

By: Representatives Watson,
Blackmon, Eads, Flaggs, Jennings,
Masterson, Moak, Pierce, Robinson
(63rd), Simpson, Smith (39th),
Stevens, Warren

To: Select Committee on
Civil Justice Reform

HOUSE BILL NO. 2

1 AN ACT TO AMEND SECTIONS 11-11-3, MISSISSIPPI CODE OF 1972,
2 TO REVISE VENUE IN MEDICAL MALPRACTICE ACTIONS; TO AMEND SECTION
3 11-46-1, MISSISSIPPI CODE OF 1972, TO CLARIFY THAT CERTAIN MEDICAL
4 PRACTITIONERS ARE EMPLOYEES UNDER THE TORT CLAIMS ACT; TO CREATE
5 SECTION 11-1-62, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT
6 PHYSICIANS AND PHARMACISTS SHALL BE INDEMNIFIED FOR PRESCRIBING
7 FDA APPROVED DRUGS; TO AMEND SECTION 11-1-63, MISSISSIPPI CODE OF
8 1972, IN CONFORMITY THERETO; TO AMEND SECTION 15-1-36, MISSISSIPPI
9 CODE OF 1972, TO REDUCE THE PERIOD FOR COMMENCING A MALPRACTICE
10 ACTION AGAINST A NURSING FACILITY; TO PROVIDE A NINETY-DAY NOTICE
11 FOR MEDICAL MALPRACTICE ACTIONS; TO AMEND SECTION 85-5-7,
12 MISSISSIPPI CODE OF 1972, TO PROVIDE THAT MEDICAL PRACTITIONERS
13 COVERED UNDER THE TORT CLAIMS ACT ARE ONLY LIABLE FOR THE
14 PERCENTAGE OF THEIR FAULT IN CIVIL ACTIONS; TO PROVIDE THAT
15 PAYMENTS FROM COLLATERAL SOURCES SHALL BE REDUCED FROM AWARDS IN
16 CIVIL ACTIONS; TO REQUIRE AFFIDAVITS IN MEDICAL MALPRACTICE
17 ACTIONS; TO PROVIDE FOR PERIODIC PAYMENTS FOR AWARDS OF \$50,000.00
18 OR MORE; TO PROVIDE A LIMITATION ON THE AWARD OF NONECONOMIC
19 DAMAGES; TO CREATE A MEDICAL MALPRACTICE RISK POOL TO PROVIDE
20 NECESSARY MEDICAL MALPRACTICE FOR CERTAIN HEALTH CARE PROVIDERS;
21 TO AMEND SECTION 43-13-407, MISSISSIPPI CODE OF 1972, TO PROVIDE
22 INITIAL FUNDING FOR THE MEDICAL MALPRACTICE RISK POOL; TO AMEND
23 SECTION 43-11-1, MISSISSIPPI CODE OF 1972, TO DEFINE THE TERM
24 MEDICAL RECORDS; TO CREATE SECTION 43-11-16, MISSISSIPPI CODE OF
25 1972, TO PROVIDE THAT MEDICAL RECORDS SHALL REMAIN THE PROPERTY OF
26 THE INSTITUTIONS FOR THE AGED AND INFIRM, SUBJECT TO REASONABLE
27 ACCESS TO THE INFORMATION CONTAINED THEREIN UPON GOOD CAUSE SHOWN
28 BY THE RESIDENT, HIS PERSONAL REPRESENTATIVES OR HEIRS; TO CREATE
29 THE MEDICAL MALPRACTICE MEDIATION BOARD AND PROVIDE FOR ITS
30 MEMBERSHIP; TO PROVIDE FOR MEDIATION FOR MEDICAL MALPRACTICE AND
31 NURSING FACILITY DISPUTES; TO PROVIDE FOR THE APPOINTMENT AND
32 CERTIFICATION OF MEDIATORS; TO PROVIDE THAT MEDIATION SHALL BE
33 NONBINDING UNLESS THE PARTIES AGREE TO MAKE IT BINDING; TO REQUIRE
34 THE COMMISSIONER OF INSURANCE TO ANNUALLY COMPILE AND PROVIDE TO
35 THE LEGISLATURE A REPORT REGARDING MEDICAL MALPRACTICE CLAIMS; TO
36 PROVIDE INCENTIVE FOR MEDICAL SCHOOL GRADUATES TO PRACTICE IN THE
37 STATE; TO PROVIDE IMMUNITY FOR MEDICAL PERSONNEL PROVIDING
38 VOLUNTEER SERVICE TO SCHOOL PROGRAMS; AND FOR RELATED PURPOSES.

39 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

40 **SECTION 1.** Section 11-11-3, Mississippi Code of 1972, is
41 amended as follows:

42 11-11-3. (1) Civil actions of which the circuit court has
43 original jurisdiction shall be commenced in the county in which
44 the defendant or any of them may be found or in the county where
45 the cause of action may occur or accrue and, if the defendant is a



46 domestic corporation, in the county in which said corporation is
47 domiciled or in the county where the cause of action may occur or
48 accrue, except where otherwise provided, and except actions of
49 trespass on land, ejectment and actions for the statutory penalty
50 for cutting and boxing trees and firing woods and actions for the
51 actual value of trees cut which shall be brought in the county
52 where the land or some part thereof is situated. If a civil
53 action is brought in an improper county, such action may be
54 transferred to the proper county pursuant to Section 11-11-17.

55 (2) Civil actions for claims of medical malpractice shall be
56 commenced in the county where the cause of action occurred.

