

1 liability for trauma care; providing consumer safeguards
2 for attorney contingent fee arrangements; establishing
3 effective dates and providing for severability.

4 *Be it enacted by the Legislature of West Virginia:*

5 That article seven b, chapter fifty-five of the code of
6 West Virginia, one thousand nine hundred thirty-one, as amended,
7 be repealed and that a new article seven b of said chapter be
8 enacted in lieu thereof, to read as follows:

9 **CHAPTER 55. ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE.**

10 **ARTICLE 7B. MEDICAL PROFESSIONAL LIABILITY.**

11 **§55-7B-1. Legislative findings and declaration of purpose.**

12 The Legislature hereby finds and declares that the citizens of
13 this state are entitled to the best medical care and facilities
14 available and that health care providers offer an essential and
15 basic service which requires that the public policy of this
16 state encourage and facilitate the provision of such service to
17 our citizens;

18 That as in every human endeavor the possibility of injury or
19 death from negligent conduct commands that protection of the
20 public served by health care providers be recognized as an
21 important state interest;

22 That our system of litigation is an essential component of this
23 state's interest in providing adequate and reasonable

1 compensation to those ~~persons~~ patients who suffer from injury or
2 death as a result of professional negligence.

3 That liability insurance is a key part of our system of
4 litigation, affording compensation to the injured while
5 fulfilling the need and fairness of spreading the cost of the
6 risks of injury;

7 That a further important component of these protections is the
8 capacity and willingness of health care providers to monitor and
9 effectively control their professional competency, so as to
10 protect the public and insure to the extent possible the highest
11 quality of care;

12 That it is the duty and responsibility of the Legislature to
13 balance the rights of our individual citizens to adequate and
14 reasonable compensation with the broad public interest in the
15 provision of services by qualified health care providers and
16 health care facilities who can themselves obtain the protection
17 of reasonably priced and extensive liability coverage;

18 That in recent years, the cost of insurance coverage has risen
19 dramatically while the nature and extent of coverage has
20 diminished, leaving the health care providers, the health care
21 facilities and the injured without the full benefit of
22 professional liability insurance coverage; further the courts
23 have sought to expand the potential liability of health care

1 providers and health care facilities beyond the scope of
2 forseeability and the risks insured by permitting causes of
3 action for those who have no relationship to the providers and
4 facilities, which expansion is contrary to the public policy of
5 this state;

6 That many of the factors and reasons contributing to the
7 increased cost and diminished availability of professional
8 liability insurance arise from the historic inability of this
9 state to effectively and fairly regulate the insurance industry
10 so as to guarantee our citizens that rates are appropriate, that
11 purchasers of insurance coverage are not treated arbitrarily,
12 and that rates reflect the competency and experience of the
13 insured health care providers and health care facilities.
14 Further contributing factors include the expense of lengthy
15 litigation and the costs of defending nonmeritorious or de
16 minimus claims which increase the costs of litigation and
17 professional medical liability insurance.

18 That in the year two thousand two, the cost of such liability
19 insurance coverage has again risen dramatically especially when
20 the cost is compared with premiums charged in neighboring
21 states, and that the increasing unavailability of professional
22 liability coverage has resulted in the State providing
23 professional liability insurance coverage; and that the

1 unavailability and high costs of professional liability coverage
2 have resulted in the State's loss of physicians, which, together
3 with other costs and taxation incurred by health care providers
4 and health care facilities in this state, have created a
5 competitive disadvantage in this state compared with neighboring
6 states, in attracting and retaining quality physicians and other
7 health care providers.

8 The Legislature further finds that medical liability issues have
9 also reached critical proportions for the state's long term
10 health care facilities, as (1) medical liability insurance
11 premiums for nursing homes in West Virginia have increased
12 dramatically in the past five years; (2) the number of claims
13 per bed has increased significantly over that period; (3) the
14 cost to the state Medicaid program as a result of such higher
15 premiums has grown considerably in this period; (4) current
16 medical liability premium costs for some nursing home constitute
17 a significant percentage of the amount of coverage; (5) these
18 high costs are leading some facilities to consider dropping
19 medical liability insurance coverage altogether; and (6) the
20 medical liability insurance crisis for nursing homes may soon
21 result in a reduction of the number of beds available to
22 citizens in need of long term care.

1 Therefore, the purpose of this enactment is to provide for a
2 comprehensive resolution of the matters and factors which the
3 Legislature finds must be addressed to accomplish the goals set
4 forth above. In so doing, the Legislature has determined that
5 reforms in the common law and statutory rights of our citizens
6 to compensation for injury and death, in the regulation of rate
7 making and other practices by the liability insurance industry,
8 in the formation of a physician's mutual insurance company and
9 in the authority of medical licensing boards to effectively
10 regulate and discipline the health care providers under such
11 board must be enacted together as necessary and mutual
12 ingredients of the appropriate legislative response.

