

By Senator Campbell

33-366-01

1 A bill to be entitled
2 An act relating to medical negligence; amending
3 s. 766.106, F.S.; providing for mandatory
4 mediation; deleting authority for arbitration;
5 providing for notice to licensees of the
6 Department of Health and the Agency for Health
7 Care Administration; modifying procedures for
8 the investigation, review, and evaluation of
9 claims; amending s. 766.110, F.S.; providing
10 for liability of health care facilities;
11 amending s. 766.201, F.S.; providing
12 legislative findings; amending s. 766.202,
13 F.S.; modifying definitions; amending s.
14 766.203, F.S.; providing a restriction on who
15 may give a medical expert opinion; amending s.
16 766.204, F.S.; providing that prospective
17 defendants who fail to timely provide copies of
18 medical records are subject to having their
19 claims and defenses struck; amending s.
20 766.205, F.S.; providing that all participants
21 in a presuit investigation are civilly liable
22 for acts of intentional misrepresentation;
23 amending s. 766.206, F.S.; requiring a court to
24 strike a defendant's defenses if the
25 defendant's response does not comply with
26 reasonable investigation requirements;
27 requiring a court to report to the Board of
28 Medicine a medical expert whose opinion failed
29 to meet reasonable investigation requirements;
30 amending s. 766.207, F.S.; prescribing
31 procedures for mandatory mediation and presuit

1 investigation of medical negligence claims;
2 deleting rule-making authority of the Division
3 of Administrative Hearings in arbitration;
4 repealing ss. 766.208, 766.209, 766.21,
5 766.211, 766.212, F.S., relating to
6 arbitration; providing an effective date.
7

8 Be It Enacted by the Legislature of the State of Florida:
9

10 Section 1. Section 766.106, Florida Statutes, is
11 amended to read:

12 766.106 Notice before filing action for medical
13 malpractice; presuit screening period; ~~offers for admission of~~
14 ~~liability and for arbitration;~~informal discovery; mandatory
15 mediation;review.--

16 (1) As used in this section:

17 (a) "Claim for medical malpractice" means a claim
18 arising out of the rendering of, or the failure to render,
19 medical care or services, and does not include claims
20 involving defective products or negligent maintenance of
21 premises.

22 (b) "Self-insurer" means any self-insurer authorized
23 under s. 627.357 or any uninsured prospective defendant.

24 (c) "Insurer" includes the Joint Underwriting
25 Association.

26 (2) After completion of presuit investigation pursuant
27 to s. 766.203 and prior to filing a claim for medical
28 malpractice, a claimant shall notify each prospective
29 defendant by certified mail, return receipt requested, of
30 intent to initiate litigation for medical malpractice. Notice
31 to a prospective defendant licensed by the Department of

1 Health, or the Agency for Health Care Administration, is
2 sufficient and is considered received if it is addressed to
3 the licensee's most current address maintained by the
4 department or agency. Notice is also considered received if
5 delivery is refused by the health care provider or an agent of
6 the health care provider.Following the initiation of a suit
7 alleging medical malpractice with a court of competent
8 jurisdiction, and service of the complaint upon a defendant,
9 the claimant shall provide a copy of the complaint to the
10 Department of Health. The requirement of providing the
11 complaint to the Department of Health does not impair the
12 claimant's legal rights or ability to seek relief for his or
13 her claim. The Department of Health shall review each incident
14 and determine whether it involved conduct by a licensee which
15 is potentially subject to disciplinary action, in which case
16 the provisions of s. 456.073 apply.

17 (3)(a) No suit may be filed against a prospective
18 defendant for a period of 90 days after notice is mailed to
19 any prospective defendant. During the 90-day period, the
20 prospective defendant or the prospective defendant's insurer
21 or self-insurer shall conduct a review to determine the
22 liability of the prospective defendant. Each insurer or
23 self-insurer shall have a procedure for the prompt
24 investigation, review, and evaluation of claims during the
25 90-day period. This procedure shall include one or more of
26 the following:

- 27 1. Internal review by a duly qualified claims
28 adjuster;
- 29 2. Creation of a panel comprised of an attorney
30 knowledgeable in the prosecution or defense of medical
31 malpractice actions, a health care provider trained in the

1 same or similar medical specialty as the prospective
2 defendant, and a duly qualified claims adjuster;

3 3. A contractual agreement with a state or local
4 professional society of health care providers, which maintains
5 a medical review committee;

6 4. Any other similar procedure which fairly and
7 promptly evaluates the pending claim.

8
9 Each prospective defendant or prospective defendant's insurer
10 or self-insurer shall investigate the claim in good faith, and
11 both the claimant and prospective defendant shall cooperate
12 with the insurer in good faith. If the prospective defendant
13 or the prospective defendant's insurer or self-insurer
14 requires, a claimant shall appear before a pretrial screening
15 panel or before a medical review committee and shall submit to
16 a physical examination, if required. Unreasonable failure of
17 any party to comply with this section justifies dismissal of
18 claims or defenses. There shall be no civil liability for
19 participation in a pretrial screening procedure if done
20 without intentional fraud.

