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1 A bill to be entitled

2 An act relating to long-term care civil enforcement;
3 amending s. 400.023, F.S.; clarifying liability of nurses
4 employed by nursing homes; requiring a certificate of
5 counsel certifying compliance with the requirement to
6 serve a copy of a complaint alleging a violation of rights
7 under pt. II of ch. 400, F.S., with the Agency for Health
8 Care Administration; amending s. 400.0233, F.S.; providing
9 definitions; authorizing voluntary binding arbitration
10 under ss. 400.02341-400.02348, F.S., following presuit
11 investigation and mediation of claims for resident's
12 rights violation or negligence; creating s. 400.02341,
13 F.S.; providing legislative findings and intent; creating
14 s. 400.02342, F.S.; providing for voluntary binding
15 arbitration for certain claims for resident's rights
16 violation or negligence; exempting rights of action
17 pursuant to s. 768.28, F.S., from voluntary binding
18 arbitration; providing evidentiary standards for voluntary
19 binding arbitration; specifying the composition of the
20 arbitration panel; providing qualifications and
21 compensation of arbitrators; specifying terms and
22 conditions of entering into arbitration; authorizing
23 rules; creating s. 400.02343, F.S.; providing for
24 arbitration to allocate financial responsibility among
25 multiple defendants; specifying the composition of the
26 arbitration panel; providing for joint and several
27 liability; requiring defendants to pay their proportionate
28 share of the economic and noneconomic damages awarded by
29 the arbitration panel; providing a defendant paying
30 damages in action for contribution against any



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31 nonarbitrating person whose negligence contributed to the
 32 injury; creating s. 400.02344, F.S.; specifying effects of
 33 failure to offer or accept voluntary binding arbitration;
 34 creating s. 400.02345, F.S.; providing for a court to
 35 determine whether a claim is subject to voluntary binding
 36 arbitration; providing procedures if a plaintiff amends a
 37 complaint to allege facts that render a claim subject to
 38 arbitration; creating s. 400.02346, F.S.; providing for
 39 dissolution of the arbitration panel if agreement cannot
 40 be reached; providing for the appointment of new
 41 arbitrators; creating s. 400.02347, F.S.; requiring
 42 payment of the arbitration award by the defendant;
 43 providing for accrual of interest beginning 90 days after
 44 the award; creating s. 400.02348, F.S.; designating
 45 arbitration awards and allocation of financial
 46 responsibility as final agency action for purposes of s.
 47 120.68, F.S.; providing for appeal to the district court;
 48 limiting judicial review; providing for enforcement of
 49 arbitration awards by the parties to the arbitration;
 50 providing for applicability; providing an effective date.

51
 52 Be It Enacted by the Legislature of the State of Florida:

53
 54 Section 1. Subsections (4) and (6) of section 400.023,
 55 Florida Statutes, are amended to read:

56 400.023 Civil enforcement.--

57 (4) A licensee shall be liable for ~~for~~ any claim for
 58 resident's rights violation or negligence by a nurse licensed
 59 under part I of chapter 464 and employed by the licensee. Nurses
 60 providing nursing services, ~~such nurse~~ shall have the duty to



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61 exercise care consistent with the prevailing professional
 62 standard of care for nurses ~~a nurse~~. The prevailing professional
 63 standard of care for nurses ~~a nurse~~ shall be that level of care,
 64 skill, and treatment which, in light of all relevant surrounding
 65 circumstances, is recognized as acceptable and appropriate by
 66 reasonably prudent similar nurses.

67 (6) The resident or the resident's legal representative
 68 shall serve a copy of any complaint alleging in whole or in part
 69 a violation of any rights specified in this part to the Agency
 70 for Health Care Administration at the time of filing the initial
 71 complaint with the clerk of the court for the county in which
 72 the action is pursued. The initial complaint must contain a
 73 certificate of counsel certifying compliance with this
 74 subsection. The requirement of providing a copy of the complaint
 75 to the agency and certifying compliance with this subsection
 76 does not impair the resident's legal rights or ability to seek
 77 relief for his or her claim.

