SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1154

SPONSOR: Health, Aging, and Long-Term Care Committee and Senator Peaden

SUBJECT: Health Care Professional Liability Insurance

DATE: March 20, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable/CS
2.			BI	
3.			AGG	
4.			AP	
5.			RC	
6.				

I. Summary:

This bill creates the Health Care Professional Liability Insurance Facility, a not-for-profit facility intended to provide medical physicians, osteopathic physicians, and physician assistants who have coverage for smaller claims with an affordable source of insurance (excess liability insurance coverage) for larger claims. The facility will allow policyholders to choose from professional liability insurance policies with deductibles of $100,000, $200,000, and $250,000; and excess coverage limits of $250,000 per claim and $750,000 annual aggregate; $1 million per claim and $3 million annual aggregate; or $2 million and $4 million annual aggregate. The facility must begin providing excess coverage no later than January 1, 2004.

All health care professionals licensed under ch. 458 or ch. 459, F.S., must purchase coverage provided by the facility as a condition of licensure. In order to qualify for coverage, the insured will be required to maintain at all times an escrow account, under the provisions of s. 625.52, F.S., a letter of credit, established under the provisions of ch. 675, F.S., or professional liability insurance coverage equal to the selected deductible amount.

The facility must charge actuarially indicated premiums and is subject to regulation by the Office of Insurance Regulation in the same manner as other insurers. The facility must operate under a plan of operation approved by the Office of Insurance Regulation.

The facility will operate under a board of governors consisting of the Secretary of Health, who will serve as board chair; three members appointed by the Governor; and three members appointed by the Chief Financial Officer.

This bill creates s. 627.3575, F.S.

II. Present Situation:

Availability and Affordability of Medical Malpractice Insurance

Medical malpractice insurance covers doctors and other professionals in the medical field for liability claims arising from their treatment of patients. Rapidly rising medical malpractice insurance premiums and the departure of many insurance companies from the medical malpractice market have created a crisis of affordability and availability in many areas of the country, including Florida.

After almost a decade of essentially flat prices, medical malpractice insurance premiums began rising in 2000. According to the Department of Insurance, rate increases for physicians and surgeons from the top 15 professional liability insurers (ranked by direct written premium in Florida as reported 12/31/01) ranged from a minimum of 33.5 percent to a maximum of 149.9 percent from 1/1/01 through 1/1/03. There was a 73 percent average rate increase, weighted for market share. Rate increases for the top three insurers ranged from 74.3 percent to 81.3 percent for the two-year period.

In October, 2002, the Department of Insurance surveyed 18 insurers (top 15 malpractice writers in Florida and 3 other insurers known to be writing coverage) to determine the status of insurers departing the state and the status of insurers writing new business. Of the 18 insurers, five medical malpractice insurers had decided to no longer write any new or renewal business in Florida. Four additional insurers were not accepting any new business from physicians. Nine remaining insurers were still accepting new business in October, 2002. As of February 28, 2003, the largest medical malpractice insurer in the state, which had not been writing new business in October, 2002, decided to resume writing new business.

While there is general agreement that medical malpractice insurance premiums have risen sharply and that physicians are having a more difficult time obtaining medical malpractice insurance coverage, there appears to be little agreement on the causes of these problems. Insurers and doctors blame "predatory" trial attorneys, "frivolous" law suits, and "out of control" juries for the spike in insurance premiums. Consumer groups accuse insurance companies of "price gouging" and cite "exorbitant" rates of medical errors. Plaintiffs' attorneys also point to medical errors, and to "predatory" pricing practices and bad business decisions of insurers during the 1990s.

There is also disagreement about possible solutions to these problems. Insurers and physicians demand tort reform, changes in the legal system that will limit the frequency of litigation and the amount of damage awards. Attorneys argue that past legal reform has unfairly blocked victims' access to the courts while doing nothing to bring down the costs of malpractice insurance. They see the solution in regulation of the insurance industry. Patient advocates focus on safety and suggest mandatory reporting of medical errors and a no-fault approach to victim compensation.

Whatever the causes and solutions, the effects of the rising cost of medical malpractice insurance and the reduction in the availability of such coverage are being felt in Florida's health care system. There have been numerous reports of doctors discontinuing doing risky procedures, retiring prematurely, practicing without insurance, and leaving litigious areas of the state in an

effort to deal with the price of liability coverage. In some cases, the decision of high risk specialists to reduce or eliminate their services has led to further reductions in services by hospitals. Some hospitals are discontinuing services such as maternity services and trauma services because of the high cost of malpractice coverage for the specialists needed to provide these services.

