STATE OF OKLAHOMA

1st Session of the 50th Legislature (2005)

SENATE BILL 670 By: Williamson

AS INTRODUCED

An Act relating to civil procedure; providing for calculation of attorney fees in class actions; defining terms; providing statute of limitations for product liability action; stating exceptions; allowing court to dismiss certain actions under specified circumstances; amending 12 O.S. 2001, Sections 993, 1101, 1102, 2023 and 2702, which relate to appeals, offers, class actions and expert testimony; adding grounds and establishing procedure to appeal certain order; clarifying language; updating statutory reference; requiring court to rule on certain motions in specified class actions; stating procedures for admissibility of certain testimony; amending 23 O.S. 2001, Sections 9.1, as amended by Section 1, Chapter 462, O.S.L. 2002, 61 and 103 (23 O.S. Supp. 2004, Section 9.1), which relates to punitive damages; requiring unanimous jury for punitive damages; allowing admissibility of certain evidence; directing payment of certain awards; authorizing periodic payments of certain awards; providing for reimbursement of certain costs under certain circumstances; allowing imposition of certain sanctions; establishing procedures for acceptance or denial of certain claims; amending Sections 4 and 5, Chapter 390, O.S.L. 2003 (63 O.S. Supp. 2004, Sections 1-1708.1D and 1-1708.1E) which relate to the Affordable Access to Health Care Act; stating form of certain claim; establishing procedure for certain claim; establishing procedures for use of expert reports; establishing procedures for answer of certain interrogatories; creating the Health Care Discovery Panel; placing cap on certain damages in specified actions; requiring reduction of damages under certain circumstances; requiring certain jury instructions under certain circumstances; establishing procedure for qualification of certain witness; defining terms; establishing guidelines for payment of certain damage awards; creating the Oklahoma Medical Disclosure Panel; establishing rights and duties of Panel; requiring estimates of certain medical care; creating the School Protection Act; providing short title; defining terms; limiting liability for certain employees under specified circumstances; establishing procedures for filing certain claim; prohibiting filing of specified suit unless certain remedies are exhausted; allowing referral of certain case to alternative dispute resolution; allowing recovery of attorney fees in certain cases; stating applicability of act; amending 76 O.S. 2001, Sections 18, as amended by Section 4, Chapter 462, O.S.L. 2002 (76 O.S. Supp. 2004, Section

18), which relates to torts; providing statute of limitations for certain claims; defining terms; stating applicability of certain provisions; clarifying asbestos-related liabilities for certain corporations; creating the Product Liability Act; providing short title; defining terms; requiring certain manufacturer to indemnify specified sellers; establishing indemnification procedures; stating certain rebuttable presumptions under specified circumstances; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 7.2 of Title 5, unless there is created a duplication in numbering, reads as follows:

A. If any portion of the benefits recovered for the class in a class action are in the form of coupons or other noncash common benefits, the attorney fees awarded in the class action shall be in cash and noncash amounts in the same proportion as the recovery for the class.

B. In class actions, if an award of attorney fees is available under applicable substantive law, the trial court shall use the Lodestar Rule to calculate the amount of fees to be awarded to class counsel. The court may increase or decrease the fee award calculated by using the Lodestar Rule by no more than five times based on factors specified in subsection C of this section.

C. As used in this section, "Lodestar Rule" means the number of hours reasonably expended multiplied by the prevailing hourly rate in the community and then adjusted for other factors. In arriving at just compensation, the court shall consider the following factors:

1. Time and labor required;

2. The novelty and difficulty of the case;

3. The skill required to perform the legal service properly;

4. The preclusion of other employment by the attorney due to acceptance of the case;

5. The customary fee;

6. Whether the fee is fixed or contingent;

7. Time limitations imposed by the client or the circumstances;

8. The amount in controversy and the results obtained;

9. The experience, reputation and ability of the attorney;

10. Whether or not the case is an undesirable case;

11. The nature and length of the professional relationship with the client; and

12. Awards in similar cases.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 95.1 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. As used in this section, "product liability action" means any action against a manufacturer or seller for recovery of damages or other relief for harm allegedly caused by a defective product, whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories, and whether the relief sought is recovery of damages or any other legal or equitable relief, including, but not limited to, an action for:

1. Injury or damage to or loss of real or personal property;

2. Personal injury;

3. Wrongful death;

4. Economic loss; or

5. Declaratory, injunctive, or other equitable relief.

B. Except as provided by subsections C, D and E of this section, a plaintiff must commence a product liability action against a manufacturer or seller of a product before the end of ten

(10) years after the date of the sale of the product by the defendant.

C. If a manufacturer or seller expressly warrants in writing that the product has a useful safe life of longer than ten (10) years, a plaintiff must commence a product liability action against that manufacturer or seller of the product before the end of the number of years warranted after the date of the sale of the product by that seller.

D. This section shall not apply to a product liability action in which damages are sought for personal injury or wrongful death if the plaintiff alleges:

1. The plaintiff was exposed to the product that is the subject of the action before the end of ten (10) years after the date the product was first sold to the plaintiff;

2. Exposure to the product caused a disease or injury that is the basis of the action; and

3. The symptoms of the disease or the cause of the injury were not, before the end of ten (10) years after the date of the first sale of the product by the defendant, manifest to a degree and for a duration that would put a reasonable person on notice that the person suffered some injury or that the product was subject to some defect.

E. This section shall not reduce a limitations period for a cause of action described by subsection D of this section that accrues before the end of the limitations period under this section.

F. This section shall not extend the limitations period within which a products liability action involving the product may be commenced under any other law.

G. This section applies only to the sale and not to the lease of a product.

H. This section shall not apply to any claim to which the General Aviation Revitalization Act of 1994 (Pub. L. No. 103-298),

108 Stat. 1552 (1994), 49 U.S.C., Section 40101 or its exceptions are applicable.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 144 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. If the court, upon motion by a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in another forum, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action.

