

By Senator Campbell

33-999-99

See HB 419

1 A bill to be entitled
2 An act relating to medical malpractice;
3 amending s. 766.207, F.S.; revising provisions
4 relating to voluntary binding arbitration of
5 medical malpractice claims; providing for the
6 effect of an offer to submit to voluntary
7 binding arbitration with respect to allegations
8 contained in the claimant's notice of intent
9 letter; revising provisions relating to the
10 arbitration panel; revising provisions relating
11 to qualifications of arbitrators; revising rate
12 of compensation for medical negligence claims
13 arbitrators; revising provisions relating to
14 damages; deleting provisions relating to
15 certain rules; amending s. 766.209, F.S.;
16 revising provisions relating to the effect of
17 failure to offer or accept voluntary binding
18 arbitration; increasing certain damage award
19 limits; providing an effective date.

21 Be It Enacted by the Legislature of the State of Florida:

23 Section 1. Section 766.207, Florida Statutes, is
24 amended to read:

25 766.207 Voluntary binding arbitration of medical
26 negligence claims.--

27 (1) Voluntary binding arbitration pursuant to this
28 section and ss. 766.208-766.212 shall not apply to rights of
29 action involving the state or its agencies or subdivisions, or
30 the officers, employees, or agents thereof, pursuant to s.
31 768.28.

1 (2) Upon the completion of presuit investigation with
2 preliminary reasonable grounds for a medical negligence claim
3 intact, the parties may elect to have damages determined by an
4 arbitration panel. Defendants offering to submit to
5 arbitration pursuant to this section and in conjunction with
6 s. 766.106, shall be deemed to have admitted both liability
7 and causation with respect to the allegations contained in the
8 claimant's notice of intent letter.Such election may be
9 initiated by either party by serving a request for voluntary
10 binding arbitration of damages within 90 days after receipt
11 ~~service~~ of the claimant's notice of intent to initiate
12 litigation upon the defendant. The evidentiary standards for
13 voluntary binding arbitration of medical negligence claims
14 shall be as provided in ss. 120.569(2)(e) and 120.57(1)(c).

15 (3) Upon receipt of a party's request for such
16 arbitration, the opposing party may accept the offer of
17 voluntary binding arbitration within 30 days. However, in no
18 event shall the defendant be required to respond to the
19 request for arbitration sooner than 90 days after service of
20 the notice of intent to initiate litigation under s. 766.106.
21 Such acceptance within the time period provided by this
22 subsection shall be a binding commitment to comply with the
23 decision of the arbitration panel. The liability of any
24 insurer shall be subject to any applicable insurance policy
25 limits. A claimant's acceptance of an offer to arbitrate shall
26 not bar the claimant from pursuing a cause of action against
27 defendants who do not offer or agree to arbitration under this
28 section.

29 (4) The arbitration panel shall be composed of three
30 arbitrators, one selected by the claimant, one selected by the
31 defendant, and one arbitrator selected jointly by the other

1 two arbitrators who shall serve as the chief arbitrator. In
2 the event of multiple plaintiffs or multiple defendants, the
3 arbitrator selected by the side with the multiple parties
4 shall jointly select the arbitrator for their side. If the
5 multiple parties cannot reach agreement as to their
6 arbitrator, a petition shall be filed with the chief judge of
7 the appropriate circuit court, who shall select the arbitrator
8 or arbitrators at issue ~~an administrative law judge furnished~~
9 ~~by the Division of Administrative Hearings who shall serve as~~
10 ~~the chief arbitrator. In the event of multiple plaintiffs or~~
11 ~~multiple defendants, the arbitrator selected by the side with~~
12 ~~multiple parties shall be the choice of those parties. If the~~
13 ~~multiple parties cannot reach agreement as to their~~
14 ~~arbitrator, each of the multiple parties shall submit a~~
15 ~~nominee, and the director of the Division of Administrative~~
16 ~~Hearings shall appoint the arbitrator from among such~~
17 ~~nominees.~~

18 (5) The arbitrators shall be independent of all
19 parties, witnesses, insurance carriers, self-insurance trusts
20 or risk retention groups of a party,and legal counsel, and no
21 officer, director, affiliate, subsidiary, or employee of a
22 party, witness, or legal counsel may serve as an arbitrator in
23 the proceeding.

