

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas As Engrossed: H2/2/01 H2/13/01 H3/28/01 H3/29/01

2 83rd General Assembly

A Bill

3 Regular Session, 2001

HOUSE BILL 1382

4

5 By: Representatives R. Smith, Carson, Adams, Allison, Altes, Bennett, Bledsoe, Bright, Clemons, Dees,
6 D. Elliott, Files, French, Gillespie, Glover, Green, Hendren, Hutchinson, Jackson, G. Jeffress, Mathis,
7 Milum, Moore, Prater, Scroggin, Shoffner, J. Taylor, Trammell, Willis, Womack, Agee, King, *Borhauer*
8 By: Senators Riggs, DeLay, Horn, T. Smith, B. Walker, Whitaker, Wilkinson

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For An Act To Be Entitled

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AN ACT TO MAKE LONG-TERM CARE AFFORDABLE AND
13 AVAIL ABLE FOR FACI LITY RESIDENTS; AND FOR OTHER
14 PURPOSES.

15

16

Subtitle

17

AN ACT TO MAKE LONG-TERM CARE AFFORDABLE
18 AND AVAI LABLE FOR FACI LITY RESIDENTS.

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BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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SECTION 1. It is found and determined by the General Assembly that the
24 *cost of claims against long-term care facilities by residents of long-term*
25 *care facilities is a significant cost for long-term care facilities; that*
26 *under present law there is no reasonable limitation upon either the amount of*
27 *recoveries under such claims, or the procedure utilized or evidence*
28 *considered in respect to the recoveries, if any, under such claims; and that*
29 *it is necessary to have a reasonable limitation on these matters in order to*
30 *provide affordable and accessible care for long-term care facility residents.*
31 *Moreover, it is found that claims brought against long-term care facilities*
32 *are unique in that in most instances the continuum of care extends over a*
33 *period of time encompassing repetitive incidents of care-giving for frail and*
34 *vulnerable patients who are oftentimes suffering from a variety of illnesses*
35 *so that it is difficult under the circumstances of courtroom presentation of*
36 *evidence of the claims to distinguish between conditions which were*

1 expectable and might normally result from pre-existing conditions unrelated
 2 to the quality of care, and those conditions which result directly and
 3 proximately from the care given by the long-term care facilities; and as a
 4 consequence recoveries in respect to such claims have escalated to the point
 5 that it may be impossible for long-term care facilities to obtain general
 6 liability insurance for the benefit of their residents. Therefore, it is
 7 found and determined by the General Assembly that among other matters
 8 requiring curative legislation is the matter of establishing a professional
 9 liability insurance pool which will be available for long-term care providers
 10 in the event that such insurance is no longer available for the long-term
 11 care provider.

12
 13 SECTION 2. Arkansas Code 16-114-201 is amended to read as follows:

14 16-114-201. Definitions.

15 As used in this subchapter, unless the context otherwise requires:

16 (1) "Action for medical injury" means any action against a medical
 17 care provider, whether based in tort, contract, under § 20-10-1209, or
 18 otherwise, to recover damages on account of medical injury;

19 (2) "Medical care provider" means a physician, certified registered
 20 nurse anesthetist, physician's assistant, nurse, optometrist, chiropractor,
 21 physical therapist, dentist, podiatrist, pharmacist, veterinarian, hospital,
 22 long-term care facility as defined in § 20-10-1202, nursing home, community
 23 mental health center, psychologist, clinic, or not-for-profit home health
 24 care agency licensed by the state or otherwise lawfully providing
 25 professional medical care, ~~or~~ services or custodial services, or an officer,
 26 employee or agent thereof acting in the course and scope of employment in the
 27 providing of such medical care or medical services; and

28 (3) "Medical injury" or "injury" means any adverse consequences
 29 arising out of or sustained in the course of the professional services, or
 30 custodial services as defined in § 20-10-1202, being rendered by a medical
 31 care provider, whether resulting from negligence, error, or omission in the
 32 performance of such services; or from rendition of such services without
 33 informed consent or in breach of warranty or in violation of contract; or
 34 from failure to diagnose; or from premature abandonment of a patient or of a
 35 course of treatment; or from failure to properly maintain equipment or
 36 appliances necessary to the rendition of such services; or otherwise arising

1 out of or sustained in the course of such services.

