

STORAGE NAME: h0879a.jud

DATE: April 7, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: HB 879

RELATING TO: Health Information Privacy

SPONSOR(S): Rep. Boyd & others

COMPANION BILL(S): SB 1828(s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) INSURANCE YEAS 9 NAYS 0

(2) JUDICIARY YEAS 8 NAYS 0

(3)

(4)

(5)

I. SUMMARY:

In the transaction of certain types of insurance, such as health and life insurance, it is common for insurance companies to obtain health information relating to the policyholder and the policyholder's family. Florida Statutes do not currently prohibit the disclosure of most types of health information in the possession of insurance companies.

This bill would require insurers to limit disclosure of any information relating to the physical, mental, or behavioral health condition of any individual or any member of the individual's family if the individual states in writing that disclosure to specified persons could jeopardize the individual's safety. The bill would permit the disclosure of an individual's health information pursuant to a subpoena or court order if the court determines that the public interest in disclosing the information outweighs the individual's privacy interest and that the health information is not reasonably available by other means.

This bill does not have a fiscal impact on state or local government.

Amendment:

There is one amendment adopted by the Committee on Insurance traveling with the bill. The amendment would authorize the legal guardian of the individual to instruct the carrier to not disclose the individual's health information. This would enable the individual to prevent disclosure of health information when, due to incapacity, the individual is unable to notify the carrier. (See Section VI. of the Analysis).

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Insurance

Insurance is a contract binding one party (insurance company) to indemnify another (policyholder) for a specified loss in return for premiums paid. The premiums paid by a policyholder are generally based on the level of risk associated with insuring that policyholder.

Insurance Companies and Health Information

In certain types of insurance, such as health, disability, and life insurance, the insurance company assesses the risk associated with a potential policyholder by examining information relating to the physical, mental, and behavioral condition of the policyholder and sometimes the policyholder's family. For example, in life insurance the prospective policyholder is usually required to submit to a medical examination.

In addition, during the course of the insurance contract, medical records are often provided to the insurance company for purposes of determining coverage under the insurance contract. For example, a person with a pre-existing medical condition who makes a claim to his or her health insurer may have to provide medical records so that the health insurance company can determine whether the claim is related to the pre-existing medical condition or is a new condition covered under the policy.

The possession of health information by insurance companies is neither limited to life and health insurers nor is the information limited to the policyholder. For example, in the workers' compensation context, the policyholder is the employer. However, the workers' compensation carrier is authorized to review employee medical records so that it may determine compensability and medical necessity.

Protection of Health Information in Florida Statutes

Control of patient records by health care practitioners

In section 455.667, F.S., Florida law requires "records owner" of health information to control and protect patient medical records. Under this section, "records owner" means:

any health care practitioner who generates a medical record after making a physical or mental examination of, or administering treatment or dispensing legend drugs to, any person; any health care practitioner to whom records are transferred by a previous records owner; or any health care practitioner's employer, including, but not limited to, group practices and staff-model health maintenance organizations, provided the employment contract or agreement between the employer and the health care practitioner designates the employer as the records owner.

This section prohibits "records owners" from furnishing to, or discussing the condition of a patient with, any person other than:

- the patient or the patient's legal representative; or
- other health care practitioners and providers involved in the care or treatment of the patient.

There are several exceptions to this rule described above. Medical records may be furnished upon written authorization of the patient or under the following circumstances:

- To any person, firm, or corporation that has procured or furnished such examination or treatment with the patient's consent;

- When compulsory physical examination is made pursuant to Rule 1.360, Florida Rules of Civil Procedure, in which case copies of the records shall be furnished to both the defendant and the plaintiff;¹
- In any civil or criminal action, unless otherwise prohibited by law, upon the issuance of a subpoena from a court; and
- For statistical and scientific research, provided the information is abstracted in such a way as to protect the identity of the patient or provided written permission is received from the patient or the patient's legal representative.