57 **SECTION 2.** Section 11-46-1, Mississippi Code of 1972, is
58 amended as follows:

59 11-46-1. As used in this chapter the following terms shall
60 have the meanings herein ascribed unless the context otherwise
61 requires:

62 (a) "Claim" means any demand to recover damages from a
63 governmental entity as compensation for injuries.

64 (b) "Claimant" means any person seeking compensation
65 under the provisions of this chapter, whether by administrative
66 remedy or through the courts.

67 (c) "Board" means the Mississippi Tort Claims Board.

68 (d) "Department" means the Department of Finance and
69 Administration.

70 (e) "Director" means the executive director of the
71 department who is also the executive director of the board.

72 (f) "Employee" means any officer, employee or servant
73 of the State of Mississippi or a political subdivision of the
74 state, including elected or appointed officials and persons acting
75 on behalf of the state or a political subdivision in any official
76 capacity, temporarily or permanently, in the service of the state
77 or a political subdivision whether with or without compensation.

78 The term "employee" shall not mean a person or other legal entity



79 while acting in the capacity of an independent contractor under
80 contract to the state or a political subdivision; provided,
81 however, that for purposes of the limits of liability provided for
82 in Section 11-46-15, the term "employee" shall include physicians
83 under contract to provide health services with the State Board of
84 Health, the State Board of Mental Health or any county or
85 municipal jail facility while rendering services under such
86 contract. The term "employee" shall also include any physician,
87 dentist or other medical practitioner under contract or affiliated
88 with or employed by the University of Mississippi Medical Center,
89 its departmental practice plans, or who practices on the campus of
90 any university under the control of the Board of Trustees of State
91 Institutions of Higher Learning only for the purposes of acting
92 within the course and scope of their contract, affiliation or
93 employment. The term "employee" shall also include any physician,
94 dentist or other medical practitioner under contract or affiliated
95 with or employed by the State Veterans Affairs Board only for the
96 purposes of acting within the course and scope of their contract,
97 affiliation or employment. The term "employee" shall also include
98 Mississippi Department of Human Services licensed foster parents
99 for the limited purposes of coverage under the Tort Claims Act as
100 provided in Section 11-46-8.

101 (g) "Governmental entity" means and includes the state
102 and political subdivisions as herein defined.

103 (h) "Injury" means death, injury to a person, damage to
104 or loss of property or any other injury that a person may suffer
105 that is actionable at law or in equity.

106 (i) "Political subdivision" means any body politic or
107 body corporate other than the state responsible for governmental
108 activities only in geographic areas smaller than that of the
109 state, including but not limited to any county, municipality,
110 school district, community hospital as defined in Section
111 41-13-10, Mississippi Code of 1972, airport authority or other



112 instrumentality thereof, whether or not such body or
113 instrumentality thereof has the authority to levy taxes or to sue
114 or be sued in its own name.

115 (j) "State" means the State of Mississippi and any
116 office, department, agency, division, bureau, commission, board,
117 institution, hospital, college, university, airport authority or
118 other instrumentality thereof, whether or not such body or
119 instrumentality thereof has the authority to levy taxes or to sue
120 or be sued in its own name.

121 (k) "Law" means all species of law including but not
122 limited to any and all constitutions, statutes, case law, common
123 law, customary law, court order, court rule, court decision, court
124 opinion, court judgment or mandate, administrative rule or
125 regulation, executive order, or principle or rule of equity.

126 **SECTION 3.** The following shall be codified as Section
127 11-1-62, Mississippi Code of 1972:

128 11-1-62. In any civil action alleging damages caused by a
129 prescription drug and absent any negligence on the part of the
130 physician or pharmacist, a physician or pharmacist shall be
131 indemnified by the manufacturer of the prescription drug for any
132 damages if the federal Food and Drug Administration (FDA) has
133 approved that drug for treatment of the condition, disease or
134 illness for which the drug was prescribed. It is the intent of
135 this section to indemnify innocent physicians and pharmacists who
136 are not actively negligent from forum-driven lawsuits and that, as
137 to any claim brought against a physician under this section, the
138 physician's insurer shall not count such claim against the
139 physician for the purposes of insurance underwriting or, in any
140 way, increase premiums for or deny insurance coverage.

141 **SECTION 4.** Section 11-1-63, Mississippi Code of 1972, is
142 amended as follows:

143 11-1-63. In any action for damages caused by a product
144 except for commercial damage to the product itself:



145 (a) Subject to the provisions of Section 11-1-62, the
146 manufacturer, seller, distributor or prescriber of the product
147 shall not be liable if the claimant does not prove by the
148 preponderance of the evidence that at the time the product left
149 the control of the manufacturer, seller, distributor or
150 prescriber:

151 (i) 1. The product was defective because it
152 deviated in a material way from the manufacturer's specifications
153 or from otherwise identical units manufactured to the same
154 manufacturing specifications, or

155 2. The product was defective because it
156 failed to contain adequate warnings or instructions, or

157 3. The product was designed in a defective
158 manner, or

159 4. The product breached an express warranty
160 or failed to conform to other express factual representations upon
161 which the claimant justifiably relied in electing to use the
162 product; and

163 (ii) The defective condition rendered the product
164 unreasonably dangerous to the user or consumer; and

165 (iii) The defective and unreasonably dangerous
166 condition of the product proximately caused the damages for which
167 recovery is sought.

168 (b) A product is not defective in design or formulation
169 if the harm for which the claimant seeks to recover compensatory
170 damages was caused by an inherent characteristic of the product
171 which is a generic aspect of the product that cannot be eliminated
172 without substantially compromising the product's usefulness or
173 desirability and which is recognized by the ordinary person with
174 the ordinary knowledge common to the community.