2
3 SECTION 3. Arkansas Code 16-114-203(b) is amended to read as follows:

4 (b) The date of the accrual of the cause of action shall be the date
5 of the wrongful act complained of and no other time. In the event that the
6 cause of action is based upon a series of wrongful acts complained of, the
7 date of accrual of the cause of action shall be a separate date for each of
8 the series of acts complained of, and any alleged wrongful acts occurring
9 prior to the two-year accrual period shall not be permitted based upon an
10 allegation of a continuing course of conduct. For the purpose of this section
11 the term "wrongful act" shall include any previous act or conduct which is
12 contributory to the injury which results from the specific "wrongful act",
13 and evidence concerning such previous act or conduct shall be admissible even
14 though such act or conduct arose prior to the period otherwise barred by the
15 statute of limitations. However, where the action is based upon the discovery
16 of a foreign object in the body of the injured person which is not discovered
17 and could not reasonably have been discovered within such two-year period,
18 the action may be commenced within one (1) year from the date of discovery or
19 the date the foreign object reasonably should have been discovered, whichever
20 is earlier.

21
22 SECTION 4. Arkansas Code 16-46-105 is amended to read as follows:

23 16-46-105. Records of and testimony before committees reviewing and
24 evaluating quality of medical or hospital care.

25 (a)(1)(A) The proceedings, minutes, records, or reports of organized
26 committees of hospital, or long-term care facility as defined in § 20-10-
27 1202, medical staffs or medical review committees of local medical societies
28 having the responsibility for reviewing and evaluating the quality of ~~medical~~
29 ~~or hospital~~ medical, hospital, or long-term care, and any records, other than
30 those records described in subsection (c) of this section, compiled or
31 accumulated by the administrative staff of such hospitals or long-term care
32 facilities in connection with such review or evaluation, together with all
33 communications or reports originating in such committees, shall not be
34 subject to discovery pursuant to the Arkansas Rules of Civil Procedure or the
35 Freedom of Information Act of 1967, § 25-19-101 et seq., or admissible in any
36 legal proceeding and shall be absolutely privileged communications.

1 (B) The submission of such proceedings, minutes, records,
2 reports, and communications to a hospital or long-term care governing board
3 shall not operate as a waiver of the privilege.

4 (2) Neither shall testimony as to events occurring during the
5 activities of such committees be subject to discovery pursuant to the
6 Arkansas Rules of Civil Procedure or the Freedom of Information Act of 1967,
7 § 25-19-101 et seq., or admissible.

8 (b)(1) Nothing in this section shall be construed to prevent
9 disclosure of the data mentioned in subsection (a) of this section to
10 appropriate state or federal regulatory agencies which by statute or
11 regulation are entitled to access to such data, nor to organized committees
12 of hospital medical staffs, or long-term care provider, or governing boards
13 where the medical practitioner seeks membership or clinical privileges.

14 (2) Further, nothing in this section shall be construed to
15 prevent discovery and admissibility if the legal action in which such data is
16 sought is brought by a medical practitioner who has been subjected to censure
17 or disciplinary action by such agency or committee or by a hospital medical
18 staff or governing board.

19 (c) Nothing in this section or § 20-9-308 shall be construed to apply
20 to original hospital medical records, incident reports, or other records with
21 respect to the care or treatment of any patient or to affect the
22 discoverability or admissibility of such records.

23 (d) As to long-term care facilities only, the county coroner shall be
24 entitled access to the records referred to in § 16-46-105(a)(1)(A) of the
25 long-term care facility which are specifically related to the death of a
26 resident whose death is being investigated by the county coroner, provided
27 that the county coroner shall maintain the confidentiality of any of the
28 records, use them solely for the purpose of his investigation, and the
29 records shall be sealed and be confidential and not otherwise available.

30
31 SECTION 5. Arkansas Code Title 16, Chapter 46, Subchapter 1 is amended
32 to add an additional section to read as follows:

33 16-46-109. Records of and pertaining to Office of Long-Term Care
34 surveys, deficiencies, plans of correction and state agencies reviewing and
35 evaluating the quality of long-term care.

36 (a)(1) Except for subsection (c) of this section, the records or

1 reports of the Office of Long-Term Care, created by § 20-10-1202, inspections
2 and investigations concerning long-term care facilities, notices of
3 deficiencies resulting from Office of Long-Term Care inspections and
4 investigations, plans of correction provided by the long-term care facility
5 in response to inspection reports, and Office of Long-Term Care complaint
6 investigations generated by agencies having the responsibility for reviewing
7 and evaluating the quality of long-term care, and any records, other than
8 those records described in subsection (c) of this section, compiled or
9 accumulated by the Office of Long-Term Care in connection with such surveys
10 and investigations, shall not be admissible in any civil legal proceeding
11 filed by a resident of a long-term care facility or the resident's
12 representative under § 20-10-1209(3) against the long-term care facility that
13 is the subject of those records or reports.

14 (2) Neither shall testimony as to events occurring during the
15 Office of Long-Term Care inspections and investigations be admissible.

16 (b) Nothing in this section shall be construed to prevent
17 admissibility of the records and reports mentioned in subsection (a) of this
18 section if the legal action in which such records and reports are sought to
19 be admitted is a proceeding concerning fines, sanctions or other regulatory
20 actions by the Office of Long-Term Care or a state or federal agency.