21 (b) At or before the end of the 90 days, the
22 prospective defendant or the prospective defendant's insurer
23 ~~or self-insurer~~ shall provide the claimant with a response:

24 1. Rejecting the claim. Such rejection must be
25 accompanied by corroboration of lack of reasonable grounds as
26 provided in s. 766.203.†

27 2. Making a settlement offer. If such settlement offer
28 is rejected by the claimant, corroboration of lack of
29 reasonable grounds pursuant to s. 766.203 must be provided
30 prior to filing an answer denying liability.† ~~or~~

31

1 ~~3. Making an offer of admission of liability and for~~
2 ~~arbitration on the issue of damages. This offer may be made~~
3 ~~contingent upon a limit of general damages.~~

4 (c) The response shall be delivered to the claimant if
5 not represented by counsel or to the claimant's attorney, by
6 certified mail, return receipt requested. Failure of the
7 prospective defendant or the prospective defendant's insurer
8 or self-insurer to reply to the notice within 90 days after
9 receipt pursuant to paragraph (b) subjects the prospective
10 defendant to striking of defenses and shall be deemed a final
11 rejection of the claim for purposes of this section.

12 (d) Upon receipt of a response rejecting a claim, or
13 upon the rejection of a settlement offer by any claimant or
14 prospective defendant, the claimant and prospective defendant
15 shall mediate the claim as provided in s. 766.207.

16 ~~(e)~~ Within 30 days of receipt of a response by a
17 prospective defendant, insurer, or self-insurer to a claimant
18 represented by an attorney, the attorney shall advise the
19 claimant in writing of the response, including:

20 1. The exact nature of the response under paragraph
21 (b).

22 2. The exact terms of any settlement offer, ~~or~~
23 ~~admission of liability and offer of arbitration on damages.~~

24 3. The legal and financial consequences of acceptance
25 or rejection of any settlement offer, ~~or admission of~~
26 ~~liability, including the provisions of this section.~~

27 4. An evaluation of the time and likelihood of
28 ultimate success at trial on the merits of the claimant's
29 action.

30 5. An estimation of the costs and attorney's fees of
31 proceeding through trial.

1 (4) The notice of intent to initiate litigation shall
2 be served within the time limits set forth in s. 95.11.
3 However, during the 90-day presuit investigation period under
4 this section, or under any automatic 90-day extension under s.
5 766.104, or any other stipulated or court-ordered extensions,
6 the statute of limitations is tolled and the statute of repose
7 is extended as to all potential defendants. Upon stipulation
8 by the parties, the 90-day presuit investigation period may be
9 extended and the statute of limitations is tolled and the
10 statute of repose is extended during any stipulated ~~such~~
11 extension. Upon receiving written notice of termination of
12 negotiations during a stipulated ~~in an~~ extended period, the
13 claimant shall have 60 days or the remainder of the period of
14 the statute of limitations or statute of repose, whichever is
15 greater, within which to file suit.

16 (5) No statement, discussion, written document,
17 report, or other work product generated by the presuit
18 screening process is discoverable or admissible in any civil
19 action for any purpose by the opposing party. All
20 participants, including, but not limited to, physicians,
21 investigators, witnesses, and employees or associates of the
22 defendant, are immune from civil liability arising from
23 participation in the presuit screening process.

24 (6) Upon receipt by a prospective defendant of a
25 notice of claim, the parties shall make discoverable
26 information available without formal discovery. Failure to do
27 so is grounds for dismissal of claims or defenses ultimately
28 asserted.

29 (7) Informal discovery may be used by a party to
30 obtain unsworn statements, the production of documents or
31 things, and physical and mental examinations, as follows:

1 (a) Unsworn statements.--Any party may require other
2 parties to appear for the taking of an unsworn statement. Such
3 statements may be used only for the purpose of presuit
4 screening and are not discoverable or admissible in any civil
5 action for any purpose by any party. A party desiring to take
6 the unsworn statement of any party must give reasonable notice
7 in writing to all parties. The notice must state the time and
8 place for taking the statement and the name and address of the
9 party to be examined. Unless otherwise impractical, the
10 examination of any party must be done at the same time by all
11 other parties. Any party may be represented by counsel at the
12 taking of an unsworn statement. An unsworn statement may be
13 recorded electronically, stenographically, or on videotape.
14 The taking of unsworn statements is subject to the provisions
15 of the Florida Rules of Civil Procedure and may be terminated
16 for abuses.

17 (b) Documents or things.--Any party may request
18 discovery of documents or things. The documents or things
19 must be produced, at the expense of the requesting party,
20 within 20 days after the date of receipt of the request. A
21 party is required to produce discoverable documents or things
22 within that party's possession or control.

23 (c) Physical and mental examinations.--A prospective
24 defendant may require an injured prospective claimant to
25 appear for examination by an appropriate health care provider.
26 The defendant shall give reasonable notice in writing to all
27 parties as to the time and place for examination. Unless
28 otherwise impractical, a prospective claimant is required to
29 submit to only one examination on behalf of all potential
30 defendants. The practicality of a single examination must be
31 determined by the nature of the potential claimant's

1 condition, as it relates to the liability of each potential
2 defendant. Such examination report is available to the parties
3 and their attorneys upon payment of the reasonable cost of
4 reproduction and may be used only for the purpose of presuit
5 screening. Otherwise, such examination report is confidential
6 and exempt from the provisions of s. 119.07(1) and s. 24(a),
7 Art. I of the State Constitution.