24 (6) The rate of compensation for medical negligence
25 claims arbitrators ~~other than the administrative law judge~~
26 shall be set by the chief judge of the appropriate circuit
27 court using by schedule providing for compensation of not less
28 than \$250 per day nor more than \$750 per day or as agreed by
29 the parties. In setting the schedule, the chief judge shall
30 ~~consider~~ the prevailing hourly rate rates charged for the
31 delivery of professional services in the community.

1 (7) Arbitration pursuant to this section shall
2 preclude recourse to any other remedy by the claimant against
3 any participating defendant, and shall be undertaken with the
4 understanding that:

5 (a) Net economic damages shall be awardable,
6 including, but not limited to, past and future medical
7 expenses ~~and 80 percent of wage loss and loss of earning~~
8 capacity, offset by any collateral source payments paid.

9 (b) Any offset of collateral source payments made as
10 of the date of the arbitration hearing shall be in accordance
11 with s. 768.76.

12 (c) Each claimant shall be entitled to receive a
13 maximum of \$350,000 in noneconomic damages per incident of
14 medical malpractice from each defendant participating in
15 arbitration. The Legislature is cognizant of the increasing
16 costs of goods and services each year and recognizes that
17 fixing a set amount of compensation has the effect of a
18 reduction in compensation each year. Accordingly, the
19 conditional limitation on damages in this section shall be
20 increased at the rate of 5 percent each year, prorated from
21 the effective date of this paragraph, to the date on which
22 noneconomic damages subject to such limitation are awarded by
23 arbitration, final judgment, or settlement ~~Noneconomic damages~~
24 ~~shall be limited to a maximum of \$250,000 per incident, and~~
25 ~~shall be calculated on a percentage basis with respect to~~
26 ~~capacity to enjoy life, so that a finding that the claimant's~~
27 ~~injuries resulted in a 50-percent reduction in his or her~~
28 ~~capacity to enjoy life would warrant an award of not more than~~
29 ~~\$125,000 noneconomic damages.~~

30 ~~(d)(c)~~ Damages for future economic losses may ~~shall~~ be
31 awarded to be paid by periodic payments pursuant to s.

1 766.202(8) ~~and shall be offset by future collateral source~~
2 ~~payments.~~

3 (e)~~(d)~~ Punitive damages shall not be awarded.

4 (f)~~(e)~~ The defendant shall be responsible for the
5 payment of interest on all accrued damages with respect to
6 which interest would be awarded at trial.

7 (g)~~(f)~~ The defendant shall pay the claimant's
8 reasonable attorney's fees, and costs, and expenses as
9 determined by the arbitration panel, which shall be taxed as
10 costs but in no event more than 15 percent of the award,
11 ~~reduced to present value.~~

12 (h)~~(g)~~ The defendant shall pay all the costs of the
13 arbitration proceeding and the fees of all the arbitrators
14 ~~other than the administrative law judge.~~

15 (i)~~(h)~~ Each defendant who submits to arbitration under
16 this section shall be jointly and severally liable for all
17 damages assessed pursuant to this section.

18 (j)~~(i)~~ The defendant's obligation to pay the
19 claimant's damages shall be for the purpose of arbitration
20 under this section only. A defendant's or claimant's offer to
21 arbitrate shall not be used in evidence or in argument during
22 any subsequent litigation of the claim following the rejection
23 thereof.

24 (k)~~(j)~~ The fact of making or accepting an offer to
25 arbitrate shall not be admissible as evidence of liability in
26 any collateral or subsequent proceeding on the claim.

27 (l)~~(k)~~ Any offer by a claimant to arbitrate must be
28 made to each defendant against whom the claimant has made a
29 claim. Any offer by a defendant to arbitrate must be made to
30 each claimant who has joined in the notice of intent to
31 initiate litigation, as provided in s. 766.106. A defendant

1 who rejects a claimant's offer to arbitrate shall be subject
2 to the provisions of s. 766.209(3). A claimant who rejects a
3 defendant's offer to arbitrate shall be subject to the
4 provisions of s. 766.209(4).

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

9
10 The provisions of this subsection shall not preclude
11 settlement at any time by mutual agreement of the parties.

