ARKANSAS SENATE

84th General Assembly - Regular Session, 2003

Amendment Form

* *

Subtitle of Senate Bill No. 919

"AN ACT TO CREATE A LIABILITY INSURANCE POOL FOR NURSING HOME PATIENTS

"

* *

Amendment No. 2 to Senate Bill No. 919.

Amend Senate Bill No. 919 as engrossed, S3/18/03:

Page 1, line 29, delete “(b)” and substitute “(b)(1)”

AND

Page 1, delete line 32 and substitute the following:
"of participating facilities.

(2) This subchapter provides fair administrative and court procedures for the resolution of disputes between facilities and their patients."

AND

Page 1, delete line 36 and substitute the following:

"(1) "Action for injury" means any civil action, whether based in tort, contract, or otherwise, to recover damages on account of an injury to a patient of a skilled nursing facility;

(2) “Affiliate of a skilled nursing facility” means any person”

AND

Page 2, line 3, delete “(2)” and substitute “(3)”

AND

Page 2, line 5, delete “(3)(A)” and substitute “(4)(A)”

AND

Page 2, line 12, delete “(4)” and substitute “(5)”

AND

Page 2, delete line 13 and substitute the following:
"or action for injury against a skilled nursing facility;"

AND

Page 2, line 14, delete “(5)” and substitute “(6)”

AND

Page 2, delete line 16 and substitute the following:
"services, including ordinary and customary long-term care services, rendered to the patient by the facility, its owners, principals,”

AND

Page 2, line 22, delete “(6)” and substitute “(7)

AND

Page 2, line 30, delete “(7)(A)” and substitute “(8)(A)”

AND

Page 2, line 36, delete “(8)” and substitute “(9)”

AND

Page 3, delete lines 2 and 3 and substitute the following:
"(10)(A) "Skilled nursing facility" means a "long-term care facility" as defined by § 20-10-213.

(B) However, "skilled nursing facility" does not include a residential care facility, post-acute head injury retraining and residential care facility, assisted living facility, or intermediate care facility for the mentally retarded; and"

AND

Page 3, line 4, delete “(10)” and substitute “(11)”

AND

Page 3, line 27, delete "which" and substitute "that"

AND
Page 3, line 31, delete "which" and substitute "that"

AND

Page 3, line 33, delete "which" and substitute "that"

AND

Page 4, line 3, delete "which" and substitute "that"

AND

Page 5, delete line 19 and substitute the following:
"With respect to a participating facility that elects to accept the"

AND

Page 5, line 29, delete "all" and substitute "each"

AND

Page 7, line 28, delete "to"

AND

Page 7, line 36, delete "two hundred dollars ($200)" and substitute "four hundred dollars ($400)"

AND

Page 8, delete line 6 and substitute the following:
"the administrator and the administrative law judges."

AND

Page 9, delete line 36 and substitute the following:
"20-10-1911. Appointment of administrative law judges — Qualifications.

(a)(1) The Administrative Office of the Courts shall appoint not less than one (1) administrative law judge, who shall serve for a term of three (3) years, on a full-time or part-time basis.

(2) The compensation and expenses of administrative law judges shall be paid by the fund.

(b)(1) Administrative law judges shall be licensed attorneys and shall be otherwise qualified as determined by the board.

(2) Administrative law judges shall be eligible for reappointment.

20-10-1912. Exclusive remedy — Venue.

(a) Notwithstanding any other provision of law, this subchapter provides the exclusive remedy for any action for injury brought against any skilled nursing facility whatsoever, its owners, principals, officers, employees, agents, and affiliates, or any person or entity providing management services to the facility.

(b)(1) An action for injury shall be brought in the circuit court of the county where the accident occurred that caused the injury or death, or in the county where the person injured or killed resided at the time of injury.

(2) A claim filed against a participating facility prior to the

filing of an action for injury shall be dismissed by the administrator without prejudice.

20-10-1913. Participating facilities – Employment of counsel.

(a) Upon request by a participating facility that maintained coverage from the fund for the relevant period, other than a participating facility that maintained commercial insurance coverage for the relevant period, the fund shall employ counsel to defend any claim or action for injury against the facility.

(b)(1) Fees and expenses incurred by counsel employed by the fund shall be paid by the fund.

(2) However, the administrator has the authority to determine the reasonableness of the fees and expenses, subject to the rules and regulations of the fund.

20-10-1914. Stay – Exhaustion of administrative remedies.

(a) After the pleadings have been joined, when it appears from a verified pleading or otherwise that the skilled nursing facility is a participating facility, the circuit court, upon the motion of the parties or its own motion, shall stay all further proceedings in the action and direct that the claimant shall exhaust administrative remedies.

(b)(1)(A) The administrative process shall conclude not later than eight (8) months after the filing of the claim with the administrator.

(B) However, the parties may agree in a writing filed with the administrator to extend the time for a period not to exceed four (4) additional months.