8 (8) Each request for and notice concerning informal
9 presuit discovery pursuant to this section must be in writing,
10 and a copy thereof must be sent to all parties. Such a
11 request or notice must bear a certificate of service
12 identifying the name and address of the person to whom the
13 request or notice is served, the date of the request or
14 notice, and the manner of service thereof.

15 (9) Copies of any documents produced in response to
16 the request of any party must be served upon all other
17 parties. The party serving the documents or his or her
18 attorney shall identify, in a notice accompanying the
19 documents, the name and address of the parties to whom the
20 documents were served, the date of service, the manner of
21 service, and the identity of the document served.

22 ~~(10) If a prospective defendant makes an offer to~~
23 ~~admit liability and for arbitration on the issue of damages,~~
24 ~~the claimant has 50 days from the date of receipt of the offer~~
25 ~~to accept or reject it. The claimant shall respond in writing~~
26 ~~to the insurer or self-insurer by certified mail, return~~
27 ~~receipt requested. If the claimant rejects the offer, he or~~
28 ~~she may then file suit. Acceptance of the offer of admission~~
29 ~~of liability and for arbitration waives recourse to any other~~
30 ~~remedy by the parties, and the claimant's written acceptance~~
31 ~~of the offer shall so state.~~

1 ~~(a) If rejected, the offer to admit liability and for~~
2 ~~arbitration on damages is not admissible in any subsequent~~
3 ~~litigation. Upon rejection of the offer to admit liability~~
4 ~~and for arbitration, the claimant has 60 days or the remainder~~
5 ~~of the period of the statute of limitations, whichever period~~
6 ~~is greater, in which to file suit.~~

7 ~~(b) If the offer to admit liability and for~~
8 ~~arbitration on damages is accepted, the parties have 30 days~~
9 ~~from the date of acceptance to settle the amount of damages.~~
10 ~~If the parties have not reached agreement after 30 days, they~~
11 ~~shall proceed to binding arbitration to determine the amount~~
12 ~~of damages as follows:~~

13 ~~1. Each party shall identify his or her arbitrator to~~
14 ~~the opposing party not later than 35 days after the date of~~
15 ~~acceptance.~~

16 ~~2. The two arbitrators shall, within 1 week after they~~
17 ~~are notified of their appointment, agree upon a third~~
18 ~~arbitrator. If they cannot agree on a third arbitrator,~~
19 ~~selection of the third arbitrator shall be in accordance with~~
20 ~~chapter 682.~~

21 ~~3. Not later than 30 days after the selection of a~~
22 ~~third arbitrator, the parties shall file written arguments~~
23 ~~with each arbitrator and with each other indicating total~~
24 ~~damages.~~

25 ~~4. Unless otherwise determined by the arbitration~~
26 ~~panel, within 10 days after the receipt of such arguments,~~
27 ~~unless the parties have agreed to a settlement, there shall be~~
28 ~~a 1-day hearing, at which formal rules of evidence and the~~
29 ~~rules of civil procedure shall not apply, during which each~~
30 ~~party shall present evidence as to damages. Each party shall~~

31

1 ~~identify the total dollar amount which he or she feels should~~
2 ~~be awarded.~~

3 ~~5. No later than 2 weeks after the hearing, the~~
4 ~~arbitrators shall notify the parties of their determination of~~
5 ~~the total award. The court shall have jurisdiction to enforce~~
6 ~~any award or agreement for periodic payment of future damages.~~

7 ~~(11) If there is more than one prospective defendant,~~
8 ~~the claimant shall provide the notice of claim and follow the~~
9 ~~procedures in this section for each defendant. If an offer to~~
10 ~~admit liability and for arbitration is accepted, the~~
11 ~~procedures shall be initiated separately for each defendant,~~
12 ~~unless multiple offers are made by more than one prospective~~
13 ~~defendant and are accepted and the parties agree to~~
14 ~~consolidated arbitration. Any agreement for consolidated~~
15 ~~arbitration shall be filed with the court. No offer by any~~
16 ~~prospective defendant to admit liability and for arbitration~~
17 ~~is admissible in any civil action.~~

18 ~~(12) To the extent not inconsistent with this part,~~
19 ~~the provisions of chapter 682, the Florida Arbitration Code,~~
20 ~~shall be applicable to such proceedings.~~

21 Section 2. Section 766.110, Florida Statutes, is
22 amended to read:

23 766.110 Liability of health care facilities.--

24 (1) All health care facilities, including hospitals
25 and ambulatory surgical centers, as defined in chapter 395,
26 have a duty to assure comprehensive risk management and the
27 competence of their medical staff and personnel through
28 careful selection and review, and are liable for a failure to
29 exercise due care in fulfilling these duties. For the purpose
30 of this section, the term "medical staff" includes members of
31 the medical staff and those health care professionals who have

