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SENATE JOINT RESOLUTION

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AMENDING THE ARKANSAS CONSTITUTION CONCERNING THE

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PROCEDURES FOR CIVIL CLAIMS; AN AMENDMENT TO THE

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ARANSAS CONSTITUTION CONCERNING THE AWARD OF COSTS

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AND FEES WHEN CERTAIN CLAIMS ARE DISMISSED, THE

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BURDEN OF PROOF IN CERTAIN ACTIONS FOR MEDICAL

17

INJURY, THE FILING OF A CERTIFICATE OF GOOD FAITH IN

18

CONJUNCTION WITH CERTAIN ACTIONS FOR MEDICAL INJURY,

19

THE SUBMISSION OF WRITTEN NOTICE OF A CLAIM FOR

20

MEDICAL INJURY TO PERSONS ALLEGEDLY LIABLE BEFORE THE

21

COMMENCEMENT OF A LEGAL CLAIM, LIMITATIONS ON THE

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AMOUNT OF PUNITIVE DAMAGES WHICH MAY BE AWARDED IN A

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CIVIL ACTION, AND THE APPORTIONMENT OF TORT

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RESPONSIBILITY.

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Subtitle

28

THE TORT REFORM AMENDMENT OF 2013.

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BE IT RESOLVED BY THE SENATE OF THE EIGHTY-NINTH GENERAL ASSEMBLY OF THE

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STATE OF ARKANSAS AND BY THE THE HOUSE OF REPRESENTATIVES, A MAJORITY OF ALL

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MEMBERS ELECTED TO EACH HOUSE AGREEING THERETO:

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SECTION 1. This amendment shall be known and may be cited as the "Tort



1 Reform Amendment of 2013”.

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3 SECTION 2. Article 7 of the Arkansas Constitution is amended to add
4 additional sections to read as follows:

5 § 53. Motions to dismiss.

6 (a) As used in this section, "frivolous" means a claim that is:

7 (1) Not well grounded in fact;

8 (2) Not warranted by existing law or a good faith argument for
9 the extension, modification, or reversal of existing law; or

10 (3) Interposed for an improper purpose, including without
11 limitation to harass or to cause unnecessary delay or needless increase in
12 the cost of litigation.

13 (b)(1)(A) When a court grants a motion to dismiss for failure to state
14 facts upon which relief can be granted and makes a finding that the claim is
15 frivolous, the court shall award the party or parties against whom the
16 dismissed claims were pending at the time the successful motion to dismiss
17 was granted the costs and reasonable and necessary attorney's fees incurred
18 in the proceedings.

19 (B) The awarded costs and fees shall be paid by the party
20 or parties whose claim or claims were dismissed as a result of the granted
21 motion to dismiss.

22 (2) Costs awarded shall include all reasonable and necessary
23 litigation costs actually incurred due to the proceedings that resulted from
24 the filing of the dismissed claims, including without limitation:

25 (A) Court costs;

26 (B) Attorney's fees;

27 (C) Court reporter fees;

28 (D) Interpreter fees; and

29 (E) Guardian ad litem fees.

30 (c)(1) An award of costs under this section shall be made only:

31 (A) After all appeals of the issue of the granting of the
32 motion to dismiss have been exhausted; and

33 (B) If the final outcome is the granting of the motion to
34 dismiss.

35 (2) The award of costs and attorney's fees under this section
36 shall be stayed until a final decision that is not subject to appeal is

1 rendered.

2 (d)(1) Notwithstanding any other provision of this section, the court
3 shall not require a party to pay costs under this section in excess of a
4 combined total of ten thousand dollars (\$10,000) in any single lawsuit.

5 (2) When multiple parties are entitled to recover their costs
6 from a single party under this section and those parties' combined actual
7 costs under this section exceed ten thousand dollars (\$10,000), then the
8 court shall apportion the awarded costs to the moving parties in proportion
9 to the amount of each moving party's incurred costs unless agreed otherwise
10 by the moving parties.

11 (3) This section does not limit the award of costs as otherwise
12 provided under Arkansas law, court rules, or at common law.

