

House Bill 339

By: Representative Hatfield of the 177th

A BILL TO BE ENTITLED
AN ACT

1 To amend Title 51 of the Official Code of Georgia Annotated, relating to torts, so as to limit
2 medical damages in actions relating to health care in instances where the defendant maintains
3 medical liability insurance; to change provisions relating to agency liability of medical
4 facilities; to change provisions relating to apportionment of award according to degree of
5 fault; to create provisions relating to apportioning damages in certain malpractice actions;
6 to provide for related matters; to provide for a penalty for bad faith failure to settle a claim;
7 to repeal conflicting laws; and for other purposes.

8 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

9 **SECTION 1.**

10 (a) The General Assembly finds that health care providers and health facilities licensed in
11 Georgia face uncertainty in the face of potential for liability in medical legal actions; and, in
12 addition to the cost of maintaining insurance in large amounts, such persons have concerns
13 about their personal liability in excess of any such insurance. The result of this situation is
14 the potential for a diminution of the availability of access to health care services and a
15 resulting adverse impact on the health and well-being of the citizens of this state.

16 (b) The General Assembly further finds that a mandated medical liability insurance coverage
17 coupled with a limitation on liability will serve the interests of both health care providers and
18 the citizens of this state, who have a reasonable expectation of affordable health care and
19 redress in those rare instances of medical malpractice.

20 **SECTION 2.**

21 Title 51 of the Official Code of Georgia Annotated, relating to torts, is amended by adding
22 a new Chapter 13 to read as follows:

"CHAPTER 13

51-13-1.

As used in this Code section, the term:

(1) 'Claimant' means a person, including a decedent's estate, who seeks or has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(2) 'Health care provider' means any person licensed under Chapter 9, 11, 26, 30, 33, 34, 35, or 39 of Title 43 or any medical facility, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(3) 'Medical damages' means, without limitation, damages for physical and emotional pain, discomfort, anxiety, hardship, distress, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation, and all other nonpecuniary losses of any kind or nature, rehabilitation and therapy, wages, income, funeral and burial expenses, the value of services performed by the injured in the absence of the injury or death, and any other monetary expense.

(4) 'Medical facility' means any institution or medical facility licensed as such under Chapter 7 of Title 31.

51-13-2.

(a) If a health care provider maintains a policy of medical liability insurance in the amount of \$1 million per incident, then in any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against such health care provider, the total amount recoverable by a claimant for medical damages in such action shall be limited to an amount not to exceed the amount of such insurance, regardless of the number of defendant health care providers or facilities against whom the claim is asserted or the number of separate causes of action on which the claim is based.

(b) If a medical facility maintains a policy of medical liability insurance in the amount of \$5 million per incident, then in any verdict returned or judgment entered in a medical malpractice action, including an action for wrongful death, against such medical facility, the total amount recoverable by a claimant for medical damages in such action shall be limited to an amount not to exceed the amount of such insurance, regardless of the number

1 of defendant health care providers or facilities against whom the claim is asserted or the
2 number of separate causes of action on which the claim is based.

3 51-13-3.

4 (a) Notwithstanding the provisions of Code Section 51-2-5, no medical facility which
5 complies with the notice provisions of either subsection (b) or (c) of this Code section shall
6 be liable for the acts or omissions of a health care professional unless there exists an actual
7 agency or employment relationship between the medical facility and the health care
8 professional.

9 (b) The medical facility shall post a notice in the form and manner described herein. Such
10 notice shall:

11 (1) Be posted conspicuously in the medical facility lobby or a public area of the medical
12 facility;

13 (2) Contain print at least one inch high; and

14 (3) Provide language substantially similar to the following:

15 'Some or all of the health care professionals performing services in this medical facility
16 are independent contractors and are not medical facility agents or employees.

17 Independent contractors are responsible for their own actions and the medical facility
18 shall not be liable for the acts or omissions of any such independent contractors.'

19 (c) The medical facility shall have the patient or the patient's personal representative sign
20 a written acknowledgment that contains language substantially similar to that set forth in
21 paragraph (3) of subsection (b) of this Code section.

22 (d) The notice required in this Code section shall be sufficient if it meets the requirements
23 of either subsection (c) or (d) of this Code section even if the patient or the patient's
24 personal representative did not see or read such notice for any reason, including but not
25 limited to medical condition or language proficiency.

26 (e) Whether a health care professional is an actual agent, an employee, or an independent
27 contractor shall be determined by the language of the contract between the health care
28 professional and the medical facility. In the absence of such a contract, or if the contract
29 is unclear or ambiguous, a health care professional shall only be considered the medical
30 facility's employee or actual agent if it can be shown by a preponderance of the evidence
31 that the medical facility reserves the right to control the time, manner, or method in which
32 the health care professional performs the services for which licensed, as distinguished from
33 the right to merely require certain definite results.

