



Sub. S.B. 88*

126th General Assembly

(As Reported S. Insurance, Commerce, and Labor)

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, the conclusion of another dispute resolution mechanism, or the court's entry of judgment on a motion to vacate, modify, or correct the 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.

* *This analysis was prepared before the report of the Senate Insurance, Commerce, and Labor Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- Creates procedural requirements for arbitration hearings concerning a party's attendance at the hearing, the rules of evidence, and the admissibility of the arbitration panel's evaluation and depositions.
- Modifies the existing law's requirements regarding the arbitration panel chairperson's duty to serve copies of the evaluation to the parties and a party's acceptance or 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 "entity"). Five years after the effective date of the program, the Superintendent and Supreme Court of Ohio each must submit a preliminary written report on the use of arbitration panels by the pilot program and other alternative dispute resolution mechanisms agreed upon by all parties to a claim to the Governor, the Speaker of the House of Representatives, and the

President of the Senate. Each report must include information the arbitration panel chairpersons submit to the Superintendent and Court pursuant to the provisions of the bill, described below in "*A party's acceptance or rejection of the evaluation*," any other findings the Superintendent or Court make concerning the results of arbitration under the pilot program, and any information the Superintendent requires under rules the Superintendent may adopt. Within one year after the conclusion of the program, the Superintendent and Court each must submit a final written report to the above persons that must include the same types of information included in the preliminary reports. (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. 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. The pilot program established by the bill is repealed ten years after its effective date. (R.C. 2339.08; 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.)

Notice of intent to file a medical negligence complaint

Initial 180-day notice requirement and exceptions

Under the bill, the claimant may not commence an action in Lorain, Erie, Huron, Cuyahoga, Summit, Lake, or Geauga county alleging 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. The bill requires an affidavit of merit, as described in Civil Rule 10, to accompany the written notice of intent. (R.C. 2339.03.)

A claimant may give notice up to 90 days before commencing an action if (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, and (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 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.*)

Arbitration panel selections

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.)

Under the bill, the arbitration panel must consist of three members, 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. Within 30 days after the entity receives notice of intent from the claimant, the entity and claimant must choose the third member chairperson of the panel. Within a second 30-day period after the parties choose the chairperson, the parties must complete their individual panel selections. The chairperson must have practiced law for at least eight years and be from the American Health Lawyers Alternative Dispute Resolution Service, American Arbitration Association, or other similar dispute resolution service. The panel member selected by each party to the claim must be a medical expert in the same area of specialty that is the subject of the claim. (R.C. 2339.04.)

If the claimant and entity cannot agree on a chairperson or, if multiple claimants or multiple entities are involved in a claim and those claimants or entities cannot agree on a panel member within the required 30-day time period, the American Health Lawyers Alternative Dispute Resolution Service, American Arbitration Association, or other similar dispute resolution service must select the chairperson or panel member on behalf of the parties or multiple claimants or entities. If a dispute resolution service chooses the chairperson of the panel on behalf of the parties, a party to the claim may reject that chairperson if the party notifies the dispute resolution service and other parties to the claim of the rejection within five days after the dispute resolution service selects the chairperson. Each party has the right to reject one chairperson selection a dispute resolution service makes on the parties' behalf. If a party rejects a chairperson, the dispute resolution service that selected the chairperson must select another chairperson within five days of being notified that a party has rejected the chairperson.

The grounds for disqualification of an arbitrator under the bill 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. (*Id.*)

Under the bill, the chairperson of the panel must (1) within 30 days of the parties selecting the panel members, set a time for the arbitration hearing, (2) set a place for the arbitration hearing, (3) set a case management schedule allowing time periods for written discovery, depositions, and the exchange of expert reports, and (4) send notice to the arbitrators and parties informing them that the arbitration panel has been selected and of the date, time, and schedule described above. The chairperson must send the above notice as soon as practicable after the chairperson decides the place, time, and schedule. The arbitration hearing must be no later than 90 days after the chairperson sets the case management schedule. (R.C. 2339.05.)

Respondent's required response or motion after the arbitration panel is selected

Under the bill, within 15 days after the entity receives notice from the chairperson of the arbitration panel concerning the place, time, and case management schedule, as described above, if the entity denies the claim, the entity must furnish a written response to the claimant and the arbitration panel or file a motion with the panel 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, and 2339.06.)

The bill imposes on the parties to the claim and the arbitration panel the procedures, rights and responsibilities of the parties, and responsibilities of the court set out in existing law concerning a motion for dismissal and affidavit of noninvolvement. For example, under existing law, the entity must notify in writing all parties to the claim that the entity filed a motion to dismiss. The parties have a right to file a motion to challenge the contents of an affidavit of noninvolvement. If a motion is filed challenging an affidavit of noninvolvement, any party may request an oral hearing on the motion for dismissal. Under existing law, the court must consider all evidence the parties submit and the parties' oral arguments before ruling on a motion to dismiss. (*Id.*)

Under the bill, within ten days after the claimant receives the entity's response or notice that the entity filed a motion to dismiss described above, the claimant must allow the entity 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. Within ten days after receiving from the claimant access to medical records and releases, 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. (R.C. 2339.06.)

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. 2339.06.)

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. 2339.07.)

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. 2339.09.)

Current process of an arbitration hearing

Existing law's arbitration provisions

Under existing law, an arbitration board's 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 must 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 also may 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 hearing provisions

The parties' duties before the arbitration hearing. At least five 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, as described above in "**Notice of intent to file a medical negligence complaint.**" The parties also must submit to the chairperson five copies of a brief or summary of each party's 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. 2339.10.)