13 **§55-7B-2. Definitions.**

14 (a) "Collateral source" means: (1) The United States Social
15 Security Act, as amended; (2) any state or federal health,
16 sickness, accident, income-disability or workers' compensation
17 paid benefit, or other act designed to provide income
18 replacement, medical, or other benefits; (3) any accident,
19 health or sickness, income or wage replacement insurance, income
20 disability insurance, casualty or property insurance (including
21 automobile and homeowners' insurance), or any other insurance
22 except life insurance; (4) any contract or agreement of any
23 group, organization, partnership, or corporation to provide, pay

1 for, or reimburse the cost of medical, hospital, dental, or
2 other health care services or provide similar benefits; or (5)
3 any contractual or voluntary wage continuation plan provided by
4 an employer or otherwise, or any other system intended to
5 provide wages during a period of disability.

6 (b) "Collateral source payments" means money paid or payable
7 by collateral sources for losses or expenses, past and future,
8 including, but not limited to, property damage, wage loss,
9 medical costs, rehabilitation costs, services and other costs
10 incurred by or on behalf of a plaintiff for which that plaintiff
11 is claiming recovery through a tort action commenced in any of
12 the courts or administrative tribunals in this state.

13 ~~(a)~~ (c) "Health care" means any act or treatment performed or
14 furnished, or which should have been performed or furnished, by
15 any health care provider for, to or on behalf of a patient
16 during the patient's medical care, treatment or confinement.

17 ~~(b)~~ (d) "Health care facility" means any clinic, hospital,
18 nursing home, or extended care facility in and licensed by the
19 state of West Virginia and any state operated institution or
20 clinic providing health care.

21 ~~(c)~~ (e) "Health care provider" means a person, partnership,
22 corporation, professional limited liability company, facility or
23 institution licensed by, or certified in, this state or another

1 state, to provide health care or professional health care
2 services, including, but not limited to, a physician,
3 osteopathic physician, hospital, dentist, registered or licensed
4 practical nurse, optometrist, podiatrist, chiropractor, physical
5 therapist or psychologist, or an officer, employee or agent
6 thereof acting in the course and scope of such officer's,
7 employee's or agent's employment.

8 (f) "Medical injury" means injury or death to a patient arising
9 or resulting from the rendering or failure to render health
10 care.

11 ~~(d)~~ (g) "Medical professional liability" means any liability for
12 damages resulting from the death or injury of a ~~person~~ patient
13 for any tort or breach of contract based on health care services
14 rendered, or which should have been rendered, by a health care
15 provider or health care facility to a patient.

16 ~~(g)~~ (h) "Non-economic loss" means losses including but not
17 limited to pain, suffering, mental anguish and grief.

18 ~~(e)~~ (i) "Patient" means a natural person who receives or should
19 have received health care from a licensed health care provider
20 under a contract, expressed or implied.

21 ~~(f)~~ (j) "Representative" means the spouse, parent, guardian,
22 trustee, attorney or other legal agent of another.

1 ((k) "Traumatic injury" means any acute or condition which,
2 according to standardized criteria for triage, involves a
3 significant risk of death or the precipitation of complications
4 or disabilities.

5

6 **§55-7B-2a. Exclusive Remedy**

7 The cause of action for medical professional liability shall be
8 the exclusive remedy for any patient alleging injury resulting
9 from health care services rendered, or which should have been
10 rendered, by a health care provider or a health care facility to
11 a patient. No other provision of this Code or the common law of
12 West Virginia shall form the basis for a cause of action against
13 a health care provider or a health care facility by any person
14 or patient alleging injury resulting from health care services
15 rendered, or which should have been rendered, by a health care
16 provider or health care facility to a patient.

17

18 **§55-7B-3. Elements of Proof.**

19 The following are necessary elements of proof that an injury
20 or death resulted from the failure of a health care provider to
21 follow the accepted standard of care:

22 (a) The health care provider failed to exercise that degree
23 of care, skill and learning required or expected of a

1 reasonable, prudent health care provider in the profession or
2 class to which the health care provider belongs acting in the
3 same or similar circumstances; and

4 (b) Such failure was a the proximate cause of the injury or
5 death of the patient.

6 (c) In order to recover damages against a health care
7 provider or health care facility under a theory that treatment
8 rendered or which should have been rendered deprived the patient
9 of a chance of recovery, or increased the risk of harm to the
10 patient, the patient must prove by clear and convincing evidence
11 that the treatment rendered or which should have been rendered
12 would have resulted in a substantial probability, meaning a
13 greater than fifty percent chance, the patient would have had an
14 improved recovery or would have survived.

