

By Representatives Levine and Greenstein

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

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22 Be It Enacted by the Legislature of the State of Florida:  
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24           Section 1. Section 766.207, Florida Statutes, is  
25 amended to read:

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

28           (1) Voluntary binding arbitration pursuant to this  
29 section and ss. 766.208-766.212 shall not apply to rights of  
30 action involving the state or its agencies or subdivisions, or  
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1 the officers, employees, or agents thereof, pursuant to s.  
2 768.28.

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

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

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

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

27           (6) The rate of compensation for medical negligence  
28 claims arbitrators ~~other than the administrative law judge~~  
29 shall be set by the chief judge of the appropriate circuit  
30 court using by schedule providing for compensation of not less  
31 than \$250 per day nor more than \$750 per day or as agreed by

1 ~~the parties. In setting the schedule, the chief judge shall~~  
2 ~~consider~~ the prevailing hourly rate ~~rates~~ charged for the  
3 delivery of professional services in the community.

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

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

12 (b) Any offset of collateral source payments made as  
13 of the date of the arbitration hearing shall be in accordance  
14 with s. 768.76.

15 (c) Each claimant shall be entitled to receive a  
16 maximum of \$350,000 in noneconomic damages per incident of  
17 medical malpractice from each defendant participating in  
18 arbitration. The Legislature is cognizant of the increasing  
19 costs of goods and services each year, and recognizes that  
20 fixing a set amount of compensation actually has the effect of  
21 a reduction in compensation each year. Accordingly, the  
22 conditional limitation on damages in this section shall be  
23 increased at the rate of 5 percent each year, pro rated from  
24 the effective date of this paragraph, to the date on which  
25 noneconomic damages subject to such limitation are awarded by  
26 arbitration, final judgment, or settlement ~~Noneconomic damages~~  
27 ~~shall be limited to a maximum of \$250,000 per incident, and~~  
28 ~~shall be calculated on a percentage basis with respect to~~  
29 ~~capacity to enjoy life, so that a finding that the claimant's~~  
30 ~~injuries resulted in a 50-percent reduction in his or her~~  
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1 ~~capacity to enjoy life would warrant an award of not more than~~  
2 ~~\$125,000 noneconomic damages.~~

3 (d)~~(c)~~ Damages for future economic losses may ~~shall~~ be  
4 awarded to be paid by periodic payments pursuant to s.  
5 766.202(8) ~~and shall be offset by future collateral source~~  
6 ~~payments.~~

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

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

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

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

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

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

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

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1       (1)~~(k)~~ Any offer by a claimant to arbitrate must be  
2 made to each defendant against whom the claimant has made a  
3 claim. Any offer by a defendant to arbitrate must be made to  
4 each claimant who has joined in the notice of intent to  
5 initiate litigation, as provided in s. 766.106. A defendant  
6 who rejects a claimant's offer to arbitrate shall be subject  
7 to the provisions of s. 766.209(3). A claimant who rejects a  
8 defendant's offer to arbitrate shall be subject to the  
9 provisions of s. 766.209(4).

10       (m)~~(i)~~ The hearing shall be conducted by all of the  
11 arbitrators, but a majority may determine any question of fact  
12 and render a final decision. The chief arbitrator shall  
13 decide all evidentiary matters.

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15 The provisions of this subsection shall not preclude  
16 settlement at any time by mutual agreement of the parties.

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

24       ~~(9) The Division of Administrative Hearings is~~  
25 ~~authorized to promulgate rules to effect the orderly and~~  
26 ~~efficient processing of the arbitration procedures of ss.~~  
27 ~~766.201-766.212.~~

28       ~~(10) Rules promulgated by the Division of~~  
29 ~~Administrative Hearings pursuant to this section, s. 120.54,~~  
30 ~~or s. 120.65 may authorize any reasonable sanctions except~~  
31 ~~contempt for violation of the rules of the division or failure~~

1 ~~to comply with a reasonable order issued by an administrative~~  
2 ~~law judge, which is not under judicial review.~~

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

5 766.209 Effects of failure to offer or accept  
6 voluntary binding arbitration.--

7 (2) If neither party requests or agrees to voluntary  
8 binding arbitration, the claim shall proceed to trial or to  
9 any available legal alternative such as offer of and demand  
10 for judgment under s. 768.79 ~~or offer of settlement under s.~~  
11 ~~45.061.~~

12 (3) If the defendant refuses a claimant's offer of  
13 voluntary binding arbitration+

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

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

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

24 (a) The damages awardable at trial shall be limited to  
25 net economic damages, and, with regard to each defendant  
26 offering voluntary binding arbitration, plus noneconomic  
27 damages not to exceed ~~\$500,000~~ ~~\$350,000~~ per incident of  
28 medical malpractice to each claimant. The Legislature  
29 expressly finds that such conditional limit on noneconomic  
30 damages is warranted by the claimant's refusal to accept  
31 arbitration, and represents an appropriate balance between the

1 interests of all patients who ultimately pay for medical  
2 negligence losses and the interests of those patients who are  
3 injured as a result of medical negligence. The Legislature is  
4 cognizant of the increasing costs of goods and services each  
5 year, and recognizes that fixing a set amount of compensation  
6 actually has the effect of a reduction in compensation each  
7 year. Accordingly, the conditional limitation on damages in  
8 this section shall be increased at the rate of 5 percent each  
9 year, pro rated from the effective date of this paragraph, to  
10 the date at which noneconomic damages subject to such  
11 limitation are awarded by arbitration, final judgment, or  
12 settlement.

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

18 (c) Damages for future economic losses may ~~shall~~ be  
19 awarded to be paid by periodic payments pursuant to s.  
20 766.202(8), ~~and shall be offset by future collateral source~~  
21 ~~payments.~~

22 Section 3. This act shall take effect July 1, 1999,  
23 and shall apply to all causes of action accruing on or after  
24 said date.

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HOUSE SUMMARY

Revises language with respect to voluntary binding arbitration of medical negligence cases. Provides that defendants offering to submit to such arbitration shall be deemed to have admitted both liability and causation with respect to the allegations contained in the claimant's notice of intent letter. Revises language with respect to the arbitration panel. Provides that the rate 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.