

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  
2 84th General Assembly  
3 Regular Session, 2003  
4

*As Engrossed: S3/17/03*

# A Bill

SENATE BILL 301

5 By: Senator Madison  
6  
7

## For An Act To Be Entitled

8 THE ARKANSAS NURSING HOME TORT REFORM ACT OF  
9 2003.  
10

### Subtitle

11 THE ARKANSAS NURSING HOME TORT REFORM  
12 ACT OF 2003.  
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14  
15  
16

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
18

19 *SECTION 1. Arkansas Code Title 20, Chapter 10 is amended to add an*  
20 *additional subchapter to read as follows:*

21 *20-10-1901. Title.*

22 *This subchapter shall be known and may be cited as the "Arkansas*  
23 *Nursing Home Tort Reform Act of 2003".*  
24

25 *20-10-1902. Purpose and intent.*

26 *(a) The purpose and intent of this subchapter is to ensure that*  
27 *persons receiving long-term care in skilled nursing facilities licensed to*  
28 *operate in this state to, when appropriate, receive compensation for their*  
29 *damages.*

30 *(b) This subchapter authorizes the creation of a liability insurance*  
31 *pool known as the Patient's Recovery Fund to provide a secure and sustainable*  
32 *source of funds to satisfy personal injury claims by or on behalf of patients*  
33 *of participating facilities.*  
34

35 *20-10-1903. Definitions.*

36 *As used in this subchapter:*



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

4       (2) "Affiliate" means any person or entity controlling, controlled by,  
5 or under common control with a skilled nursing facility;

6       (3) "Board" means the Patient's Recovery Fund Board created by this  
7 subchapter;

8       (4)(A) "Claim" means a demand for recovery of damages from the  
9 Patient's Recovery Fund, whether based in tort, contract, or otherwise, on  
10 account of an injury to a patient of a participating facility.

11       (B) A claim may be brought by the patient, or by the  
12 guardian, representative, executor, administrator, or person acting on behalf  
13 of the patient, including a third party whose right to recover damages is  
14 derivative of the legal rights of the patient;

15       (5) "Claimant" means the person or persons alleging a claim or action  
16 for injury against a skilled nursing facility;

17       (6) "Injury" means the personal injury or death of a patient of a  
18 skilled nursing facility arising out of or sustained in the course of the  
19 services rendered to the patient by the facility, its owners, principals,  
20 officers, employees, agents, and affiliates, or any person or entity  
21 providing management services to the facility, or arising out of, or  
22 sustained in the course of, the relationship between the patient and the  
23 facility, its owners, principals, officers, employees, agents and affiliates,  
24 or person or entity providing management services to the facility;

25       (7) "Occupied beds" means:

26       (A) Beds occupied by patients at midnight;

27       (B) Those beds placed on hold during a period of time not to  
28 exceed five (5) consecutive calendar days during which a patient is in a  
29 hospital bed; and

30       (C) Those beds placed on hold during a period of time not to  
31 exceed fourteen (14) consecutive calendar days during which a patient is on  
32 therapeutic home leave;

33       (8)(A) "Participating facility" means a skilled nursing facility  
34 that participates in and contributes to the Patient's Recovery Fund,  
35 including the owners, principals, officers, employees, agents, medical  
36 director and affiliates of the skilled nursing facility.

1           (B) “Participating facility” does not include any unaffiliated person  
2 or entity providing management services to the facility;

3           (9) “Patient” means a person receiving care or treatment from a skilled  
4 nursing facility;

5           (10) “Skilled nursing facility” means a “long-term care  
6 facility” as defined by § 20-10-214(4); and

7           (11) “Wrongful act” means any act or conduct, whether by commission or  
8 omission, which is a proximate cause of an injury.

9  
10           20-10-1904. Civil Reparations Trust Fund.

11           If a punitive damages award is adjudged against a skilled nursing  
12 facility, fifty percent (50%) of the punitive damages awarded, after payment  
13 of all applicable costs and fees including reasonable attorneys’ fees, shall  
14 be ordered by the administrator of the Patient’s Recovery Fund,  
15 administrative law judge, or circuit court to be paid to the claimant, with  
16 the remainder of the award to be ordered paid into the Civil Reparations  
17 Trust Fund to be administered by the Treasurer of State and to be allocated  
18 for payment of Medicaid expenditures, independent living opportunities for  
19 seniors, or in home health care as directed by the General Assembly.