13 (e) This section does not apply to:

14 (1) Actions by or against the state, other governmental
15 entities, or public officials acting in their official capacity or under
16 color of law;

17 (2) Any claim that is dismissed by the granting of a motion to
18 dismiss that was filed more than sixty (60) days after the moving party
19 received service of the latest complaint, counter-complaint, or cross-
20 complaint in which that dismissed claim was made;

21 (3)(A) Any claim that the party against whom the motion to
22 dismiss was filed:

23 (i) Withdrew; or

24 (ii) In good faith amended to state a claim upon
25 which relief may be granted.

26 (4)(A) Except as provided in subdivision (e)(4)(B) of this
27 section, actions by pro se litigants.

28 (B) Subdivision (e)(4)(A) of this section does not apply
29 if the court also finds that the pro se litigant acted unreasonably in
30 bringing or refusing to voluntarily withdraw the dismissed claim;

31 (5)(A) Except as provided in subdivision (e)(5)(B) of this
32 section, any claim that is a good faith, nonfrivolous claim filed for the
33 express purpose of:

34 (i) Extending, modifying, or reversing existing
35 precedent, law, rule, or regulation; or

36 (ii) Establishing the meaning, lawfulness, or

1 constitutionality of a law, rule, regulation, or United States or Arkansas
2 constitutional right if the meaning, lawfulness, or constitutionality is a
3 matter of first impression that has not been established by precedent in a
4 published opinion by the Supreme Court, Court of Appeals, a United States
5 district court in Arkansas, or the United States Supreme Court.

6 (B) Subdivision (e)(5)(A) of this section does not apply
7 unless at the time the successful motion to dismiss was filed, the party that
8 made the dismissed claim had:

9 (i) Specially pleaded in its latest complaint,
10 counter-complaint, or cross-complaint that the dismissed claim was made for
11 one (1) of the express purposes under subdivision (e)(5)(A) of this section;
12 and

13 (ii) Cited the contrary precedent or interpretation
14 the party seeks to distinguish or overcome or stated that the issue to be
15 decided is a matter of first impression as described in subdivision (e)(5) of
16 this section; or

17 (6) Any claim for which relief could be granted under a law, a
18 court precedent published by a court described in subdivision (e)(5) of this
19 section, a rule, or a regulation that was in effect and applicable to the
20 claim at the time the motion to dismiss was filed when the:

21 (A) Law, precedent, rule, or regulation was cited in the
22 pleading in which the dismissed claim was made or in the response to the
23 motion to dismiss; and

24 (B) Motion to dismiss the claim was granted due to the
25 subsequent repeal, amendment, overruling, or distinguishing of that law,
26 rule, regulation, or published court precedent.

27 (f) This section does not limit the ability of a court to dismiss a
28 claim or assess costs against a party whose claim has been dismissed when
29 permitted or required by other law, court rule, or at common law.

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31 § 54. Burden of proof.

32 (a)(1)(A) As used in this section, "same specialty as the defendant"
33 means a medical care provider who practices the treatment or procedure at
34 issue in the action for medical injury.

35 (B) "Same specialty as the defendant" does not mean a
36 medical care provider with the same specific credentials of the defendant

1 physician.

2 (2) A physician who by education, training, and experience is
3 familiar with the treatment or procedure at issue in an action for medical
4 injury shall be deemed to practice in the same specialty at issue.

5 (b) In an action for medical injury, when the asserted negligence does
6 not lie within the jury's comprehension as a matter of common knowledge, the
7 plaintiff shall have the burden of proving:

8 (1) By means of expert testimony provided only by a medical care
9 provider of the same specialty as the defendant, the degree of skill and
10 learning ordinarily possessed and used by members of the profession of the
11 medical care provider in good standing, engaged in the same type of practice
12 or specialty in the locality in which he or she practices or in a similar
13 locality;

14 (2) By means of expert testimony provided only by a medical care
15 provider of the same specialty as the defendant that the medical care
16 provider failed to act in accordance with that standard; and

17 (3) By means of expert testimony provided only by a qualified
18 medical expert that as a proximate result thereof the injured person suffered
19 injuries that would not otherwise have occurred.