B. In determining whether to grant a motion to stay or dismiss an action pursuant to this section, the court may consider:

1. Whether an alternate forum exists in which the claim or action may be tried;

2. Whether the alternate forum provides an adequate remedy;

3. Whether maintenance of the claim in the court in which the case is filed would work a substantial injustice to the moving party;

4. Whether the alternate forum can exercise jurisdiction over all the defendants properly joined in the claim of the plaintiff;

5. Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum; and

6. Whether the stay or dismissal would prevent unreasonable duplication or proliferation of litigation.

SECTION 4. AMENDATORY 12 O.S. 2001, Section 993, is amended to read as follows:

Section 993. A. When an order:

1. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify an attachment;

2. Denies a temporary or permanent injunction, grants a temporary or permanent injunction except where granted at an ex

parte hearing, or discharges, vacates, or modifies or refuses to discharge, vacate, or modify a temporary or permanent injunction;

3. Discharges, vacates, or modifies or refuses to discharge, vacate, or modify a provisional remedy which affects the substantial rights of a party;

4. Appoints a receiver except where the receiver was appointed at an ex parte hearing, refuses to appoint a receiver, or vacates or refuses to vacate the appointment of a receiver;

5. Directs the payment of money pendente lite except where granted at an ex parte hearing, refuses to direct the payment of money pendente lite, or vacates or refuses to vacate an order directing the payment of money pendente lite;

6. Certifies or refuses to certify an action to be maintained as a class action; ~~or~~

7. Denies a motion asserting lack of jurisdiction because an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies; or

8. Grants a new trial or opens or vacates a judgment or order, the party aggrieved thereby may appeal the order to the Supreme Court without awaiting the final determination in said cause, by filing the petition in error and the record on appeal with the Supreme Court within thirty (30) days after the order prepared in conformance with Section 696.3 of this title, is filed with the court clerk. If the appellant did not prepare the order, and Section 696.2 of this title required a copy of the order to be mailed to the appellant, and the court records do not reflect the mailing of a copy of the order to the appellant within three (3) days, exclusive of weekends and holidays, after the filing of the order, the petition in error may be filed within thirty (30) days after the earliest date on which the court records show that a copy

of the order was mailed to the appellant. The Supreme Court may extend the time for filing the record upon good cause shown.

B. If the order discharges or modifies an attachment or temporary injunction and it becomes operative, the undertaking given upon the allowance of an attachment or temporary injunction shall stay the enforcement of said order and remain in full force until final order of discharge shall take effect.

C. Where a receiver shall be or has been appointed, upon the appellant filing an appeal bond, with sufficient sureties, in such sum as may have been required of the receiver by the court or a judge thereof, conditioned for the due prosecution of the appeal and the payment of all costs or damages that may accrue to the state or any officer or person by reason thereof, the authority of the receiver shall be suspended until the final determination of the appeal, and if the receiver has taken possession of any property, real or personal, it shall be returned and surrendered to the appellant upon the filing and approval of the bonds.

D. During the pendency of an appeal pursuant to paragraph 6 or 7 of subsection A of this section, the action in the trial court shall be stayed in all respects. Following adjudication on appeal pursuant to paragraph 6 of subsection A of this section, if the class is not certified, the stay in the trial court shall automatically dissolve and the trial court may proceed to adjudicate any remaining individual claims or defenses. If after such appeal, the class is to be certified, the stay shall dissolve and the trial court shall proceed with adjudication on the merits; provided, the trial court shall at all times prior to entry of a final order retain jurisdiction to revisit the certification issues, upon motion of a party, and to order decertification of the class if during the litigation of the case it becomes evident to the court that the action is no longer reasonably maintainable as a class action.

SECTION 5. AMENDATORY 12 O.S. 2001, Section 1101, is amended to read as follows:

Section 1101. The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or ~~his~~ the attorney for the plaintiff an offer, in writing, to allow judgment to be taken against ~~him~~ the defendant for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or ~~his~~ the attorney for the defendant, within five (5) days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; and in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, ~~he~~ the plaintiff shall pay the defendant's costs from the time of the offer.

SECTION 6. AMENDATORY 12 O.S. 2001, Section 1102, is amended to read as follows:

Section 1102. The making of an offer, pursuant to the provisions contained in ~~the foregoing section~~ Sections 1101 and 1101.1 of this title, shall not be a cause for a continuance of an action or a postponement of the trial.

SECTION 7. AMENDATORY 12 O.S. 2001, Section 2023, is amended to read as follows:

Section 2023.

CLASS ACTIONS

A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;

2. There are questions of law or fact common to the class;

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. The representative parties will fairly and adequately protect the interests of the class.

B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:

a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to

other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

d. the difficulties likely to be encountered in the management of a class action.

C. CLASS ACTIONS INVOLVING JURISDICTION OF STATE AGENCY; STATE AGENCY WITH EXCLUSIVE OR PRIMARY JURISDICTION.

Before hearing or deciding a motion to certify a class action, the court shall hear and rule on all pending motions asserting lack of jurisdiction because an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies. The ruling of the court shall be reflected in a written order. If a motion provided for in this subsection is denied and a class is subsequently certified, a person may obtain appellate review of the order denying the motion as part of an appeal of the order certifying the class action.

D. DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

1. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection

may be conditional, and may be altered or amended before the decision on the merits.

2. In any class action maintained under paragraph 3 of subsection B of this section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

a. the court will exclude him from the class if he so requests by a specified date,

b. the judgment, whether favorable or not, will include all members who do not request exclusion, and

c. any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Where the class contains more than five hundred (500) members who can be identified through reasonable effort, it shall not be necessary to direct individual notice to more than five hundred (500) members, but the members to whom individual notice is not directed shall be given notice in such manner as the court shall direct, which may include publishing notice in newspapers, magazines, trade journals or other publications, posting it in appropriate places, and taking other steps that are reasonably calculated to bring the notice to the attention of such members, provided that the cost of giving such notice shall be reasonable in view of the amounts that may be recovered by the class members who are being notified. Members to whom individual notice was not directed may request exclusion from the class at any time before the issue of liability is determined, and commencing an individual action before the issue of liability is determined shall be the equivalent of requesting exclusion from the class.

3. The judgment in an action maintained as a class action under ~~paragraphs~~ paragraph 1 or 2 of subsection B of this section, whether

or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph 3 of subsection B of this section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph 2 of this subsection ~~C of this section~~ was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

4. When appropriate:

a. an action may be brought or maintained as a class action with respect to particular issues, or

b. a class may be divided into subclasses and each subclass treated as a class.

The provisions of this section shall then be construed and applied accordingly.

~~D.~~ E. ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this section applies, the court may make appropriate orders:

1. Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

2. Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

3. Imposing conditions on the representative parties or on intervenors;

4. Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and

5. Dealing with similar procedural matters.

The orders may be combined with an order under Section ~~16~~ 2016 of this ~~act~~ title and may be altered or amended as may be desirable from time to time.

~~E.~~ F. DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

SECTION 8. AMENDATORY 12 O.S. 2001, Section 2702, is amended to read as follows:

Section 2702. A. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if:

1. The testimony is based upon sufficient facts or data;

2. The testimony is the product of reliable principles and methods; and

3. The witness has applied the principles and methods reliably to the facts of the case.

B. Preliminary questions concerning the admissibility of expert testimony pursuant to subsection A of this section shall be determined by the court prior to the introduction of such evidence. The court shall act as "gatekeeper" to determine the admissibility of expert testimony and shall exclude from evidence testimony that does not satisfy the requirements of subsection A of this section.

