FIRST REGULAR SESSION

[PERFECTED]

HOUSE COMMITTEE SUBSTITUTE FOR

HOUSE BILL NO. 394

93RD GENERAL ASSEMBLY

Reported from the Committee on Insurance Policy March 10, 2005 with recommendation that House Committee Substitute for House Bill No. 394 Do Pass. Referred to the Committee on Rules pursuant to Rule 25(26)(f).

Reported from the Committee on Rules March 14, 2005 with recommendation that House Committee Substitute for House Bill No. 394 Do Pass with no time limit for debate.

Taken up for Perfection March 30, 2005. House Committee Substitute for House Bill No. 394 ordered Perfected and printed, as amended.

STEPHEN S. DAVIS, Chief Clerk

1301L.05P

AN ACT

To repeal sections 383.010, 383.035, 383.079, 383.105, 383.160, 383.165, and 538.230, RSMo, and to enact in lieu thereof twenty-three new sections relating to insurance for health care providers in Missouri.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 383.010, 383.035, 383.079, 383.105, 383.160, 383.165, and 538.230, RSMo, are repealed and twenty-three new sections enacted in lieu thereof, to be known as sections 383.010, 383.035, 383.079, 383.105, 383.112, 383.160, 383.165, 383.400, 383.401, 383.402, 383.403, 383.404, 383.405, 383.406, 383.407, 383.408, 383.409, 383.410, 383.412, 383.425, 383.430, 383.435, and 538.230, to read as follows:

383.010. 1. Notwithstanding any direct or implied prohibitions in chapter 375, 377, or 379, RSMo, any three or more persons, residents of this state, being licensed under the provisions of chapter 330, 331, 332, 334, 335, 336, 338 or 339, RSMo, or under rule 8 of the supreme court of Missouri or architects licensed pursuant to chapter 327, RSMo, may, as provided in sections 383.010 to 383.040, form a business entity for the purpose of providing malpractice insurance or indemnification for such persons upon the assessment plan, and upon compliance with section 379.260, RSMo, liability and automobile insurance as defined in

EXPLANATION — Matter enclosed in bold-faced brackets **[**thus**]** in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

subdivisions (1) and (3) of section 379.230, RSMo, may be provided upon the assessment plan to those persons licensed pursuant to chapter 197, RSMo, and for whom medical malpractice insurance is provided under this section, except that automobile insurance shall be provided only for ambulances as defined in section 190.100, RSMo. Hospitals, public or private, whether incorporated or not, as defined in chapter 197, RSMo, if licensed by the state of Missouri, professional corporations formed under the provisions of chapter 356, RSMo, for the practice of law and corporations, copartnerships or associations licensed under the provisions of chapter 339, RSMo, may also become members of any such entity. The term "persons" as used in sections 383.010 to 383.040 includes such hospitals, professional corporations and real estate business entities.

2. Anything in this section to the contrary notwithstanding, any persons duly licensed under the provisions of the laws of any other state who, if licensed under any similar provisions of the laws of this state, would be eligible to become members and insureds of an entity created under the authority of this section, may become members and insureds of such an entity, irrespective of whether such persons are residents of this state; provided, however, that any such persons must be employed by, or be a partner, shareholder or member of, a professional corporation, corporation, copartnership or association insured by or to be insured by such an entity.

3. **[**Notwithstanding any provision of law which might be construed to the contrary, sections 379.882 and 379.888, RSMo, defining "commercial casualty insurance", shall not include professional malpractice insurance policies issued by any insurer in this state.**] Insurers writing professional malpractice insurance shall be subject to the provisions of section 379.321, RSMo; provided, however, that insurers writing medical malpractice insurance shall also be subject to the provisions of sections 383.400 to 383.412.**

383.035. 1. Any association licensed pursuant to the provisions of sections 383.010 to 383.040 shall be subject to the provisions of the following provisions of the revised statutes of Missouri:

(1) Sections 374.010, 374.040, 374.046, 374.110, 374.115, 374.122, 374.170, 374.210, 374.215, 374.216, 374.230, 374.240, 374.250 and 374.280, RSMo, relating to the general authority of the director of the department of insurance;

(2) Sections 375.022, 375.031, 375.033, 375.035, 375.037 and 375.039, RSMo, relating to dealings with licensed agents and brokers;

(3) Sections 375.041 and 379.105, RSMo, relating to annual statements;