Any party that fails to submit these documents to the chairperson may be fined at the discretion of the majority of the panel, to be paid at the time of the hearing and applied to the opposing party's arbitration costs. (*Id.*)

Procedural arbitration hearing provisions. A party must attend an arbitration hearing. The Ohio Rules of Evidence apply to arbitration hearings. Under the bill, the General Assembly requests that the Supreme Court adopt rules regarding the applicability of the Rules Civil of Procedure to medical negligence arbitration under the bill. If the Court adopts rules regarding the applicability of the Rules of Civil Procedure, those rules apply to arbitration under the bill. Factual information having a bearing on 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 panel's official record. (R.C. 2339.11.)

The panel's written evaluation is admissible in subsequent court proceedings and panel members must not testify or provide depositions in subsequent court proceedings. Party admissions, witness testimony, and documentary evidence are admissible in subsequent court proceedings to the extent permitted by the Rules of Evidence. Each party's testimony and each party's attorney's opening statement may not exceed 30 minutes or another period of time that the arbitration panel determines. (*Id.*)

Arbitration evaluations. Within ten 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 findings on the applicable standard of practice or care for the services rendered by the entity, if the entity deviated from that standard of practice or care, and if that deviation was the proximate cause of the claimant's injuries. All dissenting opinions of members must accompany the evaluation. The panel's findings may not include damages; the value of the claim; or the extent, if any, of a claimant's disability or impairment. (R.C. 2339.12.)

The evaluation must state if the panel determines that a claim or defense is frivolous. If the claim proceeds to trial because an opposing party rejects all or part of the panel's evaluation, as described below in "**A party's acceptance or rejection of the evaluation,**" the party having the frivolous claim or defense must post a cash or surety bond approved by the court 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. (*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. However, any party may file a motion with the court to vacate, modify, or correct the arbitration panel's evaluation according to provisions in existing law explained above in "**Existing law's arbitration provisions.**" The chairperson must not disclose a party's acceptance or rejection until the expiration of the 28-day period described above. 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. The notice must include a statement of all fees, costs, and interest. After the chairperson sends the above notice, the chairperson must submit a report to the Superintendent and Supreme Court of Ohio that includes a summary of the arbitration proceedings, the date the claimant gave the notice of intent to file a complaint, and the date the panel rendered an evaluation of the claim. (R.C. 2339.13 and 2339.14.)

Under the bill, at any time within one year of the parties' acceptance, a party must apply to the court for an order confirming the evaluation and for determining damages to be awarded under the claim. The court must grant the order unless the court vacates, modifies, or corrects the evaluation as described above. 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 all or part of the panel's evaluation and a party files a complaint with the court within 60 days after being served with the panel's evaluation, the action must proceed to trial to determine the standard of practice or care applicable to the claim, if the entity deviated from that standard of practice or care, if that deviation was the proximate cause of the claimant's injuries, and damages to be awarded under the claim. 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 2339.14.)

The chairperson of the arbitration panel must place a copy of the evaluation and the parties' acceptances and rejections in a sealed envelope and file the envelope with the clerk of the court in which a party filed a complaint or order as described above. Unless one or more parties accepts with limitation as described above, if opposing parties accept the arbitration panel's evaluation, the evaluation is binding on all accepting parties. (R.C. 2339.14.)

If a party rejects all or any of the arbitration panel's evaluation, the claim proceeds to trial as described above and the court's verdict is not favorable to the rejecting party, the rejecting party must pay an opposing party's actual costs in addition to any damages the court orders the rejecting party to pay. 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 and reasonable attorneys' fees. (R.C. 2339.15.)

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 evaluation or jointly accepting part of the evaluation and rejecting other parts. However, as to any particular opposing party, the party may only accept or reject that part of the evaluation in its entirety. (R.C. 2339.13.)

Second, if a party accepts all of the evaluation, the party may indicate in the acceptance that the acceptance is only effective if all of the opposing parties accept the evaluation concerning the accepting party. If the limitation is included and some of the opposing parties reject the evaluation, the party who included the limitation is considered to have rejected all the evaluation, even to those opposing parties who accepted. If the limitation is not included and if some opposing parties reject the evaluation, the party who did not include the limitation is considered to have accepted the evaluation and an entry of judgment for those opposing parties who accepted the evaluation. 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 changes the one-year provision in existing law as to the statute of limitations on medical negligence actions. (R.C. 2305.113 and 2339.13.)

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. 2339.14.)

Violations of the arbitration pilot provisions

Under the bill, if any person violates the arbitration pilot provisions set out in the bill, the person aggrieved by the alleged violation may petition any court of common pleas having jurisdiction of the alleged violator for an order directing that the arbitration proceed as required under the arbitration pilot provisions. The aggrieved person must give five days written notice to the alleged violator of such a petition. The clerk of the court in which the petition was filed must serve the notice in the manner provided for serving a summons.¹ Either party, on or before the return day of the notice of petition, may demand a jury trial of the alleged violation. If a party to the action does not demand a jury trial, the court must hear and determine if a violation occurred as alleged in the petition. If a party to the action demands a jury trial, the court must make an order referring the alleged violation to a jury called and impaneled in the manner provided for in civil actions. If the jury finds that the alleged violation did not occur, the proceeding will be dismissed. If the jury finds that the alleged violation occurred, the court must make an order summarily directing the parties to proceed with the arbitration in accordance with the arbitration pilot provisions set out in the bill.

HISTORY

ACTION	DATE
Introduced	03-02-05
Reported, S. Insurance, Commerce, & Labor	---

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¹ *Civil Rule 4 establishes the procedures, times, and waivers concerning serving a summons.*