78 Section 2. Subsections (1) and (11) of section 400.0233,
 79 Florida Statutes, are amended to read:

80 400.0233 Presuit notice; investigation; notification of
 81 violation of resident's rights or alleged negligence; claims
 82 evaluation procedure; informal discovery; review; settlement
 83 offer; mediation.--

84 (1) As used in this section and ss. 400.02341-400.02348,
 85 the term:

86 (a) "Claim for resident's rights violation or negligence"
 87 means a negligence claim alleging injury to or the death of a
 88 resident arising out of an asserted violation of the rights of a
 89 resident under s. 400.022 or an asserted deviation from the
 90 applicable standard of care.



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91 (b) "Collateral sources" means any payments made to the
92 claimant, or made on his or her behalf, by or pursuant to:

93 1. The United States Social Security Act; any federal,
94 state, or local income disability act; or any other public
95 programs providing medical expenses, disability payments, or
96 other similar benefits, except as prohibited by federal law.

97 2. Any health, sickness, or income disability insurance;
98 automobile accident insurance that provides health benefits or
99 income disability coverage; and any other similar insurance
100 benefits, except life insurance benefits available to the
101 claimant, whether purchased by him or her or provided by others.

102 3. Any contract or agreement of any group, organization,
103 partnership, or corporation to provide, pay for, or reimburse
104 the costs of hospital, medical, dental, or other health care
105 services.

106 4. Any contractual or voluntary wage continuation plan
107 provided by employers or by any other system intended to provide
108 wages during a period of disability.

109 (c) "Economic damages" means financial losses that would
110 not have occurred but for the injury giving rise to the cause of
111 action, including, but not limited to, past and future medical
112 expenses and 80 percent of wage loss and loss of earning
113 capacity.

114 (d) "Incident" means all conduct that is alleged in the
115 notice of claim or complaint to have caused the injury or
116 damages to the resident.

117 (e)~~(b)~~ "Insurer" means any self-insurer authorized under
118 s. 627.357, liability insurance carrier, joint underwriting
119 association, or uninsured prospective defendant.



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120 (f) "Noneconomic damages" means nonfinancial losses that
121 would not have occurred but for the injury giving rise to the
122 cause of action, including pain and suffering, inconvenience,
123 physical impairment, mental anguish, disfigurement, loss of
124 capacity for enjoyment of life, and other nonfinancial losses.

125 (11) Within 30 days after the claimant's receipt of the
126 defendant's response to the claim, the parties or their
127 designated representatives shall meet in mediation to discuss
128 the issues of liability and damages in accordance with the
129 mediation rules of practice and procedures adopted by the
130 Supreme Court. Upon stipulation of the parties, this 30-day
131 period may be extended and the statute of limitations is tolled
132 during the mediation and any such extension. At the conclusion
133 of mediation, the claimant shall have 60 days or the remainder
134 of the period of the statute of limitations, whichever is
135 greater, within which to enter into voluntary binding
136 arbitration under ss. 400.02341-400.02348 or to file suit.

137 Section 3. Section 400.02341, Florida Statutes, is created
138 to read:

139 400.02341 Legislative findings and intent.--

140 (1) The Legislature makes the following findings:

141 (a) Liability insurance premiums for nursing homes have
142 increased dramatically in recent years, resulting in increased
143 nursing home care costs for most patients and functional
144 unavailability of liability insurance for most nursing home
145 facilities.

146 (b) The primary cause of increased liability insurance
147 premiums has been the substantial increase in loss payments to
148 claimants caused by tremendous increases in the amounts of paid
149 claims.



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150 (c) The average cost of defending a nursing home liability
151 claim has escalated in the past decade to the point where it has
152 become imperative to control such cost in the interests of the
153 public need for quality nursing home care.

154 (d) The high cost of nursing home liability claims in the
155 state can be substantially alleviated by requiring early
156 determination of the merit of claims, by providing for early
157 arbitration of claims, thereby reducing delay and attorney's
158 fees, and by imposing reasonable limitations on damages, while
159 preserving the right of either party to have its case heard by a
160 jury.

161 (e) The recovery of 100 percent of economic losses
162 constitutes overcompensation because such recovery fails to
163 recognize that such awards are not subject to taxes on economic
164 damages.