34 (f) If the court finds that there is no contract or that the contract is unclear or ambiguous
35 as to the relationship between the medical facility and health care professional, the court
36 shall apply the following:

1 (1) Factors that may be considered as evidence the medical facility exercises a right of
2 control over the time, manner, or method of the health care professional's services
3 include: the parties believed they were creating an actual agency or employment
4 relationship; the health care professional receives substantially all the employee benefits
5 received by actual employees of the medical facility; the medical facility directs the
6 details of the health care professional's work step-by-step; the health care professional's
7 services are terminable at the will of the medical facility without cause and without
8 notice; the medical facility withholds, or is required to withhold, federal and state taxes
9 from the remuneration paid to the health care professional for services to the patients of
10 the medical facility; and factors not specifically excluded in paragraph (2) of this
11 subsection; and

12 (2) Factors that shall not be considered as evidence a medical facility exercises a right
13 of control over the time, manner, or method of the health care professional's services
14 include: a requirement by the medical facility that such health care professional treat all
15 patients or that any health care professional or group is obligated to staff a medical
16 facility department continuously or from time to time; the medical facility's payment to
17 the health care professional on an hourly basis; the provision of facilities or equipment
18 by the medical facility; the fact a health care professional does not maintain a separate
19 practice outside the medical facility; the source of the payment for the professional
20 liability insurance premium for that health care professional; the fact that the professional
21 fees for services are billed by the medical facility; or any requirement by the medical
22 facility that such health care professional engage in conduct required to satisfy any state
23 or federal statute or regulation, any standard of care, any standard or guideline set by an
24 association of medical facilities or health care professionals, or any accreditation standard
25 adopted by a national accreditation organization.

26 51-13-4.

27 (a) Where an action is brought against one or more health care providers or health care
28 facilities for injury to the person and the plaintiff is to some degree responsible for the
29 injury or damages claimed, the trier of fact, in its determination of the total amount of
30 damages to be awarded, if any, shall determine the percentage of negligence of the plaintiff
31 and shall reduce the amount of damages otherwise awarded to the plaintiff in proportion
32 to his or her negligence compared with that of the person or persons liable for the injury
33 or damages claimed.

34 (b) Where an action is brought against more than one health care provider or medical
35 facility for injury to the person, the trier of fact, in its determination of the total amount of
36 damages to be awarded, if any, shall after a reduction of damages pursuant to subsection (a)

1 of this Code section, if any, apportion its award of damages among the persons who are
2 liable according to the degree of fault of each person. Damages apportioned by the trier of
3 fact as provided in this Code section shall be the liability of each person against whom they
4 are awarded, shall not be a joint liability among the persons liable, and shall not be subject
5 to any right of contribution.

6 (c) Notwithstanding the provisions of this Code section and any other provision of law
7 which might be construed to the contrary, the plaintiff shall not be entitled to receive any
8 damages if the plaintiff is 50 percent or more responsible for the injury or damages
9 claimed.

10 (d) This Code section shall not affect venue provisions regarding joint actions.

11 51-13-5.

12 (a) In the event of a claim subject to the provisions of this chapter, the liability insurer has
13 an affirmative duty to adjust the claim fairly and promptly, to make a reasonable effort to
14 investigate and evaluate the claim, and, where liability is reasonably clear, to make a good
15 faith effort to settle with the claimant potentially entitled to recover against the insured
16 under such policy. Any insurer who breaches this duty may be liable to pay the claimant,
17 in addition to the loss, not more than 50 percent of the liability of the insured for the loss
18 or \$5,000.00, whichever is greater, and all reasonable attorney's fees for the prosecution
19 of the action.

20 (b) An insurer breaches the duty of subsection (a) of this Code section when, after
21 investigation of the claim, liability has become reasonably clear and the insurer in bad faith
22 offers less than the amount reasonably owed under all the circumstances of which the
23 insurer is aware.

24 (c) The amount of recovery, including reasonable attorney's fees, if any, shall be
25 determined by the trier of fact and included in a separate judgment against the insurer
26 rendered in the action; provided, however, the attorney's fees shall be fixed on the basis
27 of competent expert evidence as to the reasonable value of the services based on the time
28 spent and legal and factual issues involved in accordance with prevailing fees in the
29 locality where the action is pending; provided, further, the trial court shall have the
30 discretion, if it finds the jury verdict fixing attorney's fees to be greatly excessive or
31 inadequate, to review and amend the portion of the verdict fixing attorney's fees without
32 the necessity of disapproving the entire verdict. The limitations contained in this Code
33 section in reference to the amount of attorney's fees are not controlling as to the fees which
34 may be agreed upon by the plaintiff and his or her attorney for the services of the attorney.

35 (d) In any action brought pursuant to subsection (b) of this Code section, and within 20
36 days of bringing such action, the plaintiff shall, in addition to service of process in

1 accordance with Code Section 9-11-4, mail to the Commissioner of Insurance and the
2 consumers' insurance advocate a copy of the demand and complaint by first-class mail.
3 Failure to comply with this subsection may be cured by delivering same."

4 **SECTION 2.**

5 All laws and parts of laws in conflict with this Act are repealed.