175 (c) (i) In any action alleging that a product is
176 defective because it failed to contain adequate warnings or
177 instructions pursuant to paragraph (a)(i)2 of this section, the



178 manufacturer, seller, distributor or prescriber shall not be
179 liable if the claimant does not prove by the preponderance of the
180 evidence that at the time the product left the control of the
181 manufacturer, seller, distributor or prescriber, the manufacturer,
182 seller, distributor or prescriber knew or in light of reasonably
183 available knowledge should have known about the danger that caused
184 the damage for which recovery is sought and that the ordinary user
185 or consumer would not realize its dangerous condition.

186 (ii) An adequate product warning or instruction is
187 one that a reasonably prudent person in the same or similar
188 circumstances would have provided with respect to the danger and
189 that communicates sufficient information on the dangers and safe
190 use of the product, taking into account the characteristics of,
191 and the ordinary knowledge common to an ordinary consumer who
192 purchases the product; or in the case of a prescription drug,
193 medical device or other product that is intended to be used only
194 under the supervision of a physician or other licensed
195 professional person, taking into account the characteristics of,
196 and the ordinary knowledge common to, a physician or other
197 licensed professional who prescribes the drug, device or other
198 product.

199 (d) For purposes of this section:

200 (i) "Seller" means any person or entity that sells
201 products of any kind.

202 (ii) "Prescriber" means any person licensed by the
203 State of Mississippi to prescribe medicine.

204 (e) In any action alleging that a product is defective
205 pursuant to paragraph (a) of this section, the manufacturer,
206 seller, distributor or prescriber shall not be liable if the
207 claimant (i) had knowledge of a condition of the product that was
208 inconsistent with his safety; (ii) appreciated the danger in the
209 condition; and (iii) deliberately and voluntarily chose to expose



210 himself to the danger in such a manner to register assent on the
211 continuance of the dangerous condition.

212 (f) In any action alleging that a product is defective
213 pursuant to paragraph (a)(i)2 of this section, the manufacturer,
214 seller, distributor or prescriber shall not be liable if the
215 danger posed by the product is known or is open and obvious to the
216 user or consumer of the product, or should have been known or open
217 and obvious to the user or consumer of the product, taking into
218 account the characteristics of, and the ordinary knowledge common
219 to, the persons who ordinarily use or consume the product.

220 (g) In any action alleging that a product is defective
221 because of its design pursuant to paragraph (a)(i)3 of this
222 section, the manufacturer or product seller shall not be liable if
223 the claimant does not prove by the preponderance of the evidence
224 that at the time the product left the control of the manufacturer
225 or seller:

226 (i) The manufacturer, seller, distributor or
227 prescriber knew, or in light of reasonably available knowledge or
228 in the exercise of reasonable care should have known, about the
229 danger that caused the damage for which recovery is sought; and

230 (ii) The product failed to function as expected
231 and there existed a feasible design alternative that would have to
232 a reasonable probability prevented the harm. A feasible design
233 alternative is a design that would have to a reasonable
234 probability prevented the harm without impairing the utility,
235 usefulness, practicality or desirability of the product to users
236 or consumers.

237 (h) (i) The manufacturer of a product who is found
238 liable for a defective product pursuant to subsection (a) shall
239 indemnify a product seller, distributor or prescriber for the
240 costs of litigation, any reasonable expenses, reasonable
241 attorney's fees and any damages awarded by the trier of fact
242 unless the seller, distributor or prescriber exercised substantial



243 control over that aspect of the design, testing, manufacture,
244 packaging or labeling of the product that caused the harm for
245 which recovery of damages is sought; the seller, distributor or
246 prescriber altered or modified the product, and the alteration or
247 modification was a substantial factor in causing the harm for
248 which recovery of damages is sought; the seller, distributor or
249 prescriber had actual knowledge of the defective condition of the
250 product at the time he supplied same; or the seller, distributor
251 or prescriber made an express factual representation about the
252 aspect of the product which caused the harm for which recovery of
253 damages is sought.

254 (ii) Subparagraph (i) shall not apply unless the
255 seller, distributor or prescriber has given prompt notice of the
256 suit to the manufacturer within thirty (30) days of the filing of
257 the complaint against the seller.

258 (i) Nothing in this section shall be construed to
259 eliminate any common law defense to an action for damages caused
260 by a product.

261 **SECTION 5.** Section 15-1-36, Mississippi Code of 1972, is
262 amended as follows:

263 15-1-36. (1) For any claim accruing on or before June 30,
264 1998, and except as otherwise provided in this section, no claim
265 in tort may be brought against a licensed physician, osteopath,
266 dentist, hospital, nursing facility, nurse, pharmacist,
267 podiatrist, optometrist or chiropractor for injuries or wrongful
268 death arising out of the course of medical, surgical or other
269 professional services unless it is filed within two (2) years from
270 the date the alleged act, omission or neglect shall or with
271 reasonable diligence might have been first known or discovered.

272 (2) For any claim accruing on or after July 1, 1998, and
273 except as otherwise provided in this section, no claim in tort may
274 be brought against a licensed physician, osteopath, dentist,
275 hospital, nursing facility, nurse, pharmacist, podiatrist,



276 optometrist or chiropractor for injuries or wrongful death arising
277 out of the course of medical, surgical or other professional
278 services unless it is filed within two (2) years from the date the
279 alleged act, omission or neglect shall or with reasonable
280 diligence might have been first known or discovered, and, except
281 as described in paragraphs (a) and (b) of this subsection, in no
282 event more than seven (7) years after the alleged act, omission or
283 neglect occurred:

284 (a) In the event a foreign object introduced during a
285 surgical or medical procedure has been left in a patient's body,
286 the cause of action shall be deemed to have first accrued at, and
287 not before, the time at which the foreign object is, or with
288 reasonable diligence should have been, first known or discovered
289 to be in the patient's body.

