

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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HOUSE BILL 1589\*

Short Title: Managed Care Entities Liable for Damages.

(Public)

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Sponsors: Representatives Hackney, Nye; and Goodwin.

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Referred to: Insurance.

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May 18, 2000

A BILL TO BE ENTITLED

AN ACT TO PROVIDE THAT A MANAGED CARE ENTITY PROVIDING A HEALTH BENEFIT PLAN IS LIABLE FOR DAMAGES FOR HARM TO ITS INSUREDS OR ENROLLEES CAUSED BY THE MANAGED CARE ENTITY'S FAILURE TO EXERCISE ORDINARY CARE.

The General Assembly of North Carolina enacts:

Section 1. Chapter 90 of the General Statutes is amended by adding a new Article to read:

**“ARTICLE LG.**

**“HEALTH CARE LIABILITY.**

**“§ 90-21.50. Legislative findings and intent.**

(a) The General Assembly finds that a wide variety of entities are integrating the functions of paying for health care, determining what health care is paid for, and providing the care. This integration of functions is breaking down traditional distinctions. Increasingly, payor determinations are governing health care and controlling decisions that in the past were the exclusive domain of health care providers and patients. The General Assembly further finds that this integration of functions makes it imperative that managed care entities be held fully responsible for the consequences of their decisions, much as health care professionals have been held responsible for the consequences of their decisions.

1       (b) The State's interest in regulating the business of insurance as provided in this  
2 Article is to protect insurance purchasers and their beneficiaries, including employees,  
3 their dependents and families, and any other patients covered by private employer-  
4 sponsored benefit plans, from the harm that may occur when managed care entities act  
5 improperly. To this end, health care providers rather than managed care entities are in  
6 charge of patient care.

7       (c) It is the intent of the General Assembly in enacting this Article to ensure that  
8 adequate State law remedies exist for all persons who are subject to the wrongful acts of  
9 those entities that contract to provide insurance for the health of North Carolina citizens.  
10 The existence of these remedies and the deterrent effects of these remedies are necessary  
11 to protect the health and safety of the residents of this State.

12 **"§ 90-21.51. Definitions.**

13 As used in this Article, unless the context clearly indicates otherwise, the term:

14       (1) 'Health benefit plan' means an accident and health insurance policy or  
15 certificate; a nonprofit hospital or medical service corporation contract;  
16 a health maintenance organization subscriber contract; a plan provided  
17 by a multiple employer welfare arrangement; or a plan provided by  
18 another benefit arrangement. 'Health benefit plan' does not mean any  
19 plan implemented or administered by the North Carolina or United  
20 States Department of Health and Human Services, or any successor  
21 agency, or its representatives. 'Health benefit plan' does not mean any  
22 of the following kinds of insurance:

23       a. Accident.

24       b. Credit.

25       c. Disability income.

26       d. Long-term or nursing home care.

27       e. Medicare supplement.

28       f. Specified disease.

29       g. Dental or vision.

30       h. Coverage issued as a supplement to liability insurance.

31       i. Workers' compensation.

32       j. Medical payments under automobile or homeowners'.

33       k. Hospital income or indemnity.

34       l. Insurance under which benefits are payable with or without  
35 regard to fault and that is statutorily required to be contained in  
36 any liability policy or equivalent self-insurance.

37       m. Short-term limited duration health insurance policies as defined  
38 in Part 144 of Title 45 of the Code of Federal Regulations.

39       (2) 'Health care provider' means:

40       a. An individual who is licensed, certified, or otherwise authorized  
41 under this Chapter to provide health care services in the ordinary  
42 course of business or practice of a profession or in an approved  
43 education or training program; or

1           b.     A health care facility, licensed under Chapter 131E or 122C of  
2           the General Statutes, where health care services are provided to  
3           patients;

4           'Health care provider' includes:

5                 1.     An agent or employee of a health care facility that is  
6                 licensed, certified, or otherwise authorized to provide  
7                 health care services;

8                 2.     The officers and directors of a health care facility; and

9                 3.     An agent or employee of a health care provider who is  
10                licensed, certified, or otherwise authorized to provide  
11                health care services.

12         (3)     'Health care service' means a health or medical procedure or service  
13         rendered by a health care provider that:

14           a.     Provides testing, diagnosis, or treatment of a human disease or  
15           dysfunction; or

16           b.     Dispenses drugs, medical devices, medical appliances, or  
17           medical goods for the treatment of a human disease or  
18           dysfunction.