C. This section shall be interpreted in a manner consistent with Federal Rule of Evidence 702 and the case law applicable thereto.

SECTION 9. AMENDATORY 23 O.S. 2001, Section 9.1, as amended by Section 1, Chapter 462, O.S.L. 2002 (23 O.S. Supp. 2004, Section 9.1), is amended to read as follows:

Section 9.1 A. In an action for the breach of an obligation not arising from contract, the jury, in addition to actual damages, may, subject to the provisions and limitations in subsections B, C and D of this section, award punitive damages for the sake of example and by way of punishing the defendant based upon the following factors:

1. The seriousness of the hazard to the public arising from the defendant's misconduct;

2. The profitability of the misconduct to the defendant;

3. The duration of the misconduct and any concealment of it;

4. The degree of the defendant's awareness of the hazard and of its excessiveness;

5. The attitude and conduct of the defendant upon discovery of the misconduct or hazard;

6. In the case of a defendant which is a corporation or other entity, the number and level of employees involved in causing or concealing the misconduct; and

7. The financial condition of the defendant.

B. Category I. Where the jury finds by clear and convincing evidence that:

1. The defendant has been guilty of reckless disregard for the rights of others; or

2. An insurer has recklessly disregarded its duty to deal fairly and act in good faith with its insured; the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greater of:

a. One Hundred Thousand Dollars ($100,000.00), or

b. the amount of the actual damages awarded.

Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

C. Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or

2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured;

the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in an amount not to exceed the greatest of:

a. Five Hundred Thousand Dollars ($500,000.00),

b. twice the amount of actual damages awarded, or

c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

The trial court shall reduce any award for punitive damages awarded pursuant to the provisions of subparagraph c of this paragraph by the amount it finds the defendant or insurer has previously paid as a result of all punitive damage verdicts entered in any court of this state for the same conduct by the defendant or insurer. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

D. Category III. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; or

2. An insurer has intentionally and with malice breached its duty to deal fairly and act in good faith with its insured; and the

court finds, on the record and out of the presence of the jury, that there is evidence beyond a reasonable doubt that the defendant or insurer acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award punitive damages in any amount the jury deems appropriate, without regard to the limitations set forth in subsections B and C of this section. Any award of punitive damages under this subsection awarded in any manner other than as required in this subsection shall be void and reversible error.

E. In determining the amount, if any, of punitive damages to be awarded under either subsection B, C or D of this section, the jury shall make the award based upon the factors set forth in subsection A of this section.

F. Punitive damages shall be awarded only if the jury is unanimous in regard to finding liability for punitive damages.

G. The provisions of this section are severable, and if any part or provision thereof shall be held void, the decision of the court shall not affect or impair any of the remaining parts or provisions thereof.

~~G. This~~ H. The provisions of this section, except subsection F of this section, shall apply to all civil actions filed after ~~the effective date of this act~~ August 25, 1995.

I. The provisions of subsection F of this section shall apply to all civil actions filed on or after November 1, 2005.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 9.2 of Title 23, unless there is created a duplication in numbering, reads as follows:

A. As used in this section:

1. "Future damages" means damages that are incurred after the date of judgment for:

a. medical, health care, or custodial care services,

b. physical pain and mental anguish, disfigurement, or physical impairment,

c. loss of consortium, companionship, or society, or

d. loss of earnings;

2. "Future loss of earnings" means the following losses incurred after the date of the judgment:

a. loss of income, wages, or earning capacity and other pecuniary losses, and

b. loss of inheritance; and

3. "Periodic payments" means the payment of money or its equivalent to the recipient of future damages at defined intervals.

B. This section applies only to an action in which the present value of the award of future damages, as determined by the court, equals or exceeds One Hundred Thousand Dollars ($100,000.00).

C. At the request of a defendant or a plaintiff, the court shall order that medical, health care, or custodial services awarded in an action be paid in whole or in part in periodic payments rather than by a lump-sum payment.

D. At the request of a defendant or a plaintiff, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by a lump-sum payment.

E. The court shall make a specific finding of the dollar amount of periodic payments that will compensate the plaintiff for the future damages.

F. The court shall specify in its judgment ordering the payment of future damages by periodic payments the:

1. Recipient of the payments;

2. Dollar amount of the payments;

3. Interval between payments; and

4. Number of payments or the period of time over which payments must be made.

G. The entry of an order for the payment of future damages by periodic payments constitutes a release of the health care liability claim filed by the plaintiff.

H. As a condition to authorizing periodic payments of future damages, the court shall require a defendant who is not adequately insured to provide evidence of financial responsibility in an amount adequate to assure full payment of damages awarded by the judgment.

I. The judgment must provide for payments to be funded by:

1. An annuity contract issued by a company licensed to do business as an insurance company, including an assignment within the meaning of Section 130, Internal Revenue Code of 1986, as amended;

2. An obligation of the United States;

3. Applicable and collectible liability insurance from one or more qualified insurers; or

4. Any other satisfactory form of funding approved by the court.

J. On termination of periodic payments of future damages, the court shall order the return of the security, or as much as remains, to the defendant.

K. On the death of the recipient, money damages awarded for loss of future earnings continue to be paid to the estate of the recipient of the award without reduction. Following the satisfaction or termination of any obligations specified in the judgment for periodic payments, any obligation of the defendant health care provider to make further payments ends and any security given reverts to the defendant.

L. For purposes of computing the award of attorney fees when the plaintiff is awarded a recovery that will be paid in periodic payments, the court shall place a total value on the payments based

on the plaintiff's projected life expectancy and reduce the amount to present value.

SECTION 11. AMENDATORY 23 O.S. 2001, Section 61, is amended to read as follows:

Section 61. A. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by ~~this chapter~~ law, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not.

B. Except as provided in subsection C of this section, for the breach of an obligation not arising from contract, if the plaintiff receives compensation for the injuries or harm that gave rise to the cause of action from a source wholly independent of the defendant, such fact may be admitted into evidence and the amount may be deducted from the amount of damages that the plaintiff recovers from the defendant.

C. The provisions of subsection B of this section shall not apply if the defendant, with specific intent to do harm to others, committed a crime and, in doing so, proximately caused the damages legally recoverable by the plaintiff.