(2) Upon the expiration of the term as provided in this subchapter or as extended by the parties, when there has been no settlement or final order, the circuit court may extend the administrative process for a reasonable time or may direct that further proceedings be had in the circuit court.

(c) Upon notice that the claim has been approved or settled by the administrator or adjudicated to a final administrative order and that all rights to seek further administrative relief or to appeal from a final administrative order have expired, the circuit court shall enter an order providing that all requests for relief with respect to the action for injury have been satisfied and that the action is dismissed with prejudice.

20-10-1915. Claims - Authority of administrator."

AND

Page 10, delete lines 1-2 and substitute the following:

"(a)(1) A claim against a participating facility shall be filed with the"

AND

Page 10, delete line 14 and substitute the following:

"of pleadings from the action for injury and the submission of affidavits or other exhibits in support of a claim or defense."

AND

Page 10, line 23, delete "2-10-1912." and substitute "20-10-1916."

AND

Page 10, delete lines 29-34 and substitute the following:

"(2)(A) The administrator may enter a written order disposing of the claim without adjudication or may refer the claim to an administrative law judge.

(B) The administrator shall serve a copy of the order upon the parties.

(b)(1)(A) If the administrator determines that a claim should be adjudicated, or if the claimant or participating facility is dissatisfied with the administrator's disposition of the claim without adjudication, the claim shall be referred to an administrative law judge.

(B) The fund shall be made a party to the proceeding.

(2) A request for adjudication by the claimant or participating facility shall be filed within twenty (20) days after the filing of the administrator's order disposing of the claim without adjudication.

(c)(1) The administrative law judge shall expeditiously conduct an evidentiary hearing on the claim and shall issue a written order within thirty (30) days after the hearing.

(2) The administrative law judge has the authority:

(A) To hear and determine all claims;

(B) To enter orders for the proper conduct of proceedings;

(C) To issue subpoenas, administer oaths, and take testimony, by deposition or otherwise;

(D) To make and enter findings of fact and rulings of law; and

(E) To make or modify awards in such amounts as may be supported by the law and the evidence.

(3)(A) An order of an administrative law judge granting, modifying, or denying a claim shall be supported by findings of fact and conclusions of law and shall be filed with the administrator.

(B) The administrator shall serve a copy of the order upon the parties.

(4) Any claim for relief or request for a ruling by the parties which is not disposed of by an express finding of fact or conclusion of law in the order shall be deemed denied.

20-10-1917. Appeal — Demand for trial by jury.

(a)(1) Any party may appeal the order of the administrative law judge to the circuit court where the action for injury is stayed by filing with the administrator, within twenty (20) days after the filing of the order, a notice of appeal.

(2) A party shall have twenty (20) days from the filing of a notice of appeal in which to file a notice of cross appeal.

(3) A notice of appeal or cross appeal:

(A) Shall designate any necessary transcript of the proceedings, with the cost to be paid by the parties ordering transcripts; and

(B) Shall be served upon all parties to the claim by certified mail.

(4) The administrator shall send to the circuit court all pertinent documents and papers, together with the designated transcript and the orders of the administrative law judge, which shall become the record on appeal.

(b)(1)(A) The circuit court shall review the findings and orders of the administrative law judge de novo on the record, in which case the decision of the circuit court shall be final.

(B) However, any party to the appeal may demand a trial de novo to the circuit court or a trial by jury of any issue triable of right by a jury by filing with the circuit court, within twenty (20) days after the filing of the administrative record transmitted by the administrator, a notice of demand therefor.

(2) A demand for trial by jury:

(A) May be indorsed upon a pleading of the party filed in the circuit court either prior to or subsequent to the filing of the administrative record; and

(B) May not be withdrawn without the consent of the parties.

(3) The failure of a party to file a demand for a trial de novo to the circuit court or a jury trial within the time provided in this subchapter constitutes a waiver by the party of such right."

AND

Page 10, line 36, delete "20-10-1913." and substitute "20-10-1918."

AND

Page 11, delete line 8 and substitute the following:
"the claim or action for injury accrued; and"

AND

Page 11, delete line 12 and substitute the following:
"participating facility in effect when the claim or action for injury accrued, exclusive of fees"

AND

Page 11, delete line 33, and substitute the following:
"decree of a circuit court.

(d) With respect to a participating facility that did not maintain coverage from the fund for the relevant period, a claim that has been approved by the administrator, or a claim that has been adjudicated to a final administrative order or a final judgment of a circuit court, shall be paid, and execution may be had thereon, as in judgments at law."

AND

Page 11, delete lines 35 and 36, and Page 12, delete lines 1 through 8 and

substitute the following:

"20-10-1919. Liability of medical director — Immunity from suit.

(a) With respect to any action for injury:

(1) The medical director of a skilled nursing facility is individually liable only for a wrongful act or acts performed solely as a treating physician of a patient; and

(2) The medical director is individually immune from suit for all other acts or omissions performed within the scope of employment as a medical director.

