SECOND REGULAR SESSION

HOUSE BILL NO. 1493

102ND GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE GRIFFITH.

3800H.01I DANA RADEMAN MILLER, Chief Clerk

AN ACT

To repeal sections 383.200, 383.206, 538.205, and 538.210, RSMo, and to enact in lieu thereof four new sections relating to long-term care facilities.

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

Section A. Sections 383.200, 383.206, 538.205, and 538.210, RSMo, are repealed and four new sections enacted in lieu thereof, to be known as sections 383.200, 383.206, 538.205, and 538.210, to read as follows:

383.200. As used in sections 383.200 to 383.209, **the following terms mean:**

(1) "Health care provider", the same meaning given to the term in section 538.205; except that, the term "health care provider" shall include any long-term care facility licensed under chapter 198;

(2) "Insurer"**,** includes 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,~~**]** practicing 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 or any entity to the extent it is self-insuring its exposure to medical malpractice liability.

383.206. 1. Notwithstanding the provisions of sections 383.037 and 383.160, no insurer shall issue or sell in the state of Missouri a policy insuring a health care provider**[**~~, as defined in section 538.205,~~**]** for damages for personal injury or death arising out of the rendering of or failure to render health care services if the director finds, based upon competent and compelling evidence, that the base rates of such insurer are excessive,

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.

inadequate, or unfairly discriminatory. A rate may be used by an insurer immediately after it has been filed with the director, until or unless the director has determined under this section that a rate is excessive, inadequate, or unfairly discriminatory.

2. In making a determination under subsection 1 of this section, the director of the department of commerce and insurance may use the following factors:

(1) Rates shall not be excessive or inadequate, nor shall they be unfairly discriminatory;

(2) No rate shall be held to be excessive unless such rate is unreasonably high for the insurance **[**~~proved~~**] provided** with respect to the classification to which such rate is applicable;

(3) No rate shall be held to be inadequate unless such rate is unreasonably low for the insurance provided with respect to the classification to which such rate is applicable;

(4) To the extent Missouri loss experience is available, rates and projected losses shall be based on Missouri loss experience and not the insurance company's or the insurance industry's loss experiences in states other than Missouri unless the failure to do so jeopardizes the financial stability of the insurer; provided however, that loss experiences relating to the specific proposed insured occurring outside the state of Missouri may be considered in allowing a surcharge to such insured's premium rate;

(5) Investment income or investment losses of the insurance company for the ten-year period prior to the request for rate approval may be considered in reviewing rates. Investment income or investment losses for a period of less than ten years shall not be considered in reviewing rates. Industrywide investment income or investment losses for the ten-year period prior to the request for rate approval may be considered for any insurance company that has not been authorized to issue insurance for more than ten years;

(6) The locale in which the health care practice is occurring;

(7) Inflation;

(8) Reasonable administrative costs of the insurer;

(9) Reasonable costs of defense of claims against Missouri health care providers;

(10) A reasonable rate of return on investment for the owners or shareholders of the insurer when compared to other similar investments at the time of the rate request; except that, such factor shall not be used to offset losses in other states or in activities of the insurer other than the sale of policies of insurance to Missouri health care providers; and

(11) Any other reasonable factors may be considered in the disapproval of the rate request.

3. The director's determination under subsection 1 of this section of whether a base rate is excessive, inadequate, or unfairly discriminatory may be based on any subcategory or subspecialty of the health care industry that the director determines to be reasonable.

4. If actuarially supported and included in a filed rate, rating plan, rule, manual, or rating system, an insurer may charge an additional premium or grant a discount rate to any health care provider based on criteria as it relates to a specified insured health care provider or other specific health care providers within the specific insured's employ or business entity. Such criteria may include:

(1) Loss experiences;

(2) Training and experience;

(3) Number of employees of the insured entity;

(4) Availability of equipment, capital, or hospital privileges;

(5) Loss prevention measures taken by the insured;

(6) The number and extent of claims not resulting in losses;

(7) The specialty or subspecialty of the health care provider;

(8) Access to equipment and hospital privileges; and

(9) Any other reasonable criteria identified by the insurer and filed with the department of commerce and insurance.

5. Supporting actuarial data shall be filed in support of a rate, rating plan, or rating system filing, when requested by the director to determine whether rates should be disapproved as excessive, inadequate, or unfairly discriminatory, whether or not the insurer has begun using the rate.

6. The director of the department of commerce and insurance shall promulgate rules for the administration and enforcement of this section. Any rule or portion of a rule, as that term is defined in section 536.010, 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 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 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, 2006, shall be invalid and void.

538.205. As used in sections 538.205 to **[**~~538.230~~**] 538.229**, the following terms shall mean:

(1) "Catastrophic personal injury", a physical injury resulting in:

(a) Quadriplegia defined as the permanent loss of functional use of all four limbs;

(b) Paraplegia defined as the permanent loss of functional use of two limbs;

(c) Loss of two or more limbs;

(d) An injury to the brain that results in permanent cognitive impairment resulting in the permanent inability to make independent decisions or engage in one or more of the following activities of daily living: eating, dressing, bathing, toileting, transferring, and walking;

(e) An injury that causes irreversible failure of one or more major organ systems; or

(f) Vision loss such that the patient's central visual acuity is no more than twenty/two-hundred in the better eye with the best correction or whose field of vision in the better eye is restricted to a degree that its widest diameter subtends an angle no greater than twenty degrees;