See s. 455.667(5)(a)-(d), F.S.

Control of health information by insurance companies

Part II of Chapter 627, F.S., regulates the insurance contract. For example, this part:

- defines various terms found in the insurance contract,
- sets forth duties and obligations of the parties to an insurance contract,
- requires certain elements to be present in an insurance contract,
- explains how applications for insurance may be denied by an insurer, and
- requires approval of policy forms by the Department of Insurance.

Part II of Chapter 627, F.S., also protects health information in a couple of specific instances. Section 627.4195, F.S., requires health insurers to maintain strict confidentiality against unauthorized or inadvertent disclosure of confidential information to persons inside or outside the insurer's organization regarding claims for payment of psychotherapeutic services and requests for psychotherapeutic records and reports related to the claims.

In addition, s. 627.429, F.S., relating to unfair practices in the underwriting of insurance with respect to the human immunodeficiency virus (HIV) infection, requires insurers to maintain strict confidentiality regarding medical test results with respect to exposure to the HIV infection or a specific sickness or medical condition derived from such exposure. Under this section, the insurer may not disclose information regarding specific test results outside of the insurance company or its employees, insurance affiliates, agents, or reinsurers, except to the person tested and to persons designated in writing by the person tested.

Apart from these sections, Florida law does not specifically prohibit insurers from disclosing health information in the insurer's possession. However, many health insurers, such as Blue Cross Blue Shield of Florida, Florida's largest health insurer, establish internal corporate policies relating to the disclosure of health information. Under such internal corporate policies, the health insurer agrees to not disclose the health information to any person without the insured's consent, other than those persons who need the information to provide the services the health insurer agreed to provide under the insurance contract -- e.g., persons who process claims, conduct utilization review.

Application of Constitutional Right to Privacy

Article I, Section 23 of the Florida Constitution guarantees a right to privacy. It reads:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This right to privacy is aimed at protecting the privacy of natural persons from intrusive acts of the government. However, it is not designed to protect persons from the intrusion of private organizations. See Resha v. Tucker, 670 So.2d 56, 58 (Fla. 1996) (stating that Florida's Constitutional right to privacy applies only to governmental action).

¹ Rule 1.360, Florida Rules of Civil Procedure, is a discovery rule enabling a party to seek an examination of a person by a qualified expert when the condition that is the subject of the requested examination is in controversy in the litigation.

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Government action has been construed by Florida courts to include court orders which compel discovery of information. See Berkeley v. Eisen, 699 So.2d 789 (Fla. 4th DCA 1997) ("Court orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy"); South Florida Blood Serv., Inc. v. Rasmussen, 467 So.2d 798, 803 (Fla. 3d DCA 1985), aff'd, 500 So.2d 533 (Fla. 1987). Information which has been protected from discovery under Florida's constitutional right of privacy include bank records and hospital records.

For example, in Berkeley, a party in litigation sought discovery of investment records, including the names and addresses of investors, from an investment manager. The investment manager sought a protective order to prevent the disclosure of this information based on his clients' constitutional right to privacy. The court employed a balancing test to determine whether the party requesting discovery established a need for the information overriding the clients' privacy rights. Berkeley 699 So. 2d at 791. According to the court, "the party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information." Id.

Also, in Amente v. Newman, 653 So.2d 1030, 1033 (Fla. 1995), the Florida Supreme Court held that "there may be circumstances under which a person would have a constitutional privacy right with respect to his or her medical records." However, where all identifying information is redacted from the medical records, the Court indicated that a person's medical records could be released since the constitutional right of privacy has been protected. Id.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)

In 1996, Congress passed HIPAA, also known as the Kennedy-Kassebaum act. The HIPAA is an act aimed at providing health insurance protections to persons who change jobs. The HIPAA prohibits health plans from denying people outright based on their health status; gives workers who change jobs better access to health coverage; limits exclusions for pre-existing conditions; and guarantees renewability and availability of health coverage for certain employees.