(b) The immunity of the medical director shall not be a defense of the skilled nursing facility and shall not alter existing law with respect to liability based upon respondeat superior.

20-10-1920. Statute of limitations.

(a) All actions for injury shall be commenced within two (2) years after the action for injury shall have accrued.

(b) An action for injury accrues on the date of the wrongful act complained of, and no other time.

(c) No action for injury shall encompass alleged wrongful acts occurring more than two (2) years prior to the commencement of the action for injury based upon an allegation of a continuing course of conduct or otherwise.

20-10-1921. Pleadings.

In any action for injury:

(1) The complaint shall state the alleged wrongful act or acts complained of with specificity, shall state how each individual wrongful act contributed to the injury, and shall specifically describe the injury; and

(2) If a demand for punitive damages is made, the complaint shall allege only that the wrongful act or acts complained of were intentional and that punitive damages should be awarded.

20-10-1922. Evidence - Burden of proof.

(a) In any claim or action for injury:

(1) The proceedings, minutes, records, data, or reports of peer review committees or quality assurance evaluation committees, or similar groups, or quality improvement programs or surveys, shall not be admissible or subject to discovery pursuant the Arkansas Rules of Civil Procedure, and shall be privileged communications;

(2)(A) Survey reports conducted by any governmental or regulatory agency shall not be admissible.

(B) However, specific entries in the survey reports that identify specific acts or omissions that allegedly were a direct cause of the injury at issue may be admissible; and

(3) The claimant shall have the burden of proving:

(A) The degree of skill and learning ordinarily possessed and practiced by a skilled nursing facility in good standing in the same or a similar locality;

(B) That the skilled nursing facility failed to act in accordance with that standard; and

(C) That as a proximate result thereof, the patient suffered injury which otherwise would not have occurred.

(b) In any action for injury that is tried before a jury:

(1) The applicable standard of care and a violation thereof shall be established by expert testimony as determined by the circuit court to be admissible under the Arkansas Rules of Evidence;

(2) Expert opinion testimony by owners, principals, officers, employees, or agents of the skilled nursing facility during the relevant period shall not be admissible without the consent of the facility; and

(3) The findings of fact and conclusions of law of the administrative law judge shall not be admissible.

20-10-1923. Punitive damages.

(a) In any action for injury:

(1)(A) If compensatory damages are awarded and the claimant has made a demand for punitive damages, the factfinder shall determine whether punitive damages should be awarded.

(B) The amount of any award of punitive damages shall be determined by the circuit court;

(2)(A) Punitive damages may be awarded against a skilled nursing facility when the facility intentionally pursued a course of conduct for the purpose of causing injury, and not otherwise.

(B) Liability for punitive damages shall be proved by clear and convincing evidence; and

(3)(A) An award of punitive damages against a skilled nursing facility shall not exceed the lesser of three (3) times the award of compensatory damages or one million dollars ($1,000,000).

(B) However, if an award of compensatory damages is twenty-five thousand dollars ($25,000) or less, an award of punitive damages shall not exceed seventy-five thousand dollars ($75,000).

(b) In any appeal of an award of punitive damages, the appellate court shall review the evidence upon which the award is based de novo.

20-10-1924. Limitation on supersedeas.

In any appeal of a judgment of a circuit court against a skilled nursing facility, the amount of a supersedeas bond or other security approved by the court shall not exceed:

(1) One million dollars ($1,000,000) in the case of a skilled nursing facility that, together with its affiliates, had one hundred fifty (150) or fewer occupied beds on the date of the judgment;

(2) Two million dollars ($2,000,000) in the case of a skilled nursing facility that, together with its affiliates, had more than one hundred fifty (150) but four hundred (400) or fewer occupied beds on the date of the judgment; or

(3) Five million dollars ($5,000,000) in the case of a skilled nursing facility which, together with its affiliates, had more than four hundred (400) occupied beds on the date of the judgment.

20-10-1925. No provision of this subchapter:

(a) Shall apply to, or alter existing law with respect to, any claim, charge, action, or suit brought or prosecuted by the Attorney General; or

(b) Shall be construed to diminish or enlarge the powers or duties of a coroner or medical examiner.

SECTION 2. Arkansas Code § 16-114-201(3) is amended to read as follows:

(3) "Medical injury" or "injury" means any adverse consequences arising out of or sustained in the course of the professional services, including ordinary and customary long-term care services, being rendered by a medical care provider, whether resulting from negligence, error, or omission in the performance of such services; or from rendition of such services without informed consent or in breach of warranty or in violation of contract; or from failure to diagnose; or from premature abandonment of a patient or of a course of treatment; or from failure to properly maintain equipment or appliances necessary to the rendition of such services; or otherwise arising out of or sustained in the course of such services."

AND

Appropriately renumber the subsequent section of the bill.

The Amendment was read the first time, rules suspended and read the second time and _____

By: Senator Miller

LDH/JMB - 031920030933

_____

JMB438 **Secretary**