

# SUNSET REVIEWS

Prepared for  
The Health and Human Services Interim Committee  
July 18, 2018

## What to Consider

Is the statute necessary?

Is the statute accomplishing its objective?

Are there ways to improve it?

## Hospital Provider Assessment Act

**Purpose:** Requires privately-owned hospitals to pay a per-patient assessment that is used to increase certain Medicaid reimbursement rates.

<b>Bill Info:</b>	Scheduled for:	June Interim Meeting
	Reauthorized:	<u>S.B. 32 (2016, 3 years)</u>
	Sunset date:	July 1, 2019
	Reference:	26-36a-101, et seq

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## Health Care Malpractice Arbitration Agreements

**Purpose:** Contains provisions relating to binding arbitration agreements for health care malpractice actions in a contract for health care services.

<b>Bill Info:</b>	Scheduled for:	July Interim Meeting
	Reauthorized:	<u>S.B. 143 (2009, 10 years)</u>
	Sunset date:	July 1, 2019
	Reference:	78B-3-421

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## Arbitration vs. Litigation

**Litigation** is “[a] contest in a court of justice, for the purpose of enforcing a right.”

**Arbitration** is the “investigation and determination of a matter... between contending parties, by one or more unofficial persons, chosen by the parties, and called ‘arbitrators,’ or ‘referees.’”

**Binding Arbitration** is an arbitration where the arbitrating parties must accept all of the findings and decisions of the arbitrator or arbitrators.

*Black’s Law Dictionary, 2nd ed.*

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## (1): Requirements for a validly executed arbitration agreement

“[F]or a binding arbitration agreement between a patient and a health care provider to be validly executed or... renewed:”

- (a) – requirement that certain information be given in writing
- (b) – requirements regarding the terms of the arbitration agreement
- (c) – requirement that the patient “be verbally encouraged to” read the information and ask any questions

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## (2), (3), and (4): Terms of arbitration agreements

- (2): Subject to Utah Uniform Arbitration Act and certain requests by the patient
- (3): "...a patient may not be denied health care on the sole basis that the patient or [certain legal representatives] refused to enter into a binding arbitration agreement with a health care provider."
- (4): Written acknowledgement sufficient unless patient demonstrates lack of capacity or fraud.

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## (5), (6), and (7): Applicability of this section

- (5): Requirements in Subsection (1) do not apply to agreements executed before May 3, 1999.
- (6): Certain legal representatives may act on behalf of a patient
- (7): Does not apply to agreements subject to Federal Arbitration Act

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Questions?

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## Presenters

- Mr. Brook Millard, Board of Governors, Utah Association for Justice
- Mr. David C. Gessel, Executive Vice President, Utah Hospital Association
- Ms. Michelle McOmber, Chief Executive Officer, Utah Medical Association
- Public Comment (time permitting)

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## Provisions of Utah Code

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## Utah Code § 78B-3-421(1)(a)

(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, 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 (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;
- (vii) the right of the patient to rescind the agreement within 10 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;

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## Utah Code § 78B-3-421(1)(b)(i) – (iii)

(1)(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 collectively selected by all persons claiming damages;

(B) one arbitrator selected by the health care provider; and

(C) a third arbitrator:

(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;

(iii) all parties waive the requirement of Section 78B-3-416 to appear before a hearing panel in a malpractice action against a health care provider;

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## Utah Code § 78B-3-421(1)(b)(iv) – (vii)

[The agreement shall require that:]

(iv) the patient be given the right to rescind the agreement within 10 days of signing the agreement;

(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

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## Utah Code § 78B-3-421(1)(c)

(1)(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.

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## Utah Code § 78B-3-421(2)

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

- (a) be subject to Chapter 11, 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.

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## Utah Code § 78B-3-421(3)

(3) Notwithstanding Subsection (1), a patient may not be denied health care on the sole basis that the patient or a person described in Subsection (6) refused to enter into a binding arbitration agreement with a health care provider.

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## Utah Code § 78B-3-421(4)

(4) A written acknowledgment of having received a written 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 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.

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## Utah Code § 78B-3-421(5) – (7)

(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.

(6) A legal guardian or a person described in Subsection 78B-3-406(6), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

(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.

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## Utah Code § 78B-3-406(6)

(6) Except as provided in Section 76-7-304.5, the following persons are authorized and empowered to consent to any health care not prohibited by law:

- (a) any parent, whether an adult or a minor, for the parent's minor child;
- (b) any married person, for a spouse;
- ~~(c) any person temporarily standing in loco parentis, whether formally serving or not, for the minor under that person's care and any guardian for the guardian's ward;~~
- (d) any person 18 years of age or over for that person's parent who is unable by reason of age, physical or mental condition, to provide such consent;
- (e) any patient 18 years of age or over;
- (f) any female regardless of age or marital status, when given in connection with her pregnancy or childbirth;
- (g) in the absence of a parent, any adult for the adult's minor brother or sister;
- (h) in the absence of a parent, any grandparent for the grandparent's minor grandchild;
- (i) an emancipated minor as provided in Section 78A-6-805;
- (j) a minor who has contracted a lawful marriage; and
- (k) an unaccompanied homeless minor, as that term is defined in the McKinney-Vento Homeless Assistance Act of 1987, Pub. L. 100-77, as amended, who is 15 years of age or older.

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