20 (c)(1) Without limiting the applicability of subsection (b) of this
21 section, when the plaintiff claims that a medical care provider failed to
22 supply adequate information to obtain the informed consent of the injured
23 person, the plaintiff shall have the burden of proving that the:

24 (A) Treatment, procedure, or surgery was performed in
25 other than an emergency situation; and

26 (B) Medical care provider did not supply that type of
27 information regarding the treatment, procedure, or surgery as would
28 customarily have been given to a patient in the position of the injured
29 person or other persons authorized to give consent for such a patient by
30 other medical care providers with similar training and experience at the time
31 of the treatment, procedure, or surgery in the locality in which the medical
32 care provider practices or in a similar locality.

33 (2) In determining whether the plaintiff has satisfied the
34 requirements of subdivision (c)(1) of this section, the following matters
35 shall be considered as material issues:

36 (A) Whether a person of ordinary intelligence and

1 awareness in a position similar to that of the injured person or persons
2 giving consent on his or her behalf could reasonably be expected to know of
3 the risks or hazards inherent in such treatment, procedure, or surgery;

4 (B) Whether the injured party or the person giving consent
5 on his or her behalf knew of the risks or hazards inherent in such treatment,
6 procedure, or surgery;

7 (C) Whether the injured party would have undergone the
8 treatment, procedure, or surgery regardless of the risk involved or whether
9 he or she did not wish to be informed thereof; and

10 (D) Whether it was reasonable for the medical care
11 provider to limit disclosure of information because such disclosure could be
12 expected to adversely and substantially affect the injured person's
13 condition.

14
15 § 55. Certificate of good faith.

16 (a)(1) In an action for medical injury in which expert testimony is
17 required under Arkansas law, the plaintiff or plaintiff's counsel shall file
18 a certificate of good faith with the complaint.

19 (2) If the certificate is not filed with the complaint, the
20 complaint shall be dismissed as provided in subsection (d) of this section
21 absent a showing that the failure to file a certificate of good faith was due
22 to:

23 (A) The failure of the provider to timely provide copies
24 of the claimant's records requested under Arkansas law; or

25 (B) Demonstrated extraordinary cause.

26 (b) The certificate of good faith shall state that:

27 (1) The plaintiff or plaintiff's counsel has consulted with one
28 (1) or more experts who have provided a signed written statement confirming
29 that upon information and belief they:

30 (A) Are competent under Arkansas law to express an opinion
31 or opinions in the case; and

32 (B) Believe, based on the information available from the
33 medical records concerning the care and treatment of the plaintiff for the
34 incident or incidents at issue, that there is a good-faith basis to maintain
35 the action consistent with the requirements of Arkansas law; or

36 (2) The plaintiff or plaintiff's counsel has consulted with one

1 (1) or more experts who have provided a signed written statement confirming
2 that upon information and belief they:

3 (A) Are competent under Arkansas law to express an opinion
4 or opinions in the case; and

5 (B)(i) Believe, based on the information available from
6 the medical records reviewed concerning the care and treatment of the
7 plaintiff for the incident or incidents at issue and, as appropriate,
8 information from the plaintiff or others with knowledge of the incident or
9 incidents at issue, that there are facts material to the resolution of the
10 case that cannot be reasonably ascertained from the medical records or
11 information reasonably available to the plaintiff or plaintiff's counsel and
12 that, despite the absence of this information, there is a good-faith basis
13 for maintaining the action as to each defendant consistent with the
14 requirements of Arkansas law.

15 (ii) Refusal of the defendant to release the medical
16 records in a timely fashion or when it is impossible for the plaintiff to
17 obtain the medical records shall waive the requirement that the expert review
18 the medical record prior to expert certification.

