



TWENTY FIRST
GUAM LEGISLATURE

Dr. David L.G. Shimizu

SENATOR

Chairman: Committee on Health, Ecology & Welfare

August 26, 1991

The Honorable
Joe T. San Agustin
Speaker, 21st Guam Legislature
Agana, Guam

via: Committee on Rules

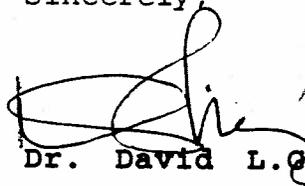
Dear Mr. Speaker:

The Committee on Health, Ecology & Welfare, to which was referred Bill No.325 AN ACT TO REPEAL P.L. 13-115 AND ADD A NEW CHAPTER XV TO TITLE X OF THE GOVERNMENT CODE OF GUAM TO PROVIDE FOR PROMPT AND EFFECTIVE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS, herein reports back and recommends that **Bill 325 As Substituted by the Committee on Health, Ecology & Welfare be Passed.**

Votes of committee members are as follows:

- 11 To Pass
- 0 Not To Pass
- 0 To The Inactive File
- 0 Abstained
- 1 Off-Island
- 0 Not Available

Sincerely,


Dr. David L.G. Shimizu

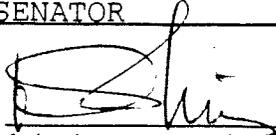
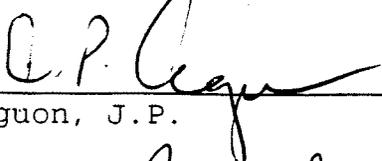
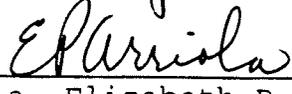
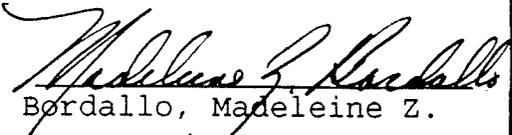
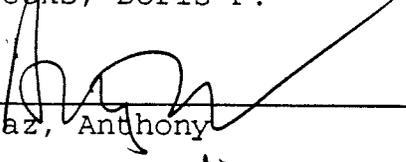
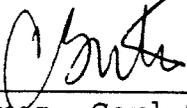
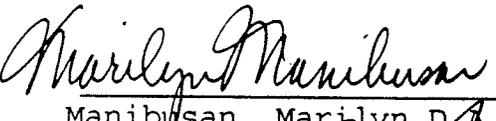
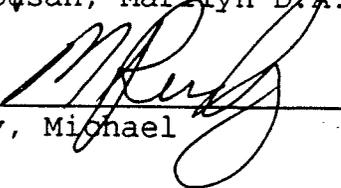
attachments



VOTE SHEET

Committee on Health, Ecology & Welfare

SB Bill No. 325: AN ACT TO REPEAL P.L. 13-115 AND ADD A NEW CHAPTER XV TO TITLE X OF THE GOVERNMENT CODE OF GUAM TO PROVIDE FOR PROMPT AND EFFECTIVE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS.

SENATOR	TO PASS	NOT TO PASS	ABSTAIN	INACTIVE FILE
 Shimizu, David L.G.	✓			
 Aguon, J.P.	✓			
 Arriola, Elizabeth P.	✓			
 Bordallo, Madeleine Z.	✓			
 Brooks, Doris F.	✓			
 Blaz, Anthony	✓			
 Dierking, Herminia	✓			
OFF-ISLAND Duenas, Edward B.				
 Gutierrez, Carl T.C.	✓			
Mailloux, Gordon				
 Manibusan, Marilyn D.A.	8/26/91 mlw			
 Reidy, Michael	8/26/91			

COMMITTEE ON HEALTH, ECOLOGY AND WELFARE

COMMITTEE REPORT ON
BILL NO. 325

"AN ACT TO REPEAL P.L.13-115 AND ADD A NEW CHAPTER XV TO TITLE X OF THE GOVERNMENT CODE OF GUAM TO PROVIDE FOR PROMPT AND EFFECTIVE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS."

BACKGROUND

Bill No. 325 (Attachment I) was referred to the Committee on Health, Ecology and Welfare on April 22, 1991 (Attachment II). This bill was introduced by Senator David L.G. Shimizu and co-sponsored by Speaker Joe T. San Agustin, Senators Madeleine Z. Bordallo, John P. Aguon and Carl T.C. Gutierrez. A Fiscal Note was requested from the Bureau of Budget and Management Research on May 3, 1991 (Attachment III). Based on the information provided, the Bureau advised that the proposed measure is administrative in nature and will not entail any fiscal impact on the General Fund (Attachment IV).

The Committee on Health, Ecology and Welfare conducted a public hearing on Monday, May 20, 1991, at 9:00 a.m., in the Legislative Public Hearing Room. The committee members present at the public hearing include: Senator David L.G. Shimizu, Chairman; Senator John P. Aguon, Vice Chairman; Senator Elizabeth P. Arriola, member; Senator Madeleine Z. Bordallo, member; Senator Doris F. Brooks, member; Senator Edward R. Duenas, member; Senator Michael Reidy, member; and Senator Ernesto M. Espaldon.

TESTIMONY

The following appeared before the Committee to present testimony:

1. Mr. Keith W. Hunter, Regional Vice President of the Honolulu Regional Office of the American Arbitration Association, presented a written testimony (Attachment V) in support of the passage and enactment of Bill No. 325. Mr.

Hunter provided background information of the American Arbitration Association as follows:

a. A private not-for-profit, independent, non-partisan organization founded in 1926.

b. Administers and designs voluntary dispute settlement procedures through 36 offices nationwide.

c. Receives over 60,000 disputes filed with the Association in 1990.

Mr. Hunter went on to say that the arbitration process offers a number of primary benefits that include:

a. Cost - almost always less from the cost of litigation.

b. Time - the average case is resolved either through settlement or award of arbitrator within 110 days of filing.

c. Privacy - arbitration proceedings are generally not a matter of public record and arbitrators may determine who, other than the parties, may attend the hearings.

d. Finality/Enforceability - although Bill No. 325 provides for trial de novo, it is rare that a party will feel the need to utilize post-arbitration mechanism, especially in light of the sanction that the court can impose if a party fails to substantially improve the arbitration decision. Arbitration will bring the dispute to a conclusion quickly and with less stress than litigation.

e. Expert Panelists - arbitration assures parties that the triers-of-fact possess the expertise in the subject area of dispute. Arbitrators tend to be quite rational and reasonable triers-of-fact who will examine the contested issues only.

2. Ms. Karen Storts, Business Manager of the Guam Contractors Association, the satellite office of the American Arbitration Association, testified orally in support of Bill No 325. She contended that Bill No. 325 does not lend itself to a possible conflict-of-interest and it provides for trained arbitrators to handle disputes.

3. Dr. Victor Perez testified orally in favor of Bill No. 325. He applauded the Committee for taking the time and effort in addressing an important area to help the health care system because he is concerned about improving the health care system and about the right of people to a fair and just compensation.

4. Mr. Edward English, Regional Vice-President for the Asia-Pacific Region of FHP, submitted a written testimony (Attachment VI) favoring Bill No. 325 with some modification that was read by Mr. Vincent P. Arriola, Government Affairs Manager for FHP. Mr. English advised that FHP has a clause in all of its contract that allows either a patient or a health care provider to submit a claim to mandatory arbitration, rather than having a claim resolved in the Superior Court of Guam. He said that aside from the fact that the docket of the Guam Court System is overloaded with

civil cases and that this will cause the attorneys' fees to be greatly increased, mandatory arbitration of medical malpractice claims is quicker, more efficient, less expensive and more equitable to all parties. Finally, he said that FHP can only support Bill No. 325 if the following amendments are made.

a. That the submission of claims to the American Arbitration Association be deleted because Bill No. 325 already provides a detailed framework for the parties to follow in an arbitration proceedings and because the Association is prejudicial to the health care provider.

b. That the designation of an attorney to be the chairman of the arbitration panel be eliminated and let that be the mutual decision of the panel themselves.

c. That the "Standard of Care" shall not be that "applicable in a civil action" but one that should be exercised by a reasonable physician in the same field practicing medicine in the community where the event occurred.

d. That the award made in arbitration shall not be anything else other than monetary damages because anything else will be unmanageable and will simply result in protracted litigation and arguments between the parties.

e. That the decision of arbitrators is final unless there are grounds for vacating or modifying the award pursuant to the specified grounds that are contained in Bill No. 325.