SECTION 12. AMENDATORY 23 O.S. 2001, Section 103, is amended to read as follows:

Section 103. In any action ~~for damages for personal injury except injury resulting in death, or in any action for damages to personal rights~~ not arising out of contract, the court shall, upon granting a motion to dismiss an action or a motion for summary judgment or subsequent to adjudication on the merits ~~and upon motion of the prevailing party~~, determine whether a claim or defense asserted in the action by a nonprevailing party was frivolous. As used in this section "frivolous" means the action was asserted in bad faith, was without merit, was not well grounded in fact, or was unwarranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law. Upon so finding, the court shall enter a judgment ordering such nonprevailing party to reimburse the prevailing party ~~an amount not to exceed Ten Thousand Dollars ($10,000.00)~~ for reasonable costs, including attorneys fees, incurred with respect to such claim or defense. In addition, the court may impose any sanction authorized by Section 2011 of Title 12 of the Oklahoma Statutes.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6822 of Title 36, unless there is created a duplication in numbering, reads as follows:

A. Within sixty (60) days after receipt by a medical professional liability insurer of properly executed proof of liability, the claimant shall be advised of the acceptance or denial of the claim by the insurer, or if further investigation is necessary. No medical professional liability insurer shall deny a claim because of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. A denial shall be given to any claimant in writing, and the claim file of the medical professional liability insurer shall contain a copy of the denial. If there is a reasonable basis supported by specific information available for review by the Insurance Commissioner that the claimant has fraudulently caused or contributed to the loss, a medical professional liability insurer shall be relieved from the requirements of this subsection. In the event of a weather-related catastrophe or a major natural disaster, as declared by the Governor, the Insurance Commissioner may extend the deadline imposed under this subsection an additional twenty (20) days.

B. If a claim is denied for reasons other than those described in subsection A of this section, and is made by any other means than writing, an appropriate notation shall be made in the claim file of

the medical professional liability insurer until such time as a written confirmation can be made.

C. Every medical professional liability insurer shall complete investigation of a claim within sixty (60) days after notification of proof of loss unless such investigation cannot reasonably be completed within such time. If such investigation cannot be completed, or if a medical professional liability insurer needs more time to determine whether a claim should be accepted or denied, it shall so notify the claimant within sixty (60) days after receipt of the proof of loss, giving reasons why more time is needed. If the investigation remains incomplete, a medical professional liability insurer shall, within sixty (60) days from the date of the initial notification, send to such claimant a letter setting forth the reasons additional time is needed for investigation. Except for an investigation of possible fraud or arson which is supported by specific information giving a reasonable basis for the investigation, the time for investigation shall not exceed one hundred twenty (120) days after receipt of proof of loss. Provided, in the event of a weather-related catastrophe or a major natural disaster, as declared by the Governor, the Insurance Commissioner may extend this deadline for investigation an additional twenty (20) days.

D. Insurers shall not fail to settle claims on the basis that responsibility for payment should be assumed by others except as may otherwise be provided by policy provisions.

E. Insurers shall not continue or delay negotiations for settlement of a claim directly with a claimant who is neither an attorney nor represented by an attorney, for a length of time which causes the rights of the claimant to be affected by a statute of limitations, or a policy or contract time limit, without giving the claimant written notice that the time limit is expiring and may affect the claimant's rights. Such notice shall be given to first-

party claimants thirty (30) days, and to third-party claimants sixty (60) days, before the date on which such time limit may expire.

F. No insurer shall make statements which indicate that the rights of a third-party claimant may be impaired if a form or release is not completed within a given period of time unless the statement is given for the purpose of notifying a third-party claimant of the provision of a statute of limitations.

G. If a lawsuit on the claim is initiated, the time limits provided for in this section shall not apply.

SECTION 14. AMENDATORY Section 4, Chapter 390, O.S.L. 2003 (63 O.S. Supp. 2004, Section 1-1708.1D), is amended to read as follows:

Section 1-1708.1D A. In every medical liability action, the court shall admit evidence of payments of medical bills made to the injured party, unless the court makes the finding described in paragraph B of this section.

B. In any medical liability action, upon application of a party, the court shall make a determination whether amounts claimed by a health care provider to be a payment of medical bills from a collateral source is subject to <u>a formal, asserted claim of</u> subrogation or other right of recovery. If the court makes a determination that any such payment is subject to <u>a formal, asserted claim of</u> subrogation or other right of recovery, evidence of the payment from the collateral source and subject to subrogation or other right of recovery shall not be admitted.

<u>C. Any person or entity that would otherwise be entitled to make a subrogation or other type of recovery claim, but fails to do so in a written, formal asserted claim by the final pretrial conference in any medical liability action, shall be deemed to have waived the claim and shall be barred from recovery on the claim.</u>

SECTION 15. AMENDATORY Section 5, Chapter 390, O.S.L. 2003 (63 O.S. Supp. 2004, Section 1-1708.1E), is amended to read as follows:

Section 1-1708.1E A. 1. In any medical liability action, a person asserting a health care liability claim or an authorized agent of the person shall give written notice of the claim by certified mail, return receipt requested, to each health care provider against whom such claim is being made at least sixty (60) days before the filing of the medical liability action.

2. If the plaintiff fails to comply with paragraph 1 of this subsection, the court shall, upon motion of the defendant, unless good cause is shown for such failure, dismiss the action without prejudice to its refiling.

3. The notice shall require the health care provider to preserve all evidence related to the events set forth in the notice, including pathology and radiology, or other medical evidence, whether or not contained in the medical chart of the patient, electronic evidence, including e-mails, paper-tracking data, and medical information, whether or not contained in the medical record.

4. The sixty-day notice period set forth in paragraph 1 of this subsection shall cause a tolling of the statute of limitations for an equal period of sixty (60) days.

B. 1. In any medical liability action, except as provided in subsection ~~B~~ C of this section, the plaintiff shall attach to the petition an affidavit attesting that:

a. the plaintiff has consulted and reviewed the facts of the claim with a qualified expert,

b. the plaintiff has obtained a written opinion from a qualified expert that clearly identifies the plaintiff and includes the expert's determination that, based upon a review of the available medical records, facts or other relevant material, a reasonable

interpretation of the facts supports a finding that the acts or omissions of the health care provider against whom the action is brought constituted professional negligence, and

c. on the basis of the qualified expert's review and consultation, the plaintiff has concluded that the claim is meritorious and based on good cause.

2. In any medical liability action, except as provided in subsection C of this section, the defendant shall attach to the answer, if denying the claim by the plaintiff or if pleading affirmative defenses, an affidavit attesting that:

a. the defendant has consulted and reviewed the facts of the claim with a qualified expert,

b. the defendant has obtained a written opinion from a qualified expert that clearly identifies the claimant and includes a determination by the expert that, based upon a review of the medical records, facts, or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the health care provider against whom the claim is brought did not constitute professional negligence, and

c. on the basis of the review and consultation by the qualified expert, the denial of the claims and the assertion of affirmative defenses are supported by the evidence and based on good cause.