19         (4)     'Health care treatment decision' means a determination that:

20           a.     Is made by a managed care entity;

21           b.     Governs the extent to which health care services are provided for,  
22           arranged for, paid for, or reimbursed under a health benefit plan;  
23           and

24           c.     Affects the quality of the diagnosis, care, or treatment provided  
25           under the health benefit plan to an enrollee or insured of the  
26           health benefit plan.

27         (5)     'Insured or enrollee' means a person that is insured by or enrolled in a  
28         health benefit plan under a policy, plan, certificate, or contract issued or  
29         delivered in this State by an insurer.

30         (6)     'Insurer' means any entity that is or should be licensed under Article 6,  
31         7, 16, 49, 65, or 67 of this Chapter.

32         (7)     'Managed care entity' means an insurer that:

33           a.     Delivers, administers, or undertakes to provide for, arrange for,  
34           or reimburse for health care services, or assumes the risk for  
35           the delivery of health care services; and

36           b.     Has a system or technique to control or influence the quality,  
37           accessibility, utilization, or costs and prices of health care  
38           services delivered or to be delivered to a defined enrollee  
39           population.

40                 'Managed care entity' does not include: (i) an employer  
41                 purchasing coverage or acting on behalf of its employees or the  
42                 employees of one or more subsidiaries or affiliated corporations  
43                 of the employer, or (ii) a health care provider.

1           (8) 'Ordinary care' means:

2           a. For a carrier or managed care entity, that degree of care that a  
3 carrier or managed care entity of ordinary prudence would use  
4 under the same or similar circumstances.

5           b. For a person that is an agent or employee of a carrier or managed  
6 care entity, that degree of care that a person of ordinary prudence  
7 in the same profession, specialty, or area of practice as the person  
8 would use in the same or similar circumstances.

9           (9) 'Physician' means:

10          a. An individual licensed as a medical doctor under Article 1 of  
11 this Chapter to practice medicine in this State;

12          b. A professional association or corporation comprising medical  
13 doctors and organized under Chapter 55B of the General  
14 Statutes; or

15          c. A person or entity wholly owned by medical doctors.

16 **"§ 90-21.52. Duty to exercise ordinary care; liability for damages for harm.**

17          (a) Each managed care entity for a health benefit plan has the duty to exercise  
18 ordinary care when making health care treatment decisions and is liable for damages for  
19 harm to an insured or enrollee proximately caused by its failure to exercise ordinary care.

20          (b) In addition to the duty imposed under subsection (a) of this section, each  
21 managed care entity for a health benefit plan is liable for damages for harm to an insured  
22 or enrollee proximately caused by the health care treatment decisions made by:

23           (1) Its agents, ostensible agents, or employees; or

24           (2) Representatives that are acting on its behalf and over whom it has the  
25 right to exercise influence or control which results in the failure to  
26 exercise ordinary care.

27          (c) It shall be a defense to any action brought under this section against a managed  
28 care entity for a health benefit plan that:

29           (1) Neither the managed care entity nor an agent or employee or  
30 representative for whom the managed care entity is liable under  
31 subsection (b) of this section controlled, influenced, or participated in  
32 the health care treatment decision; and

33           (2) The managed care entity did not deny or delay payment for any health  
34 care service or treatment prescribed or recommended by a physician or  
35 health care provider to the insured or enrollee.

36          (d) In an action brought under this Article against a managed care entity, a finding  
37 that a physician or health care provider is an agent or employee of the managed care  
38 entity may not be based solely on proof that the physician or health care provider appears  
39 in a listing of approved physicians or health care providers made available to insureds or  
40 enrollees under the managed care entity's health benefit plan.

41          (e) An action brought under this Article is not a medical malpractice action as  
42 defined in Article 1B of this Chapter. A managed care entity may not use as a defense in

1 an action brought under this Article any laws that prohibit the practice of medicine by a  
2 corporate entity or by a health maintenance organization.

3 (f) A managed care entity shall not be liable for the independent actions of a  
4 health care provider, who is not an agent or employee of the managed care entity, when  
5 that health care provider fails to exercise the standard of care required by G.S. 90-21.12.  
6 A health care provider shall not be liable for the independent actions of a managed care  
7 entity when the managed care entity fails to exercise the standard of care required by this  
8 Article.

9 (g) Nothing in this Article shall be construed to create an obligation on the part of  
10 a managed care entity to provide to an insured or enrollee a health care service that is not  
11 covered under its health benefit plan.

12 (h) A managed care entity may not enter into a contract with a health care  
13 provider, or with an employer or employer group purchasing organization, that includes  
14 an indemnification or hold harmless clause for the acts or conduct of the managed care  
15 entity. Any such indemnification or hold harmless clause is void and unenforceable to  
16 the extent of the restriction.

