S.B. 310 (S-1)-312 (S-1) & 314 (S-1):
FIRST ANALYSIS

MALPRACTICE ARBITRATION

SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

Senate Bill 310 (Substitute S-1 as reported)
Senate Bill 311 (Substitute S-1 as reported)
Senate Bill 312 (Substitute S-1 as reported)
Senate Bill 314 (Substitute S-1 as reported)
Sponsor: Senator Nick Smith
Committee: Commerce and Technology

Date Completed: 10-19-87

RATIONALE

Michigan continues to experience what some have called a medical malpractice "crisis". In the last several years, the size of medical malpractice awards have skyrocketed and the length of trials has increased. Even with the liability reforms, enacted in 1986, that limit the size of some awards, the costs associated with litigation are considerable. Some have suggested that, rather than relying on drawn-out litigation processes, some form of alternative dispute resolution mechanisms should be implemented. Already established in State law, but seldom used, is a system of medical malpractice arbitration. Proponents of this system claim that it is cost-effective compared to litigation because of its shorter time frame, and that arbitration should be used more extensively. In order to facilitate greater use of the medical malpractice arbitration system, it has been suggested that the various types of health coverage offered in this State be permitted to include a revocable arbitration agreement.

CONTENT

The bills would amend various Acts to provide for notification of covered individuals when their health coverage contained an arbitration provision for a medical malpractice dispute; to specify persons to whom the provision would apply; and to specify the right of a covered individual to revoke an arbitration agreement. Senate Bill 310 (S-1) would amend the Prudent Purchaser Act and apply to a prudent purchaser agreement and contract; Senate Bill 311 (S-1) would amend the Insurance Code relative to disability insurance policies and group disability insurance policies, and also would include "surplus lines insurers" within the definition of "malpractice insurer"; Senate Bill 312 (S-1) would amend the Public Health Code and apply to health maintenance organization (HMO) contracts; and Senate Bill 314 (S-1) would amend the Nonprofit Health Care Corporation Reform Act, which regulates Blue Cross and Blue Shield of Michigan.

Notification

The bills would require a contract, policy, or certificate for health coverage that contained a provision for arbitration of a malpractice dispute to include a "statement of that fact in 12-point boldface type". The contract, policy, or certificate also would have to specify, in 12-point boldface type, that the covered individual could revoke an arbitration agreement within 60 days after the effective date of coverage and that execution of an arbitration agreement was not a prerequisite to health care or treatment. (Senate Bill 311 (S-1) would require the 12-point boldface statement for an individual policy, but for a group policy would require a "conspicuous statement".) In addition to the statement within the contract, policy, or certificate, each organization offering health care coverage would have to develop and implement a procedure for notifying potential members about the arbitration agreement. Such a procedure would have to include, at a minimum, both notification that enrollment cards, contracts, policies, and certificates contained a statement, next to the signature line and in 12-point boldface type, describing the arbitration requirement; and the provision of an informational brochure that clearly explained the arbitration agreement and revocation provision.

In addition, Senate Bill 312 (S-1) would require HMOs to notify the Department of Public Health of "substantial" changes in health maintenance contracts within 30 days after that change; and Senate Bill 314 would require that if a health care corporation added an arbitration provision to a certificate, it would have to notify the Insurance Commissioner within 30 days of the effective date of the provision.

Arbitration

The bills would require that arbitration of a malpractice dispute be conducted according to procedures for health care arbitration outlined in the Revised Judicature Act (MCL 600.5043-600.5059).

A health care contract, policy, or certificate that contained an arbitration provision could not be considered a contract of adhesion, unconscionable, or otherwise improper because of the provision. An arbitration provision would apply to all individuals covered under the contract, policy, or certificate including their spouse and children, both born and in utero. In the case of a malpractice action involving the death of a covered individual, all persons to whom the individual, by law, owed a duty of support at the time of death would be considered covered by the arbitration agreement. In addition, the bills specify that if a contract, policy, or certificate included coverage for a minor, the contract, policy, or certificate could not be subject to disaffirmance if it were signed or otherwise agreed to by the minor's parent or legal guardian.

Right to Revoke

Within 60 days after the effective date of coverage, the covered individual could revoke the agreement to

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arbitrate Upon the request of the covered individual to revoke the agreement, the insurer, health care corporation, HMO, or prudent purchaser organization (PPO) would be required to provide the covered individual with a form to sign, indicating revocation The form would have to be prescribed by the Commissioner of Insurance and would be required to contain an original and two copies The covered individual would have to sign the form and retain one copy The original would have to be sent by registered mail to the insurer, health care corporation, HMO, or PPO Revocation also could be accomplished by written request by registered mail Such a notice would have to include the covered individual's name, address, and contract, policy, or certificate number as well as a statement of the individual's intent to revoke

A covered individual who was covered, as a dependent, under another health care coverage or benefit plan and revoked the arbitration agreement under which he or she was primarily covered, would not be bound by the arbitration agreement of the other coverage The bills would permit an insurer, health care corporation, HMO, or PPO to offer economic incentives in consideration of an agreement not to revoke the arbitration agreement

The bills would require the Commissioner of Insurance to report to the Legislature on the effect of arbitration agreements, including cost savings realized as a result of arbitration agreements The report(s) would have to be submitted within three years after the bills' effective date(s)

MCL 550 56 (Senate Bill 310 (S-1))
500 3455 and 500 3612 (Senate Bill 311 (S-1))
333 21031 (Senate Bill 312 (S-1))
550 1204 and 550 1401 (Senate Bill 314 (S-1))