20  
21           20-10-1905. Patient’s Recovery Fund – Participation.

22           (a)(1) The Patient’s Recovery Fund is created for the payment of valid  
23 claims and judgments against participating facilities.

24           (2)(A) Each participating facility shall remit monthly  
25 assessments to the fund, or make payments to the fund in lieu of assessments,  
26 based upon the number of occupied beds as of the first business day of each  
27 month.

28           (B) Assessments may be prepaid upon terms approved by the  
29 board.

30           (C) Assessments and other payments, together with earned  
31 income, surplus, and all other moneys accruing to the fund, shall be held in  
32 trust by the board for the purposes provided in this subchapter.

33           (b)(1) The fund shall not be deposited or maintained in the state  
34 treasury, but shall be a cash fund under the direction and control of the  
35 board, as provided by this subchapter.

36           (2) The fund shall not be subject to regulation by the State

1 Insurance Department.

2 (c)(1) Only claims and judgments arising from a wrongful act or acts  
3 that occur during a period of participation in the fund shall be covered by  
4 the fund.

5 (2) The fund shall offer tail coverage to participating facilities  
6 upon terms approved by the board.

7 (d)(1) A skilled nursing facility which is certified to provide  
8 services under Title XVIII or Title XIX of the Social Security Act shall  
9 participate in and contribute to the fund as a condition of maintaining its  
10 license to provide long-term care in this state.

11 (2)(A) A participating facility shall be dismissed as a  
12 participant in the fund for nonpayment of assessments or payments in lieu of  
13 assessments, as determined by the rules and regulations of the fund.

14 (B) The board shall provide by regulation for a grace  
15 period for curing a default in the payment of assessments or other payments  
16 before formal dismissal and may impose a late fee not to exceed twenty  
17 dollars (\$20.00) per occupied bed per event of default.

18 (C) Upon dismissal of a facility from the fund, wrongful  
19 acts occurring during the facility's prior period or periods of participation  
20 shall be covered.

21 (e)(1) A participating facility may be dismissed from the fund and  
22 shall not have any of the privileges or benefits of the fund upon a  
23 determination by the board or a court that the facility provides a  
24 substandard quality of care.

25 (2) Substandard quality of care is:

26 (A) Any deficiency in 42 CFR 483.13, Resident Behavior and  
27 Facility Practices, 42 CFR 483.15 Quality of Life, or 42 CFR 483.25 Quality  
28 of Care, that constitutes immediate jeopardy to resident health or safety;

29 (B) A pattern of or widespread actual harm that is not  
30 immediate jeopardy;

31 (C) A widespread potential for more than minimal harm that  
32 is not immediate jeopardy, with no actual harm; or

33 (D) A violation of any criminal law while providing care  
34 to a resident.

35  
36 20-10-1906. Election by participating facility – Initial assessments

1 and payments.

2 (a) A participating facility may elect:

3 (1) To carry a higher deductible, or to retain a higher limit of  
4 its risk, by providing evidence satisfactory to the board that it is  
5 qualified to fund its risks of loss and that the facility or its affiliate  
6 maintains segregated accounts to fund the deductible and self insured  
7 retention losses;

8 (2) To purchase commercial insurance coverage by providing proof  
9 of the coverage to the board; or

10 (3) To accept the insurance coverage provided by the Patient's  
11 Recovery Fund and to pay monthly assessments as provided in this subchapter.

12 (b) A participating facility that elects to self insure or to purchase  
13 commercial insurance:

14 (1) Shall maintain coverage of not less than three hundred fifty  
15 thousand dollars (\$350,000) per claim and an annual aggregate limit of  
16 coverage of not less than seven hundred thousand dollars (\$700,000);

17 (2) Shall pay an administrative fee to the fund in lieu of  
18 monthly assessments, as provided in § 20-10-1912(c)(2); and

19 (3)(A) Shall participate in the fund upon equal terms with other  
20 participating facilities.