1 been granted staff privileges by the facility. These duties
2 shall include, but not be limited to:

3 (a) The adoption of written procedures for the
4 selection of medical staff ~~members~~ and a periodic review of
5 the medical care and treatment rendered to patients by each
6 member of the medical staff;

7 (b) The adoption of a comprehensive risk management
8 program which fully complies with the substantive requirements
9 of s. 395.0197 as appropriate to such hospital's size,
10 location, scope of services, physical configuration, and
11 similar relevant factors;

12 (c) The initiation and diligent administration of the
13 medical review and risk management processes established in
14 paragraphs (a) and (b) including the supervision of the
15 medical staff and facility ~~hospital~~ personnel to the extent
16 necessary to ensure that such medical review and risk
17 management processes are being diligently carried out.

18
19 Each such facility shall be liable for a failure to exercise
20 due care in fulfilling one or more of these duties when such
21 failure is a proximate cause of injury to a patient.

22 (2) Every facility ~~hospital~~ licensed under chapter 395
23 shall ~~may~~ carry liability insurance or adequately insure
24 itself in an amount of not less than \$1.5 million per claim,
25 \$5 million annual aggregate to cover all medical injuries to
26 patients resulting from negligent acts or omissions on the
27 part of those members of its medical staff who are covered
28 thereby in furtherance of the requirements of ss. 458.320 and
29 459.0085. Self-insurance coverage extended hereunder to the ~~a~~
30 ~~member of a hospital's~~ medical staff meets the financial
31 responsibility requirements of ss. 458.320 and 459.0085 if the

1 ~~physician's~~ coverage limits are not less than the minimum
2 limits established in ss. 458.320 and 459.0085 and the
3 facility hospital is a verified trauma center as of July 1,
4 1990, that has extended self-insurance coverage continuously
5 to members of its medical staff for activities both inside and
6 outside of the facility hospital since January 1, 1987. Any
7 insurer authorized to write casualty insurance may make
8 available, but shall not be required to write, such coverage.
9 The facility hospital may assess on an equitable and pro rata
10 basis the following professional health care providers for a
11 portion of the total facility hospital insurance cost for this
12 coverage: physicians licensed under chapter 458, osteopathic
13 physicians licensed under chapter 459, podiatric physicians
14 licensed under chapter 461, dentists licensed under chapter
15 466, and nurses licensed under part I of chapter 464. The
16 facility hospital may provide for a deductible amount to be
17 applied against any individual health care provider found
18 liable in a law suit in tort or for breach of contract. The
19 legislative intent in providing for the deductible to be
20 applied to individual health care providers found negligent or
21 in breach of contract is to instill in each individual health
22 care provider the incentive to avoid the risk of injury to the
23 fullest extent and ensure that the citizens of this state
24 receive the highest quality health care obtainable.

25 Section 3. Section 766.201, Florida Statutes, is
26 amended to read:

27 766.201 Legislative findings and intent.--

28 (1) The Legislature finds that although the majority
29 of medical malpractice cases are settled by the parties, few
30 are settled during the presuit period. Failure to settle cases
31 early results in protracted and costly litigation at the

1 expense of victims of medical negligence and their families
2 and health care providers who have purchased medical liability
3 coverage or who are self-insured.~~makes the following~~
4 ~~findings:~~

5 ~~(a) Medical malpractice liability insurance premiums~~
6 ~~have increased dramatically in recent years, resulting in~~
7 ~~increased medical care costs for most patients and functional~~
8 ~~unavailability of malpractice insurance for some physicians.~~

9 ~~(b) The primary cause of increased medical malpractice~~
10 ~~liability insurance premiums has been the substantial increase~~
11 ~~in loss payments to claimants caused by tremendous increases~~
12 ~~in the amounts of paid claims.~~

13 ~~(c) The average cost of defending a medical~~
14 ~~malpractice claim has escalated in the past decade to the~~
15 ~~point where it has become imperative to control such cost in~~
16 ~~the interests of the public need for quality medical services.~~

17 ~~(d) The high cost of medical malpractice claims in the~~
18 ~~state can be substantially alleviated by requiring early~~
19 ~~determination of the merit of claims, by providing for early~~
20 ~~arbitration of claims, thereby reducing delay and attorney's~~
21 ~~fees, and by imposing reasonable limitations on damages, while~~
22 ~~preserving the right of either party to have its case heard by~~
23 ~~a jury.~~

24 ~~(e) The recovery of 100 percent of economic losses~~
25 ~~constitutes overcompensation because such recovery fails to~~
26 ~~recognize that such awards are not subject to taxes on~~
27 ~~economic damages.~~

28 (2) It is the intent of the Legislature to provide a
29 plan for prompt resolution of medical negligence claims. Such
30 plan shall consist of two separate components, presuit
31 investigation and mandatory mediation ~~arbitration~~. Presuit

1 investigation shall be mandatory and shall apply to all
2 medical negligence claims and defenses. Mediation Arbitration
3 shall be mandatory unless waived by the claimant and all
4 prospective defendants who have received notice or intend to
5 initiate litigation ~~voluntary and shall be available except as~~
6 ~~specified.~~