FISCAL IMPACT

The bills would have no fiscal impact on State or local government

ARGUMENTS

Supporting Argument

The bills would provide a mechanism for decreasing the cost of medical malpractice disputes in Michigan Although the legal authority and structure to resolve such disputes by way of arbitration proceedings already exists in Michigan, the process seldom is used Proponents of arbitration claim the reason for this lack of use is simply that people are uninformed about the nuances or even the existence of arbitration as an alternative means for resolving disputes The bills would serve the dual purpose of educating insureds about arbitration—through an informational brochure—and providing for greater use of arbitration in resolving medical malpractice disputes Use of arbitration to resolve disputes would not be mandatory, however, as the bills would provide for a 60-day opt-out period, during which time covered individuals could unconditionally revoke an arbitration agreement To encourage arbitration, however, insurers, health care corporation, HMOs, and PPOs could offer incentives in exchange for an agreement not to revoke the arbitration provision

By promoting the use of arbitration to settle disputes, the bills would result in savings to all parties and quicker resolution of claims Indeed, the Journal of Legal Medicine claims that an "examination of awards and data indicating the decreased time and cost for reaching a decision suggests that arbitration is a fair and cost effective method of dispute resolution" Although plaintiffs reportedly receive similar, or even greater, awards under the arbitration system, apparently there still are great savings to be realized Physicians Insurance Company of Michigan, one of the two leading medical liability insurers in the State reports that over 51% of its 1987 medical malpractice expenditures went toward legal expenses and fees On the other hand, Kaiser-Permanente, a California based HMO that insures over 11 million people, claims that its legal costs are 40% lower because it requires arbitration to resolve all medical malpractice claims In addition, the entire arbitration process in Michigan takes no more than 17 months (including a 180-day discovery period) Given the backlog of the court system, it might take that long just to get to trial Kaiser-Permanente claims that the length of an arbitration dispute is about one-half that of a litigated one

The need to use arbitration proceedings as an alternative form of dispute resolution has been recognized by other states Eighteen states have specific statutes covering the arbitration of medical claims, and Puerto Rico imposes arbitration requirements upon every medical malpractice claim In addition, in its Report on Medical Liability and Malpractice", the United States Department of Health and Human Services has urged that "states should authorize and encourage voluntary, binding arbitration of medical malpractice claims" Michigan should join the growing number of States that provide for this convenient, efficient means of resolving medical malpractice disputes

Response: The bills are unnecessary If dispute resolution through arbitration is so attractive, why is it seldom used? The Revised Judicature Act already includes provisions for arbitration of disputes relating to health care and there is nothing in law forbidding insurers from offering arbitration agreements In fact, current law requires hospitals to offer arbitration as an option and allows physicians to do so This "opt-in" system is much more desirable than the restrictive "opt-out" system suggested by the bills The bills' revocation provisions are too rigid and would result in uninformed choices being made on the part of consumers A State law that would deny the option of litigation (after an agreement made by 60 days of inaction) is not good policy In addition, the bills apparently would not require providers to choose arbitration over litigation, but, after the 60-day revocation period, they would require claimants to arbitrate

Claimants already have the option of pursuing dispute resolution through arbitration, but they simply have not chosen to do so in great numbers Also the provision that would allow insurers, HMOs, PPOs, and health care corporations to provide incentives to agree not to revoke the arbitration agreement is akin to blackmail If arbitration itself is desirable, as its proponents suggest, why are insurer-induced incentives needed? Under the guise of promoting greater savings and efficiency, the bills would restrict the options that currently are available to claimants in a medical malpractice dispute The time saving aspect of arbitration can be attributed to the small caseload to date If the bills resulted in greater use of the arbitration system, as its proponents claim, then backlogs probably would develop, as they have in the court system, and delays would be experienced One of the main benefits extolled by supporters of the arbitration system would disappear

Opposing Argument

The bills bring up a constitutional question of whether agreement by inaction represents an unknowing waiver of an individual s right to a jury trial In addition, the proposed 'opt-out" system could bind several individuals to arbitration agreements by one person's inaction Since spouses and dependents would be covered by the

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arbitration agreement, they would not even have the choice to revoke the agreement. Also, it is not clear who would be considered the parties to a group policy or contract (such as an agreement with an employer). Would each individual covered under that group policy (i.e., each employee) have the right to revoke, or could the employer revoke, or choose not to revoke, on behalf of the entire group?

Response: The constitutional right to a jury trial is a fundamental right in a criminal proceeding, not in a civil suit.

Opposing Argument

Senate Bill 312 (S-1) could cause a conflict in the law. Under existing law, an HMO is designated as a "hospital" under the requirement that hospitals offer the "opt-in" option for malpractice arbitration. The bill would allow an HMO to offer an "opt-out" agreement in its contract with a subscriber. These two provisions could be at odds, thereby prohibiting the HMO from taking advantage of the revocation agreement provision. The incentive of long-term savings through use of the arbitration process would be rendered useless due to the expected court challenge to the bill's constitutionality and conflict with other statutes.

Opposing Argument

Arbitration apparently does result in savings to the health care provider against whom a claim has been filed and to his or her malpractice insurer, but what incentive do health insurers, HMOs, PPOs, and health care corporations have to provide arbitration agreements? The bills would permit these organizations to offer arbitration agreements, but without incentives to do so they would not be likely to offer such agreements. Health coverage providers rarely are named as parties in medical malpractice suits, so savings resulting from the use of the arbitration process would not accrue to them. The bills are misdirected, the arbitration agreement should be between the individual receiving health care and the individual or organization delivering health care, not the insurer.

Response: In the case of an HMO, the organization delivering health care and the organization providing coverage are one and the same. The health care professionals, in this case, are employed by the HMO and the HMO purchases malpractice insurance to protect them.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.