21 (B) However, the fund shall not pay claims or judgments on  
22 behalf of the facility, unless, and only to the extent that, the facility  
23 acquires coverage from the funds;

24 (c)(1) Assessments and payments in lieu of assessments shall be paid  
25 beginning January, 2004, based upon the number of occupied beds as of the  
26 first business day of the month.

27 (2)(A) The initial amount of the aggregate annual assessment,  
28 payable monthly, shall be one thousand dollars (\$1,000) per occupied bed.

29 (B) The initial amount of the annual administrative fee in  
30 lieu of assessments shall be two hundred dollars (\$200) per occupied bed.

31  
32 20-10-1907. Initial limits of coverage and deductible.

33 With respect to participating facilities which elect to accept the  
34 insurance coverage provided by the Patient's Recovery Fund:

35 (1) The initial amount of the per claim limit of coverage shall be  
36 three hundred fifty thousand dollars (\$350,000);

1       (2) The initial amount of the annual aggregate limit of coverage per  
2 participating facility shall be seven hundred thousand dollars (\$700,000);  
3 and

4       (3) The initial amount of the deductible shall be ten thousand dollars  
5 (\$10,000) per claim.

6  
7       20-10-1908. Patient's Recovery Fund Board – Powers and duties.

8       (a)(1)(A) There is created the Patient's Recovery Fund Board to  
9 consist of the following five (5) members:

10               (i) A physician licensed in this state;

11               (ii) A registered nurse licensed in this state;

12               (iii) A certified public accountant licensed in this  
13 state;

14               (iv) An attorney licensed in this state; and

15               (v) A private citizen who is a resident of this  
16 state.

17       (B) The initial board shall be appointed on or before August 1,  
18 2003.

19       (C) The Arkansas Trial Lawyers Association shall submit  
20 two (2) nominees for the attorney position from which the Attorney General  
21 shall appoint the attorney member of the board.

22       (D) The Arkansas Health Care Association shall submit two  
23 (2) nominees for the physician position from which the Speaker of the House  
24 of Representatives shall appoint the physician member of the board.

25       (E) The Arkansas Health Care Association shall submit two  
26 (2) nominees for the registered nurse position from which the President Pro  
27 Tempore of the Senate shall appoint the registered nurse member of the board.

28       (F) The American Association of Retired Persons shall  
29 submit two (2) nominees for the private citizen position from which the  
30 Speaker of the House of Representatives shall appoint the private citizen  
31 member of the board.

32       (G) The Governor shall appoint the certified public  
33 accountant member of the board.

34       (2)(A) The initial terms shall be staggered so that  
35 the certified public accountant and the private citizen members shall serve  
36 for three (3) years, the attorney member and the nurse member shall serve for

1 two (2) years, and the physician shall serve for one (1) year.

2 (B) Subsequent terms shall be three (3) years.

3 (C) Directors shall be eligible for reappointment for one (1)  
4 additional three (3) year term.

5 (3) The certified public accountant member shall be the chair of the  
6 board and the attorney member shall serve as the secretary.

7 (b)(1)(A) A board member whose term expires, or who resigns, or  
8 becomes incapacitated, shall be replaced within forty-five (45) days after  
9 the vacancy or expiration of the term from a list of two (2) nominees of the  
10 same profession or standing, just as set forth in subsection (a) furnished to  
11 the official responsible for the appointment of the position, except that the  
12 Governor shall choose his or her appointee as set forth in subsection (a) of  
13 this section.

14 (B) If a successor is not appointed within the forty-five  
15 (45) day period, the remaining board members shall select an interim board  
16 member of the same profession or standing who shall serve for the new term or  
17 the unexpired portion of the term, as the case may be.

18 (2) A director whose term expires shall continue to serve until  
19 his or her successor is appointed.

20 (c) The board shall supervise the management and activities of the  
21 Patient's Recovery Fund.

22 (d) Each director shall be compensated from the fund at the rate of  
23 one hundred fifty dollars (\$150) per hour devoted to official board  
24 activities, not to exceed one thousand five hundred dollars (\$1,500) each  
25 month, plus out-of-pocket expenses incurred within the state, documented by  
26 appropriate receipts.

27 (e) Board members shall be immune from suit while acting in  
28 their official capacities, except for intentional wrongful acts or violation  
29 of fiduciary duty.

