
HOUSE BILL 1861

State of Washington

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By Representatives Lantz, Flannigan, Morrell, Springer, Cody, Kirby, Williams, Miloscia, Schual-Berke, Upthegrove, Linville, O'Brien, Campbell, Wood and Kagi

Read first time 02/08/2005. Referred to Committee on Judiciary.

1 AN ACT Relating to encouraging early resolution of health care
2 claims under chapter 7.70 RCW; amending RCW 7.70.100; and adding a new
3 section to chapter 7.70 RCW.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 **Sec. 1.** RCW 7.70.100 and 1993 c 492 s 419 are each amended to read
6 as follows:

7 (1) No action based upon a health care provider's professional
8 negligence may be commenced unless the defendant has been given at
9 least ninety days' notice of the intention to commence the action. If
10 the notice is served within ninety days of the expiration of the
11 applicable statute of limitations, the time for the commencement of the
12 action must be extended ninety days from the service of the notice.

13 (2) The provisions of subsection (1) of this section are not
14 applicable with respect to any defendant whose name is unknown to the
15 plaintiff at the time of filing the complaint and who is identified
16 therein by a fictitious name or to any defendant who cannot be found
17 within the state after a due and diligent search.

18 (3) After the filing of the ninety-day presuit notice, and before
19 a superior court trial, all causes of action, whether based in tort,

1 contract, or otherwise, for damages arising from injury occurring as a
2 result of health care provided after July 1, 1993, shall be subject to
3 mandatory mediation prior to trial except as provided in subsection (6)
4 of this section.

5 ~~((+2))~~ (4) The supreme court shall by rule adopt procedures to
6 implement mandatory mediation of actions under this chapter. The rules
7 shall require mandatory mediation without exception unless subsection
8 (6) of this section applies. The rules on mandatory mediation shall
9 address, at a minimum:

10 (a) Procedures for the appointment of, and qualifications of,
11 mediators. A mediator shall have experience or expertise related to
12 actions arising from injury occurring as a result of health care, and
13 be a member of the state bar association who has been admitted to the
14 bar for a minimum of five years or who is a retired judge. The parties
15 may stipulate to a nonlawyer mediator. The court may prescribe
16 additional qualifications of mediators;

17 (b) Appropriate limits on the amount or manner of compensation of
18 mediators;

19 (c) The number of days following the filing of a claim under this
20 chapter within which a mediator must be selected;

21 (d) The method by which a mediator is selected. The rule shall
22 provide for designation of a mediator by the superior court if the
23 parties are unable to agree upon a mediator;

24 (e) The number of days following the selection of a mediator within
25 which a mediation conference must be held; and

26 ~~(f) ((A means by which mediation of an action under this chapter~~
27 ~~may be waived by a mediator who has determined that the claim is not~~
28 ~~appropriate for mediation; and~~

29 ~~(g))~~ Any other matters deemed necessary by the court.

30 ~~((+3))~~ (5) Mediators shall not impose discovery schedules upon the
31 parties.

32 (6) The mandatory mediation requirement of subsection (4) of this
33 section does not apply to an action subject to mandatory arbitration
34 under chapter 7.06 RCW, to an action in which the parties have agreed,
35 subsequent to the arisal of the claim, to submit the claim to
36 arbitration under chapter 7.04 RCW, or to an action in which the
37 parties have entered into an agreement, subsequent to the arisal of the

1 claim, to submit the claim to any other form of alternative dispute
2 resolution process.

3 (7) The legislature respectfully requests that the supreme court by
4 rule also adopt procedures for the parties to certify to the court the
5 manner of mediation, arbitration, or other form of alternative dispute
6 resolution used by the parties to comply with this section.

7 NEW SECTION. Sec. 2. A new section is added to chapter 7.70 RCW
8 to read as follows:

9 (1) In an action under this chapter where a party has made an offer
10 of settlement that complies with the provisions of subsection (2) of
11 this section, the court may, in its discretion, award reasonable
12 attorneys' fees and statutory costs to a prevailing party. In making
13 the determination of whether or not reasonable attorneys' fees should
14 be awarded to a prevailing party, the court may consider:

15 (a) Whether the party who rejected or failed to accept the offer of
16 settlement was substantially justified in bringing the case to trial;

17 (b) The extent to which additional relevant and material facts or
18 information became known after the offer was rejected or not accepted;

19 (c) Whether the offer of settlement was made in good faith;

20 (d) The closeness of questions of fact and law at issue in the
21 case;

22 (e) Whether a party engaged in conduct that unduly or unreasonably
23 delayed the resolution of the proceeding;

24 (f) Whether the circumstances make an award unjust; and

25 (g) Any other factor the court deems appropriate under the
26 circumstances of the case.

27 (2) An offer of settlement must be made in writing and served on
28 the opposing party at least fifteen days before trial and not before
29 thirty days after the completion of the service and filing of the
30 summons and complaint. The offer must remain open for a period of not
31 less than ten days.

32 (3) An offer of settlement shall not be filed with the court or
33 communicated to the trier of fact until after judgment in the case, at
34 which point a copy of the offer of settlement shall be filed with the
35 court for the purpose of allowing the court to determine whether an
36 award of reasonable attorneys' fees is appropriate under the
37 circumstances of the case.

1 (4) If the court determines that an award of reasonable attorneys'
2 fees to a prevailing party is appropriate under this section, the court
3 shall consider the factors in RCW 7.70.070 in determining the amount of
4 reasonable attorneys' fees to be awarded. The award of reasonable
5 attorneys' fees shall be limited to attorneys' fees incurred from the
6 date of commencement of the trial.

7 (5) For the purposes of this section, "prevailing party" means a
8 party who makes an offer of settlement that is either rejected or not
9 accepted by the opposing party, and who improves his or her position at
10 trial relative to his or her offer of settlement.

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