control. This provision does not restrict the entity from communicating with other entities and acquiring medical records as otherwise permitted by the Revised Code. (*Id.*)

Within 150 days after the entity receives the claimant's notice, if the entity denies the claim, the entity must furnish a written response to the claimant or file a motion with the court to dismiss the claim. If the entity chooses to provide a written response, the response must contain the factual basis for any defense to the claim, the standard of practice or care the entity alleges is applicable to the services rendered, the entity's statement that the applicable standard of care was complied with and how compliance was achieved, and the reason the entity contends the claimant's injury is unrelated to the services rendered. If the claimant does not receive this written response in a timely manner, the claimant may commence an action. If the entity chooses to file a motion to dismiss the claim, the motion must be accompanied by an affidavit of noninvolvement. Current law requires an affidavit of noninvolvement to explain that the entity was misidentified, not involved in the care of the claimant, not obligated to care for the claimant, and could not have caused the claimant's injuries. (R.C. 2323.45, not in the bill, 2339.03, and 2339.04.)

### **General provisions concerning medical negligence claims**

Under the bill, the parties to a medical negligence claim may communicate with persons to obtain information relevant to the claim and obtain discovery, including interrogatories, document production, and depositions. A person who discloses information pursuant to this provision is not in violation of any other duty or obligation owed to the parties. (R.C. 2339.04.)

No person will be deemed competent to give expert testimony in a medical negligence claim unless the person meets the expert witness requirements for medical claims under the current law (R.C. 2743.43). (R.C. 2339.05.)

If the claimant enters into a settlement agreement with an entity regarding the medical negligence claim, the claimant and entity must jointly file a complete written copy of the agreement with the Superintendent within 30 days of entering into the agreement. Information filed with the Superintendent under this provision is confidential. (R.C. 2339.07.)

### **Arbitration**

#### **Existing law's arbitration provisions**

Under existing law, parties involved in a medical, dental, optometric, or chiropractic claim may agree to submit their medical claim to nonbinding

arbitration. The arbitration board must consist of one member chosen by the plaintiff, one member chosen by the defendant, and one member designated by the court. The member designated by the court must serve as chairperson of the board. The parties must equally share the costs of the arbitration, including the members' compensation. The arbitrators may administer oaths to witnesses, fix the time and place of the hearings, adjourn daily meetings, subpoena witnesses to testify at hearings, and take depositions. (R.C. 2711.06, 2711.07, and 2711.21, all not in the bill.)

The board's arbitration award must be in writing and signed by a majority of the arbitrators. A copy of the award must be delivered to each party to the claim. Anytime within one year after the board makes an award, any party to the claim may apply to a court of common pleas for an order confirming the award. The party applying for the order must deliver a copy of the order to the opposing party within five days before the court's hearing. When a party requests an order confirming the award, the court shall grant the order unless the court vacates, modifies, or corrects the award. If a party makes a motion to vacate, modify, or correct the award, the party must serve the adverse party with a copy of the motion within three months after the arbitrators grant the award. (R.C. 2711.08, 2711.09, and 2711.13, all not in the bill.)

The court must vacate the award if the award was procured by fraud, the arbitrators were partial or corrupt, the arbitrators were guilty of misconduct, or the arbitrators exceeded their powers. If the court vacates the award, the court may order a rehearing by the arbitrators. The court must modify or correct the award if the award contains a material miscalculation or mistake, the arbitrators awarded on a matter the parties did not submit to them, or the award is imperfect in form that does not affect the merits of the award. As explained below in "*A party's acceptance or rejection of the evaluation*," these two sections still apply under the bill's provisions. (R.C. 2711.10 and 2711.11, both not in the bill.)

If the parties do not accept the board's decision, the claim must proceed as if the claim was never submitted to arbitration. The arbitration decision and any dissenting opinion written by the board is not admissible as evidence at trial. (R.C. 2711.21, not in the bill.)