30 (f)(1) The board shall have the power and discretion, after notice to  
31 the affected participating facilities and a hearing, to determine the amount  
32 of:

33 (A) The aggregate annual assessment per occupied bed and  
34 the annual administrative fee in lieu of assessments;

35 (B) The per claim limit of coverage, so long as it is not  
36 lowered below two hundred and fifty thousand dollars (\$250,000);

1                   (C) The annual aggregate limit of coverage per  
2 participating facility so long as it is not lowered below five hundred  
3 thousand dollars (\$500,000); and

4                   (D) The amount of the per claim deductible.

5                   (2) Notice of a change in the amounts prescribed in subsection  
6 (f), or any of them, shall be given to the affected participating facilities  
7 not less than sixty (60) days before the effective date of the change.

8                   (g)(1) The board shall determine terms, conditions, and charges for  
9 providing tail coverage to participating facilities and shall have the power  
10 and discretion to offer supplemental coverage to participating facilities  
11 upon terms approved by the board.

12                   (2) However, supplemental coverage shall be not less than two  
13 hundred thousand dollars (\$200,000) per claim.

14                   (h) The board shall have the power to:

15                   (1) Enter into contracts;

16                   (2) Sue and be sued, in its own name;

17                   (3) Borrow public or private funds in amounts and upon terms as  
18 may be negotiated with a creditor or creditors, subject to otherwise  
19 applicable laws; and

20                   (4)(A) Assess an annual surcharge upon the assessments of a  
21 participating facility, after notice and a hearing, which demonstrates a  
22 disproportionately high history of payable claims, judgments, or arbitral  
23 awards, not to exceed two hundred dollars (\$200) per occupied bed.

24                   (i)(1) The board shall promulgate rules and regulations to govern:

25                                   (A) The terms and conditions of participation in the  
26 fund;

27                                   (B) The administration of the fund, including the  
28 collection, management, and disposition of fund assets, and

29                                   (C) The procedures for resolution of claims.

30  
31                   20-10-1909. Administrator – Powers and duties.

32                   (a)(1) The board shall employ an administrator of the Patient's  
33 Recovery Fund who is a graduate of an accredited four-year college or  
34 university with at least ten (10) years experience in the field of risk  
35 management or business administration.

36                   (2) All qualifications, terms, and conditions of employment,



1 including compensation, which shall be paid from the fund, shall be at the  
2 sole discretion of the board.

3 (3) The board shall employ the administrator in sufficient time  
4 for the administrator to assume the duties of office on or before January 1,  
5 2004.

6 (b) The administrator shall conduct and supervise the business affairs  
7 of the fund, under a written business plan approved by the board.

8 (c) With board approval, the administrator may purchase or lease  
9 appropriate office space, equipment, and other necessary assets for the use  
10 of the fund, and may expend fund moneys for all other necessary and  
11 appropriate purposes, subject to the rules and regulations of the fund.

12 (d) The administrator shall exercise best efforts to locate and  
13 approve a list of commercial insurance carriers to offer supplemental  
14 insurance coverage in aggregate amounts of up to two million five hundred  
15 thousand dollars (\$2,500,000) at negotiable rates.

16  
17 20-10-1910. Patient's Recovery Fund Advisory Board.

18 (a)(1) There is created the Patient's Recovery Fund Advisory Board to  
19 consist of:

20 (A) The State Insurance Commissioner;

21 (B) The Attorney General;

22 (C) The Director of the Department of Human Services;

23 (D) One (1) director appointed by the President Pro  
24 Tempore of the Arkansas Senate; and

25 (E) One (1) director appointed by the Speaker of the  
26 Arkansas House of Representatives.

27 (2) The directors appointed by the President Pro Tempore of the  
28 Senate and the Speaker of the House of Representatives shall serve for terms  
29 of two (2) years and shall be eligible for reappointment for one (1)  
30 additional three (3) year term.

31 (b)(1) The advisory board shall advise the fund board and the  
32 administrator on the proper execution of the Patient's Recovery Fund and the  
33 business plan approved by the fund board.

34 (2)(A) The advisory board shall meet not less often than  
35 semiannually to review and examine financial statements and progress reports,  
36 prepared by the administrator and previously reviewed by the board, and to

1 advise the administrator and the fund board of the sufficiency of the  
2 reports.