15

16 **§55-7B-6. Prerequisites for filing an action against a health**
17 **care provider; procedures; sanctions.**

18 (a) Notwithstanding any other provision of this code, no
19 person may file a medical professional liability action against
20 any health care provider without complying with the provisions
21 of this section.

22 (b) At least thirty days prior to the filing of a medical
23 professional liability action against a health care provider,

1 the claimant shall serve ~~by certified mail, return receipt~~
2 ~~requested,~~ a notice of claim. on each health care provider who
3 claimant will join in litigation. The notice of claim shall
4 include a statement of the theory or theories of liability upon
5 which a cause of action may be based, and a list of all health
6 care providers and health care facilities to whom notices of
7 claim are being sent, together with a screening certificate of
8 merit. The certificate of merit shall be executed under oath by
9 a health care provider qualified as an expert under the West
10 Virginia rules of evidence and shall state with particularity:
11 (1) the expert's familiarity with the applicable standard of
12 care in issue; (2) the expert's qualifications; (3) the expert's
13 opinion as to how the applicable standard of care was breached;
14 and (4) the expert's opinion as to how the breach of the
15 applicable standard of care resulted in injury or death. A
16 separate screening certificate of merit must be provided for
17 each health care provider against whom a claim is asserted. The
18 person signing the screening certificate shall have no financial
19 interest in the underlying claim, but may participate as an
20 expert witness in any judicial proceeding. Nothing in this
21 subsection may be construed to limit the application of rule
22 fifteen of the rules of civil procedure.

1 (c) Notwithstanding any provision of this code, if a
2 claimant or if represented by counsel, the claimant's counsel,
3 believes that no screening certificate of merit is necessary
4 because the cause of action is based upon a well-established
5 legal theory of liability which does not require expert
6 testimony supporting a breach of the applicable standard of
7 care, the claimant or if represented by counsel, the claimant's
8 counsel, shall file a statement specifically setting forth the
9 basis of the alleged liability of the health care provider in
10 lieu of a screening certificate of merit.

11 (d) If a claimant or his or her counsel has insufficient
12 time to obtain a screening certificate of merit prior to the
13 expiration of the applicable statute of limitations, the
14 claimant shall comply with the provisions of subsection (b) of
15 this section except that the claimant or his or her counsel
16 shall furnish the health care provider with a statement of
17 intent to provide a screening certificate of merit within sixty
18 days of the date the health care provider receives the notice of
19 claim.

20 (e) Any health care provider who ~~receives~~ is served a notice of
21 claim pursuant to the provisions of this section ~~must~~ may
22 respond, in writing, to the claimant within thirty days of
23 receipt of the claim or within thirty days of receipt of the

1 certificate of merit if the claimant is proceeding pursuant to
2 the provisions of subsection (d) of this section. The response
3 may state that the health care provider has a bona fide defense
4 and the name of the health care provider's counsel, if any.

5 (f) Upon receipt of the notice of claim or of the screening
6 certificate, if the claimant is proceeding pursuant to the
7 provisions of subsection (d) of this section, the health care
8 provider is entitled to pre-litigation mediation before a
9 qualified mediator upon written demand to the claimant. Service
10 of the notice of claim must be made in accord with the West
11 Virginia Rules of Civil Procedure, Rule 4.

12 (g) If the health care provider demands mediation pursuant
13 to the provisions of subsection (f) of this section, the
14 mediation shall be concluded within forty-five days of the date
15 of the written demand. The mediation shall otherwise be
16 conducted pursuant to rule 25 of the trial court rules, unless
17 portions of the rule are clearly not applicable to a mediation
18 conducted prior to the filing of a complaint or unless the
19 supreme court of appeals promulgates rules governing mediation
20 prior to the filing of a complaint. If mediation is conducted,
21 the claimant may depose the health care provider before
22 mediation or take the testimony of the health care provider
23 during the mediation.

1 (h) ~~The failure of a health care provider to timely respond~~
2 ~~to a notice of claim, in the absence of good cause shown,~~
3 ~~constitutes a waiver of the right to request pre-litigation~~
4 ~~mediation.~~ Except as otherwise provided in this subsection, any
5 statute of limitations applicable to a cause of action against a
6 health care provider upon whom notice was served for alleged
7 medical professional liability shall be tolled from the date of
8 ~~mailing~~ service of a notice of claim to thirty days following
9 receipt of a response to the notice of claim, thirty days from
10 the date a response to the notice of claim would be due, or
11 thirty days from the receipt by the claimant of written notice
12 from the mediator that the mediation has not resulted in a
13 settlement of the alleged claim and that mediation is concluded,
14 whichever last occurs. If a claimant has sent a notice of claim
15 relating to any injury or death to more than one health care
16 provider, any one of whom has demanded mediation, then the
17 statute of limitations shall be tolled with respect to, and only
18 with respect to, those health care providers to whom the
19 claimant sent a notice of claim to thirty days from the receipt
20 of the claimant of written notice from the mediator that the
21 mediation has not resulted in a settlement of the alleged claim
22 and that mediation is concluded.

