

MEDICAL DISPUTE RESOLUTION

AMENDMENTS

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Leonard M. Blackham

L. Alma Mansell
Peter C. Knudson

Thomas V. Hatch
David L. Thomas

Carlene M. Walker

LONG TITLE

General Description:

This bill amends provisions related to the resolution of medical malpractice disputes.

Highlighted Provisions:

This bill:

- ▶ requires notice to a patient regarding:
 - the patient's right to legal counsel in any arbitration proceeding; and
 - an arbitration agreement may not apply to errors and omissions that occurred prior to the date of the arbitration agreement without a specific agreement from the patient;
- ▶ changes the time for rescinding an arbitration agreement from 30 days to ten days;
- ▶ clarifies that medical arbitration agreements are subject to the Uniform Arbitration Act;
- ▶ provides that a patient may require:
 - mandatory mediation before arbitration;
 - retention of jointly selected arbitrators for both the liability and damages part of arbitration when they are bifurcated; and
 - the filing of an arbitration award in district court; and
- ▶ prohibits a health care provider from denying health care to a patient on the sole basis that the patient refused to sign an arbitration agreement.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78-14-17, as last amended by Chapter 207, Laws of Utah 2003

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-14-17** is amended to read:

78-14-17. Arbitration agreements.

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

(a) the patient shall be given, in writing [~~and by verbal explanation~~], the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care if Subsection [~~(2)~~] (3) applies;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;

(vi) the right of the patient to have questions about the arbitration agreement answered;
[and]

(vii) the right of the patient to rescind the agreement within [~~30~~] ten days of signing the agreement; and

(viii) the right of the patient to require mediation of the dispute prior to the arbitration of the dispute;

(b) the agreement shall require that:

(i) except as provided in Subsection (1)(b)(ii), a panel of three arbitrators shall be selected as follows:

(A) one arbitrator ~~[be]~~ collectively selected by all persons claiming damages;

~~[(iv)]~~ (B) one arbitrator ~~[be]~~ selected by the health care provider; and

~~[(iii)]~~ (C) a third arbitrator ~~[be]~~;

(I) jointly selected by all persons claiming damages and the health care provider; or

(II) if both parties cannot agree on the selection of the third arbitrator, the other two arbitrators shall appoint the third arbitrator from a list of individuals approved as arbitrators by the state or federal courts of Utah; or

(ii) if both parties agree, a single arbitrator may be selected;

~~[(iv)]~~ (iii) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

~~[(v)]~~ (iv) the patient be given the right to rescind the agreement within ~~[30]~~ ten days of signing the agreement; ~~[and]~~

~~[(vi)]~~ (v) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date[-];

(vi) the patient has the right to retain legal counsel;

(vii) the agreement only apply to:

(A) an error or omission that occurred after the agreement was signed, provided that the agreement may allow a person who would be a proper party in court to participate in an arbitration proceeding;

(B) the claim of:

(I) a person who signed the agreement;

(II) a person on whose behalf the agreement was signed under Subsection (6); and

(III) the unborn child of the person described in this Subsection (1)(b)(vii)(B), for 12 months from the date the agreement is signed; and

(C) the claim of a person who is not a party to the contract if the sole basis for the claim is an injury sustained by a person described in Subsection (1)(b)(vii)(B); and

(c) the patient shall be verbally encouraged to:

(i) read the written information required by Subsection (1)(a) and the arbitration agreement; and

(ii) ask any questions.

(2) When a medical malpractice action is arbitrated, the action shall:

(a) be subject to Chapter 31a, Utah Uniform Arbitration Act; and

(b) include any one or more of the following when requested by the patient before an arbitration hearing is commenced:

(i) mandatory mediation;

(ii) retention of the jointly selected arbitrator for both the liability and damages stages of an arbitration proceeding if the arbitration is bifurcated; and

(iii) the filing of the panel's award of damages as a judgement against the provider in the appropriate district court.

~~[(2)]~~ (3) Notwithstanding Subsection (1), a patient may not be denied health care ~~[of any kind from the emergency department of a general acute hospital, as defined in Section 26-21-2,]~~ on the sole basis that the patient or a person described in Subsection ~~[(5)]~~ (6) refused to enter into a binding arbitration agreement with a health care provider.

~~[(3)]~~ (4) A written acknowledgment of having received a written ~~[and verbal]~~ explanation of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written ~~[and verbal]~~ explanation of the agreement as required by Subsection (1) unless the patient:

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent

omission to state material facts.

~~[(4)]~~ (5) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

~~[(5)]~~ (6) A legal guardian or a person described in Subsection 78-14-5(4), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

~~[(6)]~~ (7) This section does not apply to any arbitration agreement that is subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.