165 (f) Excessive awards of noneconomic damages threaten the
166 ability of nursing home facilities to continue to provide
167 appropriate care for patients. A reasonable limitation on
168 noneconomic damages will reduce the high cost of claims without
169 jeopardizing the right of each party to be heard by a jury.

170 (2) It is the intent of the Legislature to provide a plan
171 for prompt resolution of nursing home liability claims. Such
172 plan shall consist of two separate components, presuit
173 investigation and arbitration. Presuit investigation shall be
174 mandatory and shall apply to all nursing home liability claims
175 and defenses. Arbitration shall be voluntary and shall be
176 available, except as specified.

177 (a) Presuit investigation shall include verifiable
178 requirements that reasonable investigation precede both nursing



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179 home liability claims and defenses in order to eliminate
 180 frivolous claims and defenses.

181 (b) Arbitration shall provide:

182 1. Substantial incentives for both claimants and
 183 defendants to submit their cases to binding arbitration, thus
 184 reducing attorney's fees, litigation costs, and delay.

185 2. A conditional limitation on noneconomic damages if the
 186 defendant concedes willingness to pay economic damages and
 187 reasonable attorney's fees.

188 3. Limitations on the noneconomic damages components of
 189 large awards to provide increased predictability of outcome of
 190 the claims resolution process in order for insurers to
 191 anticipate losses and to facilitate early resolution of
 192 negligence claims.

193 Section 4. Section 400.02342, Florida Statutes, is created
 194 to read:

195 400.02342 Voluntary binding arbitration of claims for
 196 resident's rights violation or negligence.--

197 (1) Voluntary binding arbitration pursuant to this section
 198 and ss. 400.02343-400.02348 does not apply to rights of action
 199 involving the state or its agencies or subdivisions, or the
 200 officers, employees, or agents thereof, pursuant to s. 768.28.

201 (2) Upon the completion of mediation under s.
 202 400.0233(11), the parties may elect, with respect only to claims
 203 arising out of the rendering of, or the failure to render,
 204 medical care or services, to have damages determined by an
 205 arbitration panel. For purposes of arbitration under ss.
 206 400.02342-400.02348, medical care or services includes:

207 (a) Skin care.

208 (b) Mobility and walking assistance.



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- 209 (c) Nourishment.
210 (d) Hydration.
211 (e) Prevention of elopement.

212
213 Such election may be initiated by either party by serving a
214 request for voluntary binding arbitration of damages within 60
215 days after the conclusion of mediation or the remainder of the
216 period of the statute of limitations, whichever is greater. The
217 evidentiary standards for voluntary binding arbitration of
218 claims arising out of the rendering of, or the failure to
219 render, medical care or services shall be as provided in ss.
220 120.569(2)(g) and 120.57(1)(c).

221 (3) Upon receipt of a party's request for such
222 arbitration, the opposing party may accept the offer of
223 voluntary binding arbitration within 30 days. Such acceptance
224 within the time period provided by this subsection shall be a
225 binding commitment to comply with the decision of the
226 arbitration panel. The liability of any insurer shall be subject
227 to any applicable insurance policy limits.

228 (4) The arbitration panel shall be composed of three
229 arbitrators, one selected by the claimant, one selected by the
230 defendant, and one administrative law judge furnished by the
231 Division of Administrative Hearings who shall serve as the chief
232 arbitrator. In the event of multiple claimants or multiple
233 defendants, the arbitrator selected by the side with multiple
234 parties shall be the choice of those parties. If the multiple
235 parties cannot reach agreement as to their arbitrator, each of
236 the multiple parties shall submit a nominee, and the director of
237 the Division of Administrative Hearings shall appoint the
238 arbitrator from among such nominees.



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239 (5) The arbitrators shall be independent of all parties,
 240 witnesses, and legal counsel, and no officer, director,
 241 affiliate, subsidiary, or employee of a party, witness, or legal
 242 counsel may serve as an arbitrator in the proceeding.

243 (6) The rate of compensation for arbitrators other than
 244 the administrative law judge shall be set by the chief judge of
 245 the appropriate circuit court by schedule, providing for
 246 compensation of not less than \$250 per day nor more than \$750
 247 per day or as agreed by the parties. In setting the schedule,
 248 the chief judge shall consider the prevailing rates charged for
 249 the delivery of professional services in the community.