290 (b) In the event the cause of action shall have been
291 fraudulently concealed from the knowledge of the person entitled
292 thereto, the cause of action shall be deemed to have first accrued
293 at, and not before, the time at which such fraud shall be, or with
294 reasonable diligence should have been, first known or discovered.

295 (3) Except as otherwise provided in subsection (4) of this
296 section, if at the time at which the cause of action shall or with
297 reasonable diligence might have been first known or discovered,
298 the person to whom such claim has accrued shall be six (6) years
299 of age or younger, then such minor or the person claiming through
300 such minor may, notwithstanding that the period of time limited
301 pursuant to subsections (1) and (2) of this section shall have
302 expired, commence action on such claim at any time within two (2)
303 years next after the time at which the minor shall have reached
304 his sixth birthday, or shall have died, whichever shall have first
305 occurred.

306 (4) If at the time at which the cause of action shall or
307 with reasonable diligence might have been first known or
308 discovered, the person to whom such claim has accrued shall be a



309 minor without a parent or legal guardian, then such minor or the
310 person claiming through such minor may, notwithstanding that the
311 period of time limited pursuant to subsections (1) and (2) of this
312 section shall have expired, commence action on such claim at any
313 time within two (2) years next after the time at which the minor
314 shall have a parent or legal guardian or shall have died,
315 whichever shall have first occurred; provided, however, that in no
316 event shall the period of limitation begin to run prior to such
317 minor's sixth birthday unless such minor shall have died.

318 (5) If at the time at which the cause of action shall or
319 with reasonable diligence might have been first known or
320 discovered, the person to whom such claim has accrued shall be
321 under the disability of unsoundness of mind, then such person or
322 the person claiming through him may, notwithstanding that the
323 period of time hereinbefore limited shall have expired, commence
324 action on such claim at any time within two (2) years next after
325 the time at which the person to whom the right shall have first
326 accrued shall have ceased to be under the disability, or shall
327 have died, whichever shall have first occurred.

328 (6) When any person who shall be under the disabilities
329 mentioned in subsections (3), (4) and (5) of this section at the
330 time at which his right shall have first accrued, shall depart
331 this life without having ceased to be under such disability, no
332 time shall be allowed by reason of the disability of such person
333 to commence action on the claim of such person beyond the period
334 prescribed under Section 15-1-55, Mississippi Code of 1972.

335 (7) For the purposes of subsection (3) of this section, and
336 only for the purposes of such subsection, the disability of
337 infancy or minority shall be removed from and after a person has
338 reached his sixth birthday.

339 (8) For the purposes of subsection (4) of this section, and
340 only for the purposes of such subsection, the disability of
341 infancy or minority shall be removed from and after a person has



342 reached his sixth birthday or from and after such person shall
343 have a parent or legal guardian, whichever occurs later, unless
344 such disability is otherwise removed by law.

345 (9) The limitation established by this section as to a
346 licensed physician, osteopath, dentist, hospital or nurse shall
347 apply only to actions the cause of which accrued on or after July
348 1, 1976.

349 (10) The limitation established by this section as to
350 pharmacists shall apply only to actions the cause of which accrued
351 on or after July 1, 1978.

352 (11) The limitation established by this section as to
353 podiatrists shall apply only to actions the cause of which accrued
354 on or after July 1, 1979.

355 (12) The limitation established by this section as to
356 optometrists and chiropractors shall apply only to actions the
357 cause of which accrued on or after July 1, 1983.

358 (13) The limitation established by this section as to
359 actions commenced on behalf of minors shall apply only to actions
360 the cause of which accrued on or after July 1, 1989.

361 (14) The limitation established by this section as to
362 nursing facilities shall apply only to actions the cause of which
363 accrued after the passage of House Bill No. _____, Third
364 Extraordinary Session of 2002.

365 (15) No action based upon the health care provider's
366 professional negligence may be begun unless the defendant has been
367 given at least ninety (90) days' prior notice of the intention to
368 begin the action. No particular form of notice is required, but
369 it shall notify the defendant of the legal basis of the claim and
370 the type of loss sustained, including with specificity the nature
371 of the injuries suffered. If the notice is served within ninety
372 (90) days of the expiration of the applicable statute of
373 limitations, the time for the beginning of the action shall be
374 extended ninety (90) days from the service of the notice. This



375 subsection shall not be applicable with respect to any defendant
376 whose name is unknown to the plaintiff at the time of filing the
377 complaint and who is identified therein by a fictitious name.

378 **SECTION 6.** Section 85-5-7, Mississippi Code of 1972, is
379 amended as follows:

380 85-5-7. (1) As used in this section "fault" means an act or
381 omission of a person which is a proximate cause of injury or death
382 to another person or persons, damages to property, tangible or
383 intangible, or economic injury, including but not limited to
384 negligence, malpractice, strict liability, absolute liability or
385 failure to warn. "Fault" shall not include any tort which results
386 from an act or omission committed with a specific wrongful intent.

387 (2) Except as may be otherwise provided in subsections (6)
388 and (8) of this section, in any civil action based on fault, the
389 liability for damages caused by two (2) or more persons shall be
390 joint and several only to the extent necessary for the person
391 suffering injury, death or loss to recover fifty percent (50%) of
392 his recoverable damages.