5. Dr. F. J. Werthmann, Chief of Staff at the Guam Memorial Hospital Authority, testified orally in favor of combining both Bill Nos. 256 and 325. He said frivolous claims must be prohibited but there is a very great threat to the practice of medicine in the United States today and that is known as the National Data Bank. The Bank is established by federal law wherein all the licensed physicians in the United States are reported and recorded. Regardless of the amount of settlement or why it was settled, the data has to be reported. The fact that it is reported is already impliedly adverse to the affected physician.

6. Mr. Peter John D. Camacho, Acting Hospital Administrator for the Guam Memorial Hospital Authority, submitted a written testimony (Attachment VII) supporting the legislative intent of Bill No, 325 because it recognizes the need for the timely resolution of malpractice claims and provides viable alternatives to litigation. He also recommended that a local office be established and that the funding, facilities and responsibilities be delineated.

7. Dr. T. Daniel Pletsch, Obstetric and Gynecology Physician at the Seventh-Day Adventist Clinic, submitted a written testimony (Attachment VIII) favoring the passage of Bill No. 325 because it addresses the crisis in the delivery of medical care vis-a-vis medical liability coverage by mandating arbitration in malpractice claims and to be administered by the American Arbitration Association. He

went on to say that funds should be appropriated to implement the act.

8. Dr. James Stadler, Chairman of the Guam Medical Society Ad-Hoc Committee on Malpractice Legislation, submitted a written testimony (Attachment IX), which was read by Dr. Walter C. Perez, favoring the passage of mandatory binding arbitration for all medical malpractice claims. The Society has certain reservations regarding the trial de novo provision of Bill No. 325 despite the sanctions provided. They maintain that the sanctions are unlikely to discourage a plaintiff from requesting a trial if he is dissatisfied with the arbitration decision since the sanctions are discretionary by the court.

9. Dr. Walter C. Perez, a practicing family physician for the past 10 years, is interested in Bill No. 325 because the bill is a landmark piece of legislation which will benefit Guam by offering a modality to resolve medical malpractice claims more efficiently, with less expense, with less emotional trauma, in a more timely manner and with equity, thus protecting all parties concerned. Dr. Perez went on to say that Bill No. 325 offers solid framework toward this end but he recommends the following amendments.

a. Binding Arbitration - This section should be re-titled to 'Mandatory and Binding Arbitration'. The reference to 'binding arbitration' is confusing because of the title. Binding implies the arbitrator's decision is final and would obviate the need for trial de novo.

b. Standard of Care - This should be defined specifically to include the reasonable standard of practice by a reasonable physician in the same specialty area and in accordance to the reasonable standard of the Territory of Guam at the time of the alleged malpractice.

c. Selection of Arbitrators - This should be amended to provide that a minimum of two of the three panel members be all residents of Guam. Also, that the Chairperson of the panel be decided by the three panel members and not necessarily the attorney panel.

d. Offer of Reparation - Offer of reparation by either party and not just by the respondent should be privileged.

e. Award of Arbitrator - The award should be limited to monetary damages only because they can be ascertained more tangibly. The determination of future services may be unwieldy insofar as determining the nature and extent of these services.

f. Confirmation of Award - This section should be applicable only in cases where there is a violation in the delivery of an award to parties. This provision defeats the purported advantages of arbitration and that is one of privacy.

g. Private Arbitration - Some provisions should be incorporated to allow for private arbitration agreed to by both parties and the validity of such arbitration should be specified and applicable to all sections to insure protection of all parties.

10. Dr. Gregory J. Miller of the Marianas Chiropractic Clinic submitted a written testimony (Attachment X) favoring Bill No. 325. He was, however, concerned that the bill does not call for binding arbitration. Nonbinding arbitration, in his opinion, will make matters worse by exposing providers to the probability of having to defend themselves in both arbitration and then again in the suit, which would escalate cost and make litigation protracted.

11. Mr. James W. Gillian, Associate Administrator for the Guam Memorial Health Plan, submitted a written testimony (Attachment XI) supporting Bill No. 325 because it requires timely settlement of claims and may also help to make the costs of claims adjudication lower.

FINDINGS

The Committee finds that the medical malpractice problem has reached a crisis proportion during the last two decades. This dilemma is not a private battle between health care providers and their insurers, but rather, that increased costs are inevitably passed on to the consumer in the form of higher medical fees and costs. Costs also increase as a result of "defensive medicine" practiced by physicians in an effort to avoid malpractice suits. In the end, many insurance companies currently refuse to offer malpractice coverage or have raised the cost of premiums to prohibitive levels.

The Guam Legislature tried to address the issue of medical malpractice when Public Law 13-115 was enacted into law on December 23, 1975. However, this piece of legislation was struck down by the courts because it contains sections that are mutually incongruous and incompatible which makes the law inorganic and unenforceable.

Bill No. 325 provides the Legislature's response to the crisis of medical malpractice claims and offers solid framework toward this end. The public hearing brought out certain recommended modifications that would strengthen the measure further. The recommendations that were offered that should be incorporated in the bill include the following.

1. That the definition of "Standard of Care" under Section 9990.6 be amended as follows: "The prevailing standard of duty, practice or care by a reasonable physician in the same field practicing medicine in the community at the time of the alleged malpractice shall be the standard applied in the arbitration".

2. That Section 9990.8, "Selection of Arbitrators", be amended to provide that:

a. a minimum of two of the three panel members be residents of Guam.

b. the chairperson of the panel shall be the collective decision of all three panel members.

3. That Section 9990.12, "Offer of Reparation", be amended to provide that offer of reparation by either party and not just by the respondent shall be privileged.

4. That Section 9990.33, "Award of Arbitrators", be amended to provide that the award shall be limited to monetary damages.

5. That a new Section 9990.46, Controlling Statute, be incorporated that would prevent Bill No. 325 from being in conflict with provisions of Title V, Chapter 32, Guam Code Annotated.

RECOMMENDATION

The Committee recommends that Bill No. 325, as substituted by the Committee, (Attachment XII) be passed.

8/21/91

ORIGINAL

Bill No. 325
Introduced By:

D.L.G. Shimizu
J. T. San Agustin
M. Z. Bordallo
J.F. Aguon
C.T.C. Gutierrez

M. Manuella

AN ACT TO REPEAL P.L. 13-115 AND ADD A NEW CHAPTER XV TO TITLE X OF THE GOVERNMENT CODE OF GUAM TO PROVIDE FOR PROMPT AND EFFECTIVE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS.

1 BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:

2 Section 1. Chapter XV of Title X of the Government Code
3 of Guam, §§9900 through 9990.14, enacted by P.L. 13-115
4 on December 23, 1977, is hereby repealed in its entirety.

5 Section 2. A new Chapter XV is hereby added to Title X of
6 the Government Code of Guam to read as follows:

7 "CHAPTER XV

8 Medical Malpractice
9 Mandatory Arbitration Act

10 Section 9990. Title. This Act may be cited as the
11 'Medical Malpractice Mandatory Arbitration Act.'

12 Section 9990.1. Definitions. As used in this chapter:

13 (a) 'Association' means the American Arbitration
14 Association or other entity organized to arbitrate
15 disputes pursuant to this Chapter.

16 (b) 'Health professional' means any person licensed or
17 certified to practice the healing arts within the
18 Territory of Guam.

19 (c) 'Health care institution' means any health care
20 facility, health maintenance organization or independent
21 practice association operated primarily to provide
22 medical services.

23 (d) 'Malpractice' means any tort or breach of contract
24 based on health care or professional services rendered or
25 which should have been rendered by a health professional
26 or a health care institution to a patient.

27 (e) 'Petitioner' means the patient, his relatives, his
28 heirs-at-law or personal representative pursuing a claim
29 in arbitration, or any third-party or other party
30 pursuing a claim in arbitration, against a health
31 professional or health care provider.

32 (f) 'Respondent' means the health professional or health
33 care provider defending a claim in arbitration filed by a
34 Petitioner.
35

1 Section 9990.2. Mandatory Arbitration. Any claim that
2 accrues or is being pursued in the Territory of Guam,
3 whether in tort, contract, or otherwise, shall be
4 submitted to binding arbitration pursuant to the terms of
5 this Act if it is a controversy between the patient, his
6 relatives, his heirs-at-law or personal representative or
7 any third-party or other party, and the health
8 professional or health care institution, or their
9 employees or agents, and is based on malpractice, tort,
10 contract, strict liability, or any other alleged
11 violation of a legal duty incident to the acts of the
12 health professional or health care institution, or
13 incident to services rendered or to be rendered by the
14 health professional or health care institution.