1 (i) Notwithstanding any other provision of this code, a
2 notice of claim, a health care provider's response to any notice
3 claim, a certificate of merit and the results of any mediation
4 conducted pursuant to the provisions of this section are
5 confidential and are not admissible as evidence in any court
6 proceeding unless the court, upon hearing, determines that
7 failure to disclose the contents would cause a miscarriage of
8 justice.

9

10 §55-7B-7. Testimony of expert witness on standard of care.

11 (a) The applicable standard of care and a defendant's
12 failure to meet ~~said~~ the standard, if at issue, shall be
13 established in medical professional liability cases by the
14 plaintiff by testimony of one or more knowledgeable, competent
15 expert witnesses if required by the court. ~~Such~~ The expert
16 testimony may only be admitted in evidence if the foundation,
17 therefor, is first laid establishing that: ~~(a)~~ (1) The opinion
18 is actually held by the expert witness; ~~(b)~~ (2) the opinion can
19 be testified to with reasonable medical probability; ~~(c)~~ (3)
20 ~~such~~ the expert witness possesses professional knowledge and
21 expertise coupled with knowledge of the applicable standard of
22 care to which his or her expert opinion testimony is addressed;
23 ~~(d)~~ (4) ~~such~~ the expert maintains a current license to practice,

1 with the appropriate licensing authority of any state, in the
2 same or substantially similar medical field as the defendant
3 health care provider; provided that the expert's license has not
4 been revoked or suspended in the past 365 days in any state; ~~in~~
5 ~~one of the states of the United States; and (e) (5) such the~~
6 expert is engaged or qualified in the same or substantially
7 similar medical field as the defendant health care provider; and
8 (6) the expert devotes three fourths of his or her professional
9 time annually to the active clinical practice in his or her
10 medical field of specialty or to teaching in his or her medical
11 field in an accredited university.

12 (b) Nothing contained in this section may be construed to
13 limit a trial court's discretion in determining the competency
14 or lack of competency on a ground not specifically enumerated
15 herein.

16

17 **§55-7B-8. Limit on liability for noneconomic loss.**

18 In any medical professional liability action brought against
19 a health care provider, the maximum amount recoverable as
20 damages for noneconomic loss shall not exceed one million
21 dollars- ; provided that for actions filed during calendar year
22 two thousand three, the maximum amount recoverable as damages
23 for noneconomic loss shall not exceed two hundred fifty thousand

1 dollars, and provided further, that the maximum amount of two
2 hundred fifty thousand dollars recoverable for noneconomic loss
3 shall then increase by ten thousand dollars per year beginning
4 in calendar year two thousand four.

5

6 **§55-7B-9. Joint and several liability.**

7 (a) In the trial of a medical professional liability action
8 against a health care provider involving multiple defendants,
9 the jury shall be required to report its findings to the court
10 on a form provided by the court which contains each of the
11 possible verdicts as determined by the court.

12 (b) In every medical professional liability action, the
13 court shall make findings as to the total dollar amount awarded
14 as damages to each plaintiff. ~~The court shall enter judgment of~~
15 ~~joint and several liability against every defendant which bears~~
16 ~~twenty-five percent or more of the negligence attributable to~~
17 ~~all defendants.~~ The court may not enter joint and several
18 liability against any defendant. The court shall enter judgment
19 of several, but not joint, liability against and among ~~all~~
20 ~~defendants which bear less than twenty-five percent of the~~
21 ~~negligence attributable to all defendants~~ in accordance with the
22 percentage of negligence attributable to each defendant. To
23 determine the amount of judgment to be entered against each

1 defendant, the court, with regard to each defendant, shall
2 multiply the total amount of damages recoverable by the
3 plaintiff by the percentage of each defendant's fault and that
4 amount shall be the maximum recoverable against said defendant.