19 (c) Within thirty (30) days after a defendant has alleged in an answer
20 or amended answer that a nonparty is at fault for the injuries or death of
21 the plaintiff and expert testimony is required to prove fault as required by
22 Arkansas law, each defendant or defendant's counsel shall file a certificate
23 of good faith stating that:

24 (1) The defendant or defendant's counsel has consulted with one
25 (1) or more experts, which may include the defendant's filing the certificate
26 of good faith, who have provided a signed written statement confirming that
27 upon information and belief they:

28 (A) Are competent under Arkansas law to express an opinion
29 or opinions in the case; and

30 (B) Believe, based on the information reviewed concerning
31 the care and treatment of the plaintiff for the incident or incidents at
32 issue, that there is a good-faith basis to allege such a fault against
33 another consistent with the requirements of Arkansas law; or

34 (2) The defendant or defendant's counsel has consulted with one
35 (1) or more medical experts, which may include the defendant's filing the
36 certificate of good faith, who have provided a signed written statement

1 confirming that upon information and belief they:

2 (A) Are competent under Arkansas law to express an opinions
3 or opinions in the case; and

4 (B) Believe, based on the information reviewed concerning
5 the care and treatment of the plaintiff for the incident or incidents at
6 issue, that:

7 (i) There are facts material to the resolution of
8 the case that cannot be reasonably ascertained from the information
9 reasonably available to the defendant or defendant's counsel; and

10 (ii) Despite the absence of the material facts under
11 subdivision (c)(2)(B)(i) of this section, there is a good-faith basis for
12 alleging such a fault against another, whether already a party to the action
13 or not, consistent with the requirements of Arkansas law.

14 (d)(1) The failure of a plaintiff to file a certificate of good faith
15 in compliance with this section shall, upon motion, make the action subject
16 to dismissal with prejudice.

17 (2) The failure of a defendant to file a certificate of good
18 faith in compliance with this section alleging the fault of a nonparty shall,
19 upon motion, make such allegations subject to being stricken with prejudice
20 unless the plaintiff consents to waive compliance with this section.

21 (3) If the allegations are stricken, a defendant, except for a
22 defendant who complied with this section, cannot assert, and neither shall
23 the judge nor jury consider, the fault, if any, of those identified by the
24 allegations.

25 (4) The court may, upon motion, grant an extension within which
26 to file a certificate of good faith if the court determines that a health
27 care provider who has medical records relevant to the issues in the case has
28 failed to timely produce medical records upon timely request, or for other
29 good cause shown.

30
31 § 56. Notice of claim for medical injury.

32 (a) An action for medical injury shall not be commenced until at least
33 sixty (60) days after service of a written notice of the alleged claim for
34 medical injury upon the person or persons alleged to be liable, by certified
35 or registered mail, to the last known address of the person or persons
36 allegedly liable.

1 (b) If the written notice under subsection (a) of this section is
2 served within sixty (60) days of the expiration of the period for bringing
3 suit, the time for commencement of the action shall be extended one hundred
4 and eighty (180) days from the service of the notice.

5 (c)(1) Except as provided in subdivision (c)(2) of this section,
6 during the one-hundred-eighty-day extension of the statute of limitations
7 under subsection (b) of this section a potential party to the alleged claim
8 or an attorney for a potential party to the alleged claim shall not have ex
9 parte communication with the claimant's treating medical care providers.

10 (2) A potential party to the alleged claim or an attorney for a
11 potential party to the alleged claim may request medical records from the
12 claimant's treating medical care providers upon proper authorization.

13
14 § 57. Limitations on the amount of punitive damages.

15 (a) Except as provided in subsection (b) of this section, a punitive
16 damages award for each plaintiff in a civil action shall not be more than
17 nine (9) times the amount of compensatory damages awarded in the civil
18 action.

19 (b) Subsection (a) of this section does not apply when the finder of
20 fact:

21 (1) Determines by clear and convincing evidence that, at the
22 time of the injury, the defendant intentionally pursued a course of conduct
23 that shocks the conscience for the purpose of causing serious bodily injury
24 or death; and

25 (2) Determines that the defendant's conduct did, in fact, result
26 in serious bodily injury or death.

27
28 § 58. Apportionment of tort responsibility.

29 (a) As used in this section:

30 (1) "Contributory fault" includes contributory negligence,
31 misuse of a product, unreasonable failure to avoid or mitigate harm, and
32 assumption of risk unless the risk is expressly assumed in a legally
33 enforceable release or similar agreement;

34 (2) "Person" means an individual, corporation, business trust,
35 estate, trust, partnership, limited liability company, association, joint
36 venture, public corporation, government, or governmental subdivision, agency,

1 or instrumentality, or any other legal or commercial entity;

2 (3) "Released person" means a person that would be liable for
3 damages to a claimant for personal injury or harm to property if the person
4 had not been discharged from liability under subsection (g) of this section;
5 and

6 (4) "Responsibility", with respect to a claim for damages for
7 personal injury or harm to property, means the legal consequences of an act
8 or omission that is the basis for liability or a defense in whole or in part.