393 (3) Except as otherwise provided in subsections (2) and (6)
394 of this section, in any civil action based on fault, the liability
395 for damages caused by two (2) or more persons shall be several
396 only, and not joint and several and a joint tortfeasor shall be
397 liable only for the amount of damages allocated to him in direct
398 proportion to his percentage of fault. In assessing percentages
399 of fault an employer and the employer's employee or a principal
400 and the principal's agent shall be considered as one (1) defendant
401 when the liability of such employer or principal has been caused
402 by the wrongful or negligent act or omission of the employee or
403 agent.

404 (4) Any defendant held jointly liable under this section
405 shall have a right of contribution against fellow joint
406 tortfeasors. A defendant shall be held responsible for



407 contribution to other joint tortfeasors only for the percentage of
408 fault assessed to such defendant.

409 (5) Nothing in this section shall eliminate or diminish any
410 defenses or immunities which currently exist, except as expressly
411 noted herein.

412 (6) Joint and several liability shall be imposed on all who
413 consciously and deliberately pursue a common plan or design to
414 commit a tortious act, or actively take part in it. Any person
415 held jointly and severally liable under this section shall have a
416 right of contribution from his fellow defendants acting in
417 concert.

418 (7) In actions involving joint tortfeasors, the trier of
419 fact shall determine the percentage of fault for each party
420 alleged to be at fault.

421 (8) Physicians, dentists and other medical practitioners
422 covered under the provisions of Section 11-46-1 et seq. shall only
423 be liable for the amount of damages which is the percentage of
424 fault allocated to such physician, dentist and other medical
425 practitioners.

426 (9) Nothing in this section shall be construed to create a
427 cause of action. Nothing in this section shall be construed, in
428 any way, to alter the immunity of any person.

429 **SECTION 7.** After the jury makes an award in an action for
430 personal injury against a health care provider based upon
431 professional negligence, the defendant may present to the
432 presiding judge evidence of any amount payable as a benefit to the
433 plaintiff as a result of the personal injury under the United
434 States Social Security Act, any state or federal income disability
435 or worker's compensation act, any health, sickness or
436 income-disability insurance, accident insurance that provides
437 health benefits or income-disability coverage and any contract or
438 agreement of any group, organization, partnership or corporation
439 to provide, pay for or reimburse the cost of medical, hospital,



440 dental or other health care services. If the defendant elects to
441 present such evidence, the plaintiff may introduce evidence of any
442 amount which the plaintiff has paid or contributed to secure his
443 right to these insurance benefits. The plaintiff may also
444 introduce evidence of any leave time lost due to the personal
445 injury. The presiding judge shall reduce the jury award by the
446 amount of such benefits less any amount which the plaintiff has
447 paid or contributed to secure such benefits.

448 "Health care provider" means an individual licensed,
449 certified or otherwise authorized or permitted by law to provide
450 health care in the ordinary course of business or practice of a
451 profession. "Health care provider" also means any hospital or
452 nursing facility.

453 "Professional negligence" means a negligent act or omission
454 to act by a health care provider in the rendering of professional
455 services, which act or omission is the proximate cause of a
456 personal injury or wrongful death, provided that such services are
457 within the scope of services for which the provider is licensed
458 and which are not within any restriction imposed by the licensing
459 agency or licensed hospital.

460 **SECTION 8.** Before any action for medical malpractice may be
461 brought, the attorney bringing such action shall sign an affidavit
462 as an officer of the court stating that he has had his case
463 reviewed by a medical expert and the medical expert has determined
464 that there is a reasonable basis for the commencement of the
465 action.

466 **SECTION 9.** (1) In any action for injury or damages against
467 a provider of health care services, the court shall, at the
468 request of either party, enter a judgment ordering that money
469 damages or its equivalent for future damages of the judgment
470 creditor be paid in whole or in part by periodic payments rather
471 than by a lump-sum payment if the award equals or exceeds Fifty
472 Thousand Dollars (\$50,000.00) in future damages. In entering a



473 judgment ordering the payment of future damages by periodic
474 payments, the court shall make a specific finding as to the dollar
475 amount of periodic payments which will compensate the judgment
476 creditor for such future damages. As a condition to authorizing
477 period payments of future damages, the court shall require the
478 judgment debtor who is not adequately insured to post security
479 adequate to assure full payment of such damages awarded by the
480 judgment. Upon termination of periodic payments of future
481 damages, the court shall order the return of this security, or so
482 much as remains, to the judgment debtor.

483 (2) (a) The judgment ordering the payment of future damages
484 by periodic payments shall specify the recipient or recipients of
485 the payments, the dollar amount of the payments, the interval
486 between payments, and the number of payments or the period of time
487 over which payments shall be made. Such payments shall only be
488 subject to modification in the event of the death of the judgment
489 creditor.

490 (b) In the event that the court finds that the judgment
491 debtor has exhibited a continuing pattern of failing to make the
492 payments, as specified in paragraph (a), the court shall find the
493 judgment debtor in contempt of court and, in addition to the
494 required periodic payments, shall order the judgment debtor to pay
495 the judgment creditor all damages caused by the failure to make
496 such period payments, including court costs and attorney's fees.

497 (3) However, money damages awarded for loss of future
498 earnings shall not be reduced or payments terminated by reason of
499 the death of the judgment creditor, but shall be paid to persons
500 to whom the judgment creditor owed a duty of support, as provided
501 by law, immediately prior to his death. In such cases the court
502 which rendered the original judgment, may, upon petition of any
503 party in interest, modify the judgment to award and apportion the
504 unpaid future damages in accordance with this subsection.



505 (4) Following the occurrence or expiration of all
506 obligations specified in the periodic payment judgment, any
507 obligation of the judgment debtor to make further payments shall
508 cease and any security given, pursuant to subsection (1) shall
509 revert to the judgment debtor.