21 (c)(1) Nothing in this section shall be construed to apply to original
22 long-term care facility medical records, or to reports referred to in
23 subdivision (a)(1) of this section which are found by the court or
24 arbitration panel or other tribunal having jurisdiction over the matter, to
25 be directly related to the claim of the resident who has brought a claim
26 against the facility, and to the damages which are alleged to have been the
27 proximate result thereof.

28 (2) Furthermore, nothing in this section is intended to render
29 any of the records or reports referred to in § 16-46-109(a)(1) to be excluded
30 from the definition of "public records", as defined in § 25-19-103(1), or to
31 be unavailable for examination or copying under the Freedom of Information
32 Act of 1967, beginning at § 29-19-101. However, the introduction of, or
33 reference to the reports or records referred to in § 16-46-109(a)(1) is
34 intended to be prohibited except as specifically set forth herein.

35
36 SECTION 6. Arkansas Code 20-10-1209 is amended, to read as follows:

1 20-10-1209. Civil enforcement.

2 (a)(1) Any resident who incurs a medical injury or an injury as
3 defined in § 16-114-201(3) or who is injured by a deprivation or infringement
4 of his or her rights as specified in this subchapter may bring a cause of
5 action against any licensee responsible for the deprivation or infringement.

6 (2)(A) The action may be brought by the resident or his or her
7 guardian or by the
8 personal representative of the estate of a deceased resident.

9 ~~(3)~~ (B) The action may be brought in any court of competent
10 jurisdiction in the county in which the injury occurred or where the licensee
11 is located to enforce such rights and to recover actual and punitive damages.

12 (3)(A) In the action the resident shall be entitled to recovery
13 of civil damages under §§ 20-10-1209(a)(4) and 20-10-1209(c), or § 16-114-
14 208. Otherwise, a resident shall not have a private cause of action for a
15 medical injury; the cause of action provided for hereunder shall be the sole
16 and exclusive remedy of the resident for a medical injury, and the resident's
17 rights shall be governed by the provisions of § 20-10-1209(a)(4) and 20-10-
18 1209(c) and §§ 16-114-201 through 16-114-209, which shall supersede and
19 subsume any other cause of action based on the facts giving rise to the
20 action for medical injury, whether under a theory of tort, negligence, or
21 other statutory or common law right of action.

22 ~~(5)~~(B) No separate award of attorney's fees may be made by the
23 court, especially including those provided in § 16-22-308.

24 (4) The resident may seek to recover actual damages when there
25 is a finding that an employee of the long-term care facility failed to do
26 something which a reasonably careful person would do or did something which a
27 reasonable person would not do under circumstances similar to those shown by
28 the evidence in the case, which caused an injury due to an infringement or a
29 deprivation of the resident's rights.

30 (b)(1) A licensee shall not be liable for the medical
31 negligence of any physician rendering care or treatment to the resident,
32 except for the services of a medical director as required in this subchapter.

33 (2) Nothing in this subsection shall be construed to protect a
34 licensee from liability for failure to provide a resident with appropriate
35 observation, assessment, nursing diagnosis, planning, intervention, and
36 evaluation of care by nursing staff.

1 (c) For the purpose of this section, punitive damages may be awarded
2 for conduct which is willful, wanton, gross or flagrant, reckless, or
3 consciously indifferent to the rights of the resident.

4
5 SECTION 7. Arkansas Code Title 23, Chapter 91 is amended by adding an
6 additional subchapter to read as follows:

7
8 Subchapter 3.

9 23-91-301.

10 If after notice and opportunity for hearing the State Insurance
11 Department determines that insurance for professional liability is
12 unavailable for a substantial number of the long-term care providers in
13 Arkansas, then the department shall be authorized to establish the Arkansas
14 Long-Term Care Liability Pool as provided in § 23-91-303.

15
16 23-91-302

17 (a) The Arkansas Long-Term Care Liability Pool shall provide coverage
18 for professional liability for any long-term care providers licensed by the
19 State of Arkansas and receiving Medicare or Medicaid funds administered by
20 the Department of Human Services which shall elect to be covered by the pool.

21
22 (b)(1) The pool shall provide insurance for professional liability for
23 long-term care providers for actual damages under § 16-114-208(a)(1) and for
24 noneconomic compensatory damages under § 16-114-208(a)(2) and actual damages
25 under § 20-10-1209(a)(4).

26 (2) Subject to the twenty-five thousand dollar (\$25,000)
27 deductible provided for in § 23-91-303(3)(A)(i), the pool shall be the
28 exclusive source of recovery of actual damages under § 16-114-208(a)(1) and
29 for noneconomic compensatory damages under § 16-114-208(a)(2) and actual
30 damages under § 12-10-1209(a)(4) recoverable from long-term care providers
31 who elect to be covered by the pool.