15 Section 9990.3. Initiation Of Arbitration. Arbitration is
16 initiated by a petitioner or petitioners serving a
17 written demand for arbitration upon a respondent or
18 respondents in the same manner provided by law for the
19 service of summons in the Superior Court of Guam; except
20 that the petitioner or his agent may serve the demand
21 without the necessity of it being served by a Marshal of
22 the Superior Court of Guam. The demand for arbitration
23 shall not be filed in the Superior Court of Guam, unless
24 the petitioner or petitioners require the appointment of
25 a Guardian Ad Litem, as provided for in Section 9990.8 of
26 this Act. The demand for arbitration shall be filed with
27 the Association. The demand for arbitration shall state
28 the name and address of the petitioner or petitioners,
29 identify the respondent or respondents, and shall outline
30 the factual basis of the claim and the alleged acts of
31 negligence or wrongdoing of the respondent or
32 respondents.

33 Section 9990.4. Response To Demand. Within twenty
34 (20) days after service of a demand for arbitration, the
35 respondent or respondents shall file a response to the
36 demand for arbitration and serve it upon the petitioner
37 or petitioners, or their attorney. The response shall
38 identify any defenses then known to the respondent or
39 respondents. If a respondent fails to file a response,
40 then the petitioner or petitioners may proceed in default
41 to appoint an arbitration panel pursuant to Section
42 9990.6 of the this Act.

43 Section 9990.5. Applicability of Statute of Limitations.
44 A claim shall be waived and forever barred as against a
45 respondent if on the date the demand is served the

1 applicable statute of limitations would bar the claim.

2 Section 9990.6. Standard of Care. The prevailing standard
3 of duty, practice, or care applicable in a civil action
4 shall be the standard applied in the arbitration.

5 Section 9990.7. Administration of Arbitration. The
6 Association shall administer a proceeding filed under
7 this Chapter. The administrative expense shall be as may
8 be agreed to by the parties and the Association, or as
9 may be provided by the Association. The administrative
10 costs shall be equally shared by the parties subject to
11 an award of costs by the panel as provided in Section
12 9990.30 herein.

13 Section 9990.8. Selection of Arbitrators. An arbitration
14 under this Chapter shall be heard by a panel of three (3)
15 arbitrators. One shall be an attorney who shall be the
16 chairperson and shall have jurisdiction over pre-hearing
17 procedures, one shall be a physician, preferably but not
18 necessarily from the respondent's medical specialty, and
19 the third shall be a person who is neither a doctor,
20 lawyer, or representative of a health care institution or
21 insurance company.

22 (a) Except as otherwise provided in Subsection (d),
23 arbitrator candidates shall be selected pursuant to the
24 rules and procedures of the Association from a poll of
25 candidates generated by the Association. The rules and
26 procedures of the Association pertaining to a selection
27 of arbitrators under this Chapter shall require that the
28 Association send simultaneously to each party an
29 identical list of five arbitrator candidates in each of
30 the three categories together with a brief biographical
31 statement on each candidate. A party may strike from the
32 list any name which is unacceptable and shall number the
33 remaining names in order of preference. When the lists
34 are returned to the Association they shall be compared
35 and the first mutually agreeable candidate in each
36 category shall be invited to serve.

37 (b) Where no mutually agreed upon arbitrator is selected
38 for any category, a second list of that category shall be
39 sent pursuant to Subsection (a).

40 (c) If a complete panel is not selected by mutual
41 agreement of the parties pursuant to Subsections (a) and
42 (b) then under the applicable rules and procedures of the
43 Association, the Association shall appoint the remainder
44 of the panel on whom agreement has not been reached by
45 the parties. The appointment by the Association shall be

1 subject to challenge by any party for cause which
2 challenge may allege facts to establish that unusual
3 community or professional pressures will unreasonably
4 influence the objectivity of the panelists. A request to
5 strike an arbitrator for cause shall be determined by the
6 regional director or comparable officer of the
7 Association.

8 (d) The parties shall not be restricted to the arbitrator
9 candidates submitted for consideration. If all parties
10 mutually agree upon a panelist within a designated
11 category, the panelist shall be invited to serve.

12 Section 9990.9. Challenge for Bias. The Association shall
13 make an initial screening for bias as may be appropriate
14 and shall require a candidate for a particular case to
15 complete a current personal disclosure statement under
16 oath. In addition to other relevant information this
17 statement shall disclose any personal acquaintance with
18 any of the parties or their counsel and the nature of
19 such acquaintance. If this statement reveals facts which
20 suggest the possibility of partiality, the Association
21 shall communicate those facts to the parties if the
22 panelist is proposed by the arbitration association.

23 (a) Any party may propound reasonable questions to an
24 arbitrator candidate if such questions are propounded
25 within ten (10) days of the receipt of the candidate's
26 name. Such questions shall be propounded through the
27 Association and the candidate shall respond to the
28 Association promptly.

29 (b) A party shall not communicate with a candidate
30 directly or indirectly except through the Association at
31 any time after the filing of the demand for arbitration.
32 Any candidate who is aware of such communication shall
33 immediately notify the Association.

34 Section 9990.10. Rules of Arbitration. The arbitration
35 proceeding shall be subject to rules promulgated by the
36 Association in conformance with this Act.

37 Section 9990.11. Multiple Petitioners and Multiple
38 Respondents. In cases involving a common question of law
39 or fact, when there are multiple petitioners and/or
40 multiple respondents, the disputes, controversies, and
41 issues shall be consolidated into a single arbitration
42 proceeding.

43 (a) A person who is not a party to the arbitration may
44 join in the arbitration at the request of any party with
45 all the rights and obligations of the original parties.

1 Each party to an arbitration under this Chapter is deemed
2 to be bound by the joinder of a new party.

3 Section 9990.12. Offer of Reparation. Prior to the
4 institution of a proceeding or claim by a patient, any
5 offer of reparations and all communications incidental
6 thereto made in writing to a patient by a health
7 professional or health care institution is privileged and
8 may not be used by any party to establish the liability
9 or measure of damages attributable to the offeror.

10 (a) Such an offer shall provide that a patient has thirty
11 (30) days to accept or reject the offer, or such lesser
12 period of time as may be necessitated by the condition or
13 health of the patient.

14 (b) After any rejection or the lapse of the applicable
15 time, any party may demand arbitration.

16 (c) Any such offer to a patient shall include a statement
17 that the patient may consult legal counsel before
18 rejecting or accepting the offer.

19 (d) In a case where a potential claim is identified by a
20 health professional or health care institution where
21 reparations, in its judgment, are not appropriate, the
22 professional or institution may, at its option, file a
23 demand for arbitration which demand shall identify the
24 potential claim and deny liability.

25 Section 9990.13. Appointment of Guardian Ad Litem.

26 (a) When a minor, or an insane or incompetent person is a
27 petitioner, he must appear either by general guardian or
28 a Guardian Ad Litem appointed by the Superior Court of
29 Guam. A Guardian Ad Litem may be appointed in a claim for
30 arbitration under this Act when it is deemed by a judge
31 of the Superior Court of Guam expedient to represent the
32 minor, insane, or incompetent person in the arbitration
33 proceeding, notwithstanding he may have a general
34 guardian and may have appeared by him. The general
35 guardian or Guardian Ad Litem so appearing for an infant,
36 insane or incompetent person in any arbitration
37 proceeding shall have the power to compromise the same
38 and to agree to any settlement or decision of the
39 arbitrators to be entered therein against his ward,
40 subject to the approval of a majority of the arbitrators.

41 (b) All Guardian Ad Litem appointed by the Superior
42 Court of Guam to pursue a claim for arbitration shall be
43 appointed pursuant to §373 of the Guam Code of Civil
44 Procedure. Any petition to appoint a Guardian Ad Litem to
45 pursue a claim for arbitration shall have a copy of the

1 demand for arbitration attached thereto.

2 Section 9990.14. Stay of Proceedings When Suit is Filed.

3 If any suit or proceeding is brought in the courts of
4 Guam upon any issue referable to arbitration under the
5 Medical Malpractice Mandatory Arbitration Act, the court
6 in which said suit is pending, upon being satisfied that
7 the issue involved in such suit or proceeding is
8 referable to arbitration under this Act, shall upon
9 application of one of the parties, stay all proceedings
10 in the action until such arbitration has been had in
11 accordance with the terms of this Act.

12 Section 9990.15. Failure to Arbitrate Under This Act. The

13 party aggrieved by the alleged failure, neglect, or
14 refusal of another to arbitrate under this Act, may
15 petition the Superior Court of Guam, for an order
16 directing that such arbitration proceed in the manner
17 provided for in this Act. Five (5) days notice in writing
18 of such application shall be served upon the party in
19 default. Service thereof shall be made in the manner
20 provided by law for the service of summons in the
21 Superior Court of Guam. The court shall hear the parties,
22 and the court shall then make an order directing the
23 parties to proceed to arbitration in accordance with the
24 terms of this Act.