7 ~~(a) Presuit investigation shall include:~~

8 ~~1. Verifiable requirements that reasonable~~
9 ~~investigation precede both malpractice claims and defenses in~~
10 ~~order to eliminate frivolous claims and defenses.~~

11 ~~2. Medical corroboration procedures.~~

12 ~~(b) Arbitration shall provide:~~

13 ~~1. Substantial incentives for both claimants and~~
14 ~~defendants to submit their cases to binding arbitration, thus~~
15 ~~reducing attorney's fees, litigation costs, and delay.~~

16 ~~2. A conditional limitation on noneconomic damages~~
17 ~~where the defendant concedes willingness to pay economic~~
18 ~~damages and reasonable attorney's fees.~~

19 ~~3. Limitations on the noneconomic damages components~~
20 ~~of large awards to provide increased predictability of outcome~~
21 ~~of the claims resolution process for insurer anticipated~~
22 ~~losses planning, and to facilitate early resolution of medical~~
23 ~~negligence claims.~~

24 Section 4. Section 766.202, Florida Statutes, is
25 amended to read:

26 766.202 Definitions: ~~ss. 766.201-766.212.~~ --As used in
27 ss. 766.202-766.207 ~~ss. 766.201-766.212~~, the term:

28 (1) "Claimant" means any person who has a cause of
29 action arising from medical negligence.

30 ~~(2) "Collateral sources" means any payments made to~~
31 ~~the claimant, or made on his or her behalf, by or pursuant to:~~

1 ~~(a) The United States Social Security Act; any~~
2 ~~federal, state, or local income disability act; or any other~~
3 ~~public programs providing medical expenses, disability~~
4 ~~payments, or other similar benefits, except as prohibited by~~
5 ~~federal law.~~

6 ~~(b) Any health, sickness, or income disability~~
7 ~~insurance; automobile accident insurance that provides health~~
8 ~~benefits or income disability coverage; and any other similar~~
9 ~~insurance benefits, except life insurance benefits available~~
10 ~~to the claimant, whether purchased by him or her or provided~~
11 ~~by others.~~

12 ~~(c) Any contract or agreement of any group,~~
13 ~~organization, partnership, or corporation to provide, pay for,~~
14 ~~or reimburse the costs of hospital, medical, dental, or other~~
15 ~~health care services.~~

16 ~~(d) Any contractual or voluntary wage continuation~~
17 ~~plan provided by employers or by any other system intended to~~
18 ~~provide wages during a period of disability.~~

19 ~~(3) "Economic damages" means financial losses which~~
20 ~~would not have occurred but for the injury giving rise to the~~
21 ~~cause of action, including, but not limited to, past and~~
22 ~~future medical expenses and 80 percent of wage loss and loss~~
23 ~~of earning capacity.~~

24 ~~(2)~~(4) "Investigation" means that an attorney has
25 reviewed the case against the prospective ~~each and every~~
26 ~~potential~~ defendant and has consulted with a medical expert
27 and has obtained a written opinion from said expert.

28 ~~(3)~~(5) "Medical expert" means a person duly and
29 regularly engaged in the practice of his or her profession who
30 holds a health care professional degree from a university or
31 college and has had special professional training and

1 | experience or one possessed of special health care knowledge
2 | or skill about the subject upon which he or she is called to
3 | testify or provide an opinion.

4 | ~~(4)~~(6) "Medical negligence" means medical malpractice,
5 | whether grounded in tort or in contract, and does not include
6 | claims involving defective products or negligent maintenance
7 | of premises.

8 | ~~(7)~~ "Noneconomic damages" means nonfinancial losses
9 | which would not have occurred but for the injury giving rise
10 | to the cause of action, including pain and suffering,
11 | inconvenience, physical impairment, mental anguish,
12 | disfigurement, loss of capacity for enjoyment of life, and
13 | other nonfinancial losses.

14 | ~~(8)~~ "Periodic payment" means provision for the
15 | structuring of future economic damages payments, in whole or
16 | in part, over a period of time, as follows:

17 | ~~(a)~~ A specific finding of the dollar amount of
18 | periodic payments which will compensate for these future
19 | damages after offset for collateral sources shall be made.
20 | The total dollar amount of the periodic payments shall equal
21 | the dollar amount of all such future damages before any
22 | reduction to present value.

23 | ~~(b)~~ The defendant shall be required to post a bond or
24 | security or otherwise to assure full payment of these damages
25 | awarded. A bond is not adequate unless it is written by a
26 | company authorized to do business in this state and is rated
27 | A+ by Best's. If the defendant is unable to adequately assure
28 | full payment of the damages, all damages, reduced to present
29 | value, shall be paid to the claimant in a lump sum. No bond
30 | may be canceled or be subject to cancellation unless at least
31 | 60 days' advance written notice is filed with the court and

1 ~~the claimant. Upon termination of periodic payments, the~~
2 ~~security, or so much as remains, shall be returned to the~~
3 ~~defendant.~~