(4) Section 375.163, RSMo, relating to the competence of managing officers;

(5) Section 375.246, RSMo, relating to reinsurance requirements, except that no association shall be required to maintain reinsurance, and for insurance issued to members who

joined the association on or before January 1, 1993, an association shall be allowed credit, as an asset or as a deduction from liability, for reinsurance which is payable to the ceding association's insured by the assuming insurer on the basis of the liability of the ceding association under contracts reinsured without diminution because of the insolvency of the ceding association;

(6) Section 375.390, RSMo, relating to the use of funds by officers for private gain;

(7) Section 375.445, RSMo, relating to insurers operating fraudulently;

(8) Section 379.080, RSMo, relating to permissible investments, except that limitations in such section shall apply only to assets equal to such positive surplus as is actually maintained by the association;

(9) Section 379.102, RSMo, relating to the maintenance of unearned premium and loss reserves as liabilities, except that any such loss reserves may be discounted in accordance with reasonable actuarial assumptions**;**

(10) Sections 383.100 to 383.112 relating to reports from medical malpractice insurers;

(11) Section 379.321, RSMo, relating to commercial casualty rate filing requirements;

(12) Sections 374.202 to 374.207, RSMo, relating to the examination powers of the director of insurance; and

(13) Sections 383.400 to 383.412 relating to notification, data reporting, and rating requirements.

2. Any association which was licensed pursuant to the provisions of sections 383.010 to 383.040 on or before January 1, 1992, shall be allowed until December 31, 1995, to comply with the provisions of this section as they relate to investments, reserves and reinsurance.

3. Any association licensed pursuant to the provisions of sections 383.010 to 383.040 shall file with its annual statement a certification by a fellow or an associate of the Casualty Actuarial Society. Such certification shall conform to the National Association of Insurance Commissioners annual statement instructions unless otherwise provided by the director of the department of insurance.

4. The director of the department of insurance shall have authority in accordance with section 374.045, RSMo, to make all reasonable rules and regulations to accomplish the purpose of sections 383.010 to 383.040, including the extent to which insurance provided by an association may be extended to provide payment to a covered person resulting from a specific illness possessed by such covered person; except that no rule or regulation may place limitations or restrictions on the amount of premium an association may write or on the amount of insurance or limit of liability an association may provide.

5. Other than as provided in this section, no other insurance law of the state of Missouri shall apply to an association licensed pursuant to the provisions of this chapter, unless such law shall expressly state it is applicable to such associations.

6. If, after August 28, 1992, and after its second full calendar year of operation, any association licensed under the provisions of sections 383.010 to 383.040 shall file an annual statement which shows a surplus as regards policyholders of less than zero dollars, or if the director of the department of insurance has other conclusive and credible evidence more recent than the last annual statement indicating the surplus as regards policyholders of an association is less than zero dollars, the director of the department of insurance may order such association to submit, within ninety days following such order, a voluntary plan under which the association will restore its surplus as regards policyholders to at least zero dollars. The director of the department of insurance may monitor the performance of the association's plan and may order modifications thereto, including assessments or rate or premium increases, if the association fails to meet any targets proposed in such plan for three consecutive quarters.

7. If the director of the department of insurance issues an order in accordance with subsection 6 of this section, the association may, in accordance with chapter 536, RSMo, file a petition for review of such order. Any association subject to an order issued in accordance with subsection 6 of this section shall be allowed a period of three years, or such longer period as the director may allow, to accomplish its plan to restore its surplus as regards policyholders to at least zero dollars. If at the end of the authorized period of time the association has failed to restore its surplus to at least zero dollars, or if the director of the department of insurance has ordered modifications of the voluntary plan and the association's surplus has failed to increase within three consecutive quarters after such modification, the director of the department of insurance may allow an additional time for the implementation of the voluntary plan or may exercise his powers to take charge of the association as he would a mutual casualty company pursuant to sections 375.1150 to 375.1246, RSMo. Sections 375.1150 to 375.1246, RSMo, shall apply to associations licensed pursuant to sections 383.010 to 383.040 only after the conditions set forth in this section are met. When the surplus as regards policyholders of an association subject to subsection 6 of this section has been restored to at least zero dollars, the authority and jurisdiction of the director of the department of insurance under subsections 6 and 7 of this section shall terminate, but this subsection may again thereafter apply to such association if the conditions set forth in subsection 6 of this section for its application are again satisfied.