5 ~~(c) Each defendant against whom a judgement of joint and~~
6 ~~several liability is entered in a medical professional liability~~
7 ~~action pursuant to subsection (b) of this section is liable to~~
8 ~~each plaintiff for all or any part of the total dollar amount~~
9 ~~awarded regardless of the percentage of negligence attributable~~
10 ~~to him. A right of contribution exists in favor of each~~
11 ~~defendant who has paid to a plaintiff more than the percentage~~
12 ~~of the total dollar amount awarded attributable to him. The~~
13 ~~total amount of recovery for contribution is limited to the~~
14 ~~amount paid by the defendant to a plaintiff in excess of the~~
15 ~~percentage of the total dollar amount awarded attributable to~~
16 ~~him relative to the percentage of negligence attributable to~~
17 ~~him. No right of contribution exists against any defendant who~~
18 ~~entered in to a good faith settlement with the plaintiff prior~~
19 ~~to the jury's report of its findings to the court or the court's~~
20 ~~findings as to the total dollar amount awarded as to damages.~~

21 (c) In assessing percentages of fault, the trier of fact shall
22 consider the fault of all persons who contributed to the alleged
23 damages regardless of whether such person was or could have been

1 named as a party to the suit. Fault of a nonparty may be
2 considered if the plaintiff entered into a settlement agreement
3 with the nonparty or if a defendant party gives notice no later
4 than sixty days before the date of trial that a nonparty was
5 wholly or partially at fault. The notice shall be given by
6 filing a pleading or discovery response in the action
7 designating such nonparty and setting forth such nonparty's name
8 and last-known address, or the best identification of such
9 nonparty which is possible under the circumstances, together
10 with a brief statement of the basis for believing such nonparty
11 to be at fault. In all instances where a nonparty is assessed a
12 percentage of fault, any recovery by a plaintiff shall be
13 reduced in proportion to the percentage of fault chargeable to
14 such nonparty. Where a plaintiff has settled with a party or
15 nonparty before verdict, that plaintiff's recovery will be
16 reduced by the amount of the settlement or in proportion to the
17 percentage of fault assigned to the settling party or nonparty,
18 whichever is greater. The plaintiff shall promptly and fully
19 inform all other persons against whom liability is asserted of
20 the terms of any such settlement.

21 ~~(d) Where a right of contribution exists in a medical~~
22 ~~professional liability action pursuant to subsection (c) of this~~
23 ~~section, the findings of the court or jury as to the percentage~~

1 ~~of negligence and liability of the several defendants to the~~
2 ~~plaintiff shall be binding among such defendants as determining~~
3 ~~their rights of contribution.~~

4 (d) Nothing in this article is meant to eliminate or diminish
5 any defenses or immunities which exist as of the effective date
6 of this article, except as expressly noted herein.

7 (e) Nothing in this article is meant to preclude a person from
8 being held responsible for the portion of comparative fault
9 assessed against another person who is acting as an agent or
10 servant of such person, or if the fault of the other person is
11 otherwise imputable or attributable to such person.

12 (f) Assessments of percentages of fault for nonparties are used
13 only as a vehicle for accurately determining the fault of named
14 parties. Where fault is assessed against nonparties, findings
15 of such fault shall not subject any nonparty to liability in
16 that or any other action, or be introduced as evidence of
17 liability or for any other purpose in any other action.

18 (g) In all actions involving fault of more than one person,
19 unless otherwise agreed by all parties to the action, the court
20 shall instruct the jury to answer special interrogatories or, if
21 there is no jury, shall make findings, indicating the percentage
22 of the total fault that is allocated to each party and nonparty
23 pursuant to the provisions of this article. For this purpose,

1 the court may determine that two or more persons are to be
2 treated as a single person.

3
4 §55-7B-10. Reduction in compensatory damages for collateral
5 sources payments.

6 (a) Notwithstanding any other provision of this code to
7 the contrary, in any medical professional liability action in
8 which a plaintiff seeks recovery for expenses for medical care,
9 rehabilitation services, loss of earnings, loss of earning
10 capacity or other economic losses, and in which liability is
11 admitted or is determined by the trier of fact and damages are
12 awarded, evidence to establish that the expenses or losses were
13 paid or are payable, in whole or in part, by a collateral source
14 shall be admissible to the court in which the action was brought
15 after a verdict for the plaintiff and before a judgment is
16 entered on the verdict.

17 (b) The court shall determine the amount of the plaintiff's
18 expenses or losses that have been paid or are payable by a
19 collateral source. There shall be no reduction for collateral
20 sources for which a subrogation or reimbursement right has been
21 perfected. The total amount of the collateral sources
22 determined by the court shall then be offset or reduced by a sum

1 equal to the premiums or portion of premiums paid for the
2 particular benefit by the plaintiff or the plaintiff's family.