~~2.~~ 3. If a medical liability action is filed:

a. without an affidavit being attached to the petition, as required in paragraph 1 of this subsection, and

b. no extension of time is subsequently granted by the court, pursuant to subsection ~~B~~ C of this section,

the court shall, upon motion of the defendant, dismiss the action without prejudice to its refiling.

4. In a medical liability action if an answer is filed without an affidavit being attached and no extension of time is subsequently granted as provided in subsection C of this section, the court may, if it is in the interest of justice, upon motion of the plaintiff, strike all affirmative defenses raised in the answer.

~~3.~~ 5. The written opinion from the qualified expert for the claimant shall state the acts or omissions of the defendant(s) that the expert then believes constituted professional negligence and shall include reasons explaining why the acts or omissions constituted professional negligence. The written opinion from the qualified expert shall not be admissible at trial for any purpose nor shall any inquiry be permitted with regard to the written opinion for any purpose either in discovery or at trial.

6. The written opinion from the qualified expert for the defendant shall state the acts and omissions that the expert believes did not constitute professional negligence and shall include reasons why the claim is denied and explaining the basis for each affirmative defense including why the adverse outcome is not caused by the acts or omissions of the health care provider. The written opinion from the qualified expert shall not be admissible at trial for any purpose nor shall any inquiry be permitted with regard to the written opinion for any purpose either in discovery or at trial.

~~B.~~ C. 1. The court may, upon application of ~~the plaintiff~~ either party for good cause shown, grant the plaintiff an extension of time, not exceeding ninety (90) days after the date the petition is filed, except for good cause shown, to file in the action an affidavit attesting that the ~~plaintiff~~ party has obtained a written opinion from a qualified expert as described in paragraph 1 of subsection ~~A~~ B of this section.

2. If on the expiration of an extension period described in paragraph 1 of this subsection, ~~the plaintiff~~ either party has failed to file in the action an affidavit as described above, the court shall, upon motion of ~~the defendant~~ other party, unless good cause is shown for such failure, dismiss the action without prejudice to its refiling.

~~C.~~ D. 1. Upon written request of ~~any defendant~~ either party in a medical liability action, ~~the plaintiff~~ other party shall, within ten (10) business days after receipt of such request, provide the ~~defendant~~ other party with:

a. a copy of the written opinion of a qualified expert mentioned in an affidavit filed pursuant to subsection ~~A~~ B or ~~B~~ C of this section, and

b. in the case of a request by the defendant, an authorization from the plaintiff in a form that complies with applicable state and federal laws, including the Health Insurance Portability and Accountability Act of 1996, for the release of any and all medical records, excluding psychiatric records, related to the plaintiff for a period commencing five (5) years prior to the incident that is at issue in the medical liability action.

2. If the plaintiff fails to comply with paragraph 1 of this subsection, the court shall, upon motion of the defendant, unless good cause is shown for such failure, dismiss the action without prejudice to its refiling.

SECTION 16. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1E-1 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. In a medical liability action, a plaintiff shall, not later than one hundred twenty (120) days after the date the action was filed, serve on each party or the party's attorney one or more

expert reports, with a curriculum vitae of each expert listed in the report for each health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each party whose conduct is implicated in a report shall file and serve any objection to the sufficiency of the report not later than twenty-one (21) days after the date a report was served, or all objections are waived.

B. If, as to any defendant, an expert report has not been served within the period specified by subsection A of this section, the court, on the motion of the defendant, may, subject to subsection C of this section, enter an order that:

1. Awards to the affected health care provider reasonable attorney fees and costs of court incurred by the defendant; and

2. Dismisses the claim with respect to the defendant, without prejudice to the refiling of the claim.

C. If an expert report has not been served within the period specified by subsection A of this section or is found to be deficient, the court may grant one thirty-day extension to the plaintiff in order to serve the expert report or cure the deficiency.

D. A plaintiff may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different health care providers or regarding different issues arising from the conduct of a health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all health care providers or with respect to both liability and causation issues for a health care provider.

E. Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

F. Subject to subsection J of this section, an expert report served under this section:

1. Is not admissible in evidence by any party;

2. Shall not be used in a deposition, trial, or other proceeding; and

3. Shall not be referred to by any party during the course of the action for any purpose.

G. A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report provided in subsection H of this section.

H. "Expert report" means a written report by an expert that provides a fair summary of the opinions of the expert as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

I. Until a plaintiff has served the expert report and curriculum vitae as required by subsection A of this section, all discovery in a health care liability claim is stayed except for the acquisition by the plaintiff of information, including medical or hospital records or other documents or tangible things, related to the patient's health care and the standard sets of interrogatories and requests for production as provided for in Section 17 of this act.

J. If an expert report is used by the plaintiff in the course of the action for any purpose other than to meet the service requirement of subsection A of this section, the restrictions imposed by subsection F of this section on use of the expert report by any party are waived.

SECTION 17. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1E-2 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. In every medical liability action, the plaintiff shall within forty-five (45) days after the date of filing of the original petition serve on the defendant's attorney or, if no attorney has appeared for the defendant, on the defendant, full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the appropriate standard set of requests for production of documents and things promulgated by the Health Care Discovery Panel, established by subsection I of this section.

B. Every health care provider who is a defendant in a health care liability claim shall within forty-five (45) days after the date on which an answer to the petition was due serve on the plaintiff's attorney or, if the plaintiff is not represented by an attorney, on the plaintiff, full and complete answers to the appropriate standard set of interrogatories and complete responses to the standard set of requests for production of documents and things promulgated by the Health Care Discovery Panel.

C. Except on motion and for good cause shown, no objection may be asserted regarding any standard interrogatory or request for production of documents and other items, but no response shall be required if a particular interrogatory or request is clearly inapplicable under the circumstances of the case.

D. Failure to file full and complete answers and responses to standard interrogatories and requests for production of documents and other items in accordance with subsections A and B of this section or the making of a groundless objection under subsection C of this section shall be grounds for sanctions by the court in accordance with Section 3237 of Title 12 of the Oklahoma Statutes.

E. The time limits imposed under subsections A and B of this section may be extended by the court on the motion of a responding

party for good cause shown and shall be extended if agreed in writing between the responding party and all opposing parties. In no event shall an extension be for a period of more than an additional thirty (30) days.