9 (b)(1) Except as otherwise provided in subsection (b)(2) and (b)(3) of
10 this section, in an action seeking damages for personal injury or harm to
11 property based on negligence or on any other claim for which the claimant may
12 be subject to a defense in whole or part based on contributory fault, any
13 contributory fault chargeable to the claimant diminishes the amount that the
14 claimant otherwise would be entitled to recover as compensatory damages for
15 the injury or harm by the percentage of responsibility assigned to the
16 claimant pursuant to subsection (c) of this section.

17 (2) If the claimant's contributory fault is equal to or greater
18 than the combined responsibility of all other parties and released persons
19 whose responsibility is determined to have caused personal injury to or harm
20 to property of the claimant, the claimant may not recover any damages.

21 (3) A party is responsible for the fault of another person or
22 entity or for the payment of a proportionate share of another person or
23 entity if the other person or entity was acting as an agent or servant of the
24 party.

25 (3) In a jury trial, the court shall instruct the jury regarding
26 the legal effect of its answers to interrogatories, made under subsection (c)
27 of this section, on a claimant's right to recover damages under subsection
28 (b)(2) of this section.

29 (c)(1) In an action to recover damages for personal injury or harm to
30 property involving the responsibility of more than one party or a released
31 person, the court shall instruct the jury to answer special interrogatories
32 or, if there is no jury, make findings:

33 (A) Stating the amount of damages that a claimant would be
34 entitled to recover if any contributory fault were disregarded;

35 (B) Stating, as to each claim, the percentage of the total
36 responsibility of all the parties and released persons attributed to each

1 claimant, defendant, and released person that caused the injury or harm;

2 (C) Regarding whether any of the parties or released
3 persons acted in concert or with an intent to cause personal injury or harm
4 to property; and

5 (D) Regarding any other issue of fact fairly raised by the
6 evidence which is necessary to make a determination under subsection (d) of
7 this section or enter judgment under subsection (e) of this section.

8 (2) In determining percentages of responsibility, the trier of
9 fact shall consider:

10 (A) The nature of the conduct of each party and released
11 person determined to be responsible; and

12 (B) The extent of the causal relation between the conduct
13 and the damages claimed.

14 (3) The court shall determine the extent to which the
15 responsibility of one party, which is based on the act or omission of another
16 party, warrants that the parties be treated as a single party for the purpose
17 of submitting interrogatories to the jury or making findings under
18 subdivision (c)(1) of this section.

19 (d)(1) After the trier of fact has answered interrogatories or made
20 findings under subsection (c) of this section, the court shall determine, in
21 accordance with the percentages of responsibility found:

22 (A) The monetary amount of any award of damages to a
23 claimant;

24 (B) The amount of the several share for which each party
25 found liable is responsible; and

26 (C) Any amount attributable to a released person.

27 (2)(A) After the court has made its determinations pursuant to
28 subsection (d)(1) of this section, a claimant, no later than ninety (90) days
29 after the entry of judgment for the plaintiff, may move the court to
30 determine whether all or part of the amount of the several share for which a
31 party is liable will not be reasonably collectible and request reallocation.

32 (B) If the court based on a preponderance of the evidence
33 determines that the party's share will not be reasonably collectible, the
34 court shall make findings reallocating the uncollectible share severally to
35 the other parties, including the claimant, and any released person.

36 (C) Reallocation shall be made in the proportion that each

1 party's and released person's respective percentage of responsibility bears
2 to the total of the percentages of responsibility attributed to the parties,
3 including the claimant, and any released person but not including the
4 percentage being reallocated.

5 (3)(A) A party whose liability is reallocated remains liable to
6 a claimant for any additional share of responsibility allocated to the
7 claimant.

8 (B) A party that discharges an additional share of
9 responsibility allocated to it under subdivision (d)(2) of this section has a
10 right of reimbursement from the party from which the share was reallocated.