250 (7) Arbitration pursuant to this section shall preclude
 251 recourse to any other remedy by the claimant against any
 252 participating defendant, and shall be undertaken with the
 253 understanding that:

254 (a) The defendant has made an offer of admission of
 255 liability and for arbitration on the issue of damages. This
 256 offer may be made contingent upon a limit of general damages.

257 (b) Net economic damages shall be awardable, including,
 258 but not limited to, past and future medical expenses and 80
 259 percent of wage loss and loss of earning capacity, offset by any
 260 collateral source payments made prior to the arbitration award.

261 (c) Noneconomic damages shall be limited to a maximum of
 262 \$250,000 per incident. If the claimant's care has been provided
 263 all or in part by Medicaid, the award shall first pay the
 264 Medicaid program those amounts expended for the claimant's care
 265 and the Medicaid program shall have a lien against the award for
 266 any future payments that would be paid for by Medicaid.

267 (d) Punitive damages may not be awarded.



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268 (e) The defendant shall be responsible for the payment of
269 interest on all accrued damages with respect to which interest
270 would be awarded at trial.

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

275 (g) The defendant shall pay all the costs of the
276 arbitration proceeding and the fees of all the arbitrators other
277 than the administrative law judge.

278 (h) Each defendant who submits to arbitration under this
279 section shall be jointly and severally liable for all damages
280 assessed pursuant to this section.

281 (i) The defendant's obligation to pay the claimant's
282 damages shall be for the purpose of arbitration under this
283 section only. A defendant's or claimant's offer to arbitrate
284 shall not be used in evidence or in argument during any
285 subsequent litigation of the claim following the rejection
286 thereof.

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

290 (k) Any offer by a claimant to arbitrate must be made to
291 each defendant against whom the claimant has made a claim. Any
292 offer by a defendant to arbitrate must be made to each claimant.
293 A defendant who rejects a claimant's offer to arbitrate shall be
294 subject to the provisions of s. 400.02344(3). A claimant who
295 rejects a defendant's offer to arbitrate shall be subject to the
296 provisions of s. 400.02344(4).



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297 (1) The hearing shall be conducted by all of the
298 arbitrators, but a majority may determine any question of fact
299 and render a final decision. The chief arbitrator shall decide
300 all evidentiary matters. The chief arbitrator shall file a copy
301 of the final decision with the clerk of the Agency for Health
302 Care Administration.

303
304 The provisions of this subsection shall not preclude settlement
305 at any time by mutual agreement of the parties.

306 (8) Any issue between the defendant and the defendant's
307 insurer or self-insurer as to who shall control the defense of
308 the claim and any responsibility for payment of an arbitration
309 award shall be determined under existing principles of law;
310 provided that the insurer or self-insurer shall not offer to
311 arbitrate or accept a claimant's offer to arbitrate without the
312 written consent of the defendant.

313 (9) The Division of Administrative Hearings may adopt
314 rules to effect the orderly and efficient processing of the
315 arbitration procedures of ss. 400.02342-400.02348.

316 (10) Rules adopted by the Division of Administrative
317 Hearings pursuant to this section, s. 120.54, or s. 120.65 may
318 authorize any reasonable sanctions except contempt for violation
319 of the rules of the division or failure to comply with a
320 reasonable order issued by an administrative law judge, which is
321 not under judicial review.

322 Section 5. Section 400.02343, Florida Statutes, is created
323 to read:

324 400.02343 Arbitration to allocate financial responsibility
325 among multiple defendants.--



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326 (1) The provisions of this section shall apply when more
327 than one defendant has participated in voluntary binding
328 arbitration pursuant to s. 400.02342.

329 (2) Within 20 days after the determination of damages by
330 the arbitration panel in the first arbitration proceeding, those
331 defendants who have agreed to voluntary binding arbitration
332 shall submit any dispute among them regarding the apportionment
333 of financial responsibility to a separate binding arbitration
334 proceeding. Such proceeding shall be with a panel of three
335 arbitrators, which panel shall consist of the administrative law
336 judge who presided in the first arbitration proceeding, who
337 shall serve as the chief arbitrator, and two nursing home
338 administrators appointed by the defendants. In the event the
339 defendants cannot agree on their selection of arbitrators within
340 20 days after the determination of damages by the arbitration
341 panel in the first arbitration proceeding, a list of not more
342 than five nominees shall be submitted by each defendant to the
343 director of the Division of Administrative Hearings, who shall
344 select the other arbitrators but shall not select more than one
345 from the list of nominees of any defendant.