8. Any association licensed pursuant to the provisions of sections 383.010 to 383.040 shall place on file with the director of the department of insurance, except as to excess liability risks which by general custom are not written according to manual rates or rating plans, a copy of every manual of classifications, rules, underwriting rules and rates, every rating plan and every

modification of the foregoing which it uses. Filing with the director of the department of insurance within ten days after such manuals, rating plans or modifications thereof are effective shall be sufficient compliance with this subsection. Any rates, rating plans, rules, classifications or systems in effect or in use by an association on August 28, 1992, may continue to be used by the association. Upon written application of a member of an association, stating his reasons therefor, filed with the association, a rate in excess of that provided by a filing otherwise applicable may be used by the association for that member.

383.079. The director shall compile a statistical summary of all data submitted and shall issue a public report to the Missouri Bar and the supreme court of the state of Missouri. **Beginning not later than December 31, 2005, and annually thereafter, the director shall report to the general assembly an accurate report as to the actual rates charged for malpractice insurance and any changes in those rates from the previous year.**

383.105. 1. Every insurer providing medical malpractice insurance to a Missouri health care provider and every health care provider who maintains professional liability coverage through a plan of self-insurance shall submit to the director of the department of insurance a report of all claims, both open claims filed during the reporting period and closed claims filed during the reporting period, for medical malpractice made against any of its Missouri insureds during the preceding three-month period.

2. The report shall be in writing and contain the following information:

(1) Name and address of the insured and the person working for the insured who rendered the service which gave rise to the claim, if the two are different;

(2) Specialty coverage of the insured;

(3) Insured's policy number;

(4) Nature and substance of the claim;

(5) Date and place in which the claim arose;

(6) Name, address and age of the claimant or plaintiff;

(7) Within six months after final disposition of the claim, the amounts paid, if any, and the date and manner of disposition (judgment, settlement or otherwise);

(8) Expenses incurred; and

(9) Such additional information as the director may require.

3. As used in this section, "insurer" includes every insurance company authorized to transact insurance business in this state, every unauthorized insurance company transacting business pursuant to chapter 384, RSMo, every risk retention group, every insurance company issuing insurance to or through a purchasing group, **every entity operating under this chapter,** and any other person providing insurance coverage in this state**[**. With respect to any insurer transacting business pursuant to chapter 384, RSMo, filing the report required by this section

shall be the obligation of the surplus lines broker or licensee originating or accepting the insurance**], including self-insured health care providers**.

383.112. 1. Any insurer, as defined in section 383.105, that fails to timely report claims information as required by sections 383.100 to 383.125 shall be subject to the penalties applicable to insurance companies under section 374.215, RSMo.

2. For purposes of sections 383.100 to 383.125, any guarantee association paying claims on behalf of an insolvent insurer shall be subject to the same reporting requirements as the insolvent insurer.

383.160. 1. All association policies of insurance shall be written so as to apply to injury which results from acts or omissions occurring during the policy period. No policy form shall be used by the association unless it has been filed with the director and approved **[**or thirty days have elapsed and he has not delivered to the board written disapproval of it as misleading or not in the public interest**]**. The director shall have the power to disapprove any policy form previously approved if found by him after hearing to be misleading or not in the public interest.

2. Cancellation of the association's policies shall be governed by law.

3. The rates, rating plans, rating rules, rating classifications and territories applicable to the insurance written by the association and statistics relating thereto shall be subject to the casualty rate regulation law giving due consideration to the past and prospective loss and expense experience in medical malpractice insurance of all of the insurers, trends in the frequency and severity of losses, the investment income of the association, and such other information as the director may require. All rates shall be actuarially sound and shall be calculated to be self-supporting.

4. In the event sufficient funds are not available for the sound financial operation of the association, additional funds shall be raised by making an assessment on all member companies. Assessments shall be made against members in the proportion that the net direct premiums for the preceding calendar year of each member for each line of insurance requiring it to participate in said plan bear to the net direct premiums for the preceding calendar year of all members for such line of insurance; provided that, assessments made pursuant to sections 383.150 to 383.195 shall not exceed in any calendar year one percent of each member's net direct premiums attributable to the line or lines of insurance the writing of which requires it to be a member.

5. All members shall deduct the amount of any assessment from past or future premium taxes due but not yet paid the state.