25 Section 9990.16. Service of Documents Upon Arbitrators;

26 Ex Parte Contact. Once the arbitration panel has been
27 selected, each of the arbitrators shall be provided with
28 a copy of the demand for arbitration and any responses
29 thereto by the Association. Each of the arbitrators shall
30 also be provided by the Association with the parties'
31 notice to each other identifying experts, witnesses,
32 documents and arbitration briefs as authorized in this
33 Act. Any motions or requests for additional discovery
34 shall also be served upon each of the arbitrators through
35 the Association.

36 Section 9990.17. Witnesses Before Arbitrators. The panel

37 or its chairperson in the arbitration proceeding shall,
38 upon application by a party to the proceeding, and may
39 upon its own determination, issue a subpoena requiring a
40 person to appear and be examined with reference to a
41 matter within the scope of the proceeding, and to produce
42 books, records, or papers pertinent to the proceeding. In
43 case of disobedience to the subpoena, the chairperson or
44 a majority of the arbitration panel in the arbitration

1 proceeding may petition the Superior Court of Guam to
2 require the attendance and testimony of the witness and
3 the production of books, papers, and documents. The
4 Superior Court of Guam, in case of contumacy or refusal
5 to obey a subpoena, may issue an order requiring that
6 person to appear and to produce books, records, and
7 papers and give evidence touching the matter in question.
8 Failure to obey the order of the Court may be punished by
9 the Court as contempt. The fees for the attendance of any
10 person to attend before the arbitration panel as a
11 witness shall be the same as the fees for witnesses
12 subpoenaed before the Superior Court of Guam. The
13 Superior Court of Guam shall order a witness to pay the
14 cost of the aggrieved party, to include attorney's fees,
15 if it is determined that the witness wrongfully failed to
16 appear before the arbitration panel.

17 Section 9990.18. Evidence and Testimony. A hearing shall
18 be informal and the arbitrators shall be the sole judge
19 of the relevancy and materiality of the evidence offered.
20 (a) The arbitrators may receive and consider evidence in
21 the form of an affidavit, but shall give appropriate
22 weight to any objections made. All documents to be
23 considered by the arbitrators shall be filed at the
24 hearing.

25 (b) Testimony shall be taken under oath and a record of
26 the proceedings shall be made by a tape recording. Any
27 party, at that party's expense, may have transcriptions
28 or copies of the recording made or may provide for a
29 written transcript of the proceedings. The costs of any
30 transcription ordered by the panel for its own use shall
31 be deemed part of the costs of the proceedings.

32 (c) Expert testimony shall not be required but where
33 expert testimony is used, it shall be admitted under the
34 same circumstances as in a civil trial and be subject to
35 cross-examination.

36 (d) The party with the burden of establishing a standard
37 of care and breach thereof shall establish such standards
38 whether by the introduction of expert testimony, or by
39 other competent proof of the standard and the breach
40 thereof, which may include the use of works as provided
41 in Subsection (d).

42 (e) Authoritative, published works on the general and
43 specific subjects in issue may be admitted and argued
44 from, upon prior notice to all other parties.

45 (f) The panel shall accord such weight and probative
46 worth to expert evidence as it deems appropriate. The

1 panel may call a neutral expert on its own motion, which
2 expert witness shall be subject to cross-examination by
3 the parties. The costs of the expert will be deemed a
4 cost of the proceeding.

5 Section 9990.19. Identification of Expert Witnesses.
6 Within thirty (30) days after the arbitrators have been
7 selected, any petitioner pursuing a claim against a
8 respondent shall identify the expert witnesses that the
9 petitioner will call at the arbitration hearing. When
10 identifying such experts, the petitioner shall provide
11 the name of the expert, the address of the expert, and
12 shall state the subject matter on which the expert is
13 expected to testify, and state the substance of the facts
14 and opinions to which the expert is to testify and a
15 summary of the grounds for each opinion. Within thirty
16 (30) days after the petitioner has identified his
17 experts, the respondent shall identify the expert
18 witnesses that the respondent will call to testify at the
19 arbitration hearing. The respondent shall provide the
20 name of the expert witness, the address of the expert
21 witness, and state the subject matter on which the expert
22 is expected to testify, and state the substance of the
23 facts and opinions to which the expert is expected to
24 testify and a summary of the grounds for each opinion.

25 Section 9990.20. Identification of Witnesses and
26 Documents. Within thirty (30) days after the respondent
27 has identified respondent's expert witnesses, the parties
28 shall exchange a list of witnesses that they expect to
29 call to testify at the arbitration hearing along with a
30 summary of each witnesses' proposed testimony. The
31 parties shall also provide each other with copies of all
32 documents and material that they intend to introduce as
33 evidence at the arbitration hearing.

34 Section 9990.21. Additional Discovery. Additional
35 discovery, not otherwise provided for in this Act, such
36 as depositions, interrogatories and requests to produce,
37 shall not be permitted unless:
38 (a) The parties stipulate to allow additional discovery;
39 or,
40 (b) A majority of the arbitrators at the pre-arbitration
41 conference provided for in Section 9990.22 of this Act
42 authorize additional discovery for good cause shown upon
43 the application of a party to the arbitration proceeding.
44 The arbitrators shall liberally authorize additional
45 discovery if it is necessary in order for a petitioner or

1 respondent to more adequately present or defend a claim.

2 Section 9990.22. Time And Place Of Arbitration Hearing.

3 Within thirty (30) days after the parties have exchanged
4 their lists of witnesses and provided each other with the
5 documents that the parties intend to introduce as
6 evidence at the arbitration hearing, the arbitrators
7 shall meet at a place designated by the chairperson and
8 conduct a pre-arbitration conference for the purpose of
9 deciding upon a date and place for the arbitration
10 hearing, and for the purpose of deciding whether
11 additional discovery should be permitted pursuant to
12 Section 9990.21 of this Act. The arbitrators, or a
13 majority of them, shall agree upon a date and place for
14 the arbitration hearing. The arbitration hearing shall be
15 conducted within ninety (90) days after the pre-
16 arbitration conference between the arbitrators and the
17 parties unless agreed otherwise by the parties. Oral
18 notice to the parties at the pre-arbitration conference
19 of the date, time and location of the arbitration hearing
20 shall be deemed sufficient.

21 Section 9990.23. Arbitration Briefs. Any arbitration

22 brief to be filed by a petitioner must be filed at least
23 ten (10) working days before the arbitration hearing. Any
24 arbitration brief to be filed by a respondent must be
25 filed at least five (5) working days before the
26 arbitration hearing. A petitioner may file a reply brief,
27 which shall respond only to matters discussed in the
28 respondent's arbitration brief, no later than two (2)
29 working days before the arbitration hearing.

30 (a) The panel may order submission of post-hearing briefs
31 within ten (10) calendar days after the close of
32 hearings. In written briefs, each party may summarize the
33 evidence in testimony and may propose a comprehensive
34 award of remedial or compensatory elements.

35 Section 9990.24. Representation By Counsel. Any party may
36 be represented in hearings before the arbitration panel
37 by counsel.

38 A party may appear without counsel, and shall be advised
39 of such right and the right to retain counsel in a manner
40 calculated to inform the person of the nature and
41 complexity of a proceeding by a simple concise form to be
42 distributed by the Association administering the
43 arbitration.

1 Section 9990.25. Attendance At Hearings. Parties to the
2 arbitration and their counsel are entitled to attend all
3 hearings. Non-party witnesses may be excluded by either
4 party upon request.

5 Section 9990.26. Oaths. The arbitrators shall require all
6 witnesses at the arbitration hearing to testify under
7 oath.

8 Section 9990.27. Arbitration In The Absence Of A Party.
9 The arbitration may proceed in the absence of any party
10 who, after due notice, fails to be present. An award
11 shall not be made solely on the default of a party. The
12 arbitrators shall require the attending party to submit
13 evidence.

14 Section 9990.28. Adjournments. Hearings may be adjourned
15 by a majority of the arbitrators only for good cause, and
16 an appropriate fee will be charged if the arbitrators
17 determine that a party has wrongfully caused an
18 adjournment to take place.

19 Section 9990.29. Waiver of Statutory Rights. Any party
20 who proceeds with arbitration after knowledge that any
21 provision of this Act has not been complied with and
22 fails to state his objections thereto in writing shall be
23 deemed to have waived his right to object.