The parties may also agree to submit to binding arbitration if any of the above medical claims arise. Existing law sets out several requirements that must be present in a binding arbitration agreement for the agreement to be valid and enforceable. (R.C. 2711.21, 2711.22, 2711.23, and 2711.24, all not in the bill.)

### **The bill's arbitration provisions**

Under the bill and contrary to existing law, prior to filing a medical negligence complaint, all claims alleging medical negligence must be arbitrated in accordance with the bill's provisions. (R.C. 2339.08.)

### **The arbitration panel**

The arbitration panel must consist of three members from the American Health Lawyers Alternative Dispute Resolution Service, with the claimant selecting one member, the entity selecting one member, and both the claimant and entity agreeing on a third member. The third member must serve as the chairperson of the panel. The chairperson must set the time and place for the arbitration hearing and send notice of the hearing to the arbitrators and parties at least 28 days before the hearing date. (R.C. 2339.09 and 2339.10.)

The grounds for disqualification of an arbitrator are the same as the grounds for disqualification provided in existing law for judges. The parties must share the cost of the arbitration; however, the claimant and entity are separately responsible for the cost of the member representing their interests. (R.C. 2339.09.)

### **The parties' duties before the arbitration hearing**

At least seven days before the arbitration hearing, the parties to the claim must submit to the chairperson of the panel copies of the written notices the claimant served and written responses or motions to dismiss the entity served or filed, as described above in "**Preliminary medical negligence requirements.**" The parties also must submit to the chairperson five copies of a brief or summary of the parties' factual and legal positions. Additionally, the parties may submit additional documents pertaining to the arbitration. A party must serve one copy of each document submitted to the chairperson to the opposing party's attorney of record. (R.C. 2339.11.)

Any party that fails to submit these documents to the chairperson will be fined \$60, to be paid at the time of the hearing and distributed equally among the panel members. (*Id.*)

### **Procedural arbitration hearing provisions**

A party has the right, but is not required, to attend an arbitration hearing. If scars, disfigurement, or other unusual conditions exist, the conditions may be demonstrated to the arbitration panel by personal appearance, photographs, or videotape. (R.C. 2339.12.)

The Ohio Rules of Evidence apply to arbitration hearings. Factual information having a bearing on damages or liability must be supported by documentary evidence when possible. A stenographic record or tape recording and transcript of each arbitration hearing must be maintained as part of the arbitration's official record. (*Id.*)

The panel's evaluation is not admissible in subsequent court proceedings and panel members must not testify or provide depositions in subsequent court proceedings. In a jury action, however, the court may inform the jury that the claim was arbitrated and to each party, whether the panel's evaluation favored the party. Party admissions, witness testimony, and documentary evidence are admissible in subsequent court proceedings to the extent permitted by the Rules of Evidence. (*Id.*)

### **Arbitration evaluations**

Within 14 days after an arbitration hearing, the arbitration panel must evaluate the claim and serve each party with a copy of its evaluation. The evaluation must include the panel's specific finding on the applicable standard of practice or care for the services rendered by the entity. The evaluation includes the panel's awards and if any award is not unanimous. All dissenting opinions of members must accompany the evaluation. (R.C. 2339.13.)

The evaluation must state if the panel determines that a claim or defense is frivolous. If the claim proceeds to trial, the party having the frivolous claim or defense must post a cash or surety bond of \$50,000. If the court enters judgment against the party who posted the bond, the bond must be used to pay all reasonable costs incurred by the opposing party, including reasonable attorney fees. The evaluation also must include a separate award for each cross-claim, counterclaim, and third-party claim that has been filed. (*Id.*)

### **A party's acceptance or rejection of the evaluation**

Each party to a claim must file a written acceptance or rejection of the panel's evaluation within 28 days after being served the evaluation. The failure of a party to file an acceptance or rejection constitutes the party's acceptance of the evaluation. A party may only accept or reject the awards in their entirety. The chairperson must not disclose a party's acceptance or rejection until the expiration of the 28-day period. The chairperson must place a copy of the evaluation and the parties' acceptances and rejections in a sealed envelope for filing with the clerk of court. If the case proceeds to trial in accordance with the provisions explained below, the court must not open the envelope and the parties must not reveal the amount of the awards until the court renders judgment. (R.C. 2339.14 and 2339.15.)