4 ~~(c) The provision for payment of future damages by~~
5 ~~periodic payments shall specify the recipient or recipients of~~
6 ~~the payments, the dollar amounts of the payments, the interval~~
7 ~~between payments, and the number of payments or the period of~~
8 ~~time over which payments shall be made.~~

9 Section 5. Subsection (3) and (4) of section 766.203,
10 Florida Statutes, are amended to read:

11 766.203 Presuit investigation of medical negligence
12 claims and defenses by prospective parties.--

13 (3) Prior to issuing its response to the claimant's
14 notice of intent to initiate litigation, during the time
15 period for response authorized pursuant to s. 766.106, the
16 defendant or the defendant's insurer or self-insurer shall
17 conduct an investigation to ascertain whether there are
18 reasonable grounds to believe that:

19 (a) The defendant was negligent in the care or
20 treatment of the claimant; and

21 (b) Such negligence resulted in injury to the
22 claimant.

23
24 Corroboration of lack of reasonable grounds for medical
25 negligence litigation shall be provided with any response
26 rejecting the claim by the defendant's submission of a
27 verified written medical expert opinion from a medical expert
28 as defined in s. 766.202(5), at the time the response
29 rejecting the claim is mailed, which statement shall
30 corroborate reasonable grounds for lack of negligent injury
31 sufficient to support the response denying negligent injury.

1 Such medical expert opinion must not be from a member of the
2 same self-insurance trust or risk-retention group, or a
3 medical expert who is insured by the same insurance carrier as
4 any prospective defendant.

5 (4) If any previous opinion by the same medical expert
6 has been disqualified, the medical expert opinion required by
7 this section must so state and include the name of the court
8 and the case number in which such opinion has been
9 disqualified.~~The medical expert opinions required by this~~
10 ~~section shall specify whether any previous opinion by the same~~
11 ~~medical expert has been disqualified and if so the name of the~~
12 ~~court and the case number in which the ruling was issued.~~

13 Section 6. Subsection (1) and (2) of section 766.204,
14 Florida Statutes, are amended to read:

15 766.204 Availability of medical records for presuit
16 investigation of medical negligence claims and defenses;
17 penalty.--

18 (1) Notwithstanding any other provision of law, copies
19 of any medical record relevant to the investigation any
20 litigation of a medical negligence claim or defense shall be
21 provided to a claimant or a defendant, or to the attorney
22 thereof, at a reasonable charge not to exceed 35 cents per
23 page within 10 business days of a request for copies, except
24 that an independent special hospital district with taxing
25 authority which owns two or more hospitals shall have 20 days.
26 It shall not be grounds to refuse copies of such medical
27 records that they are not yet completed or that a medical bill
28 is still owing.

29 (2) Failure to provide copies of such medical records
30 within the time required, or failure to make the charge for
31 copies a reasonable charge as provided in this section, shall

1 constitute evidence of failure of that prospective defendant
2 ~~party~~ to comply with good-faith presuit investigation ~~good~~
3 ~~faith-discovery~~ requirements, and shall waive the requirement
4 of written medical corroboration of the claim as provided in
5 s. 766.203(2), and shall subject the prospective defendant to
6 striking of claims and defenses ~~by the requesting party.~~

7 Section 7. Subsection (2) and (4) of section 766.205,
8 Florida Statutes, are amended to read:

9 766.205 Presuit discovery of medical negligence claims
10 and defenses.--

11 (2) Such access shall be provided without formal
12 discovery, pursuant to s. 766.106, and failure to so provide
13 shall be grounds for striking ~~dismissal~~ of any applicable
14 claim or defense ultimately asserted.

15 (4) No statement, discussion, written document,
16 report, or other work product generated solely by the presuit
17 investigation process is discoverable or admissible in any
18 civil action for any purpose by the opposing party. All
19 participants, including, but not limited to, hospitals and
20 other medical facilities, and the officers, directors,
21 trustees, employees, and agents thereof, physicians,
22 investigators, witnesses, and employees or associates of the
23 defendant, are immune from civil liability arising from
24 participation in the presuit investigation process, except in
25 cases of intentional misrepresentation. Such immunity from
26 civil liability includes immunity for any acts by a medical
27 facility in connection with providing medical records pursuant
28 to s. 766.204(1) regardless of whether the medical facility is
29 or is not a defendant.

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1 Section 8. Subsection (3) and paragraph (a) of
2 subsection (5) of section 766.206, Florida Statutes, are
3 amended to read:

4 766.206 Presuit investigation of medical negligence
5 claims and defenses by court.--

6 (3) If the court finds that the response mailed by a
7 defendant rejecting the claim is not in compliance with the
8 reasonable investigation requirements, the court shall strike
9 the defendant's response and defenses, and the person who
10 mailed such response, whether the defendant, the defendant's
11 insurer, or the defendant's attorney, shall be personally
12 liable for all attorney's fees and costs incurred during the
13 investigation and evaluation of the claim, including the
14 reasonable attorney's fees and costs of the claimant.

15 (5)(a) If the court finds that the corroborating
16 written medical expert opinion attached to any notice of ~~claim~~
17 ~~or intent to initiate litigation~~ or to a any response
18 rejecting a claim lacked reasonable investigation, the court
19 shall report the medical expert issuing such corroborating
20 opinion to the Board of Medicine ~~Division of Medical Quality~~
21 ~~Assurance~~ or its designee. If such medical expert is not a
22 resident of the state, the division shall forward such report
23 to the disciplining authority of that medical expert.