24 Section 9990.30. Fees and Costs of Arbitration. Except
25 for the parties to the arbitration and their agents,
26 officers, and employees, all witnesses appearing pursuant
27 to subpoena are entitled to receive fees and mileage in
28 the same amount and under the same circumstances as
29 prescribed by law for witnesses in civil actions in the
30 Superior Court of Guam. The fee and mileage of a witness
31 subpoenaed upon the application of a party to the
32 arbitration shall be paid by that party. The fee and
33 mileage of a witness subpoenaed solely upon the
34 determination of the arbitrator or the majority of a
35 panel of arbitrators shall be paid in the manner provided
36 for the payment of the arbitrators' expenses.

37 (a) The costs of each arbitrator's fees and expenses,
38 together with any administrative fee may be assessed
39 against any party in the award or may be assessed among
40 parties in such proportions as may be determined in the
41 arbitration award. Each party shall bear its own
42 attorney's fees in the arbitration proceeding.

43 Section 9990.31. Damages. Damages or remedial care shall

1 be without limitation as to nature or amount unless
2 otherwise provided by law.

3 section 9990.32. Timely Award. The award of the
4 arbitrators shall be rendered promptly by the arbitrators
5 and, unless otherwise agreed by the parties, not later
6 than twenty (20) business days from the date of the close
7 of the hearing. However, if the arbitrators fail to
8 render an award within twenty (20) business days from the
9 date of the close of the hearing, the arbitrators' award
10 shall not be vacated on this ground unless it can be
11 proven that a party has been seriously prejudiced due to
12 the fact that the arbitrators have not rendered an award
13 within twenty (20) business days.

14 Section 9990.33. Award of Arbitrators. A majority of the
15 panel of arbitrators may grant any relief deemed
16 equitable and just, including money damages, provision
17 for hospitalization, medical, or rehabilitative
18 procedures, support, or any combination thereof.

19 (a) The award in the arbitration proceeding shall be in
20 writing and shall be signed by the arbitrators or a
21 majority of the panel of arbitrators. An award cannot be
22 rendered unless it is signed by a majority of the
23 arbitrators. Award shall include a determination of all
24 the questions submitted to arbitration by each party, the
25 resolution of which is necessary to determine the
26 dispute, controversy, or issue.

27 (b) The panel shall determine the degree to which each
28 respondent party, if more than one, was at fault for the
29 total damages accruing to any other party to the
30 arbitration, considering all sources of damage involving
31 parties to the arbitration, but excluding the damages
32 attributable to persons not parties to the arbitration.

33 (c) The panel shall prepare a schedule of contributions
34 according to the relative fault of each party which
35 schedule shall be binding those parties, but such
36 determination shall not affect a claimant's right to
37 recover jointly and severally from all parties where such
38 right otherwise exists in the law.

39 Section 9990.34. Award of Remedial Services. In the case
40 of an award, any element of which includes remedial
41 services, contracts, annuities, or other non-cash award
42 element, the panel shall determine the current cash value
43 of each element of the award and shall also determine a
44 total current cash value of the entire award.

45 (a) An award of remedial surgery or care shall not

1 require that the patient undergo such treatment or care
2 by the health care professional or institution whose
3 conduct resulted in the award.

4 (b) A claimant need not accept the benefits of an award
5 for remedial surgery or other non-cash award element and
6 such refusal shall not affect the claimant's right to
7 receive any other part of the award, nor shall the
8 refusal entitle the claimant to payment of the current
9 cash value of the portion refused except as provided in
10 Subsections (c) and (d).

11 (c) Where the total determined current cash value of the
12 entire award is ONE HUNDRED THOUSAND DOLLARS
13 (\$100,000.00) or less, any party may be satisfied or
14 request satisfaction of all or a designated part of an
15 award by payment in a lump sum of the current cash value
16 of the total award or part of the award so designated.

17 (d) Where the total determined current cash value of the
18 entire award is greater than ONE HUNDRED THOUSAND DOLLARS
19 (\$100,000.00) the award shall provide that at least one-
20 third (1/3), unless otherwise stipulated by the parties,
21 of its total current cash value shall be payable in cash
22 lump sum, which payment may represent the current cash
23 value of remedial elements of the award or other
24 compensable damages.

25 Section 9990.35. Delivery of Award to Parties. The
26 parties shall accept as legal delivery of the award the
27 placing of the award or a true copy thereof in the mail
28 by the arbitrators addressed to such party at its last
29 known address or to the party's attorney, or personal
30 service of the award on the party or the party's
31 attorney.

32 Section 9990.36. Confirmation of Award. At any time
33 within one (1) year after an award is made, any party to
34 the arbitration may apply to the Superior Court of Guam
35 for an order confirming the award, and thereupon the
36 court must grant such an order unless the award is
37 vacated, modified, corrected, or appealed as prescribed in
38 Sections 9990.37, 9990.38 and 9990.40 of this Act. Notice
39 of the application shall be served upon the adverse
40 party, and thereupon the court shall have jurisdiction of
41 such party as though he had appeared generally in the
42 proceeding. If the adverse party is a resident of Guam,
43 service shall be made upon the adverse party as
44 prescribed by law for the service of a civil action in
45 the Superior Court of Guam. If the adverse party shall be

1 a non-resident, then the notice of the application shall
2 be served in like manner as other process of the Superior
3 Court of Guam served upon non-residents.

4 Section 9990.37. Vacation of Arbitration Award. In any of
5 the following cases, the Superior Court of Guam may make
6 an order vacating the award upon the application of any
7 party to the arbitration:

8 (a) Where the award was procured by corruption, fraud or
9 undue means;

10 (b) Where there was corruption in any of the arbitrators;

11 (c) Where the arbitrators exceeded their powers and the
12 award cannot be corrected without affecting the merits of
13 the decision upon the controversy submitted; or

14 (d) Where the rights of such party were substantially
15 prejudiced by the refusal of the arbitrators to postpone
16 the hearing upon sufficient cause being shown therefore
17 or by the refusal of the arbitrators to hear evidence
18 material to the controversy or by other conduct of the
19 arbitrators contrary to the provisions of this Chapter.
20 Where an award is vacated, the court shall direct a re-
21 hearing by the arbitrators, or if the court deems it
22 appropriate, shall direct the parties to select new
23 arbitrators for another arbitration proceeding.

24 Section 9990.38. Modification of Award. In any of the
25 following cases, the Superior Court of Guam may make an
26 order modifying or correcting the award upon the
27 application of any party to the arbitration:

28 (a) Where there was an evident material miscalculation of
29 figures or an evident material mistake in the description
30 of any person, thing, or property referred to in the
31 award.

32 (b) Where the arbitrators have awarded upon a matter not
33 submitted to them, unless it is a matter not effecting
34 the merits of the decision upon the matter submitted.

35 (c) Where the award is imperfect in matter or form not
36 effecting the merits of the controversy. The court may
37 modify and correct the award so as to effect the intent
38 thereof and promote justice between the parties.

39 Section 9990.39. Notice of Motion to Vacate or Modify.
40 Notice of a motion to vacate, modify, or correct an award
41 must be served upon the adverse party or his attorney
42 within thirty (30) days after the award is served upon
43 the party seeking to vacate, modify or correct the award.

44 Section 9990.40. Notice of Appeal and Request for Trial

1 De Novo.

2 (a) Within thirty (30) days after the award is served
3 upon the parties, any party may file with the clerk of
4 the Superior Court of Guam and serve on the other parties
5 and the Association a written Notice of Appeal and
6 Request for Trial De Novo of the action.

7 (b) After the filing and service of the written Notice of
8 Appeal and Request for Trial De Novo, the case shall be
9 set for trial pursuant to applicable court rules.

10 (c) If the action is triable by right to a jury, and a
11 jury was not originally demanded but is demanded within
12 ten (10) days of service of the Notice of Appeal and
13 Request for Trial De Novo by a party having the right of
14 trial by jury, the trial de novo shall include a jury,
15 and a jury trial fee shall be paid as provided by law.

16 Section 9990.41. Procedures at Trial De Novo.

17 (a) The clerk shall seal any arbitration award if a trial
18 de novo is requested. The jury will not be informed of
19 the arbitration proceeding, the award, or about any other
20 aspect of the arbitration proceedings. The sealed
21 arbitration award shall not be opened until after the
22 verdict is received and filed in a jury trial, or until
23 after the judge has rendered a decision in a court trial.

24 (b) All discovery permitted during the course of the
25 arbitration proceedings shall be admissible in the trial
26 de novo subject to all applicable rules of civil
27 procedure and evidence. The court in the trial de novo
28 shall insure that any reference to the arbitration
29 proceeding is omitted from any discovery taken therein
30 and sought to be introduced at the trial de novo.

31 (c) No statements or testimony made in the course of the
32 Arbitration hearing shall be admissible in evidence for
33 any purpose in the trial de novo.