3 (c) If the court determines that all or part of the
4 plaintiff's expenses or losses have been paid or are payable by
5 a collateral source, the court shall reduce that portion of the
6 judgment that represents damages paid or payable by a collateral
7 source and as determined pursuant to subsection (b) of this
8 section. Any reduction made by the court shall not exceed the
9 amount of the judgment for economic loss or that portion of the
10 verdict that represents damages paid or payable by a collateral
11 source.

12 (d) Benefits from a collateral source shall not be considered
13 payable or receivable unless the court makes a determination
14 that there is a previously existing contractual or statutory
15 obligation on the part of the collateral source to pay the
16 benefits.

17 (e) Notwithstanding any other provision of this Code to the
18 contrary, in any medical professional liability action, within
19 ten days after a verdict for the plaintiff, the plaintiff's
20 attorney shall send notice of the verdict by registered mail to
21 all persons entitled by contract to a lien against the proceeds
22 of the plaintiff's recovery. If a contractual lien holder does
23 not exercise the lien holder's right of subrogation within

1 twenty days after receipt of the notice of the verdict, the lien
2 holder shall lose the right of subrogation. This subsection
3 applies only to contracts executed or renewed on or after the
4 first day of July, two thousand three.

5 (f) A provider of collateral sources that has a right of
6 subrogation or reimbursement that has complied with the
7 requirements of this section shall have a right of reimbursement
8 from a claimant to whom it has provided collateral sources if
9 such claimant has recovered all or part of such collateral
10 sources from a tortfeasor. The provider's right of
11 reimbursement shall be limited to the actual amount of
12 collateral sources paid to the claimant and recovered from a
13 tortfeasor, minus the provider's pro rata share of costs and
14 attorney's fees incurred by the plaintiff. In determining the
15 provider's pro rata share of costs and attorney's fees, the
16 provider shall have deducted from its recovery a percentage
17 amount equal to the percentage of the judgment or settlement
18 which is for costs and attorney's fees.

19 (g) Reimbursement of a collateral source provider pursuant to
20 this section shall satisfy such collateral source provider's
21 right of subrogation or reimbursement. The provider shall have
22 no right of subrogation or reimbursement for collateral sources
23 payments made after the date of waiver, settlement or judgment.

1 A collateral source provider claiming a right of subrogation or
2 reimbursement under this section shall cooperate with the
3 plaintiff as is reasonably necessary to determine the nature and
4 extent of the subrogation claim. The failure of the provider to
5 cooperate may be taken into account by the court in determining
6 the right to or the amount of the reimbursement asserted.

7 (h) In the event that the fees for legal services provided to
8 the plaintiff are based on a percentage of the amount of money
9 awarded to the plaintiff, such percentage shall be based on the
10 net amount of the award as reduced by the Court pursuant to this
11 Section. Reasonable attorney's fees recovered from lien holders
12 or subrogors shall be awarded by the Court.

13

14 §55-7B-11. Periodic payment of damages.

15 (a) In a medical professional liability action, the trier
16 of fact shall make a determination with separate findings for
17 each claimant specifying the amount of each of the following:

18 (1) Past damages for:

19 (i) medical and other related expenses in a lump sum;

20 (ii) loss of earnings in a lump sum; and

21 (iii) noneconomic loss in a lump sum.

22 (2) Future damages for:

23 (i) medical and other related expenses by year;

1 (ii) loss of earnings or earning capacity in a lump sum; and

2 (iii) noneconomic loss in a lump sum.

3 (b) Except for future medical and other related expenses
4 totaling less than one hundred thousand dollars for a single
5 claimant as provided in sub-section (h) of this section, future
6 damages for medical and other related expenses shall be paid as
7 periodic payments after reduction to reflect payment of the
8 proportionate share of counsel fees and costs based upon the
9 present value of the future damages awarded pursuant to this
10 subsection. The trier of fact may vary the amount of periodic
11 payments for future damages for medical and other related
12 expenses from year to year for the expected life of the claimant
13 to account for different annual expenditure requirements,
14 including the immediate needs of the claimant. The trier of
15 fact may also provide for purchase and replacement of medically
16 necessary equipment in the years that expenditures will be
17 required.

18 (c) The trier of fact may incorporate into periodic
19 payment schedules any future medical expense award adjustments
20 to account for reasonably anticipated inflation and medical care
21 improvements as presented by competent evidence.

22 (d) Future damages for medical and other related expenses
23 shall be paid in the years that the trier of fact finds they

1 will accrue. Unless the court orders or approves a different
2 schedule for payment, the annual amounts due must be paid in
3 equal quarterly installments, rounded to the nearest dollar.
4 Each installment is due and payable on the first day of the
5 month in which it accrues.

6 (e) Interest does not accrue on a periodic payment before
7 payment is due. If the payment is not made on or before the due
8 date, the legal rate of interest accrues as of that date.