F. If a party is added by an amended pleading, intervention, or otherwise, the new party shall file full and complete answers to the appropriate standard set of interrogatories and full and complete responses to the standard set of requests for production of documents and things no later than forty-five (45) days after the date of filing of the pleading by which the party first appeared in the action.

G. If information or documents required to provide full and complete answers and responses as required by this section are not in the possession of the responding party or attorney when the answers or responses are filed, the party shall supplement the answers and responses.

H. Nothing in this section shall preclude any party from taking additional nonduplicative discovery of any other party. The standard sets of interrogatory and requests for production provided for by this section shall not limit the number of interrogatories and requests for production allowed by the Oklahoma Discovery Code.

I. There is hereby created the Health Care Discovery Panel. The Panel shall develop standard sets of interrogatories and requests for documents and other items appropriate for each of the categories of plaintiffs and defendants usually involved in medical liability actions.

J. The Panel shall be composed of nine (9) members, to be appointed as follows:

1. Three attorneys licensed to practice law in this state, one physician licensed to practice medicine in this state, and one consumer advocate, to be appointed by the Governor;

2. One attorney licensed to practice law in this state and one physician licensed to practice medicine in this state, to be appointed by the Speaker of the House of Representatives; and

3. One attorney licensed to practice law in this state and one physician licensed to practice medicine in this state, to be appointed by the President Pro Tempore of the Senate.

K. Members of the Panel shall serve at the pleasure of the appointing authority. Any vacancy on the Panel shall be filled by the original appointing authority. A majority of the members present at a meeting shall constitute a quorum for the transaction of business. The Panel may elect a chair and a vice-chair. Employees of the Office of the Administrative Director of the Courts shall serve as staff for the Panel.

L. Members of the Panel shall serve without compensation but shall be entitled reimbursement for necessary expenses pursuant to the State Travel Reimbursement Act.

M. The Panel shall submit the standard sets of interrogatories and requests for documents developed pursuant to subsection I of this section to the Supreme Court by February 1, 2005.

SECTION 18. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1F-2 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Except as provided in subsection B of this section, in any civil action brought against a hospital or hospital system, or its employees, officers, directors, or volunteers, for damages based on an act or omission by the hospital or hospital system, or its employees, officers, directors, or volunteers, the liability of the hospital or hospital system is limited to money damages in a maximum amount of Five Hundred Thousand Dollars ($500,000.00) for any act or omission resulting in damage or injury to a patient if the patient or, if the patient is a minor or is otherwise legally incompetent,

the person responsible for the patient, signs a written statement that acknowledges:

1. That the hospital is providing care that is not administered for or in expectation of compensation; and

2. The limitations on the recovery of damages from the hospital in exchange for receiving the health care services.

B. This section shall not apply to wrongful death actions or to an act or omission that is the result of gross negligence or willful or wanton misconduct.

SECTION 19. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1J of Title 63, unless there is created a duplication in numbering, reads as follows:

A. If the plaintiff in a medical liability action has settled with one or more persons, the court shall reduce the amount of damages to be recovered by the plaintiff with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:

1. The sum of the dollar amounts of all settlements; or

2. A percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

B. An election made under subsection A of this section shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected the option provided for in paragraph 1 of subsection A of this section.

SECTION 20. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1K of Title 63, unless there is created a duplication in numbering, reads as follows:

A. In an action for damages that involves a claim of negligence arising from the provision of emergency medical care in a hospital

emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the court shall instruct the jury to consider, together with all other relevant matters:

1. Whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

2. The presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;

3. The circumstances constituting the emergency; and

4. The circumstances surrounding the delivery of the emergency medical care.

B. The provisions of subsection A of this section shall not apply to medical care or treatment:

1. That occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient;

2. That is unrelated to the original medical emergency; or

3. That is related to an emergency caused in whole or in part by the negligence of the defendant.

C. The provisions of this section shall apply to all actions filed on or after November 1, 2005.

SECTION 21. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1L of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The court shall apply the criteria specified in subsection B of this section in determining whether an expert is qualified to offer expert testimony on the issue of whether the defendant health care provider departed from accepted standards of health care but may depart from those criteria if, under the circumstances, the court determines that there is good reason to admit the expert's

testimony. The court shall state on the record the reason for admitting the testimony if the court departs from the criteria.

B. In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

1. Is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and

2. Is actively practicing or retired from practicing health care in an area of health care services relevant to the claim.

C. This section shall not prevent a health care provider who is a defendant, or an employee of the defendant health care provider, from qualifying as an expert.

D. A pretrial objection to the qualifications of a witness under this section shall be made not later than the later of the twenty-first day after the date the objecting party receives a copy of the witness's curriculum vitae or the twenty-first day after the date of the witness's deposition. If circumstances arise after the date on which the objection must be made that could not have been reasonably anticipated by a party before that date and that the party believes in good faith provide a basis for an objection to a witness's qualifications, and if an objection was not made previously, this subsection does not prevent the party from making an objection as soon as practicable under the circumstances. The court shall conduct a hearing to determine whether the witness is qualified as soon as practicable after the filing of an objection and, if possible, before trial. If the objecting party is unable to object in time for the hearing to be conducted before the trial, the hearing shall be conducted outside the presence of the jury. This

subsection does not prevent a party from examining or cross-examining a witness at trial about the witness's qualifications.

SECTION 22. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1M of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The Oklahoma Medical Disclosure Panel is created to determine which risks and hazards related to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients or persons authorized to consent for their patients and to establish the general form and substance of such disclosure.

B. The Panel shall be composed of nine (9) members to be appointed as follows:

1. Three physicians licensed to practice medicine in this state, one attorney licensed to practice law in this state and one consumer advocate to be appointed by the Governor;

2. One attorney licensed to practice law in this state and one physician licensed to practice medicine in this state to be appointed by the Speaker of the House of Representatives; and

3. One attorney licensed to practice law in this state and one physician licensed to practice medicine in this state to be appointed by the President Pro Tempore of the Senate.

C. Members of the Panel shall serve at the pleasure of the respective appointing authority. Any vacancy on the Panel shall be filled by the original appointing authority. A majority of the members present at a meeting shall constitute a quorum for the transaction of business. The Panel may elect a chair and vice-chair. Employees of the State Department of Health shall serve as staff for the Panel.

D. Members of the Panel are not entitled to compensation for their services, but shall be entitled to reimbursement of any

necessary expense incurred in the performance of duties pursuant to the State Travel Reimbursement Act.

E. 1. To the extent feasible, the Panel shall identify and make a thorough examination of all medical treatments and surgical procedures in which physicians and health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure of the risks and hazards to the patient or person authorized to consent for the patient.