510 (5) As used in this section:

511 (a) "Future damages" includes damages for future
512 medical treatment, care or custody, loss of future earnings, loss
513 of bodily function, or future pain and suffering of the judgment
514 creditor.

515 (b) "Periodic payments" means the payment of money or
516 delivery of other property to the judgment creditor at regular
517 intervals.

518 (c) "Health care provider" means an individual
519 licensed, certified, or otherwise authorized or permitted by law
520 to provide health care in the ordinary course of business or
521 practice of a profession. "Health care provider" includes the
522 legal representatives of a health care provider. "Health care
523 provider" also means any hospital or nursing facility.

524 (d) "Professional negligence" means a negligent act or
525 omission to act by a health care provider in the rendering of
526 professional services, which act or omission is the proximate
527 cause of a personal injury or wrongful death, provided that such
528 services are within the scope of services for which the provider
529 is licensed and which are not within any restriction imposed by
530 the licensing agency or licensed hospital.

531 (6) It is the intent of the Legislature in enacting this
532 section to authorize the entry of judgments in malpractice actions
533 against health care providers which provide for the payment of
534 future damages through periodic payments rather than lump-sum
535 payments. By authorizing periodic payment judgments, it is the
536 further intent of the Legislature that the courts will utilize
537 such judgments to provide compensation sufficient to meet the



538 needs of an injured plaintiff and those persons who are dependent
539 on the plaintiff for whatever period is necessary while
540 eliminating the potential windfall from a lump-sum recovery which
541 was intended to provide for the care of an injured plaintiff over
542 an extended period who then dies shortly after the judgment is
543 paid, leaving the balance of the judgment award to persons and
544 purposes for which it was not intended. It is also the intent of
545 the Legislature that all elements of the periodic payment program
546 be specified with certainty in the judgment ordering such payments
547 and that the judgment not be subject to modification at some
548 future time which might alter the specifications of the original
549 judgment.

550 **SECTION 10.** (1) For the purposes of this section, the
551 following words and phrases shall have the meanings ascribed
552 herein unless the context clearly requires otherwise:

553 (a) "Noneconomic damages" means subjective,
554 nonpecuniary damages arising from death, pain, suffering,
555 inconvenience, physical impairment, disfigurement, mental anguish,
556 worry, emotional distress, loss of society and companionship, loss
557 of consortium, bystander injury, injury to reputation,
558 humiliation, loss of the enjoyment of life, hedonic damages, other
559 nonpecuniary damages, and any other theory of damages such as fear
560 of loss, illness or injury. The term "noneconomic damages" shall
561 not include punitive damages.

562 (b) "Actual economic damages" means objectively
563 verifiable pecuniary damages arising from medical expenses and
564 medical care, rehabilitation services, custodial care,
565 disabilities, loss of earnings and earning capacity, loss of
566 income, burial costs, loss of use of property, costs of repair of
567 replacement of property, costs of obtaining substitute domestic
568 services, loss of employment, loss of business or employment
569 opportunities, and other objectively verifiable monetary losses.



570 (2) (a) In any action for malpractice, negligence, error,
571 omission, mistake or the unauthorized rendering of professional
572 services against a provider of health care, the court shall
573 instruct the jury that in the event they find the defendant
574 liable, they shall not award the plaintiff more than Five Hundred
575 Thousand Dollars (\$500,000.00) for pain and suffering, loss of
576 companionship, embarrassment and other items of general damages
577 unless the judge determines by clear and convincing evidence that
578 there is substantial or permanent loss or impairment of a bodily
579 function or substantial disfigurement, or other special
580 circumstances in the case which warrant a finding that imposition
581 of such a limitation would deprive the plaintiff of just
582 compensation for the injuries sustained. In any such action which
583 is tried without a jury, the court shall not award the plaintiff
584 more than Five Hundred Thousand Dollars (\$500,000.00) for pain and
585 suffering, loss of companionship, embarrassment and other items of
586 general damages unless the aforesaid findings are made specially
587 by the court and stated separately in the judgment entered by the
588 court. It is the intent of this section to limit all noneconomic
589 damages to the above.

590 (b) The limitations on damages set forth in this
591 section shall be adjusted for inflation annually. The adjustment
592 shall be based on the cumulative annual adjustment for inflation
593 for each year since the effective date of the damages limitations
594 in this section. The adjustment made pursuant to this paragraph
595 shall be rounded upward or downward to the nearest increment of
596 Ten Dollars (\$10.00).

597 (c) As used in this section, "inflation" means the
598 annual percentage change in the United States Department of Labor,
599 Bureau of Labor Statistics, Consumer Price Index for the State of
600 Mississippi, all items, all urban consumers or its successor
601 index.



602 (d) The Secretary of State shall certify the adjusted
603 limitation on damages within fourteen (14) days after the
604 appropriate information is available.

605 **SECTION 11.** The Commissioner of Insurance shall establish a
606 medical malpractice risk pool for the purpose of making necessary
607 medical malpractice insurance available for physicians, registered
608 nurses and all other personnel who are duly licensed to practice
609 in a hospital and hospitals. Monies for the initial funding of
610 the Medical Malpractice Risk Pool shall be drawn from the Health
611 Care Expendable Fund established in Section 43-13-407. The
612 Commissioner of Insurance shall promulgate rules and regulations
613 necessary for the operation of the risk pool.