11 (C) Upon motion, the court in the judgment entered under
12 subsection (e) of this section shall declare the rights and obligations
13 resulting from the reallocation, including any rights and obligations with
14 regard to subrogation or a secured position.

15 (D) If any party to whom reallocation has been made holds
16 a secured position with regard to the share reallocated, each party to whom
17 reallocation has been made has a proportionate share in the secured position.

18 (E) Any amount recovered under this subsection from a
19 party whose liability has been reallocated shall be distributed to each of
20 the parties to whom the reallocation was made in the same proportion as the
21 original reallocation.

22 (4) Reallocation does not make a released person liable for any
23 reallocated share of responsibility unless the release or other agreement so
24 provides.

25 (5) If a motion for reallocation is made, any party may conduct
26 discovery regarding any issue relevant to the motion.

27 (e)(1) After determining an award of damages to a claimant and the
28 amount of the several share, including any reallocated share, for which each
29 party found liable is responsible, the court shall enter judgment severally
30 against each party adjudged liable, except in the following situations:

31 (A) If two or more parties adjudged liable acted in
32 concert or with an intent to cause personal injury to, or harm to property
33 of, the claimant, the court shall enter judgment jointly and severally
34 against the parties for their joint share;

35 (B) If a party is adjudged liable for failing to prevent
36 another party from intentionally causing personal injury to, or harm to

1 property of, the claimant, the court shall enter judgment jointly and
2 severally against the parties for their combined shares of responsibility;

3 (C) If a party is adjudged liable for the act or omission
4 of another party under subdivision (c)(3) of this section, the court shall
5 enter judgment jointly and severally against the parties for their joint
6 share; and

7 (D) If Arkansas law, other than this amendment, so
8 requires, the court shall enter judgment jointly and severally or otherwise
9 conform the judgment to the statute.

10 (2) If a court grants a motion for reallocation pursuant to
11 subsection (d) of this section after judgment is entered, the court shall
12 modify the judgment to declare the rights and obligations resulting from the
13 reallocation, including any rights and obligations with regard to subrogation
14 or a secured position.

15 (f)(1)(A) Except as otherwise provided in subdivision (f)(2) of this
16 section, a party that is jointly and severally liable with one or more other
17 parties under this amendment has a right of contribution from another party
18 jointly liable for any amount the party pays in excess of the several amount
19 for which the party is responsible.

20 (B) A party against which contribution is sought is not
21 liable for more than the monetary amount of the party's several share of
22 responsibility determined pursuant to subsection (d) of this amendment.

23 (2) A party that is adjudged liable for the act or omission of
24 another party under subdivision (e)(1)(C) of this section has a right of
25 indemnification from the other party.

26 (3) A party that is subject to liability for injury to, or harm
27 to property of, a claimant under this amendment has a right to:

28 (A) Join a person that is also subject to liability to the
29 claimant for all or part of the same injury or harm if the claimant has not
30 sued the person; and

31 (B) Seek contribution or indemnity, whichever is
32 appropriate, from another person whose liability is not determined in the
33 proceeding in which the party is adjudged liable if the other person is
34 responsible for all or part of the claimant's injury or harm.

35 (4) A claim for contribution or indemnity may be asserted in the
36 original action or in a separate action.

1 (g)(1)(A) A release, covenant not to sue, covenant not to execute a
2 judgment, or similar agreement by a claimant and person subject to liability
3 discharges the person from liability to the claimant to the extent provided
4 in the agreement and from liability for contribution to any other person
5 subject to liability to the claimant for the same injury or harm.

6 (B) The agreement does not discharge any other person
7 subject to liability upon the same claim unless the agreement so provides.

8 (2) The amount of the claim of the releasing person under
9 subdivision (g)(1) of this section against other persons jointly and
10 severally liable for the same injury or harm for which the released person
11 would have been liable is reduced by the percentage of responsibility
12 attributed to the released person pursuant to subsection (c) of this
13 amendment.

14 (3) A release, covenant not to sue, covenant not to execute a
15 judgment, or similar agreement extinguishes any claim for contribution or
16 indemnity that the released person would have had against another person that
17 would have been jointly and severally liable with the released person.

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19 /s/J. Hutchinson
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