24 Section 9. Section 766.207, Florida Statutes, is
25 amended to read:

26 766.207 Mandatory mediation ~~Voluntary binding~~
27 ~~arbitration~~ of medical negligence claims.--

28 (1) It is the intent of the Legislature that the
29 entire presuit investigation procedure and mandatory mediation
30 process be concluded within 120 days ~~Voluntary binding~~
31 ~~arbitration pursuant to this section and ss. 766.208-766.212~~

1 ~~shall not apply to rights of action involving the state or its~~
2 ~~agencies or subdivisions, or the officers, employees, or~~
3 ~~agents thereof, pursuant to s. 768.28.~~

4 (2) Upon the completion of the presuit investigation
5 period and any other stipulated extensions, all prospective
6 defendants and claimants shall proceed to mediation under this
7 section within 30 days. The statute of limitations is tolled,
8 and the statute of repose is extended, until the completion of
9 mediation. A claimant has 60 days or the remainder of the
10 statute of limitations or statute of repose, whichever is
11 longer, within which to file an action.~~with preliminary~~
12 ~~reasonable grounds for a medical negligence claim intact, the~~
13 ~~parties may elect to have damages determined by an arbitration~~
14 ~~panel. Such election may be initiated by either party by~~
15 ~~-serving a request for voluntary binding arbitration of damages~~
16 ~~within 90 days after service of the claimant's notice of~~
17 ~~intent to initiate litigation upon the defendant. The~~
18 ~~evidentiary standards for voluntary binding arbitration of~~
19 ~~medical negligence claims shall be as provided in ss.~~
20 ~~120.569(2)(g) and 120.57(1)(c).~~

21 (3) Within 30 days after the completion of the presuit
22 investigation period and any stipulated extensions, the
23 parties or their designated representatives shall meet in
24 mediation to discuss the issues of liability and damages in
25 accordance with the mediation rules of practice and procedures
26 adopted by the Supreme Court of this state.~~Upon receipt of a~~
27 ~~party's request for such arbitration, the opposing party may~~
28 ~~accept the offer of voluntary binding arbitration within 30~~
29 ~~days. However, in no event shall the defendant be required to~~
30 ~~respond to the request for arbitration sooner than 90 days~~
31 ~~after service of the notice of intent to initiate litigation~~

1 ~~under s. 766.106. Such acceptance within the time period~~
2 ~~provided by this subsection shall be a binding commitment to~~
3 ~~comply with the decision of the arbitration panel. The~~
4 ~~liability of any insurer shall be subject to any applicable~~
5 ~~insurance policy limits.~~

6 (4) To the extent not inconsistent with this part, the
7 provisions of the Florida Mediation Code, Florida Rules of
8 Civil Procedure, are applicable to such proceedings.~~The~~
9 ~~arbitration panel shall be composed of three arbitrators, one~~
10 ~~selected by the claimant, one selected by the defendant, and~~
11 ~~one an administrative law judge furnished by the Division of~~
12 ~~Administrative Hearings who shall serve as the chief~~
13 ~~arbitrator. In the event of multiple plaintiffs or multiple~~
14 ~~defendants, the arbitrator selected by the side with multiple~~
15 ~~parties shall be the choice of those parties. If the multiple~~
16 ~~parties cannot reach agreement as to their arbitrator, each of~~
17 ~~the multiple parties shall submit a nominee, and the director~~
18 ~~of the Division of Administrative Hearings shall appoint the~~
19 ~~arbitrator from among such nominees.~~

20 (5) The claimants and prospective defendants shall
21 each pay their pro rata share of all the costs of the
22 mediation.~~The arbitrators shall be independent of all~~
23 ~~parties, witnesses, and legal counsel, and no officer,~~
24 ~~director, affiliate, subsidiary, or employee of a party,~~
25 ~~witness, or legal counsel may serve as an arbitrator in the~~
26 ~~proceeding.~~

27 (6) The fact of mediation, any documents or testimony
28 presented, and negotiation and statements made during the
29 mediation are not admissible in any collateral or subsequent
30 proceeding on the claim. Information, documents, or records
31 otherwise available from original sources are not to be

1 construed as inadmissible in any subsequent proceeding by
2 virtue of having been presented during the mediation; nor may
3 any person who participates at such mediation be prevented
4 from testifying as to matters of personal knowledge; however,
5 such a person may not be asked about any aspect of the
6 mediation or opinions formed as a result of the mediation.~~The~~
7 ~~rate of compensation for medical negligence claims arbitrators~~
8 ~~other than the administrative law judge shall be set by the~~
9 ~~chief judge of the appropriate circuit court by schedule~~
10 ~~providing for compensation of not less than \$250 per day nor~~
11 ~~more than \$750 per day or as agreed by the parties. In~~
12 ~~setting the schedule, the chief judge shall consider the~~
13 ~~prevailing rates charged for the delivery of professional~~
14 ~~services in the community.~~