3 (B) The financial statements shall include a balance sheet  
4 and income statement, prepared according to generally accepted accounting  
5 principles.

6 (C) The financial statements and progress reports shall be  
7 subject to public inspection.

8 (3) The advisory board shall issue an annual financial report  
9 prepared and certified by a certified public accountant on the first business  
10 day of July of each year, which shall be subject to public inspection.

11  
12 20-10-1911. Accumulation of fund assets – Disposition.

13 (a) All moneys held by the Patient Recovery Fund shall be deposited in  
14 banks located within the state or shall be invested in obligations which are  
15 permitted investments for the board of trustees of any public employee  
16 retirement system of any political subdivision of the state.

17 (b) An accurate inventory of all personal property of the fund shall  
18 be maintained at all times.

19 (c) The fund may be used for the following purposes:

20 (1) The payment and satisfaction of claims or judgments;

21 (2) The payment of reasonable fees and expenses incurred by  
22 counsel employed by the fund; and

23 (3) The payment of the costs of operation of the fund, including  
24 but not limited to, compensation, fees, and ordinary business expenses.

25  
26 20-10-1912. Participating facilities – Employment of counsel.

27 (a) Upon request by a participating facility, other than a  
28 participating facility that maintained commercial insurance coverage for the  
29 relevant period, the Patient's Recovery Fund shall employ counsel to defend  
30 any action for injury against the facility to recover damages on account of  
31 an injury to a patient.

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

34 (2) However, the administrator of the Patient's Recovery Fund  
35 has the authority to determine the reasonableness of the fees and expenses,  
36 subject to the rules and regulations of the fund.

1           (3) A participating facility shall be able to put the Patient's  
2 Recovery Fund on notice of the filing of the civil lawsuit and the fund shall  
3 retain counsel on behalf of the participating facility at the expense of the  
4 fund.

5           (4) A claim against a participating facility which accrues  
6 during the participation of the facility shall be submitted to the  
7 administrator of the Patient's Recovery Fund by the claimant on forms created  
8 by the administrator and made readily available to the claimant.

9           (b) After the participating facility has responded to the claim, the  
10 administrator has the sole authority to approve or to settle any claim  
11 against a participating facility to the extent of the applicable limit of  
12 coverage provided by the fund, including the deductible.

13  
14           20-10-1913. Payment of claims.

15           (a) With respect to a participating facility which maintained coverage  
16 from the Patient's Recovery Fund for the relevant period, a claim that has  
17 been approved or settled by the administrator of the Patient's Recovery Fund,  
18 or a claim that has been adjudicated to a final judgment of a circuit court,  
19 shall be paid as follows:

20           (1) The participating facility shall pay the deductible and the  
21 self-insured portion of the award, if any, that were in effect when the claim  
22 or action for injury accrued; and

23           (2) If commercial insurance coverage is inapplicable, the fund  
24 shall pay the balance of the award to the claimant, subject to the per claim  
25 limit of coverage and the annual aggregate limit of coverage per  
26 participating facility in effect when the claim or action for injury,  
27 exclusive of fees and expenses, accrued.

28           (b)(1)(A) Claims and judgments that become final or unappealable during  
29 the first six (6) months of the calendar year shall be paid by the fund on  
30 the following August 15.

31           (B) Claims and judgments that become final or unappealable  
32 during the last six (6) months of the calendar year shall be paid by the fund  
33 no later than February 15.

34           (2)(A) If the balance in the fund is insufficient to pay in full  
35 all claims and judgments that have become final or unappealable during a six-  
36 month period, the award paid to each claimant shall be prorated.

1                   (B) Any amount left unpaid as a result of the proration  
2 shall be paid before the payment of claims and judgments that become final or  
3 unappealable during any subsequent six-month period.

4                   (c)(1) Prejudgment interest shall not be payable on any claim or  
5 judgment.

6                   (2)(A) Simple interest at the rate of six percent (6%) per annum  
7 shall be paid on the unpaid balance of a claim or judgment from and after  
8 August 15 or February 15, as the case may be.