6. Any funds which result from policyholder premiums and other revenues received in excess of those funds required for reserves, loss payments and expenses incurred and accrued at the end of any calendar year shall be paid proportionately to the general fund to the extent that credit against premium tax liability has been granted pursuant to subsection 5 **of this section** and

to members which have been assessed but have not received tax credits as provided in subsection 5 **of this section**.

383.165. Each policyholder shall pay to the association in the first policy year, in addition to the premium payment due for insurance through the association, an amount equal to said premium payment. Such charge shall be separately stated in the policy. **Such charge shall be paid in the form of cash or cash equivalent and not in the form of a promissory note.**

383.400. 1. As used in sections 383.400 to 383.412, the term "insurer" or "insurers" means any insurance company, mutual insurance company, medical malpractice association, any entity created under this chapter, or other entity providing any insurance to any health care provider, as defined in section 538.205, RSMo, practicing medicine in the state of Missouri, against claims for malpractice or professional negligence; provided, however, that the term "insurer" or "insurers" shall not mean any surplus lines insurer operating under chapter 384, RSMo, or any entity to the extent it is self-insuring its exposure to medical malpractice liability.

2. Notwithstanding any other provision of law, no insurer shall, with regards to medical malpractice insurance, as defined in section 383.150:

(1) Charge an assessment or surcharge, or increase the premium charges, by more than ten percent for such insurance without first providing written notice by certified United States mail to the insured at least sixty days prior to the effective date of such actions; provided, however, such notice is not required if the premium change is due to the request of the insured;

(2) Fail or refuse to renew the aforesaid insurance without first providing written notice by certified United States mail to the insured at least sixty days prior to the effective date of such actions, unless such failure or refusal to renew is based upon a failure to pay sums due or a termination or suspension of the health care provider's license to practice medicine in the state of Missouri, termination of the insurer's reinsurance program, or a material change in the nature of the insured's health care practice; or

(3) Cease the issuance of such policies of insurance in the state of Missouri without first providing written notice by certified United States mail to the insured and to the Missouri department of insurance at least one hundred eighty days prior to the effective date of such actions.

3. Any insurer that fails to provide the notice required under subdivisions (1) and (2) of subsection 2 of this section shall, at the option of the insured, continue the coverage in accordance with the provisions of subdivision (2) of subsection 6 of section 379.321, RSMo.

383.401. The Missouri department of insurance shall, prior to May 30, 2006, establish risk-reporting categories for medical malpractice insurance premiums, as defined in section 383.150, and shall establish regulations for the reporting of all premiums charged by such categories. The Missouri department of insurance shall consider the history of prior court judgments for claims under chapter 383, in each county of the state in establishing the risk reporting categories.

383.402. All insurers shall, with regards to medical malpractice insurance as defined in section 383.150, provide to the Missouri department of insurance, beginning on June 1, 2006, and not less than annually thereafter, an accurate report as to the actual rates, including assessments levied against members, charged by such company for such insurance, for each of the risk-reporting categories established in section 383.401.

383.403. Not later than December 31, 2008, and at least annually thereafter, the Missouri department of insurance shall, utilizing the information provided pursuant to section 383.402 establish and publish, a market rate reflecting the median of the actual rates charged for each of the aforesaid risk-reporting categories for the preceding year by all insurers with at least a three percent market share of a respective risk-reporting category as of December thirty-first of the prior year which have been certified to have rates which are not inadequate by an actuary chosen by the Missouri department of insurance.

383.404. After January 1, 2009, insurance premium rates charged by any insurer, with regards to medical malpractice insurance as defined in section 383.150, which are no greater than twenty percent higher, or twenty percent lower than the market rate established pursuant to section 383.403, shall be presumed to be reasonable.

383.405. After January 1, 2009, insurance premium rates charged by any insurer, with regards to medical malpractice insurance as defined in section 383.150, which are greater than twenty percent higher, or twenty percent lower than the market rate established pursuant to section 383.403, shall be presumed to be unreasonable.

383.406. 1. As used in this section, "director" means the director of the department of insurance.

2. If any insurer proposes to increase or decrease the premium rates so that they are presumed to be unreasonable under section 383.405 for medical malpractice insurance as defined in section 383.150, the insurer shall notify the director in writing at least sixty days prior to the effective date of the proposed premium rate change. The notice shall include a detailed description of the proposed premium rate change, actuarial justification for the premium rate change, and such other information as the director may prescribe by rule.