346 (3) The administrative law judge appointed to serve as the
347 chief arbitrator shall convene the arbitrators for the purpose
348 of determining allocation of responsibility among multiple
349 defendants within 65 days after the determination of damages by
350 the arbitration panel in the first arbitration proceeding.

351 (4) The arbitration panel shall allocate financial
352 responsibility among all defendants named in the notice of an
353 asserted violation of a resident's rights or deviation from the
354 standard of care, regardless of whether the defendant has
355 submitted to arbitration. The defendants in the arbitration



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356 proceeding shall pay their proportionate share of the economic
357 and noneconomic damages awarded by the arbitration panel. All
358 defendants in the arbitration proceeding shall be jointly and
359 severally liable for any damages assessed in arbitration. The
360 determination of the percentage of fault of any defendant not in
361 the arbitration case shall not be binding against that
362 defendant, nor shall it be admissible in any subsequent legal
363 proceeding.

364 (5) Payment by the defendants of the damages awarded by
365 the arbitration panel in the first arbitration proceeding shall
366 extinguish those defendants' liability to the claimant and shall
367 also extinguish those defendants' liability for contribution to
368 any defendants who did not participate in arbitration.

369 (6) Any defendant paying damages assessed pursuant to this
370 section or s. 400.02342 shall have an action for contribution
371 against any nonarbitrating person whose negligence contributed
372 to the injury.

373 Section 6. Section 400.02344, Florida Statutes, is created
374 to read:

375 400.02344 Effects of failure to offer or accept voluntary
376 binding arbitration.--

377 (1) A proceeding for voluntary binding arbitration is an
378 alternative to jury trial and shall not supersede the right of
379 any party to a jury trial.

380 (2) If neither party requests or agrees to voluntary
381 binding arbitration, the claim shall proceed to trial or to any
382 available legal alternative such as offer of and demand for
383 judgment under s. 768.79 or offer of settlement under s. 45.061.

384 (3) If the defendant rejects a claimant's offer to enter
385 voluntary binding arbitration:



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386 (a) The claim shall proceed to trial without limitation on
387 damages, and the claimant, upon proving violation of a
388 resident's rights or negligence, shall be entitled to recover
389 prejudgment interest and reasonable attorney's fees up to 25
390 percent of the award reduced to present value.

391 (b) The claimant's award at trial shall be reduced by any
392 damages recovered by the claimant from arbitrating codefendants
393 following arbitration.

394 (4) If the claimant rejects a defendant's offer to enter
395 voluntary binding arbitration:

396 (a) The damages awardable at trial shall be limited to net
397 economic damages, plus noneconomic damages not to exceed
398 \$350,000 per incident. The Legislature expressly finds that
399 such conditional limit on noneconomic damages is warranted by
400 the claimant's refusal to accept arbitration, and represents an
401 appropriate balance between the interests of all residents who
402 ultimately pay for rights and negligence losses and the
403 interests of those residents who are injured as a result of
404 negligence and violations of rights.

405 (b) Net economic damages reduced to present value shall be
406 awardable, including, but not limited to, past and future
407 medical expenses and 80 percent of wage loss and loss of earning
408 capacity, offset by any collateral source payments.

409 (c) If the claimant's care has been provided in all or in
410 part by Medicaid, the award shall first pay the Medicaid program
411 those amounts expended for the claimant's care and the Medicaid
412 program shall have a lien against the award for any future
413 payments that would be paid for by Medicaid.

414 (5) Punitive damages may be awarded pursuant to ss.
415 400.0237 and 400.0238.



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416 (6) Jury trial shall proceed in accordance with existing
417 principles of law.

418 Section 7. Section 400.02345, Florida Statutes, is created
419 to read:

420 400.02345 Determination of whether claim is subject to
421 arbitration.--

422 (1) In the event of a dispute, a court of competent
423 jurisdiction may determine whether the claim is subject to the
424 voluntary arbitration provisions of ss. 400.02342-400.02348.