15 ~~(7) Arbitration pursuant to this section shall~~
16 ~~preclude recourse to any other remedy by the claimant against~~
17 ~~any participating defendant, and shall be undertaken with the~~
18 ~~understanding that:~~

19 ~~(a) Net economic damages shall be awardable,~~
20 ~~including, but not limited to, past and future medical~~
21 ~~expenses and 80 percent of wage loss and loss of earning~~
22 ~~capacity, offset by any collateral source payments.~~

23 ~~(b) Noneconomic damages shall be limited to a maximum~~
24 ~~of \$250,000 per incident, and shall be calculated on a~~
25 ~~percentage basis with respect to capacity to enjoy life, so~~
26 ~~that a finding that the claimant's injuries resulted in a~~
27 ~~50-percent reduction in his or her capacity to enjoy life~~
28 ~~would warrant an award of not more than \$125,000 noneconomic~~
29 ~~damages.~~

30 ~~(c) Damages for future economic losses shall be~~
31 ~~awarded to be paid by periodic payments pursuant to s.~~

1 ~~766.202(8) and shall be offset by future collateral source~~
2 ~~payments.~~

3 ~~(d) Punitive damages shall not be awarded.~~

4 ~~(e) The defendant shall be responsible for the payment~~
5 ~~of interest on all accrued damages with respect to which~~
6 ~~interest would be awarded at trial.~~

7 ~~(f) The defendant shall pay the claimant's reasonable~~
8 ~~attorney's fees and costs, as determined by the arbitration~~
9 ~~panel, but in no event more than 15 percent of the award,~~
10 ~~reduced to present value.~~

11 ~~(g) The defendant shall pay all the costs of the~~
12 ~~arbitration proceeding and the fees of all the arbitrators~~
13 ~~other than the administrative law judge.~~

14 ~~(h) Each defendant who submits to arbitration under~~
15 ~~this section shall be jointly and severally liable for all~~
16 ~~damages assessed pursuant to this section.~~

17 ~~(i) The defendant's obligation to pay the claimant's~~
18 ~~damages shall be for the purpose of arbitration under this~~
19 ~~section only. A defendant's or claimant's offer to arbitrate~~
20 ~~shall not be used in evidence or in argument during any~~
21 ~~subsequent litigation of the claim following the rejection~~
22 ~~thereof.~~

23 ~~(j) The fact of making or accepting an offer to~~
24 ~~arbitrate shall not be admissible as evidence of liability in~~
25 ~~any collateral or subsequent proceeding on the claim.~~

26 ~~(k) Any offer by a claimant to arbitrate must be made~~
27 ~~to each defendant against whom the claimant has made a claim.~~
28 ~~Any offer by a defendant to arbitrate must be made to each~~
29 ~~claimant who has joined in the notice of intent to initiate~~
30 ~~litigation, as provided in s. 766.106. A defendant who~~
31 ~~rejects a claimant's offer to arbitrate shall be subject to~~

1 ~~the provisions of s. 766.209(3). A claimant who rejects a~~
2 ~~defendant's offer to arbitrate shall be subject to the~~
3 ~~provisions of s. 766.209(4).~~

4 ~~(1) The hearing shall be conducted by all of the~~
5 ~~arbitrators, but a majority may determine any question of fact~~
6 ~~and render a final decision. The chief arbitrator shall~~
7 ~~decide all evidentiary matters.~~

8
9 The provisions of this section subsection do shall not
10 preclude settlement at any time by mutual agreement of the
11 parties.

12 ~~(7)(8) Any issue between the defendant and the~~
13 ~~defendant's insurer or self-insurer as to who shall control~~
14 ~~the defense of the claim and any responsibility for payment of~~
15 ~~damages an arbitration award, shall be determined under~~
16 ~~existing principles of law; provided that the insurer or~~
17 ~~self-insurer shall not offer to arbitrate or accept a~~
18 ~~claimant's offer to arbitrate without the written consent of~~
19 ~~the defendant.~~

20 ~~(9) The Division of Administrative Hearings is~~
21 ~~authorized to promulgate rules to effect the orderly and~~
22 ~~efficient processing of the arbitration procedures of ss.~~
23 ~~766.201-766.212.~~

24 ~~(10) Rules promulgated by the Division of~~
25 ~~Administrative Hearings pursuant to this section, s. 120.54,~~
26 ~~or s. 120.65 may authorize any reasonable sanctions except~~
27 ~~contempt for violation of the rules of the division or failure~~
28 ~~to comply with a reasonable order issued by an administrative~~
29 ~~law judge, which is not under judicial review.~~

30 Section 10. Sections 766.208, 766.209, 766.21,
31 766.211, and 766.212, Florida Statutes, are repealed.

1 Section 11. This act shall take effect July 1, 2001,
2 and shall apply to actions that have not been filed before
3 that date.

4
5 *****

6 SENATE SUMMARY

7 Repeals the law that provides for arbitration of medical
8 negligence cases and provides for mandatory mediation.
9 Provides procedures, responsibilities of prospective
defendants, liability of parties, and penalties for
noncompliance. (See bill for details.)

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