At the expiration of the 28-day period, the chairperson must mail a notice to all parties to the action indicating each party's acceptance or rejection of the panel's evaluation. If all parties accept the evaluation, the chairperson must mail a copy of the awards to all parties, adding all fees, costs, and interest. At any time within one year of the parties' acceptance, a party must apply to the court for an order confirming the award. The court must grant the order unless the court vacates, modifies, or corrects the evaluation according to provisions in existing law explained above in **'Existing law's arbitration provision.'** If a party makes an application to vacate, modify, or correct the evaluation, written notice of the application must be served on adverse parties five days before the hearing on the application. (*Id.*)

Under the bill and contrary to current law, if a party rejects the panel's evaluation and awards, the action must proceed to trial if a party files a complaint with the court within 60 days after being served with the panel's evaluation. Under existing law, the party must file a complaint within one year after the cause of action accrued in order for the claim to proceed to trial. (R.C. 2305.113 and 2339.15.)

If the claim proceeds to trial upon the rejecting party's complaint, the rejecting party must pay the opposing party's actual costs unless the verdict is at least 10% more favorable to the rejecting party than the evaluation. However, if the opposing party also rejects the evaluation and award, the opposing party is entitled to costs only if the verdict is more favorable to the opposing party than the evaluation. The court must adjust the verdict by adding assessable costs and interest to the amount of the verdict. "Actual costs" include those costs taxable in any civil action. (R.C. 2339.16.)

#### **Additional acceptance and rejection provisions for multiple parties**

In arbitration proceedings that involve multiple parties on either side, several exceptions apply. First, all of the parties on either side of the claim have the option of jointly accepting all of the arbitration panel's awards or jointly accepting some awards and rejecting others. However, if the parties are not acting jointly and only in individual capacities, the individual party may only accept or reject the awards in their entirety. (R.C. 2339.14.)

Second, if a party accepts all of the awards, the party may indicate in the acceptance that the acceptance is only effective if all of the opposing parties accept the awards. If the limitation is included and some of the opposing parties reject the awards, the party who included the limitation is considered to have rejected all the awards, even to those opposing parties who accepted. If the limitation is not included and if some opposing parties reject the award, the party who did not include the limitation is considered to have accepted the awards and

an entry of judgment for those opposing parties who accepted the award. However, the action between the party who did not include the limitation and opposing parties who rejected the award may proceed to trial if a party files with the court a complaint within 60 days after being served the panel's evaluation. As explained above in "A party's acceptance or rejection of the evaluation," this 60-day provision appears to change the one-year provision in existing law as to the statute of limitations on medical negligence actions. (R.C. 2305.113, 2339.14, and 2339.15.)

Third, for parties that have accepted the portions of the evaluation that apply to them, the chairperson must mail copies of the awards to those parties unless the party included a limitation in the party's acceptance, as described above. (R.C. 2339.15.)

Under the bill, if the opposing parties jointly reject all or part of the evaluation, the action must proceed to trial on the unresolved matters if a party files a complaint with the court within 60 days after being served the panel's evaluation. As explained above, this 60-day provision appears to change existing law as to the statute of limitations on medical negligence actions. (R.C. 2305.113 and 2339.15.)

### Arbitration agreements

Contrary to the provisions in existing law concerning arbitration agreements explained above in "Existing law's arbitration provisions," the bill stipulates that any arbitration agreement the parties enter into, whether as to awards or other matters, is binding on all parties to the agreement. The bill does not set out requirements that must be in the agreement to make the agreement valid and enforceable, as under existing law. (R.C. 2339.17.)

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## HISTORY

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Introduced	03-02-05	p. 259

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