

FIRST REGULAR SESSION

# HOUSE BILL NO. 128

102ND GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVE GRIFFITH.

0331H.011

DANA RADEMAN MILLER, Chief Clerk

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## 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.

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*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Section A. Sections 383.200, 383.206, 538.205, and 538.210, RSMo, are repealed  
2 and four new sections enacted in lieu thereof, to be known as sections 383.200, 383.206,  
3 538.205, and 538.210, to read as follows:

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

2 **(1) "Health care provider", the same meaning given to the term in section**  
3 **538.205; except that, the term "health care provider" shall include any long-term care**  
4 **facility licensed under chapter 198;**

5 **(2) "Insurer", includes any insurance company, mutual insurance company, medical**  
6 **malpractice association, any entity created under this chapter, or other entity providing any**  
7 **insurance to any health care provider**~~[-as defined in section 538.205,]~~ **practicing in the state**  
8 **of Missouri, against claims for malpractice or professional negligence; provided, however,**  
9 **that the term "insurer" or "insurers" shall not mean any surplus lines insurer operating under**  
10 **chapter 384 or any entity to the extent it is self-insuring its exposure to medical malpractice**  
11 **liability.**

383.206. 1. Notwithstanding the provisions of sections 383.037 and 383.160, no  
2 insurer shall issue or sell in the state of Missouri a policy insuring a health care provider~~[-as~~  
3 ~~defined in section 538.205,]~~ for damages for personal injury or death arising out of the  
4 rendering of or failure to render health care services if the director finds, based upon  
5 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.

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

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

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

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

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

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

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

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

31         (7) Inflation;

32         (8) Reasonable administrative costs of the insurer;

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

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

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

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

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

- 48 (1) Loss experiences;
- 49 (2) Training and experience;
- 50 (3) Number of employees of the insured entity;
- 51 (4) Availability of equipment, capital, or hospital privileges;
- 52 (5) Loss prevention measures taken by the insured;
- 53 (6) The number and extent of claims not resulting in losses;
- 54 (7) The specialty or subspecialty of the health care provider;
- 55 (8) Access to equipment and hospital privileges; and
- 56 (9) Any other reasonable criteria identified by the insurer and filed with the  
57 department of commerce and insurance.

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

62 6. The director of the department of commerce and insurance shall promulgate rules  
63 for the administration and enforcement of this section. Any rule or portion of a rule, as that  
64 term is defined in section 536.010, that is created under the authority delegated in this section  
65 shall become effective only if it complies with and is subject to all of the provisions of  
66 chapter 536 and, if applicable, section 536.028. This section and chapter 536 are  
67 nonseverable and if any of the powers vested with the general assembly pursuant to chapter  
68 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently  
69 held unconstitutional, then the grant of rulemaking authority and any rule proposed or  
70 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  
2 mean:

- 3 (1) "Catastrophic personal injury", a physical injury resulting in:
  - 4 (a) Quadriplegia defined as the permanent loss of functional use of all four limbs;
  - 5 (b) Paraplegia defined as the permanent loss of functional use of two limbs;
  - 6 (c) Loss of two or more limbs;
  - 7 (d) An injury to the brain that results in permanent cognitive impairment resulting in  
8 the permanent inability to make independent decisions or engage in one or more of the

9 following activities of daily living: eating, dressing, bathing, toileting, transferring, and  
10 walking;

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

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

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

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

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

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

27 (6) "Health care provider", any physician, hospital, health maintenance organization,  
28 ambulatory surgical center, ~~long term care facility including those licensed under chapter~~  
29 ~~198,~~ dentist, registered or licensed practical nurse, optometrist, podiatrist, pharmacist,  
30 chiropractor, professional physical therapist, psychologist, physician-in-training, and any  
31 other person or entity that provides health care services under the authority of a license or  
32 certificate; **except that, the term "health care provider" shall not include any long-term**  
33 **care facility licensed under chapter 198;**

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

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

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

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

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

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

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

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

8 2. (1) In any action against a health care provider for damages for personal injury  
9 arising out of the rendering of or the failure to render health care services, no plaintiff shall  
10 recover more than four hundred thousand dollars for noneconomic damages irrespective of  
11 the number of defendants.

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

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

20 3. (1) This section shall also apply to any individual or entity, or their employees or  
21 agents:

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

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

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

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

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

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

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

48           8. Any provision of law or court rule to the contrary notwithstanding, an award of  
49 punitive damages against a health care provider governed by the provisions of sections  
50 538.205 to ~~[538.230]~~ **538.229** shall be made only upon a finding by the jury that the evidence  
51 clearly and convincingly demonstrated that the health care provider intentionally caused  
52 damage to the plaintiff or demonstrated malicious misconduct that caused damage to the  
53 plaintiff. Evidence of negligence including, but not limited to, indifference to or conscious  
54 disregard for the safety of others shall not constitute intentional conduct or malicious  
55 misconduct.

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

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

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

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

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