9                   (B) However, in any action for injury that is tried before  
10 a jury, post judgment interest shall be payable as provided by law.

11  
12                   20-10-1914. No provision of this subchapter shall apply to, or alter  
13 existing law, with respect to any claim, charge, action, or suit brought or  
14 prosecuted by the Attorney General.

15  
16                   SECTION 2. Arkansas Code Title 19, Chapter 5, Subchapter 11 is amended  
17 to add an additional section to read as follows:

18                   19-5-1123. Civil Reparations Trust Fund.

19                   (a) There is created on the books of the Treasurer of State, Auditor  
20 of State, and Chief Fiscal Officer of the State a trust fund to be known as  
21 the "Civil Reparations Trust Fund".

22                   (b) The fund shall consist of those moneys collected and used for the  
23 purposes provided under § 20-10-1922.

24                   (c)(1) The moneys credited to the fund shall be held as trust funds in  
25 interest bearing accounts only.

26                   (2) All interest earned shall be credited to the fund and shall  
27 be used only for the purposes of the fund.

28  
29                   SECTION 3. Arkansas Code Title 20, Chapter 10, Subchapter 1 is amended  
30 to add additional sections to read as follows:

31                   20-10-109. Continuous quality improvement programs.

32                   (a)(1) Any provider of long-term medical care in a facility that  
33 participates in an insurance pool created for the purpose of accumulating  
34 funds to satisfy residents' claims against the provider shall demonstrate a  
35 commitment to providing a high degree of quality of care for its residents as  
36 a condition for participation in the fund.

1           (2) The provider shall demonstrate the required commitment  
 2 through participation in a continuous quality improvement program.

3           (3) A continuous quality improvement program shall include at  
 4 least four (4) of the following:

5                   (A) Customer satisfaction surveys;

6                   (B) Physical restraints;

7                   (C) Staff satisfaction surveys;

8                   (D) Pressure ulcers;

9                   (E) Staff turnover;

10                  (F) Office of Long-Term Care survey inspections; and

11                  (G) Nutrition and hydration.

12           (b) A provider shall demonstrate continuous active participation in a  
 13 continuous quality improvement program in a manner satisfactory to the  
 14 governing body of the insurance pool.

15           (c) The continuous quality improvement program shall be an  
 16 administrative expense in the Office of Long-Term Care reimbursement manual,  
 17 and shall be incurred against each participating facility.

18  
 19           20-10-110. Nurses aide training.

20           All long-term care facilities eligible to receive Medicaid  
 21 reimbursements shall require nurse aides to:

22                   (1) Complete a state-approved training and competency evaluation  
 23 program; or

24                   (2) Demonstrate competence through satisfactory participation in a  
 25 state-approved nurses aide training and competency evaluation program that  
 26 include at least sixteen (16) hours of training in the following subjects  
 27 before any direct contact with the resident:

28                           (A) Communication and interpersonal skills;

29                           (B) Infection control;

30                           (C) Safety and emergency procedures, two (2) hours of which  
 31 shall be specific to the facility in which the nurse aide is employed, and  
 32 including the Heimlich maneuver;

33                           (D) Promoting resident's independence; and

34                           (E) Respecting resident's rights.

35  
 36           SECTION 4. EMERGENCY CLAUSE. It is found and determined by the

1 General Assembly of the State of Arkansas that adequate commercial insurance  
2 coverage at affordable rates is not available for nursing homes in this  
3 state; that lawsuits and claims that may become lawsuits threaten the  
4 financial stability of nursing homes; that patients of nursing homes do not  
5 have recourse to adequate sources of funds to redress legitimate claims for  
6 personal injury; and that existing procedures are inadequate to protect the  
7 interests of nursing homes and of those persons, primarily the elderly, who  
8 are in need of long-term care. Therefore, an emergency is declared to exist  
9 and this act being immediately necessary for the preservation of the public  
10 peace, health, and safety shall become effective on:

11 (1) The date of its approval by the Governor;

12 (2) If the bill is neither approved nor vetoed by the Governor, the  
13 expiration of the period of time during which the Governor may veto the bill;  
14 or

15 (3) If the bill is vetoed by the Governor and the veto is overridden,  
16 the date the last house overrides the veto.

17  
18 /s/ Madison