34 Section 9990.42. Scheduling of the Trial De Novo. Every
35 case transferred to the court shall maintain the
36 approximate position on the civil trial docket as if the
37 case had not been so transferred, unless at the
38 discretion of the court, the docket position is modified.

39 Section 9990.43. The Prevailing Party In The Trial De
40 Novo: Costs.

41 (a) The 'Prevailing Party' in a trial de novo is the
42 party who has (1) appealed and improved upon the
43 Arbitration award by 40% or more, or (2) has not appealed
44 and the opposing party has appealed and failed to improve
45 upon the Arbitration award by 40% or more. For the

1 purpose of this rule, 'improve' or 'improved' means to
2 increase the award for a plaintiff or to decrease the
3 award for the defendant.
4 (b) The 'prevailing party' under these rules, as defined
5 above, is deemed the prevailing party under any statute
6 or rule of court, and as such is entitled to costs of
7 trial and all other remedies as provided by law.

8 Section 9990.44. Sanction For Failing To Prevail In The
9 Trial De Novo.

10 (a) After the verdict is received and filed, or the
11 court's decision rendered in a trial de novo, the trial
12 court shall impose sanctions, as set forth below, against
13 the non-prevailing party whose appeal resulted in the
14 trial de novo.

15 (b) The sanctions available to the court are as

16 (1) Reasonable cost and fees (other than
17 attorneys' fees) actually incurred by the party
18 but not otherwise taxable under the law;

19 (2) Costs of Jurors;

20 (3) Attorneys' fees not to exceed \$40,000.00;

21 (c) Sanctions imposed against a plaintiff will be
22 deducted from any award rendered. Sanctions imposed
23 against a defendant will be added to any award rendered.

24 (d) In determining sanctions, if any, the court shall
25 consider all the facts and circumstances of the case and
26 the intent and purpose of Mandatory Arbitration in the
27 Territory of Guam.

28 Section 9990.45. Applicability To Government Of Guam And
29 Its Agencies. Claims against the Government of Guam and
30 its agencies are governed by the Government Claims Act.
31 Thus, this Act does not apply to claims against the Guam
32 Memorial Hospital Authority or other health care
33 institutions established by the Government of Guam.

34 Section 9990.46. Effective Date Of Statute. This Act
35 shall not apply to any claim that accrues before the date
36 that the Act becomes law.

37 Section 9990.47. Severability Clause. If any section or
38 sentence of this Act is deemed unconstitutional, then
39 that section or sentence shall be severed from the Act
40 and the remainder of the Act shall remain and be of full
41 force and effect."

42

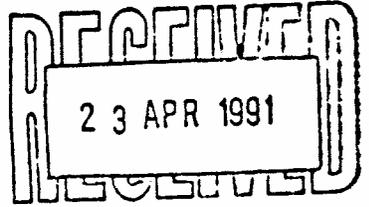
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Senator **HERMINIA D. DIERKING**

21st GUAM LEGISLATURE



Committees:

CHAIRPERSON:

Rules

General
Governmental
Operations

VICE CHAIRPERSON:

Ways & Means

Energy
Utilities and
Consumer
Protection

MEMBER:

Economic and
Agricultural
Development

Education

Health,
Ecology and
Welfare

Housing
Community
Development,
Federal and
Foreign Affairs

Judiciary
and
Criminal Justice

Tourism and
Transportation

Youth, Senior
Citizens, and
Cultural Affairs

April 22, 1991

MEMORANDUM

TO: Chairperson, Committee on Health, Ecology and Welfare

FROM: Chairperson, Committee on Rules

SUBJECT: Referral - Bill No. 325

The above Bill is referred to your Committee. Please note that the referral is subject to ratification by the Committee on Rules at its next meeting. It is recommended you schedule a public hearing at your earliest convenience.

HERMINIA D. DIERKING

Enclosure

ATTACHMENT II. - RULES REFERRAL OF BILL



Dr. David L.G. Shimizu

SENATOR

Chairman: Committee on Health, Ecology & Welfare

TWENTY FIRST

GUAM LEGISLATURE



May 3, 1991

Ms. Giovanni Sgambelluri
Director
Bureau of Budget &
Management Research
P.O. Box 2950
Agana, Guam, 96910

Dear Ms. Sgambelluri,

The Health, Ecology & Welfare Committee will hold a public hearing at the Legislative Hearing Room on Monday, May 20, 1991, from 9:00 AM to 5:00 PM on the following bills:

Bill No. 325: AN ACT TO REPEAL PL13-115 AND ADD A NEW CHAPTER XV TO TITLE X OF THE GOVERNMENT CODE OF GUAM TO PROVIDE FOR PROMPT AND EFFECTIVE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS.

Bill No. 256: AN ACT TO REPEAL AND REENACT CHAPTER XV OF TITLE X OF THE GOVERNMENT CODE OF GUAM TO PROVIDE FOR PROMPT AND EFFECTIVE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS.

I am kindly requesting your office to furnish fiscal notes on the above bills listed.

Your contribution at the hearing will greatly assist the HEW committee in preparing its report on the proposed measures.

Dr. David L.G. Shimizu

cc:

- Speaker
- All other Senators
- Executive Director
- All Media





BUREAU OF BUDGET & MANAGEMENT RESEARCH
OFFICE OF THE GOVERNOR, Post Office Box 2950, Agana, Guam 96910



GIOVANNI T. SGAMBELLURI
DIRECTOR

MAY 20 1991

Senator David L.G. Shimizu
Committee on Human Services &
Higher Education
Twenty-First Guam Legislature
Post Office Box CB-1
Agana, Guam 96910

Dear Senator Shimizu:

Pursuant to Section 1903 of Chapter X of the Government Code of Guam,
transmitted herewith is a fiscal note on Bill No. 256 and waiver request
on Bill No. 325.

Should I be of any assistance, please contact my office.

Sincerely,

GIOVANNI T. SGAMBELLURI
Acting

Enclosures

cc: Sen. Carl T.C. Gutierrez
Chairperson, Committee on
Ways and Means

ATTACHMENT IV. - REPLY OF FISCAL NOTE REQUEST

* Na chilong i minalagota yan i guinahata *



Commonwealth Now!



BUREAU OF BUDGET & MANAGEMENT RESEARCH
OFFICE OF THE GOVERNOR, Post Office Box 2950, Agaña, Guam 96910



GIOVANNI T. SGAMBELLURI
Director

The Bureau requests that Bill Nos. 325 be granted a waiver pursuant to Public Law 12-229 for the following reason(s).

Bill No. 325 is an act to repeal sections 9900 through 9990.14 of Chapter XV of Title X of the Government Code of Guam in its entirety and to add a new Chapter XV to Title X of the Government Code relative to providing for prompt and effective resolution of medical malpractice claims.

The intent of the proposed legislation is administrative in nature and poses no fiscal impact on the General Fund. However, it should be noted that Bill No. 256 proposes to also repeal and reenact Chapter XV of Title X of the Government Code of Guam regarding the prompt and effective resolution of medical malpractice claims.


GIOVANNI T. SGAMBELLURI

"Na chlong i minalagota yan i guinahata"



May 17, 1991

Re: Bill No 325
An Act To Repeal PL13-115
And Add A New Chapter XV To
Title X Of The Government
Code Of Guam To Provide For
Prompt And Effective
Resolution Of Medical
Malpractice Claims -
Testimony of Keith W. Hunter

Chairman Shimizu and Honorable Committee Members:

My name is Keith W. Hunter and I am the Regional Vice President of the Honolulu Regional Office of the American Arbitration Association. My regional administrative responsibilities include the Territory of Guam, the entire South Pacific/Micronesian Region and the State of Hawaii. I am pleased and honored to appear before you today to lend my support for the passage and enactment of Bill No. 325.

BACKGROUND

The American Arbitration Association is the nation's leading advocate of arbitration, mediation, and other forms of alternative dispute resolution. A private, not-for-profit organization founded in 1926, the AAA administers and designs voluntary dispute settlement procedures through its 36 offices nationwide. In 1990 over 60,000 disputes were filed with the AAA for resolution through arbitration or mediation.

Recently the AAA established a permanent presence here in Guam through a formal link with the Guam Contractors Association. This alliance will alleviate the logistical and geographic limitations of having to communicate directly with our Honolulu office. It will also afford parties the ability to obtain necessary arbitration materials in a matter of days.