Self-Insurance

The Florida Statutes establish two methods of self-insurance that once were available for health care professional liability self-insurance. However, neither the Florida Patient's Compensation Fund nor the medical malpractice self-insurance funds authorized under ch. 627, F.S., are available for new enrollees.

Section 627.357, F.S., authorizes a group or association of health care providers to self-insure against medical malpractice claims. The entity may self-insure upon obtaining approval from the Department of Insurance and upon (1) establishing a medical malpractice risk management trust fund to provide coverage against professional medical malpractice liability and (2) employing a professional consultant for loss prevention and claims management coordination under a risk management program. The risk management trust fund may insure hospital parent corporations, hospital subsidiary corporations, and committees against claims arising out of the rendering of, or failure to render, medical care or services. The fund is subject to regulation and investigation by the department, to the rules which the department may adopt (ch. 4-187 F.A.C.), and to the statutes regulating trade practices and fraud. This statute prohibits the formation of a self-insurance fund after October 1, 1992.

The Florida Patient's Compensation Fund is a private self-insurance fund established in s. 766.105, F.S. The 1975 Legislature created the Florida Patient's Compensation Fund to provide affordable medical malpractice insurance for Florida's physicians and hospitals. The fund provided benefits from 1975-1983. Since that time, it has been resolving remaining claims. Any money left in the fund after all claims have been resolved would be returned on a prorated basis to the physicians and facilities that contributed to the fund.

Governor's Select Task Force on Healthcare Professional Liability Insurance

In recognition of the problems with the affordability and availability of medical malpractice insurance, Governor Bush appointed the Governor's Select Task Force on Healthcare Professional Liability Insurance on August 28, 2002, to address the impact of skyrocketing liability insurance premiums on health care in Florida. The Task Force was charged with making recommendations to prevent a future rapid decline in accessibility and affordability of health care in Florida and was further charged to submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by January 31, 2003.

The Task Force had ten meetings at which it received testimony and discussed five major areas: (1) health care quality; (2) physician discipline; (3) the need for tort reform; (4) alternative dispute resolution; and (5) insurance premiums and markets. The final report of the Task Force includes findings and 60 recommendations to address the medical malpractice crisis in Florida.

The reports and information received by the Task Force, as well as transcripts of the meetings, were compiled into thirteen volumes that accompany the main report.

The following findings and recommendations relating to alternative professional liability insurance products are included in the final report of the Task Force. The Task Force found that "…the healthcare community has an option to address medical malpractice self-insurance programs. Further, the Task Force finds that the Department of Insurance does not have sufficient rule making authority to provide protection to the health care professionals and the victims of medical malpractice utilizing or making claims against self-insurance funds."

The Task Force made three recommendations regarding alternative insurance products:

> *Recommendation 1.* The Legislature should repeal the prohibition against creating Medical Malpractice Risk Management Trust Funds in section 627.357, Florida Statutes.
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> *Recommendation 2.* The Legislature should encourage the creation of self-insurance options for healthcare providers.
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> *Recommendation 3.* The Legislature should expand the rulemaking authority of the Department of Insurance for self-insurance programs to insure they remain solvent and provide the insurance coverage purchased by participants.

Chapters 458 and 459, Florida Statutes

Chapter 458, Florida Statutes, is the medical practice act, which governs the practice of allopathic medicine within the state. This chapter establishes requirements for licensure of medical physicians and physician assistants. Section 458.320, F.S., establishes financial responsibility requirements for medical physicians for the payment of claims and costs ancillary thereto arising out of the rendering of, or the failure to render, medical care or services. This section also permits a physician to go without insurance if the physician agrees to pay a judgment creditor the lesser amount of the judgment or $100,000 ($250,000 if the physician maintains hospital privileges) and notifies his patients.

Chapter 459, Florida Statutes, is the osteopathic medical practice act, which governs the practice of osteopathic medicine within the state. This chapter establishes requirements for licensure of osteopathic physicians and physician assistants. Section 459.0085, F.S., establishes financial responsibility requirements for osteopathic physicians for the payment of claims and costs ancillary thereto arising out of the rendering of, or the failure to render, medical care or services. This section also permits a physician to go without insurance if the physician agrees to pay a judgment creditor the lesser amount of the judgment or $100,000 ($250,000 if the physician maintains hospital privileges) and notifies his patients.