3. Within ten days of receipt of the notice from the insurer, the director shall set a date for a hearing on the proposed premium rate change and shall publish notice of the hearing. The date set for the hearing shall be within thirty days after receipt of the notice from the insurer. The director shall provide a copy of any information filed by the insurer under subsection 2 of this section to any person making a written request for such information. The hearing may, at the director's discretion, be a public hearing.

4. At the hearing, the insurer may provide additional information in support of its proposed premium rate change, and any member of the public may provide information in support of or in opposition to the proposed premium rate change. The director may call upon the director's own experts to review the proposed premium change and may question the insurer about the proposal at the hearing.

5. Within twenty days after the close of the hearing, the director shall review all of the information submitted and determine whether the proposed premium rate change is justified. No rate shall be considered justified that is excessive, inadequate, or unfairly discriminatory. If the director determines that the rate is justified, the director shall issue an order authorizing the insurer to use the premium rate as proposed. If the director determines that the rate has not been justified by the insurer, the director shall issue an order prohibiting the use of the premium rate as proposed. The insurer may appeal the order under chapter 536, RSMo.

6. No insurer who charges a premium rate that is presumed to be unreasonable under section 383.405 because the rate is greater than twenty percent lower than the market rate shall be subject to the hearing requirements in this section if the insurer files a certificate of actuarial soundness with the director of the department of insurance.

383.407. For purposes of sections 383.404 to 383.412, the following terms mean:

(1) "Base rate", the premium rate designed to reflect the average aggregate experience of a particular health care provider classification prior to adjustment for individual risk characteristics;

(2) "Schedule rating or individual risk rating credits or debits", rating factors or adjustments applied to an insurer's base rates to increase or decrease the premium of an individual insured or unit or exposure to adjust the base rate to account for individual risk characteristics not reflected in the base rate. As used in sections 383.404, 383.405, and 383.406, "insurance premium rate" means the base rate as established herein plus such schedule rating or individual risk rating credits or debits as allowed under regulations promulgated by the department of insurance.

383.408. 1. The department of insurance shall establish reporting standards for insurers by which the insurers shall report their base rates for the health care provider

classifications designated by the department, in whatever categories the department determines to be actuarially appropriate.

2. The department shall collect the information required in subsection 1 of this section and shall create a database to be made available to the public that compares the base rates charged by each insurer actively writing a particular health care provider classification code. Such database may distinguish between base rates for different types of coverage.

383.409. 1. The department of insurance shall establish reporting standards for insurers by which the insurers, or an advisory organization designated by the department, shall annually report such Missouri medical malpractice insurance premium, loss, exposure, and other information as the department may require for the purpose of compiling a Missouri medical malpractice ratemaking database. The reports shall be in a format determined by the department. Such information shall be considered confidential information and shall be a closed record under chapter 610, RSMo.

2. The department shall collect the information required in subsection 1 of this section and compile it in a manner appropriate for assisting Missouri medical malpractice insurers in developing their future base rates, schedule rating or individual risk rating factors, and other aspects of their rating plans. In compiling the information and making it available to Missouri insurers and the public, the department shall remove any individualized information that identifies a particular insurer as the source of the information. The department may combine such information with similar information obtained through insurer examinations so as to cover periods of more than one year.

383.410. After August 28, 2005, when evaluating the base rates of any medical malpractice insurer, including any insurer newly admitted to write medical malpractice insurance in Missouri or any insurer entering such line, in order to determine whether such rates are excessive, inadequate, or unfairly discriminatory, the director of insurance shall, in addition to any other methods of evaluation, use the base rates collected under section 383.408 as a basis for comparison.

383.412. 1. If the director finds that any insurer or filing organization has violated any provision of sections 383.400 to 383.411, the director may impose a penalty of not more than five hundred dollars for each violation, but if the director finds the violation to be willful, the director may impose a penalty of not more than five thousand dollars for each violation. Such penalties may be in addition to any other penalty provided by law.

2. The director may suspend the license of any rating organization or insurer that fails to comply with an order of the director relating to sections 383.400 to 383.411 within the time limited by such order, or any extension thereof which the director may grant. The

director shall not suspend the license of any rating organization or insurer for failure to comply with an order until the time prescribed for an appeal therefrom has expired or if an appeal has been taken, until the order has been affirmed. The director may determine when a suspension of license shall become effective and it shall remain in effect for a period fixed by the director, unless the director modifies or rescinds such suspension or until the order upon which such suspension is based is modified, rescinded, or reversed.