425 (2) If a plaintiff, at any time, amends a complaint to
426 allege facts that render a claim subject to arbitration under
427 ss. 400.02342-400.02348, the parties shall have 30 days to
428 determine whether or not to voluntarily arbitrate that claim and
429 the procedural limitations imposed on the parties under ss.
430 400.02342-400.02348 shall apply if the case proceeds to trial.

431 Section 8. Section 400.02346, Florida Statutes, is created
432 to read:

433 400.02346 Misarbitration.--

434 (1) At any time during the course of voluntary binding
435 arbitration of a claim arising out of the rendering of, or the
436 failure to render, medical care or services pursuant to s.
437 400.02342, the administrative law judge serving as chief
438 arbitrator on the arbitration panel, if he or she determines
439 that agreement cannot be reached, may dissolve the arbitration
440 panel and request the director of the Division of Administrative
441 Hearings to appoint two new arbitrators from lists of three to
442 five names timely provided by each party to the arbitration.
443 Not more than one arbitrator shall be appointed from the list
444 provided by any party, unless only one list is timely filed.



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445 (2) Upon appointment of the new arbitrators, arbitration
 446 shall proceed at the direction of the chief arbitrator in
 447 accordance with the provisions of ss. 400.02342-400.02348.

448 (3) At any time after the allocation arbitration hearing
 449 under s. 400.02343 has concluded, the administrative law judge
 450 -serving as chief arbitrator on the arbitration panel may
 451 dissolve the arbitration panel and declare the proceedings
 452 concluded if he or she determines that agreement cannot be
 453 reached.

454 Section 9. Section 400.02347, Florida Statutes, is created
 455 to read:

456 400.02347 Payment of arbitration award; interest.--

457 (1) Within 20 days after the determination of damages by
 458 the arbitration panel pursuant to s. 400.02342, the defendant
 459 shall:

460 (a) Pay the arbitration award, including interest at the
 461 legal rate, to the claimant; or

462 (b) Submit any dispute among multiple defendants to
 463 arbitration pursuant to s. 400.02343.

464 (2) Commencing 90 days after the award rendered in the
 465 arbitration procedure pursuant to s. 400.02342, such award shall
 466 begin to accrue interest at the rate of 18 percent per year.

467 Section 10. Section 400.02348, Florida Statutes, is
 468 created to read:

469 400.02348 Appeal of arbitration awards and allocations of
 470 financial responsibility.--

471 (1) An arbitration award and an allocation of financial
 472 responsibility are final agency action for purposes of s.
 473 120.68. Any appeal shall be taken to the district court of
 474 appeal for the district in which the arbitration took place,



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475 shall be limited to review of the record, and shall otherwise
476 proceed in accordance with s. 120.68. The amount of an
477 arbitration award or an order allocating financial
478 responsibility, the evidence in support of either, and the
479 procedure by which either is determined are subject to judicial
480 scrutiny only in a proceeding instituted pursuant to this
481 subsection.

482 (2) No appeal shall operate to stay an arbitration award,
483 nor shall any arbitration panel, arbitration panel member, or
484 circuit court stay an arbitration award. The district court of
485 appeal may order a stay to prevent manifest injustice, but no
486 court shall abrogate the provisions of s. 400.02347(2).

487 (3) Any party to an arbitration proceeding may enforce an
488 arbitration award or an allocation of financial responsibility
489 by filing a petition in the circuit court for the circuit in
490 which the arbitration took place. A petition may not be granted
491 unless the time for appeal has expired. If an appeal has been
492 taken, a petition may not be granted with respect to an
493 arbitration award or an allocation of financial responsibility
494 that has been stayed.

495 (4) If the petitioner establishes the authenticity of the
496 arbitration award or of the allocation of financial
497 responsibility, shows that the time for appeal has expired, and
498 demonstrates that no stay is in place, the court shall enter
499 such orders and judgments as are required to carry out the terms
500 of the arbitration award or allocation of financial
501 responsibility. Such orders are enforceable by the contempt
502 powers of the court, and execution shall issue upon the request
503 of a party for such judgment.



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504 Section 11. This act shall take effect July 1, 2003, and
505 shall apply to causes of action accruing on or after that date.