9 (f) Liability to a claimant for periodic payments not yet
10 due for medical and other related expenses terminates upon the
11 claimant's death.

12 (g) Each party liable for all or a portion of the judgment
13 shall provide funding for the awarded periodic payments,
14 separately or together with one or more others, by means of an
15 annuity contract, trust or other qualified funding plan, which
16 is approved by the court. The state insurance commissioner
17 shall annually publish a list of insurers designated by the
18 commissioner as qualified to participate in the funding of
19 periodic payment judgments.

20 (h) Future damages for medical and other related expenses
21 shall not be awarded in periodic payments if the claimant
22 objects at least one hundred days prior to trial and stipulates
23 that the total amount of the future damages for medical and

1 other related expenses, without reduction to present value, does
2 not exceed \$100,000.

3 (i) Effect of full funding.--If full funding of an award
4 pursuant to this section has been provided, the judgment is
5 discharged and any outstanding liens as a result of the judgment
6 are released.

7 (j) Retained jurisdiction.--The court which enters
8 judgment for periodic payments shall retain jurisdiction to
9 enforce the judgment and to resolve related disputes.

10

11 **55-7B-12. Limit on liability for trauma care.**

12 (a) Any health care facility; employee or agent of a health care
13 facility who renders care or assistance to patients; health care
14 provider who renders care or assistance in a health care
15 facility, whether or not the care or assistance was rendered
16 gratuitously or for a fee; or resident physician or dentist,
17 intern, fellow or medical student or other person enrolled in a
18 program of undergraduate or graduate medical education; that in
19 good faith renders care or assistance necessitated by a
20 traumatic injury demanding immediate medical attention, for
21 which the patient enters the health care facility, may not be
22 held liable for more than five hundred thousand in civil
23 damages, exclusive of interest, computed from the date of

1 judgment, to or for the benefit of any claimant arising out of
2 any act or omission in rendering that care or assistance if the
3 care or assistance is rendered in good faith and in a manner not
4 amounting to reckless, willful or wanton conduct.

5 (b) The limitation on liability provided pursuant to subsection
6 (a) above shall not apply to any act or omission in rendering
7 care or assistance for any medical condition that is unrelated
8 to the original traumatic injury; provided, however, that in any
9 action for medical professional liability based upon care or
10 assistance rendered pursuant to subsection (a), there shall be a
11 rebuttable presumption that any medical condition which arises
12 during follow-up care of the patient was related to the original
13 traumatic injury and the limitation on liability provided by
14 subsection (a) applies to that medical condition.

15

16 **§55-7B-13 Contingent fee arrangement.**

17 (a) An attorney shall not contract for or collect a contingency
18 fee for representing any person seeking damages in connection
19 with an action for injury or damage against a health care
20 provider or health care facility based upon alleged medical
21 professional liability in excess of the following limits: (1)
22 Forty percent of the first fifty thousand dollars recovered.

23 (2) Thirty-three and one-third percent of the next fifty

1 thousand dollars (\$50,000) recovered. (3) Twenty-five percent
2 of the next five hundred thousand dollars (\$500,000) recovered.
3 (4) Fifteen percent of any amount on which the recovery exceeds
4 six hundred thousand dollars (\$600,000). The limitations shall
5 apply regardless of whether the recovery is by settlement,
6 arbitration, or judgment, or whether the person for whom the
7 recovery is made is a responsible adult, an infant, or a person
8 of unsound mind.

9 (b) If periodic payments are awarded to the plaintiff pursuant
10 to section eleven of this article, the court shall place a total
11 value on these payments based upon the projected life expectancy
12 of the plaintiff and include this amount in computing the total
13 award from which attorney's fees are calculated under this
14 section.

15 (c) For purposes of this section: (1) "Recovered" means the
16 net sum recovered after deducting any disbursements or costs
17 incurred in connection with prosecution or settlement of the
18 claim and costs of medical care incurred by the plaintiff. The
19 attorney's office overhead costs or charges are not deductible
20 disbursements or costs for such purpose.

21 (d) An attorney who contracts to represent a client on a
22 contingency fee basis shall, at the time the contract is entered
23 into, provide a duplicate copy of the contract, signed by both

1 the attorney and the client, or the client's guardian or
2 representative, to the plaintiff, or to the client's guardian or
3 representative. The contract shall be in writing and shall
4 include, but is not limited to, all of the following: (1) A
5 statement of the contingency fee rate that the client and
6 attorney have agreed upon. (2) A statement as to how
7 disbursements and costs incurred in connection with the
8 prosecution or settlement of the claim will affect the
9 contingency fee and the client's recovery. (3) A statement as
10 to what extent, if any, the client could be required to pay any
11 compensation to the attorney for related matters that arise out
12 of their relationship not covered by their contingency fee
13 contract. This may include any amounts collected for the
14 plaintiff by the attorney. (4) A statement that the fee is not
15 set by law but is negotiable between attorney and client. (5) A
16 statement that the rates set forth in this section are the
17 maximum limits for the contingency fee agreement, and that the
18 attorney and client may negotiate a lower rate.