614 **SECTION 12.** Section 43-13-407, Mississippi Code of 1972, is
615 amended as follows:

616 43-13-407. (1) In accordance with the purposes of this
617 article, there is established in the State Treasury the Health
618 Care Expendable Fund, into which shall be transferred from the
619 Health Care Trust Fund the following sums:

620 (a) In fiscal year 2000, Fifty Million Dollars
621 (\$50,000,000.00);

622 (b) In fiscal year 2001, Fifty-five Million Dollars
623 (\$55,000,000.00);

624 (c) In fiscal year 2002, Sixty Million Five Hundred
625 Thousand Dollars (\$60,500,000.00);

626 (d) In fiscal year 2003, Sixty-six Million Five Hundred
627 Fifty Thousand Dollars (\$66,550,000.00);

628 (e) In fiscal year 2004 and each subsequent fiscal
629 year, a sum equal to the average annual amount of the income from
630 the investment of the funds in the Health Care Trust Fund since
631 July 1, 1999.

632 (2) In any fiscal year in which interest and dividends from
633 the investment of the funds in the Health Care Trust Fund are not
634 sufficient to fund the full amount of the annual transfer into the



635 Health Care Expendable Fund as required in subsection (1) of this
636 section, the State Treasurer shall transfer from tobacco
637 settlement installment payments an amount that is sufficient to
638 fully fund the amount of the annual transfer.

639 (3) (a) On March 6, 2002, the State Treasurer shall
640 transfer the sum of Eighty-seven Million Dollars (\$87,000,000.00)
641 from the Health Care Trust Fund into the Health Care Expendable
642 Fund. In addition, at the time the State of Mississippi receives
643 the 2002 calendar year tobacco settlement installment payment, the
644 State Treasurer shall deposit the full amount of that installment
645 payment into the Health Care Expendable Fund.

646 (b) If during any fiscal year after March 6, 2002, the
647 general fund revenues received by the state exceed the general
648 fund revenues received during the previous fiscal year by more
649 than five percent (5%), the Legislature shall repay to the Health
650 Care Trust Fund one-third (1/3) of the amount of the general fund
651 revenues that exceed the five percent (5%) growth in general fund
652 revenues. The repayment required by this paragraph shall continue
653 in each fiscal year in which there is more than five percent (5%)
654 growth in general fund revenues, until the full amount of the
655 funds that were transferred and deposited into the Health Care
656 Expendable Fund under the provisions of paragraph (a) of this
657 subsection have been repaid to the Health Care Trust Fund.

658 (4) All income from the investment of the funds in the
659 Health Care Expendable Fund shall be credited to the account of
660 the Health Care Expendable Fund. Any funds in the Health Care
661 Expendable Fund at the end of a fiscal year shall not lapse into
662 the State General Fund.

663 (5) The funds in the Health Care Expendable Fund shall be
664 available for expenditure under specific appropriation by the
665 Legislature beginning in fiscal year 2000, and shall be expended
666 exclusively for health care purposes, including, but not limited
667 to, the initial funding for the Medical Malpractice Risk Pool



668 established in House Bill _____, 2002 Third Extraordinary
669 Session.

670 (6) Subsections (1), (2), (4) and (5) of this section shall
671 stand repealed on July 1, 2004.

672 **SECTION 13.** Section 43-11-1, Mississippi Code of 1972, is
673 amended as follows:

674 43-11-1. When used in this chapter, the following words
675 shall have the following meaning:

676 (a) "Institutions for the aged or infirm" means a place
677 either governmental or private which provides group living
678 arrangements for four (4) or more persons who are unrelated to the
679 operator and who are being provided food, shelter and personal
680 care whether any such place be organized or operated for profit or
681 not. The term "institution for aged or infirm" includes nursing
682 homes, pediatric skilled nursing facilities, psychiatric
683 residential treatment facilities, convalescent homes and homes for
684 the aged, provided that these institutions fall within the scope
685 of the definitions set forth above. The term "institution for the
686 aged or infirm" does not include hospitals, clinics or mental
687 institutions devoted primarily to providing medical service.

688 (b) "Person" means any individual, firm, partnership,
689 corporation, company, association or joint stock association, or
690 any licensee herein or the legal successor thereof.

691 (c) "Personal care" means assistance rendered by
692 personnel of the home to aged or infirm residents in performing
693 one or more of the activities of daily living, which includes, but
694 is not limited to, the bathing, walking, excretory functions,
695 feeding, personal grooming and dressing of such residents.

696 (d) "Psychiatric residential treatment facility" means
697 any nonhospital establishment with permanent facilities which
698 provides a 24-hour program of care by qualified therapists
699 including, but not limited to, duly licensed mental health
700 professionals, psychiatrists, psychologists, psychotherapists and



701 licensed certified social workers, for emotionally disturbed
702 children and adolescents referred to such facility by a court,
703 local school district or by the Department of Human Services, who
704 are not in an acute phase of illness requiring the services of a
705 psychiatric hospital, and are in need of such restorative
706 treatment services. For purposes of this paragraph, the term
707 "emotionally disturbed" means a condition exhibiting one or more
708 of the following characteristics over a long period of time and to
709 a marked degree, which adversely affects educational performance:

- 710 1. An inability to learn which cannot be explained
711 by intellectual, sensory or health factors;
- 712 2. An inability to build or maintain satisfactory
713 relationships with peers and teachers;
- 714 3. Inappropriate types of behavior or feelings
715 under normal circumstances;
- 716 4. A general pervasive mood of unhappiness or
717 depression; or
- 718 5. A tendency to develop physical symptoms or
719 fears associated with personal or school problems. An
720 establishment furnishing primarily domiciliary care is not within
721 this definition.

722 (e) "Pediatric skilled nursing facility" means an
723 institution or a distinct part of an institution that is primarily
724 engaged in providing to inpatients skilled nursing care and
725 related services for persons under twenty-one (21) years of age
726 who require medical or nursing care or rehabilitation services for
727 the rehabilitation of injured, disabled or sick persons.