The AAA's caseloads are quite varied and cases are filed with the AAA tribunals through a variety of mechanisms. A vast majority of cases proceed through arbitration because parties include an arbitration clause in their contract or agreement which establishes arbitration as the mechanism through which any and all contractual disputes will be resolved. Other cases proceed to arbitration because disputants, after a dispute arises, agree to utilize arbitration in lieu of litigation. Over the last 20 years the American Arbitration Association has also been written directly into state and federal statutes as the administrative agency to whom all disputes will be referred that arise out of the particular statutory scheme. For example the AAA has been named in Hawaii's State "lemon law" program as the State Certified Arbitration Program and has been written in as the administrative agency to whom internal condominium disputes in Hawaii will be referred for resolution. The AAA is also included in the State of Michigan's Mandatory Medical Malpractice Legislation and

is included in a variety of state statutes which mandate arbitration in California to name just a few. Clearly the AAA enjoys a national reputation as an independent, non-partisan administrative agency in whom state and federal legislators place enormous responsibility and trust. We believe that we can serve the citizens and the legal and medical communities of the Territory of Guam in the capacity called for in Act 325.

THE PROBLEM

The medical malpractice problem, a dilemma that involves health care providers, the insurance industry, the legal profession, and the medical consumer, has reached a crisis proportion during the last two decades. Many insurance companies currently refuse to offer malpractice coverage or have raised the cost of premiums to prohibitive levels. It is my understanding that medical negligence insurance is currently not available in the Territory of Guam.

The public must bear in mind that this is not a private battle between health care providers and their insurers, but rather, that increased costs are inevitably passed on to the consumer in the form of higher medical fees and costs. Costs also increase as a result of "defensive medicine" practiced by physicians in an effort to avoid malpractice suits. Excessive testing and unnecessarily prolonged hospitalization can add significantly to the overall costs to the patient.

The increase in this type of litigation also has a detrimental effect on the judicial system and those who utilize it. Resolution of medical malpractice suits can take several years and patients truly deserving of compensation thus face long delays while doctors and medical institutions are forced to continue functioning despite pending lawsuits that could threaten their reputations.

MOVING TOWARD A SOLUTION

In response to this crisis, several legislation measures have been adopted by various states. Among them are ceilings on damages, restrictions on contingency fees, shortened statute of limitations, mandatory screening of malpractice claims and binding arbitration. Screening boards and mandatory arbitration have become increasingly popular and effective alternatives to litigation aimed at reducing delays, cutting legal expenditures, and diminishing the price of malpractice insurance.

Forty-eight states and the Territory of Guam have adopted general arbitration statutes and many states have included specific reference to the use of arbitration for medical malpractice disputes. It is important to note, at this juncture, that mandatory medical malpractice arbitration is not a replacement for malpractice insurance. It is, however, a more expedient and cost-effective forum which when used appropriately can significantly reduce the time

and expense normally encountered in malpractice litigation.

THE ROLE OF THE AAA

Act 325 calls for the administration of medical malpractice arbitration claims in the Territory of Guam through the American Arbitration Association. I appear before you today on behalf of the AAA to assure this honorable body that the AAA is prepared to undertake this administrative responsibility and is uniquely qualified to do so. As indicated earlier the AAA is the largest and oldest private dispute resolution agency in the United States with particular expertise in the administration of various malpractice arbitration statutes. As a national not-for-profit administrative agency the AAA has no direct ties to health care providers, patients, the legal community nor to any agency of the territorial government. This independence is absolutely critical to the disputants perception of independence, impartiality and objectivity in the tribunal through which they seek justice. Absent an appropriate appearance of neutrality and objectivity the users of the mandatory arbitration system are likely to exhibit mistrust of the arbitration process or avoid it altogether.

The AAA has promulgated the most widely used set of arbitration procedures in the United States - the Commercial Arbitration Rules. These rules are designed specifically to dove-tail with the arbitration statute to

provide a procedural framework for the arbitration process. The Commercial Arbitration Rules with some modification to the administrative fee schedule would be used in the administration of any and all disputes arising out of Act 325.

THE ARBITRATION PANEL

Act 325 provides for the arbitration panel to be made up of one attorney, one physician or health care professional, preferably but not necessarily from the respondent's medical speciality, and the third shall be a layperson who is neither a doctor, lawyer, or representative of a health care institution or insurance company. This panel composition is consistent with the structure of virtually all medical malpractice panels around the country and I believe would be appropriate here in Guam.

The AAA maintains a national panel of arbitrators which consists of over 60,000 attorneys, retired judges, doctors, stock brokers, contractors, engineers, business people and many others. Every member of the AAA's panel must meet certain criteria established by the AAA and must attend an intensive training seminar designed specifically to enhance his/her understanding of the arbitration process. AAA panelists must also adhere to the Code of Ethics for Arbitrators in Commercial Disputes which mandates complete disclosure of any potential bias or any relationship with any party to the arbitration which is.

likely to even create the appearance of bias or partiality.

In January of this year the AAA conducted an Arbitrator Training and Development seminar here in Guam which was attended by 65 professionals from a variety of fields. Over (30) thirty residents of Guam have gained acceptance to the AAA's panel and many more are currently applying. Additional training programs will be offered this year which will be geared specifically to attorneys and medical practitioners who will be serving under the protocols of Act 325.

The AAA is also capable of appointing arbitrators from outside of Guam in those instances where publicity about a particular case has reached such a level that obtaining a truly neutral and unbiased panelists becomes difficult or impossible.

BENEFITS OF ARBITRATION

There are a number of primary benefits of the arbitration process:

1. ~~Costs~~ - The overall cost of the arbitration process are almost always less than the cost of litigation.
2. ~~Time~~ - The average case filed with the AAA is resolved either through settlement or award of arbitrator within 110 days of filing.
3. Privacy - Arbitration proceedings are

generally not a matter of public record and the Arbitrators may determine who, other than the parties, may attend the hearings.

4. Finality/Enforceability - Although Act 325 provides for a trial de novo in cases where one or more parties is dissatisfied with the award, in my personal experiences based on substantial research it is indeed rare that a party will feel the need to utilize this post-arbitration mechanism, particularly in light of this sanctions that the court can impose if a party fails to substantially improve its arbitration decision. In all other cases arbitration will bring the dispute to a conclusion quickly and with less stress than litigation.
5. Expert Panelists - Arbitration assures parties that the triers-of-fact will possess expertise in the subject area of the dispute. Disputes can be resolved based on their merits by individuals who are familiar with the standard of care in the community rather than on emotional pleas for justice and compensation in cases where the standard of care has not been breached. Arbitrators tend to be quite rational and reasonable triers-of-fact who will examine the

contested issues closely. One recent medical malpractice report indicated that arbitrators found liability more often than juries did because jurors are often confused about what constitutes a malpractice, however, arbitrators generally do not award the huge sums of money that juries do.

6. Medical Malpractice Insurance - The enactment of a mandatory medical malpractice arbitration statute in Guam should send a strong signal to insurance providers that Guam has taken meaningful and constructive steps to establish an efficient, fair and cost-effective forum for managing medical malpractice costs.

A close look at the process and its operational facets together with the intent of Act 325 should yield the recognition that the drafters of this legislation have realized - something needs to be done to improve the current system and to address the obvious need for the availability of malpractice insurance. The legislative intent of Act 325 is to extend equity, justice and law beyond the formalistic parameters of the courtroom into the efficient and cost-effective realm of arbitration. Arbitration is not a panacea nor is it a cure all but it possesses obvious attributes and it can serve as the important first step toward managing the medical

malpractice situation in Guam.

Thank you very much for your patience and consideration.

I would be pleased to answer any questions or concerns you may have.

FHP[®]

HEALTH CARE

May 13, 1991

COPY

VIA HAND DELIVERY

The Honorable David L.G. Shimizu
Senator, Twenty-First Guam Legislature
2nd Floor, Quan's Building
324 West Soledad Avenue
Agana, Guam 96910

Re: Bill No. 325, An Act to Repeal Public Law 13-115
and to Add A New Chapter XV to Title X of the
Government Code of Guam to Provide for Prompt
and Effective Resolution of Medical Malpractice
Claims

Dear Senator Shimizu:

Thank you for this opportunity to submit written
testimony in regards to Bill No. 325. FHP supports mandatory
arbitration of medical malpractice claims and FHP supports Bill
325 if it can be amended prior to enactment.