2. The Panel shall prepare separate lists of those medical treatments and surgical procedures that do and do not require disclosure and, for those treatments and procedures that do require disclosure, shall establish the degree of disclosure required and the form in which the disclosure will be made.

3. Lists prepared under this section together with written explanations of the degree and form of disclosure shall be published in the Oklahoma Register.

F. At least annually, or at such other period as the Panel may determine from time to time, the Panel will identify and examine any new medical treatments and surgical procedures that have been developed since its last determination, shall assign them to the proper list, and shall establish the degree of disclosure required and the form in which the disclosure will be made. The Panel will also examine such treatments and procedures for the purpose of revising lists previously published. These determinations shall be published in the Oklahoma Register.

SECTION 23. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1708.1N of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Before a patient or a person authorized to consent for a patient gives consent to any medical care or surgical procedure, the health care provider shall give written estimate of the cost of the

medical care or surgical procedure to the patient or person authorized to give consent for the patient.

B. Every health care provider shall publish and make available to the public costs for medical services and procedures that are performed by the health care provider.

SECTION 24. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-140 of Title 70, unless there is created a duplication in numbering, reads as follows:

Sections 24 through 31 of this act shall be known and may be cited as the "School Protection Act".

SECTION 25. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-141 of Title 70, unless there is created a duplication in numbering, reads as follows:

As used in the School Protection Act:

1. "Education employee" means a member of the board of education of a school district or any individual who is employed by a school as a:

a. teacher, superintendent, principal, student teacher, school nurse, or support employee as defined in Section 1-116 of Title 70 of the Oklahoma Statutes,

b. resident teacher as defined in Section 6-182 of Title 70 of the Oklahoma Statutes, or

c. substitute teacher or teacher assistant; and

2. "School" means a public school district, including charter schools, the Oklahoma School of Science and Mathematics, or a governmental entity that employs teachers as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

SECTION 26. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-142 of Title 70, unless there is created a duplication in numbering, reads as follows:

A. An education employee of a school district is not personally liable for any act that is within the scope of the duties of

employment of the employee and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which an education employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

B. This section shall not apply to the operation, use, or maintenance of any motor vehicle.

C. In addition to the immunity provided under this section and under other provisions of state law, an individual is entitled to any immunity and any other protections afforded under the Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C., Section 6731 et seq. Nothing in this section shall be construed to limit or abridge any immunity or protection afforded an individual under state law.

D. For purposes of this section, "individual" shall include a person who provides services to private schools, to the extent provided by federal law.

SECTION 27. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-143 of Title 70, unless there is created a duplication in numbering, reads as follows:

A. Within ninety (90) days before the date a person files a suit against an education employee of a school, the person shall give written notice to the employee of the claim, reasonably describing the incident from which the claim arose.

B. An education employee of a school against whom a suit is pending who does not receive written notice, as required by subsection A of this section, may file a motion to dismiss the action within thirty (30) days after the date the person files an original answer in the court in which the suit is pending.

C. The court shall dismiss the action without prejudice if the court, after a hearing, finds that the education employee was not provided notice as required by this section.

SECTION 28. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-144 of Title 70, unless there is created a duplication in numbering, reads as follows:

A person may not file suit against an education employee of a school unless the person has exhausted the remedies provided by the school district for resolving the complaint.

SECTION 29. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-145 of Title 70, unless there is created a duplication in numbering, reads as follows:

A court in which a judicial proceeding is being brought against an education employee of a school may refer the case to an alternative dispute resolution procedure as provided by law.

SECTION 30. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-146 of Title 70, unless there is created a duplication in numbering, reads as follows:

In an action against an education employee of a school involving an act that is within the scope of duty of the employee's employment and brought against the employee in the individual capacity of the employee, the employee shall be entitled to recover attorney fees and court costs from the plaintiff if the employee is found immune from liability under the School Protection Act.

SECTION 31. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 6-147 of Title 70, unless there is created a duplication in numbering, reads as follows:

The School Protection Act shall be in addition to and shall not limit or amend The Governmental Tort Claims Act or any other applicable law.

SECTION 32. AMENDATORY 76 O.S. 2001, Section 18, as amended by Section 4, Chapter 462, O.S.L. 2002 (76 O.S. Supp. 2004, Section 18), is amended to read as follows:

Section 18. ~~An~~ A. Except as provided in subsection B of this section, an action for damages for injury or death against any

physician, health care provider or hospital licensed under the laws of this state, whether based in tort, breach of contract or otherwise, arising out of patient care, shall be brought within two (2) years of the date the plaintiff knew or should have known, through the exercise of reasonable diligence, of the existence of the death, injury or condition complained of; provided, however, the minority or incompetency when the cause of action arises will extend said period of limitation.

B. Any action for damages for injury or death against any physician, health care provider, or hospital licensed under the laws of this state, based in tort and arising out of patient care, shall be brought within ten (10) years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose and all actions which are not brought within ten (10) years after the act or omission giving rise to the claim are time barred.

SECTION 33. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 71 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. As used in this section:

1. "Asbestos claim" means any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including:

a. property damage caused by the installation, presence, or removal of asbestos,

b. the health effects of exposure to asbestos, including any claim for:

(1) personal injury or death,

(2) mental or emotional injury,

(3) risk of disease or other injury, or

(4) the costs of medical monitoring or surveillance, and

c. any claim made by or on behalf of any person exposed to asbestos, or a representative, spouse, parent, child, or other relative of the person;

2. "Corporation" means a corporation for profit, including:

a. a domestic corporation organized under the laws of this state, or

b. a foreign corporation organized under laws other than the laws of this state;

3. "Successor asbestos-related liabilities" means any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, that are related in any way to asbestos claims that were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation, with or into another corporation or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under subsection D of this section, were or are paid or otherwise discharged, or committed to be paid or otherwise discharged, by or on behalf of the corporation, or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this state or another jurisdiction;

4. "Successor" means a corporation that assumes or incurs, or has assumed or incurred, successor asbestos-related liabilities; and

5. "Transferor" means a corporation from which successor asbestos-related liabilities are or were assumed or incurred.

B. 1. The limitations in subsection C of this section shall apply to a domestic corporation or a foreign corporation that has had a certificate of authority to transact business in this state or has done business in this state and that is a successor or which is a successor of a successor corporation, but in the latter case only to the extent of the limitation of liability applied under paragraph 2 of subsection C of this section and subject to the limitations found in this section.