(2) "Economic damages", damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity;

(3) "Employee", any individual who is directly compensated by a health care provider for health care services rendered by such individual and other nonphysician individuals who are supplied to a health care provider by an entity that provides staffing;

(4) "Equitable share", the share of a person or entity in an obligation that is the same percentage of the total obligation as the person's or entity's allocated share of the total fault, as found by the trier of fact;

(5) "Future damages", damages that the trier of fact finds will accrue after the damages findings are made;

(6) "Health care provider", any physician, hospital, health maintenance organization, ambulatory surgical center, **[**~~long-term care facility including those licensed under chapter 198,~~**]** dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist, chiropractor, professional physical therapist, psychologist, physician-in-training, and any other person or entity that provides health care services under the authority of a license or certificate**; except that, the term "health care provider" shall not include any long-term care facility licensed under chapter 198**;

(7) "Health care services", any services that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized. Professional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care provider's profession or in furtherance of the purposes for which an institutional health care provider is organized;

(8) "Medical damages", damages arising from reasonable expenses for necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial and other health and rehabilitative services;

(9) "Noneconomic damages", damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment,

disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages;

(10) "Past damages", damages that have accrued when the damages findings are made;

(11) "Punitive damages", damages intended to punish or deter malicious misconduct or conduct that intentionally caused damage to the plaintiff, including exemplary damages and damages for aggravating circumstances;

(12) "Self-insurance", a formal or informal plan of self-insurance or no insurance of any kind.

538.210. 1. A statutory cause of action for damages against a health care provider for personal injury or death arising out of the rendering of or failure to render health care services is hereby created, replacing any such common law cause of action. The elements of such cause of action are that the health care provider failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant's profession and that such failure directly caused or contributed to cause the plaintiff's injury or death.

2. (1) In any action against a health care provider for damages for personal injury arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than four hundred thousand dollars for noneconomic damages irrespective of the number of defendants.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, in any action against a health care provider for damages for a catastrophic personal injury arising out of the rendering or failure to render heath care services, no plaintiff shall recover more than seven hundred thousand dollars for noneconomic damages irrespective of the number of defendants.

(3) In any action against a health care provider for damages for death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than seven hundred thousand dollars for noneconomic damages irrespective of the number of defendants.

3. **(1)** This section shall also apply to any individual or entity, or their employees or agents:

[~~(1)~~**] (a)** That provide, refer, coordinate, consult upon, or arrange for the delivery of health care services to the plaintiff; and

[~~(2)~~**] (b)** Who is a defendant in a lawsuit brought against a health care provider under this chapter, or who is a defendant in any lawsuit that arises out of the rendering of or the failure to render health care services.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, this section shall not apply to any long-term care facility licensed under chapter 198.

4. No health care provider whose liability is limited by the provisions of this chapter shall be liable to any plaintiff based on the actions or omissions of any other entity or individual who is not an employee of such health care provider, unless the individual is an employee of a subsidiary in which the health care provider has a controlling interest and the subsidiary does not carry a professional liability insurance policy or self-insurance covering said individual of at least one million dollars per occurrence and a professional liability insurance policy or self-insurance covering said subsidiary of at least one million dollars per occurrence.

5. The limitations on liability as provided for in this section shall apply to all claims for contribution.

6. In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, where the trier of fact is a jury, such jury shall not be instructed by the court with respect to the limitation on an award of noneconomic damages, nor shall counsel for any party or any person providing testimony during such proceeding in any way inform the jury or potential jurors of such limitation.

7. For purposes of sections 538.205 to **[**~~538.230~~**] 538.229**, any spouse claiming damages for loss of consortium of their spouse shall be considered to be the same plaintiff as their spouse.

8. Any provision of law or court rule to the contrary notwithstanding, an award of punitive damages against a health care provider governed by the provisions of sections 538.205 to **[**~~538.230~~**] 538.229** shall be made only upon a finding by the jury that the evidence clearly and convincingly demonstrated that the health care provider intentionally caused damage to the plaintiff or demonstrated malicious misconduct that caused damage to the plaintiff. Evidence of negligence including, but not limited to, indifference to or conscious disregard for the safety of others shall not constitute intentional conduct or malicious misconduct.

9. For purposes of sections 538.205 to **[**~~538.230~~**] 538.229**, all individuals and entities asserting a claim for a wrongful death under section 537.080 shall be considered to be one plaintiff.

10. The limitations on awards for noneconomic damages provided for in this section shall be increased by one and seven-tenths percent on an annual basis effective January first of each year. The current value of the limitation shall be calculated by the director of the department of commerce and insurance, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register on the first business day following January first, but the value shall otherwise be exempt from the provisions of section 536.021.

11. In any claim for damages under this chapter, and upon post-trial motion following a jury verdict with noneconomic damages exceeding four hundred thousand dollars, the trial court shall determine whether the limitation in subsection 2 of this section shall apply based on the severity of the most severe injuries.

12. If a court of competent jurisdiction enters a final judgment on the merits that is not subject to appeal and that declares any provision or part of either section 1.010 or this section to be unconstitutional or unenforceable, then section 1.010 and this section, as amended by this act and in their entirety, are invalid and shall have no legal effect as of the date of such judgment, and this act, including its repealing clause, shall likewise be invalid and of no legal effect. In such event, the versions of sections 1.010 and this section that were in effect prior to the enactment of this act shall remain in force.

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