As you probably know, FHP has a clause in all of its
contracts that allows either a patient or the health care
provider to submit a claim to mandatory arbitration, rather than
having the claim resolved in the Superior Court of Guam. FHP's
experience has been that mandatory arbitration of medical
malpractice claims is quicker, more efficient, less expensive
and more equitable to all parties concerned. It is no secret
that Guam's court system is presently overloaded with civil
cases and all of the indications are that it will take longer
and longer for civil cases in Guam's court system to go to
trial. The delay involved in filing a suit in Guam's court
system causes the attorneys' fees for both the patient and the
health care provider to be greatly increased in a suit in court
versus the costs incurred in mandatory arbitration. More
importantly, the inability of Guam's local physicians to obtain
medical malpractice insurance and the shortage of local

ATTACHMENT VI. - ED ENGLISH TESTIMONY

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physicians requires that the Guam Legislature take steps to limit the costs that local physicians must incur when defending against medical malpractice claims, while at the same time providing a fair system for the resolution of such claims.

Although FHP has always been in support of a mandatory medical malpractice act, and FHP has substantial experience in the arbitration of malpractice claims, FHP can only support Bill No. 325 if it is substantially amended. FHP's proposed amendments to Bill 325 are as follows:

1. American Arbitration Association.

Bill No. 325 requires a patient to submit his or her claim to the American Arbitration Association ("Association"). The Association then provides the parties with a list of proposed arbitrators and oversees the arbitration proceeding. FHP respectfully submits that the use of the Association is unnecessary and is prejudicial to the health care provider.

For the most part, parties to arbitration proceedings submit their claims to the Association in order to have some framework by which to conduct the arbitration proceeding. This frequently occurs in construction contract disputes. Bill 325, however, already provides a detailed framework that specifically sets forth the rights of the parties, the dates that the parties must file their claims and responses, the allowable discovery that can be conducted by each party, the manner in which the arbitration proceeding will be conducted, and the manner in which the decision will be rendered by the arbitrations. Inasmuch as Bill 325 already provides a detailed framework for the parties to follow in an arbitration proceeding, it is unnecessary for the parties to resort to the Association.

More importantly, FHP's experience has been that the arbitrators provided by the Association are generally not from Guam. For example, the nearest office of the Association is in Honolulu, Hawaii. When the Association's office in Honolulu, Hawaii, provides parties in Micronesia with a list of arbitrators, the vast majority of these prospective arbitrators tend to be from Hawaii or the mainland United States.

In addition, a large number of the proposed arbitrators from Hawaii that are attorneys tend to be attorneys that represent injured parties. In other words, many of the attorneys listed on the Association's proposed list of arbitrators tend to be the same attorneys that make their living

by suing doctors. Bill 325 will not benefit health care providers in Micronesia if the arbitrators are not from Guam and the arbitrators tend to represent the interests of injured parties against health care providers.

Rather than requiring patients and health care providers to select arbitrators from a list proposed by the Association, the patient and health care provider should each be allowed to select their own arbitrator, and then the two selected arbitrators can select a neutral arbitrator. This process has been followed for years in the arbitration proceedings to which FHP has been a party and there have never been any problems. This is also the process followed in most arbitration proceedings. When the parties are allowed to select their own arbitrators, they normally select arbitrators from Guam that are familiar with the norms and values of our community. This process is more preferable than requiring the patient and the health care provider to select their arbitrators from a list of unknown off-island individuals supplied by an office in Honolulu, Hawaii.

2. Method of Selecting Arbitrators.

As presently drafted, in addition to requiring the patient and health care provider to select their respective arbitrators from a list of unknown off-island individuals supplied by an office of the Association in Honolulu, Hawaii, Bill 325 also requires that the chairman of the arbitration panel be an attorney. Quite frankly, and with all due respect to the legal community, attorneys are the primary cause of the medical malpractice crisis that has necessitated the passage of a mandatory arbitration act. Why should the chairman of the arbitration panel be an attorney? To use an old adage, isn't this just placing the fox in the henhouse?

FHP has conducted arbitration proceedings in the past on many occasions when the chairman or neutral arbitrator has not been an attorney and there have not been any problems whatsoever. More often than not, the neutral arbitrator in a tripartite arbitration is not an attorney. The identification of the neutral arbitrator should be a mutual decision made between the two selected arbitrators that are appointed by the patient and the health care provider. The selected arbitrators should not have their hands tied and be compelled to identify an attorney as the neutral arbitrator.

3. Standard of Care.

Bill 325 provides that the standard of care shall be that "applicable in a civil action." Historically, the standard of care applied in any medical malpractice claim is the standard of care that should be exercised by a reasonable physician in the same field practicing medicine in the community where the event occurred. Bill 325 should be amended to specifically identify the historical test that has been used to define the standard of care, and the arbitrators should not be required to speculate as to what standard of care may or may not be applied in some unidentified "civil action."

4. Award of Arbitrators.

In courts of law and in all other arbitration proceedings to which FHP has ever been a party, the arbitrators have only been allowed to award monetary damages to a patient. The arbitrators have not been allowed to order a health care provider to provide care in the future or to perform other acts in the future such as arranging for hospitalization, etc. The reason for this is that it is difficult, if not impossible, to require a health care provider to "specifically perform" certain events years after an arbitrator panel or court proceeding has been concluded.

Bill 325 allows the arbitrators to order a health care provider to provide for hospitalization, medical care and rehabilitation procedures in the future. Any such order will be unmanageable and will simply result in protracted litigation and arguments between the parties that will go on for years and years. Rather than allowing the arbitrators to order the health care provider to specifically perform events in the future, Bill 325 should be amended to provide that the arbitrators can only award a monetary judgment. This will bring Bill 325 into conformance with the method of awarding relief that is followed in the Superior Court of Guam and is followed by all other arbitration panels of which FHP is aware.

There may also be constitutional problems with allowing the arbitrators to order health care providers to perform acts in the future such as hospitalization, medical or rehabilitation procedures. It will be difficult to specify what procedures will be required in the arbitration award and the award will then be subject to challenge for vagueness, lack of due process, etc.

The quagmire of problems that will arise should the arbitrators be allowed to order health care providers to perform medical care in the future can be avoided by simply granting to the arbitrators the same powers as the judges in the Superior Court of Guam. That power is limited to the award of a monetary judgment which can easily be administered and performed.

5. Trial De Novo.

The purpose of mandatory arbitration is to have the claim of a patient settled once and for all by a panel of arbitrators. The decision of the arbitrators should be final unless exceptional circumstances exist. Unfortunately, Bill 325 does not make the decision of the arbitrators final. After the arbitration decision is rendered, an aggrieved party can proceed to the Superior Court of Guam and have a trial de novo by a jury. This defeats the purpose of requiring arbitration.

The provision in Bill 325 penalizing a non-prevailing party after a trial de novo will not adequately protect the interests of the health care provider. A health care provider wants a claim against him or her submitted to mandatory arbitration in order to avoid the unnecessary embarrassment and excessive expense of defending claims in a public forum. Health care providers often settle frivolous claims in order to avoid embarrassment and expense. Bill 325, as written, will allow claimants to continue to threaten health care providers with the embarrassment and expense of a claim being litigated in a public forum. Health care providers, therefore, will continue to pay frivolous claims in order to avoid the embarrassment and expense of a public forum.

The standard practice in arbitration proceedings is to require that the decision of the arbitrators be final unless exceptional circumstances exist. Bill 325 should be amended to provide that the decision of the arbitrators is final unless there are grounds for vacating or modifying the award pursuant to the specified grounds that are contained in Bill 325.

6. The Right to Enter Into Private Arbitration.

While all patients should be required to submit claims against health care providers to binding arbitration, the Guam Legislature should not preempt the right of patients and health care providers to enter into private arbitration agreements. For example, a patient and a health care provider may decide

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that they want to submit their claim to the Association, or some other organization that conducts arbitration proceedings. Such a patient and health care provider should have the right to enter into private arbitration agreements.

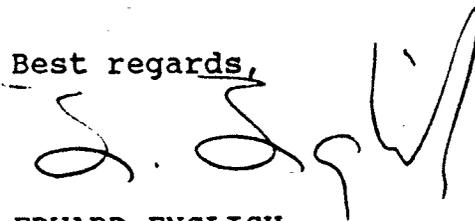
Bill 325 does not specifically allow patients and health care providers to enter into private arbitration agreements and does not specifically recognize the validity of such private arbitration agreements. Bill 325 should be amended to specifically allow patients and health care providers to enter into private arbitration agreements.

CONCLUSION

Thank you for allowing FHP to submit written testimony in regards to Bill 325. As presently stated, FHP strongly supports a mandatory arbitration act. Attached hereto is a proposed bill that contains all of the modifications proposed by FHP to Bill 325. The attached bill will provide a fair mechanism for the resolution of claims between patients and health care providers, and will also correct the deficiencies in Bill 325 that have been identified herein.

Please let me know if you need any additional information.

Best regards,



EDWARD ENGLISH
Regional Vice President
Asia-Pacific Region

EE:mac
Enclosure

cc: Guam Medical Society

C91369

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