32 (c)(1) Except as provided in subdivision (c)(2) of this section,
33 nothing in this section shall preclude recovery of punitive damages against
34 the long-term care provider if permitted under Arkansas law.

35 (2) However, in the action for punitive damages no evidence of
36 any settlement of damages relating to actual or non-economic compensatory

1 damages shall be admissible in any proceeding for punitive damages.

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3 23-91-303.

4 The State Insurance Department shall adopt the following rules and
5 regulations to implement the provisions of this subchapter:

6 (1) The State Insurance Department must find that professional
7 liability insurance coverage is not available in Arkansas for a substantial
8 number of the long-term care providers licensed by the State of Arkansas and
9 receiving Medicare or Medicaid funds administered by the Department of Human
10 Services;

11 (2)(A) The Arkansas Long-Term Care Liability Pool will be established
12 as a separate, independent trust created by the state for the sole and
13 exclusive benefit of claimants against long-term care providers who elect to
14 be covered by the pool.

15 (B) Neither contributions to the pool nor payments from the pool
16 shall be commingled with or be limited or governed by the provision of
17 Arkansas law relating to expenditures of general revenue;

18 (3)(A)(i) The pool shall be established and maintained through a
19 periodic premium payments by the insureds in an amount determined by the
20 governing board of the pool to be sufficient to render the pool self-
21 supporting and actuarially sound to fund the pool risks assumed by the pool
22 with a twenty-five thousand dollar (\$25,000) deductible amount payable by the
23 insured and to fund expenses of the pool.

24 (ii) The risks assumed by the pool shall include the
25 absolute obligation to pay all actual damages determined to be due from the
26 claimants to the insureds under § 16-114-208(a)(1), the amount payable for
27 noneconomic compensatory damages under § 16-114-208(a)(2), actual damages
28 under § 12-10-1209(a)(4), and cost of defense incurred by the insureds.

29 (iii)(a) Except as provided in subdivision (3)(A)(iii)(b)
30 of this section, the amount of actual damages under § 16-114-208(a)(1) and §
31 12-10-1209(a)(4) shall be paid when determined by a final order after the
32 period for appeal has expired.

33 (b) Any portion of such payment to which the state
34 or federal government is entitled under state or federal law shall be paid as
35 a priority to the respective state or federal agency.

36 (iv) Payment of the noneconomic compensatory damages under

1 § 16-114-208(a)(2) may be deferred by the pool in the event that the
2 aggregate noneconomic compensatory damages awarded or allowed for the
3 claimants against the covered insureds exceeds the actuarial reserve
4 established therefor. In that event the pool shall be authorized to pay the
5 deferred portion of any such noneconomic compensatory damages over a period
6 of up to five years, and be payable, with interest thereon, at six percent
7 (6%) per annum in installments to be determined by the pool.

8 (B) The pool administrator shall have the sole and exclusive
9 right to defend all covered claims and to make all determinations as to
10 settlement of covered claims;

11 (4) The pool shall not be authorized to assess covered providers in an
12 amount in excess of the annual premium established by the pool;

13 (5) Provision shall be made for administration of the pool, including:

14 (A) The contracting for administration with private insurance
15 carriers or others;

16 (B) The employment of attorneys, actuaries, and other advisors
17 to the pool; and

18 (C) The payment of agent's commissions for the service of the
19 accounts of the long-term care providers;

20 (6) Provision shall be made for adjustment of contributions for
21 individual long-term care providers based on cost of living index increases
22 and experience rating adjustments for covered providers based on their loss
23 experience;

24 (7) The coverage provided by the pool shall not be mandatory for all
25 long-term care providers licensed by the State of Arkansas and receiving
26 Medicaid and Medicare funds structured by the Department of Human Services,
27 but rather shall be optional for such providers; and

28 (8) Provision shall be made for orderly termination of the pool in the
29 event that coverage becomes available from private carriers for substantially
30 all of the providers.

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33 SECTION 8. EMERGENCY CLAUSE. It is found and determined by the
34 General Assembly that an emergency exists due to the existence of a
35 significant number of lawsuits and claims which may become lawsuits against
36 long-term care facilities; and that if this act is not made effective at the

1 earliest practicable date then the outcome of these claims and lawsuits will
2 jeopardize the financial stability of the long-term care providers, and,
3 therefore, become a threat to the continuing provision for care for the
4 elderly and others requiring long-term care in Arkansas. Therefore, an
5 emergency is declared to exist and this act being immediately necessary for
6 the preservation of the public peace, health and safety shall become
7 effective on the date of its approval by the Governor. If the bill is
8 neither approved nor vetoed by the Governor, it shall become effective on the
9 expiration of the period of time during which the Governor may veto the bill.
10 If the bill is vetoed by the Governor and the veto is overridden, it shall
11 become effective on the date the last house overrides the veto.

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/s/ R. Smith, et al.