19 (e) Failure to comply with any provision of this section
20 renders the agreement voidable at the option of the plaintiff,
21 and the attorney shall thereupon be entitled to collect a
22 reasonable fee.

1 (f) This section shall not apply to contingency fee contracts
2 for the recovery of workers' compensation benefits.

3 This section shall become operative **ninety days from passage**.

4

5 ~~§55-7B-10~~ **14. Effective Date; applicability of provisions.**

6 (a) The provisions of House Bill 149, enacted during the
7 first extraordinary session of the Legislature, 1986, shall be
8 effective at the same time that the provisions of Enrolled
9 Senate Bill 714, enacted during the regular session, 1986,
10 become effective, and the provisions of said House Bill 149
11 shall be deemed to amend the provisions of Enrolled Senate Bill
12 714. The provisions of this article shall not apply to injuries
13 which occur before the effective date of this said Enrolled
14 Senate Bill 714.

15 (b) The amendments to this article as provided in House
16 Bill 601, enacted during the sixth extraordinary session of the
17 Legislature, two thousand one, apply to all causes of action
18 alleging medical professional liability which are filed on or
19 after the first day of March, two thousand two.

20 (c) The amendment to this article as provided in **(House**
21 **Bill/Senate Bill ?)**, enacted during the **special/regular** session
22 of the Legislature, two thousand **two/three**, apply to all causes
23 of action alleging medical professional liability which are

1 filed on or after the first day of [REDACTED], two thousand
2 two/three.

3

4 **§55-7B-~~11~~ 15. Severability**

5 (a) If any provision of this article as enacted during the
6 first extraordinary session of the Legislature, 1986, in House
7 Bill 149, or as enacted during the regular session of the
8 Legislature, 1986, in Senate Bill 714, or the application
9 thereof to any person or circumstance is held invalid, such
10 invalidity shall not affect other provisions or applications of
11 this article, and to this end, the provisions of this article
12 are declared to be severable.

13 (b) If any provision of the amendments to section five of
14 this article, any provision of new section six-d of this article
15 or any provision of the amendments to section eleven, article
16 six, chapter fifty-six of this code as provided in House Bill
17 601, enacted during the sixth extraordinary session of the
18 Legislature, two thousand one, is held invalid, or the
19 application thereof to any person is held invalid, then,
20 notwithstanding any other provision of law, every other
21 provision of said House Bill 601 shall be deemed invalid and of
22 no further force and effect.

1 (c) If any provision of the amendments to sections six or
2 ten of this article or any provision of new sections six-a, six-
3 b or six-c of this article as provided in House Bill 601,
4 enacted during the sixth extraordinary session of the
5 Legislature, two thousand one, is held invalid, such invalidity
6 shall not affect other provisions or applications of this
7 article, and to this end, such provisions are deemed severable.

8 (d) If any provision of the amendments to sections [REDACTED]
9 of this article or any provision of new sections [REDACTED]
10 of this article as provided in [REDACTED] Bill No. [REDACTED], enacted
11 during the special/regular session of the Legislature, two
12 thousand two/three, is held invalid, such invalidity shall not
13 affect other provisions or applications of this article, and to
14 this end, such provisions are deemed severable.

15
16 Note: The purpose of this bill is to maintain and stabilize the
17 health care delivery system in this state. The bill: (1) Adds
18 an additional requirement for admissibility of testimony of an
19 expert witness on the standard of care by requiring that such
20 testimony may only be by an appropriately licensed expert who
21 either devotes three fourths of his or her professional time to
22 the clinical practice of medicine or teaches in his or her field
23 in an accredited university; (2) limits the liability for non-

1 economic loss to \$250,000; (3) eliminates joint, but not
2 several, liability among multiple defendants in actions for
3 medical professional liability; (4) allows for reduction in
4 judgments for compensatory damages for certain collateral source
5 payments; (5) provides for periodic payments for future damages
6 awards; (6) limits liability for trauma care; and (7) places
7 consumer safeguards on attorney contingent fee arrangements.

8

9 Strike-throughs indicate language that would be stricken
10 from the present law, and underscoring indicates new language
11 that would be added.

12

13 Sections **XXX** and **XXX** are new; therefore, strike-throughs and
14 underscoring have been omitted.

15