III. Effect of Proposed Changes:

The bill creates s. 627.3575, F.S., creating the Health Care Professional Liability Insurance Facility. The not-for-profit facility is intended to provide health care professionals, who are licensed under ch. 458 and ch. 459, F.S., and who have coverage for smaller claims, with an

affordable source of insurance for larger claims. The facility is self-funding, is not a state agency and does not create any state liability. The facility will have the powers necessary to operate as an excess insurer, including the power to sue and be sued; hire employees, consultants, attorneys, and other professionals; contract with service providers; maintain offices appropriate to the conduct of its business; and take other actions as necessary in the fulfillment of its responsibilities.

The facility will allow policyholders to choose from professional liability insurance policies with deductibles of $100,000, $200,000, and $250,000; excess coverage limits of $250,000 per claim and $750,000 annual aggregate; $1 million per claim and $3 million annual aggregate; or $2 million and $4 million annual aggregate.

All health care professionals licensed under ch. 458 or ch. 459, F.S., (medical physicians, osteopathic physicians, and physician assistants) must purchase coverage provided by the facility as a condition of licensure. In order to qualify for coverage, the insured will be required to maintain at all times an escrow account, under the provisions of s. 625.52, F.S., or a letter of credit, established under the provisions of ch. 675, F.S., or professional liability insurance coverage equal to the selected deductible amount. The professional liability insurance coverage may be obtained from an authorized insurer, a surplus lines insurer, a risk retention group, the Medical Malpractice Joint Underwriting Association, or a medical malpractice self-insurance fund.

The facility will charge actuarially indicated premiums for the coverage provided and must retain the services of consulting actuaries to prepare its rate filings. The rate filings must have no more than three rating categories by specialty and must apply a discount or surcharge based on the provider's loss experience. The facility will not pay dividends to policyholders. If the consulting actuaries determine that the premiums collected are more than enough to pay future claims, the excess funds may be distributed to the participants. If the facility is dissolved, any amounts not required as a reserve for outstanding claims must be transferred to the policyholders of record as of the last day of operation.

The facility will operate under a board of governors consisting of the Secretary of Health, who will serve as board chair; three members appointed by the Governor; and three members appointed by the Chief Financial Officer. Members will serve at the pleasure of the official who appointed them, and any vacancy will be filled in the same manner as the original appointment. Board members will not be eligible for compensation but may be reimbursed for per diem and travel expenses.

The facility will operate under a plan of operation that must be submitted to the Office of Insurance Regulation for approval. At any time the board of governors may adopt amendments to the plan and submit the amendments to the Office of Insurance Regulation for approval. The facility will be subject to regulation by the Office of Insurance Regulation as to rates and policy forms in the same manner as a private sector insurance company. The Office of Insurance Regulation may adopt rules to implement the provisions of the bill. The facility is not subject to part II of ch. 631, F.S., which establishes the Florida Insurance Guaranty Association and requires insurers to be members.

The facility must begin providing excess coverage no later than January 1, 2004. The Governor and the Chief Financial Officer must make their appointments to the board of governors no later than July 1, 2003. Prior to the appointment of the board, the Secretary of Health, as chair, may perform ministerial acts on behalf of the board. The Office of Insurance Regulation must provide support services to the facility until the facility has hired its own permanent staff. In order to provide start-up funds for the facility, the board of governors may incur debt or enter into agreements for lines of credit up to an amount that may not exceed $10 million.

Any policy issued under this act will take effect January 1, 2004, except that a health care provider holding a liability insurance policy that commenced in 2003 and did not terminate until after January 1, 2004, would be required to purchase coverage under this act upon the termination date of that policy

The bill will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Physicians and physician assistants licensed under ch. 458 or ch. 459, F.S., would be required to have coverage for smaller claims and would be required to purchase excess coverage from the Health Care Professional Liability Insurance Facility. Private insurers currently providing excess coverage would lose this business.

C. Government Sector Impact:

The Office of Insurance Regulation would incur the cost of providing support staff to the facility before it has hired its own staff as well as the cost of overseeing the operation of the facility.

The Department of Health will incur costs for ensuring physician compliance with the requirements of the bill as part of licensure and licensure renewal and the cost of the Secretary's performing ministerial acts on behalf of the board before the board is appointed.

VI. Technical Deficiencies:

On page 3, line 11, the words "per claim" should be inserted after "$2 million".

VII. Related Issues:

This bill appears to eliminate the option for a physician to go without insurance.

The bill includes physician assistants in the requirement to maintain minimum financial responsibility and purchase excess coverage through the Health Care Professional Liability Insurance Facility. It is not clear that these requirements should apply to physician assistants.

VIII. Amendments:

None.