2. The limitations in subsection C of this section shall not apply to:

a. workers' compensation benefits,

b. any claim against a corporation that does not constitute a successor asbestos-related liability,

c. an insurance company,

d. any obligations under the National Labor Relations Act, 29 U.S.C., Section 151 et seq., as amended, or under any collective bargaining agreement,

e. a successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor,

f. a contractual obligation existing as of November 1, 2004, that was entered into with claimants or potential claimants or their counsel and which resolves asbestos claims or potential asbestos claims,

g. any claim made against the estate of a debtor in a bankruptcy proceeding commenced prior to November 1, 2004, under the United States Bankruptcy Code, 11

U.S.C., Section 101 et seq. by or against such debtor, or against a bankruptcy trust established under 11 U.S.C., Section 524(g) or similar provisions of the United States Code in such a bankruptcy proceeding commenced prior to such date, or

h. a cause of action for premises liability, but only if the successor owned or controlled the premises at issue after the merger or consolidation.

C. 1. Except as further limited in paragraph 2 of this subsection, the cumulative successor asbestos-related liabilities of a corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The corporation shall not have any responsibility for successor asbestos-related liabilities in excess of this limitation.

2. If the transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior merger or consolidation with a prior transferor, the fair market value of the total assets of the prior transferor, determined as of the time of such earlier merger or consolidation, shall be substituted for the limitation set forth in paragraph 1 of this subsection for purposes of determining the limitation of liability of a corporation.

D. 1. A corporation may establish the fair market value of total gross assets for the purpose of the limitations under subsection C of this section through any method reasonable under the circumstances, including:

a. by reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arm's-length transaction, or

b. in the absence of other readily available information from which fair market value can be determined, by

reference to the value of the assets recorded on a balance sheet.

2. Total gross assets include intangible assets.

3. Total gross assets include the aggregate coverage under any applicable liability insurance that was issued to the transferor whose assets are being valued for purposes of this section and which insurance has been collected or is collectable to cover successor asbestos-related liabilities, except compensation for liabilities arising from workers' exposure to asbestos solely during the course of their employment by the transferor. A settlement of a dispute concerning such insurance coverage entered into by a transferor or successor with the insurers of the transferor ten (10) years or more before the enactment of this section shall be determinative of the aggregate coverage of such liability insurance to be included in the calculation of the transferor's total gross assets.

4. The fair market value of total gross assets shall reflect no deduction for any liabilities arising from any asbestos claim.

E. 1. Except as otherwise provided in this section, the fair market value of total gross assets at the time of a merger or consolidation increases annually at a rate equal to the sum of:

a. the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the merger or consolidation, and

b. one percent (1%).

2. The rate provided for in paragraph 1 of this subsection shall not be compounded.

3. The adjustment of fair market value of total gross assets continues as provided under paragraph 1 of this subsection until the date the adjusted value is exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by or on behalf of the corporation or a predecessor, or by or on behalf of a transferor, after the time of the merger or

consolidation for which the fair market value of total gross assets is determined.

4. No adjustment of the fair market value of total gross assets shall be applied to any liability insurance otherwise included in the definition of total gross assets.

SECTION 34. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 101 of Title 76, unless there is created a duplication in numbering, reads as follows:

Sections 34 through 38 of this act shall be known and may be cited as the "Product Liability Act".

SECTION 35. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 102 of Title 76, unless there is created a duplication in numbering, reads as follows:

In the Product Liability Act:

1. "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant;

2. "Product liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories;

3. "Seller" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof; and

4. "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.

SECTION 36. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 103 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. A manufacturer shall indemnify and hold harmless a seller against loss arising out of a product liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

B. For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

C. Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

D. For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

E. The duty to indemnify under this section:

1. Applies without regard to the manner in which the action is concluded; and

2. Is in addition to any duty to indemnify established by law, contract, or otherwise.

F. A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

G. A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

SECTION 37. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 104 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action alleging that an injury was caused by a failure to provide adequate warnings or information with regard to a pharmaceutical product, there is a rebuttable presumption that the defendant or defendants, including a health care provider, manufacturer, distributor, and prescriber, are not liable with respect to the allegations involving failure to provide adequate warnings or information if:

1. The warnings or information that accompanied the product in its distribution were those approved by the United States Food and Drug Administration for a product approved under the federal Food, Drug, and Cosmetic Act, 21 U.S.C., Section 301 et seq., as amended, or Section 351, Public Health Service Act, 43 U.S.C., Section 262, as amended; or

2. The warnings provided were those stated in monographs developed by the United States Food and Drug Administration for pharmaceutical products that may be distributed without an approved new drug application.

B. The claimant may rebut the presumption provided for in subsection A of this section as to each defendant by establishing that:

1. The defendant, before or after premarket approval or licensing of the product, withheld from or misrepresented to the United States Food and Drug Administration required information that was material and relevant to the performance of the product and was causally related to the claimant’s injury;

2. The pharmaceutical product was sold or prescribed in the United States by the defendant after the effective date of an order of the United States Food and Drug Administration to remove the product from the market or to withdraw its approval of the product;

3. a. The defendant recommended, promoted, or advertised the pharmaceutical product for an indication not approved by the United States Food and Drug Administration,

b. The product was used as recommended, promoted, or advertised, and

c. The claimant's injury was causally related to the recommended, promoted, or advertised use of the product;

4. a. The defendant prescribed the pharmaceutical product for an indication not approved by the United States Food and Drug Administration,

b. The product was used as prescribed, and

c. The claimant's injury was causally related to the prescribed use of the product; or

5. The defendant, before or after premarket approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C., Section 201 and that conduct caused the warnings or instructions approved for the product by the United States Food and Drug Administration to be inadequate.

SECTION 38. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 105 of Title 76, unless there is created a duplication in numbering, reads as follows:

A. In a product liability action brought against a product manufacturer or seller, there is a rebuttable presumption that the product manufacturer or seller is not liable for any injury to a claimant caused by some aspect of the formulation, labeling, or design of a product if the product manufacturer or seller establishes that the formula, labeling, or design for the product complied with mandatory safety standards or regulations adopted and promulgated by the appropriate regulatory agency of the federal government that were applicable to the product at the time of

manufacture and that specifically related to the formula, labeling or design that directly caused harm.

B. The claimant may rebut the presumption in subsection A of this section by establishing that:

1. The mandatory federal safety standards or regulations applicable to the product were inadequate to protect the public from harm; or

2. The manufacturer, before or after marketing the product, withheld or misrepresented information or material relevant to the federal government's or agency's determination of adequacy of the safety standards or regulations at issue in the action.

C. This section does not extend to manufacturing flaws or defects even though the product manufacturer has complied with all quality control and manufacturing practices mandated by the appropriate regulatory agency of the federal government.

SECTION 39. This act shall become effective November 1, 2005.

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