12 (8) Any issue between the defendant and the
13 defendant's insurer or self-insurer as to who shall control
14 the defense of the claim and any responsibility for payment of
15 an arbitration award, shall be determined under existing
16 principles of law; provided that the insurer or self-insurer
17 shall not offer to arbitrate or accept a claimant's offer to
18 arbitrate without the written consent of the defendant.

19 ~~(9) The Division of Administrative Hearings is~~
20 ~~authorized to promulgate rules to effect the orderly and~~
21 ~~efficient processing of the arbitration procedures of ss.~~
22 ~~766.201-766.212.~~

23 ~~(10) Rules promulgated by the Division of~~
24 ~~Administrative Hearings pursuant to this section, s. 120.54,~~
25 ~~or s. 120.65 may authorize any reasonable sanctions except~~
26 ~~contempt for violation of the rules of the division or failure~~
27 ~~to comply with a reasonable order issued by an administrative~~
28 ~~law judge, which is not under judicial review.~~

29 Section 2. Subsections (2), (3), and (4) of section
30 766.209, Florida Statutes, are amended to read:

31

1 766.209 Effects of failure to offer or accept
2 voluntary binding arbitration.--

3 (2) If neither party requests or agrees to voluntary
4 binding arbitration, the claim shall proceed to trial or to
5 any available legal alternative such as offer of and demand
6 for judgment under s. 768.79 ~~or offer of settlement under s.~~
7 ~~45.061.~~

8 (3) If the defendant refuses a claimant's offer of
9 voluntary binding arbitration, +

10 ~~(a)~~ the claim shall proceed to trial without
11 limitation on damages, and the claimant, upon proving medical
12 negligence, shall be entitled to recover prejudgment interest,
13 costs, and reasonable attorney's fees which shall be taxed as
14 costs up to 25 percent of the award reduced to present value.

15 ~~(b) The claimant's award at trial shall be reduced by~~
16 ~~any damages recovered by the claimant from arbitrating~~
17 ~~codefendants following arbitration.~~

18 (4) If the claimant rejects a defendant's offer to
19 enter voluntary binding arbitration:

20 (a) The damages awardable at trial shall be limited to
21 net economic damages, and, with regard to each defendant
22 offering voluntary binding arbitration, plus noneconomic
23 damages not to exceed \$500,000 ~~\$350,000~~ per incident of
24 medical malpractice to each claimant. The Legislature
25 expressly finds that such conditional limit on noneconomic
26 damages is warranted by the claimant's refusal to accept
27 arbitration, and represents an appropriate balance between the
28 interests of all patients who ultimately pay for medical
29 negligence losses and the interests of those patients who are
30 injured as a result of medical negligence. The Legislature is
31 cognizant of the increasing costs of goods and services each

1 year and recognizes that fixing a set amount of compensation
2 has the effect of a reduction in compensation each year.
3 Accordingly, the conditional limitation on damages in this
4 section shall be increased at the rate of 5 percent each year,
5 prorated from the effective date of this paragraph, to the
6 date at which noneconomic damages subject to such limitation
7 are awarded by arbitration, final judgment, or settlement.

8 (b) Net economic damages reduced to present value
9 shall be awardable, including, but not limited to, past and
10 future medical expenses ~~and 80 percent~~ of wage loss and loss
11 of earning capacity, offset only by any collateral source
12 payments paid for past economic damages.

13 (c) Damages for future economic losses may ~~shall~~ be
14 awarded to be paid by periodic payments pursuant to s.
15 766.202(8), ~~and shall be offset by future collateral source~~
16 ~~payments.~~

17 Section 3. This act shall take effect July 1, 1999,
18 and shall apply to all causes of action accruing on or after
19 that date.

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22 LEGISLATIVE SUMMARY

23
24 Revises language with respect to voluntary binding
25 arbitration of medical negligence cases. Provides that
26 defendants offering to submit to such arbitration shall
27 be deemed to have admitted both liability and causation
28 with respect to the allegations contained in the
29 claimant's notice of intent letter. Revises language with
30 respect to the arbitration panel. Provides that the rate
31 of compensation for medical negligence claims arbitrators
shall be set by the chief judge of the appropriate
circuit court using the prevailing hourly rate charged
for the delivery of professional services in the
community. Revises language concerning maximum amounts of
damages which may be awarded. Deletes provisions
authorizing the making of described rules. Revises
language with respect to the effects of failure to offer
or accept voluntary binding arbitration. (See bill for
details.)