728 (f) "Licensing agency" means the State Department of
729 Health.

730 (g) "Medical records" mean, without restriction, those
731 medical histories, records, reports, summaries, diagnoses and
732 prognoses, records of treatment and medication ordered and given,
733 notes, entries, x-rays and other written or graphic data prepared,



734 kept, made or maintained in institutions for the aged or infirm
735 that pertain to residency in, or services rendered to residents
736 of, an institution for the aged or infirm.

737 **SECTION 14.** The following shall be codified as Section
738 43-11-16, Mississippi Code of 1972:

739 43-11-16. Medical records are and shall remain the property
740 of the various institutions for the aged and infirm, subject
741 however to reasonable access to the information contained therein
742 upon good cause shown by the resident, his personal
743 representatives or heirs, his attending medical personnel and his
744 duly authorized nominees, and upon payment of any reasonable
745 charges for such service. Nothing in this section shall be
746 construed to deny access to medical records by the licensing
747 agency in the discharge of its official duties under this chapter.
748 Except as otherwise provided by law, medical records shall not
749 constitute public records and nothing in this section shall be
750 deemed to impair any privilege of confidence conferred by law or
751 the Mississippi Rules of Evidence on residents, their personal
752 representatives or heirs by Section 13-1-21.

753 **SECTION 15.** (1) There is created the Medical Malpractice
754 Mediation Board which shall be comprised of the following members:

755 (a) One (1) person appointed by the Governor;

756 (b) One (1) person appointed by the Mississippi Trial
757 Lawyers Association;

758 (c) One (1) person appointed by the Mississippi Bar;

759 (d) One (1) person appointed by the Mississippi
760 Hospital Association; and

761 (e) One (1) person appointed by the Mississippi Medical
762 Association.

763 (2) All members of the board shall be entitled to per diem
764 as provided in Section 25-3-69 and travel expenses as provided in
765 Section 25-3-41 for the performance of their duties as members of
766 the board.



767 (3) The board shall elect a chairman and other officers it
768 deems necessary to carry out the purposes of this act.

769 **SECTION 16.** Before any medical malpractice suit or suit
770 involving a nursing facility may be brought, the dispute must be
771 submitted for mediation. The board shall appoint and certify
772 mediators for such disputes. Mediators shall be members of the
773 Mississippi Bar who have been engaged in the active practice of
774 law for a minimum of five (5) years. The mediator shall make
775 every effort to help parties resolve their dispute in order to
776 avoid litigation. Mediation shall be informal and rules of Civil
777 Procedure and Evidence shall be relaxed. Mediation under this act
778 shall be nonbinding unless the parties agree in writing to make
779 the mediation binding. Any matter which is submitted for
780 mediation under this act which is not resolved may not be filed as
781 civil action until ninety (90) days after the termination of
782 mediation.

783 **SECTION 17.** Sections 15 and 16 of this act shall not be
784 construed to take away from the courts their power over awards,
785 nor to make invalid any award good at common law. Sections 15 and
786 16 of this act shall be liberally construed for the encouragement
787 of the settlement of disputes and the prevention of litigation.

788 **SECTION 18.** The Commissioner of Insurance annually for a
789 period of three (3) years shall compile and provide to the
790 Legislature a report on the number of medical malpractice claims,
791 the rate being charged for medical malpractice insurance premiums,
792 the number of physicians leaving the state and any other issues
793 that the commissioner determines impact the medical profession.

794 **SECTION 19.** If any graduate of the University of Mississippi
795 Medical Center decides to retain residency and practice medicine
796 in the state upon graduation from any accredited medical doctor
797 program or nurse practitioner program, then for a period of two
798 (2) years that physician or nurse practitioner shall be able to
799 receive from designated state funds an amount not to exceed twenty



800 percent (20%) of such physician's or nurse practitioner's medical
801 malpractice premium should those funds be made available by the
802 Legislature and if the physician's or nurse practitioner's
803 practice includes a minimum of twenty percent (20%) Medicaid paid
804 patients.

805 **SECTION 20.** (1) Any licensed physician or certified nurse
806 practitioner who voluntarily provides needed medical or health
807 services to any program at an accredited school in the state
808 without the expectation of payment due to the inability of such
809 person to pay for said services shall be immune from liability for
810 any civil action arising out of the provision of such medical or
811 health services provided in good faith on a charitable basis.
812 This section shall not extend immunity to acts of willful or gross
813 negligence. Except in cases of rendering emergency care wherein
814 the provisions of Section 73-25-37, Mississippi Code of 1972,
815 apply, immunity under this section shall be extended only if the
816 physician or certified nurse practitioner and patient execute a
817 written waiver in advance of the rendering of such medical
818 services specifying that such services are provided without the
819 expectation of payment and that the licensed physician or
820 certified nurse practitioner shall be immune as provided herein.

821 (2) Any physician who voluntarily renders any medical
822 service under a special volunteer medical license authorized under
823 Section 73-25-18 without any payment or compensation or the
824 expectation or promise of any payment or compensation shall be
825 immune from liability for any civil action arising out of any act
826 or omission resulting from the rendering of the medical service
827 unless the act or omission was the result of the physician's gross
828 negligence or willful misconduct. In order for the immunity under
829 this subsection to apply, there must be a written or oral
830 agreement for the physician to provide a voluntary noncompensated
831 medical service before the rendering of the service by the
832 physician.



833 **SECTION 21.** This act shall take effect and be in force from
834 and after its passage and shall apply only to causes of action
835 accruing on or after that date.

