

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1999

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SENATE BILL 1326

Short Title: HMO Patient Protection Act.

(Public)

Sponsors: Senators Wellons, Dannelly, Harris; Albertson, Carter, Clodfelter, Dalton, Forrester, Garrou, Hartsell, Kinnaird, Lucas, Martin of Guilford, Metcalf, Odom, Perdue, Purcell, Rand, Rucho, Warren, and Weinstein.

Referred to: Judiciary I.

June 14, 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.

1 much as health care professionals have been held responsible for the consequences of
2 their decisions.

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

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

14 **"§ 90-21.51. Definitions.**

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

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

25 a. Accident.

26 b. Credit.

27 c. Disability income.

28 d. Long-term or nursing home care.

29 e. Medicare supplement.

30 f. Specified disease.

31 g. Dental or vision.

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

33 i. Workers' compensation.

34 j. Medical payments under automobile or homeowners'.

35 k. Hospital income or indemnity.

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

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

41 (2) 'Health care provider' means:

42 a. An individual who is licensed, certified, or otherwise authorized
43 under this Chapter to provide health care services in the ordinary

- 1 course of business or practice of a profession or in an approved
2 education or training program; or
3 b. A health care facility, licensed under Chapter 131E or 122C of
4 the General Statutes, where health care services are provided to
5 patients;
6 'Health care provider' includes:
7 1. An agent or employee of a health care facility that is
8 licensed, certified, or otherwise authorized to provide
9 health care services;
10 2. The officers and directors of a health care facility; and
11 3. An agent or employee of a health care provider who is
12 licensed, certified, or otherwise authorized to provide
13 health care services.
14 (3) 'Health care service' means a health or medical procedure or service
15 rendered by a health care provider that:
16 a. Provides testing, diagnosis, or treatment of a human disease or
17 dysfunction; or
18 b. Dispenses drugs, medical devices, medical appliances, or
19 medical goods for the treatment of a human disease or
20 dysfunction.
21 (4) 'Health care treatment decision' means a determination that:
22 a. Is made by a managed care entity;
23 b. Governs the extent to which health care services are provided for,
24 arranged for, paid for, or reimbursed under a health benefit plan;
25 and
26 c. Affects the quality of the diagnosis, care, or treatment provided
27 under the health benefit plan to an enrollee or insured of the
28 health benefit plan.
29 (5) 'Insured or enrollee' means a person that is insured by or enrolled in a
30 health benefit plan under a policy, plan, certificate, or contract issued or
31 delivered in this State by an insurer.
32 (6) 'Insurer' means any entity that is or should be licensed under Article 6,
33 7, 16, 49, 65, or 67 of this Chapter.
34 (7) 'Managed care entity' means an insurer that:
35 a. Delivers, administers, or undertakes to provide for, arrange for,
36 or reimburse for health care services, or assumes the risk for
37 the delivery of health care services; and
38 b. Has a system or technique to control or influence the quality,
39 accessibility, utilization, or costs and prices of health care
40 services delivered or to be delivered to a defined enrollee
41 population.
42 'Managed care entity' does not include: (i) an employer
43 purchasing coverage or acting on behalf of its employees or the

employees of one or more subsidiaries or affiliated corporations of the employer, or (ii) a health care provider.

(8) 'Ordinary care' means:

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

(9) 'Physician' means:

- a. An individual licensed as a medical doctor under Article 1 of this Chapter to practice medicine in this State;
- b. A professional association or corporation comprising medical doctors and organized under Chapter 55B of the General Statutes; or
- c. A person or entity wholly owned by medical doctors.

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

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

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

- (1) Its agents, ostensible agents, or employees; or
- (2) Representatives that are acting on its behalf and over whom it has the right to exercise influence or control which results in the failure to exercise ordinary care.

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

- (1) Neither the managed care entity nor an agent or employee or representative for whom the managed care entity is liable under subsection (b) of this section controlled, influenced, or participated in the health care treatment decision; and
- (2) The managed care entity did not deny or delay payment for any health care service or treatment prescribed or recommended by a physician or health care provider to the insured or enrollee.

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

1 (e) An action brought under this Article is not a medical malpractice action as
2 defined in Article 1B of this Chapter. A managed care entity may not use as a defense in
3 an action brought under this Article any laws that prohibit the practice of medicine by a
4 corporate entity or by a health maintenance organization.

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

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

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

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

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

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

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

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

40 **"§ 90-21.54. Separate trial required.**

41 Upon motion of any party in an action that includes a claim brought pursuant to this
42 Article involving a managed care entity, the court shall order separate discovery and a

1 separate trial of any claim, cross claim, counterclaim, or third-party claim against any
2 physician or other health care provider.

3 **"§ 90-21.55. Punitive damages.**

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

6 **"§ 90-21.56. Exhaustion of administrative remedies and appeals.**

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

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

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

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

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

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

21 "Rule 42. Consolidation; separate trials.

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

31 (b) Separate trials. –

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

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

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