3. No penalty shall be imposed or no license shall be suspended or revoked except upon a written order of the director, stating the director's findings, made after a hearing held upon not less than ten days' written notice to such person or organization specifying the alleged violation.

383.425. 1. Beginning January 1, 2007, any public corporation organized pursuant to section 287.902, RSMo, may form a corporation, association or company for the purpose of issuing medical malpractice insurance, as that term is defined in section 383.100, under the provisions of this section. Any corporation, association, or company formed under the provisions of this section shall be organized and operated as a stock company. The incorporators of such a stock company shall also meet the requirements of chapter 379, RSMo, relating to the organization of insurance companies and the laws of this state governing the organization of private corporations unless the provisions of this section provide otherwise. All insurance laws of this state shall apply to any corporation, association, or company formed under the provisions of this section unless the provisions of this section provide otherwise. No company, corporation or association authorized to issue medical malpractice insurance pursuant to chapter 379 prior to August 28, 2005, shall incorporate under the provisions of this section.

2. In addition to the requirements set forth in section 379.035, RSMo, the declaration and the articles of incorporation filed by the incorporators of the proposed stock company shall provide that the stock insurance company shall issue medical malpractice insurance to health care providers in Missouri.

3. Any company formed under the provisions of this section shall be subject to all provisions of the statutes that relate to private insurance carriers and to the jurisdiction of the department of insurance in the same manner as private insurance carriers, except as provided by the director. The director of the department of insurance may waive the capital and surplus requirements of chapter 379 solely for medical malpractice for any company formed under the provisions of this section for a period of ten years after its incorporation.

4. Notwithstanding section 375.772, RSMo, any stock company incorporated or formed under this section shall not be a member of the Missouri property and casualty

insurance guarantee association, be subject to assessments from such association, nor be classified as an insolvent insurer under sections 375.771 to 375.779, RSMo, unless the company meets the capital and surplus requirements provided in chapter 379, RSMo, and maintains such capital and surplus requirements for a period of not less than three consecutive years. But in no event shall such stock company become a member until its tenth anniversary. After qualifying under this section, the stock company incorporated under the provisions of this section shall participate in the Missouri property and casualty insurance guarantee association pursuant to sections 375.771 to 375.779, RSMo, provided that the company shall continue to meet the capital and surplus requirements provided in chapter 379, RSMo.

5. Any association formed pursuant to sections 383.020 to 383.040 for the purpose of providing medical malpractice insurance to its members, may be merged into one of the stock companies formed under this section.

383.430. The department of insurance shall promulgate rules defining the term "claim" as it applies to claims made for medical malpractice. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

383.435. By January 1, 2010, all insurers writing medical malpractice insurance in this state shall offer medical malpractice policies of insurance which are written so as to apply to injury which results from acts or omissions occurring during the policy period, regardless of the timing of the filing of a claim based on such acts or omissions.

538.230. 1. In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services where fault is apportioned among the parties and persons released pursuant to subsection 3 of this section, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties, or the court, if there is no jury, shall make findings, indicating the percentage of total fault of all the parties to each claim that is allocated to each party and person who has been released from liability under subsection 3 of this section.

2. The court shall determine the award of damages to each plaintiff in accordance with the findings, subject to any reduction under subsection 3 of this section and enter judgment

against each party liable on the basis of the rules of joint and several liability**[**. However, notwithstanding the provisions of this subsection, any defendant against whom an award of damages is made shall be jointly liable only with those defendants whose apportioned percentage of fault is equal to or less than such defendant**] as established in section 537.067, RSMo**.

3. Any release, covenant not to sue, or similar agreement entered into by a claimant and a person or entity against which a claim is asserted arising out of the alleged transaction which is the basis for plaintiff's cause of action, whether actually made a party to the action or not, discharges that person or entity from all liability for contribution or indemnity but it does not discharge other persons or entities liable upon such claim unless it so provides. However, the claim of the releasing person against other persons or entities is reduced by the amount of the released persons' or entities' equitable share of the total obligation imposed by the court pursuant to a full apportionment of fault under this section as though there had been no release.