In addition to these provisions, section 264 of HIPAA requires Congress to enact by August 21, 1999, legislation to protect the privacy of individuals' health information. This legislation would preempt and supersede any state laws that are less stringent or restrictive than the federal law. On September 11, 1997, Secretary Shalala of the Department of Health and Human Services delivered to Congress recommendations on legislation relating to protections for individuals' health information which is in the possession of health care providers. Under the provisions of the HIPAA, if Congress does not enact legislation to protect the privacy of individuals' health information, the Secretary of the Department of Health and Human Services is required to promulgate such standards by regulation. To date, Congress has not enacted any privacy legislation.

B. EFFECT OF PROPOSED CHANGES:

Insurers would be required to limit disclosure of any information relating to the physical, mental, or behavioral health condition of any individual or any member of the individual's family if the individual states in writing that disclosure to specified persons could jeopardize the individual's safety. Since the bill applies to health information of "individuals," insurers would be required to limit disclosure of any person's health information and not just health information of the insurer's policyholders. An insurer could disclose an individual's health information pursuant to a subpoena or court order if the court determines that the public interest in disclosing the information outweighs the individual's privacy interest and that the health information is not reasonably available by other means. As a result, this bill would require a court to conduct a balancing test similar to the one currently conducted by courts to determine whether a discovery order infringes on Florida's constitutional right to privacy.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. Insurers would be required to limit the disclosure of health information in their possession.

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The bill limits the disclosure of health information by insurers and protects the privacy of individuals whose health information is in the possession of insurers. As such, individuals may feel more free to provide information to insurers because there is less of a chance that private health information will be disclosed.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. The bill prevents insurers from disclosing health information in their possession.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

N/A

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Creates s. 627.433, F.S.

E. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Insurers would be required to catalog and honor requests made under this bill.

2. Direct Private Sector Benefits:

The bill limits the disclosure of health information by insurers and protects the privacy of individuals whose health information is in the possession of insurers. As such, individuals may feel more free to provide information to insurers because there is less of a chance that private health information will be disclosed.

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

V. COMMENTS:

The bill appears to be designed to protect individuals' privacy interest with respect to health information in the possession of insurers. However, the bill limits disclosure of such information only where the individual states in writing that disclosure would "jeopardize the individual's safety." The bill does not define the term "safety." As such, it is possible that the bill could be interpreted to limit disclosure of health information only where an individual's physical safety is at issue, as opposed to instances where an individual might suffer non-physical harm.

Congress has not yet enacted federal legislation protecting the privacy of health information. However, should Congress enact such a law in the future and should the federal law be more restrictive than this bill, the federal law may preempt or supersede this bill.

Judiciary Committee staff comments:

A subpoena duces tecum directed at a non-party would be issued pursuant to Rule 1.351, Florida Rules of Civil Procedure, with notice of intent to serve a subpoena served on all parties no less than 10 or 15 days prior to issuance of the subpoena. If a party objects to issuance, relief is obtained pursuant to Rule 1.310(d). The legislation raises the issue of the carrier's obligation in the event that the party does not object to issuance of the subpoena. The language in lines 22 - 23 -- after the court's determination -- may require the carrier to object to production and request relief pursuant to Rule 1.310 (d) if the carrier is in receipt of a written request from the individual not to disclose.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 17, 1999, the Committee on Insurance adopted the following amendment:

Amendment #1 (offered in Committee by Rep. Heyman): On page 1, line 18, this amendment would authorize the legal guardian of the individual to instruct the carrier to not disclose the individual's health information. This would enable the individual to prevent disclosure of health information when, due to incapacity, the individual is unable to notify the carrier.

On April 5, 1999, the Committee on Judiciary adopted one amendment. This amendment clarifies the carrier's obligation in the event that the carrier is a non-party and the individual fails to object to the issuance of a subpoena.

VII. SIGNATURES:

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