17 (i) A managed care entity shall not remove a physician or health care provider  
18 from its plan or refuse to renew the physician or health care provider with its plan for  
19 advocating on behalf of an enrollee for appropriate and medically necessary health care  
20 for the enrollee.

21 **"§ 90-21.53. No liability under this Article on the part of an employer or employer**  
22 **group purchasing organization that purchases coverage or assumes risk**  
23 **on behalf of its employees or a physician or health care provider.**

24 (a) This Article does not create any liability on the part of an employer or  
25 employer group purchasing organization that purchases a health benefit plan or assumes  
26 risk on behalf of its employees.

27 (b) This Article does not create any liability on the part of an employer of an  
28 enrollee or insured or that employer's employees, unless the employer is the enrollee's or  
29 insured's managed care entity and makes coverage determinations under a managed care  
30 plan. This Article does not create any liability on the part of an employee organization, a  
31 voluntary employee beneficiary organization, or a similar organization, unless such  
32 organization is the enrollee's or insured's managed care entity and makes coverage  
33 determinations under a managed care plan.

34 (c) This Article does not create any liability on the part of a physician or health  
35 care provider in addition to that otherwise imposed under existing law. No managed care  
36 entity held liable under this Article shall be entitled to contribution under Chapter 1B of  
37 the General Statutes from a physician or health care provider.

38 **"§ 90-21.54. Separate trial required.**

39 Upon motion of any party in an action that includes a claim brought pursuant to this  
40 Article involving a managed care entity, the court shall order separate discovery and a  
41 separate trial of any claim, cross claim, counterclaim, or third-party claim against any  
42 physician or other health care provider.

43 **"§ 90-21.55. Punitive damages.**

1 An action brought under this Article is subject to the provisions and limitations of  
2 Chapter 1D of the General Statutes for recovery of punitive damages.

3 **"§ 90-21.56. Exhaustion of administrative remedies and appeals.**

4 (a) Except as provided in this section, no action shall be commenced under this  
5 Article until the plaintiff has exhausted all internal and external administrative remedies  
6 established under Parts 2 and 4 of Article 50 of Chapter 58 of the General Statutes.

7 (b) The plaintiff may file a claim without exhausting all internal and external  
8 administrative remedies established under Parts 2 and 4 of Article 50 of Chapter 58 of the  
9 General Statutes if the plaintiff proves the following to the court:

10 (1) Harm to the plaintiff has already occurred because of the conduct of the  
11 managed care entity or because of an act or omission of an employee,  
12 agent, ostensible agent, or representative of the managed care entity for  
13 whose conduct the managed care entity is liable.

14 (2) The administrative review would not be beneficial to the plaintiff.

15 (c) This Article does not prohibit a plaintiff from pursuing other appropriate  
16 remedies for relief."

17 Section 2. G.S. 1A-1, Rule 42, reads as rewritten:

18 "Rule 42. Consolidation; separate trials.

19 (a) Consolidation. ~~When~~ Except as provided in subdivision (b)(2) of this section,  
20 when actions involving a common question of law or fact are pending in one division of  
21 the court, the judge may order a joint hearing or trial of any or all the matters in issue in  
22 the actions; he may order all the actions consolidated; and he may make such orders  
23 concerning proceedings therein as may tend to avoid unnecessary costs or delay. When  
24 actions involving a common question of law or fact are pending in both the superior and  
25 the district court of the same county, a judge of the superior court in which the action is  
26 pending may order all the actions consolidated, and he may make such orders concerning  
27 proceedings therein as may tend to avoid unnecessary costs or delay.

28 (b) Separate trials. –

29 (1) The court may in furtherance of convenience or to avoid prejudice and  
30 shall for considerations of venue upon timely motion order a separate  
31 trial of any claim, ~~cross claim,~~ cross claim, counterclaim, or third-party  
32 claim, or of any separate issue or of any number of claims, ~~cross claims,~~  
33 cross claims, counterclaims, third-party claims, or issues.

34 (2) Upon motion of any party in an action that includes a claim commenced  
35 under Article 1G of Chapter 90 of the General Statutes involving a  
36 managed care entity as defined in G.S. 90-21.50, the court shall order  
37 separate discovery and a separate trial of any claim, cross claim,  
38 counterclaim, or third-party claim against a physician or other medical  
39 provider."

40 Section 3. This act becomes effective July 1, 2001, and applies to causes of  
41 action arising on and after that date.