

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1267 CS Nursing Homes
SPONSOR(S): Stargel
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Elder & Long-Term Care Committee</u>	<u>8 Y, 0 N, w/CS</u>	<u>Walsh</u>	<u>Liem</u>
2) <u>Judiciary Committee</u>	<u></u>	<u>Hogge</u>	<u>Hogge</u>
3) <u>Health Care Appropriations Committee</u>	<u></u>	<u></u>	<u></u>
4) <u>Health & Families Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

Committee Substitute for HB 1267 provides a limit on non-economic damages against a community-based nursing home facility or its subcontractors of \$200,000 per claimant, regardless of the number of defendants or individual claimants, for violations of patient's rights or for acts of negligence. The bill further provides for bringing a claims bill to the Legislature for any amount of the award in excess of the limit.

The bill provides, with certain limitations, that a community-based nursing home is not liable for acts or omissions of its subcontractors, and provides this is the exclusive liability for such facility, its subcontractors, and each employee thereof, and for certain others acting within the course and scope of their managerial or policymaking duties.

The bill requires all nursing homes to be protected by approved automatic sprinkler systems and specifies a time schedule for compliance. The bill establishes a loan guarantee program to help nursing homes defray the cost of installing sprinkler systems.

AHCA estimates that there are 35 nursing homes in the state that will be required to install sprinkler systems at a total cost of \$4.41 million. AHCA estimates that Medicaid will pay an annual cost of \$669,419, or \$275,198 in General Revenue and \$394,221 from the Medical Care Trust Fund. The CS authorizes use of Medicaid funds for capital improvements to help pay for sprinkler system installation and authorizes a 5-year repayment period. Any Medicaid funds used for sprinkler system installation must come from existing Medicaid appropriations. The total estimated cost to Medicaid over the five-year period is \$3,347,097. (See "Fiscal Comments" for additional information.)

The Agency for Health Care Administration (AHCA) estimates it will need one additional FTE to implement the provisions of the bill.

The bill takes effect July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Nursing Home Liability: Provide Limited Government, Safeguard Individual Liberty --- CS for HB 1267 provides a limitation on noneconomic damages for nursing home facilities that meet certain eligibility requirements.

Nursing Home Firesafety: Provide Limited Government --- CS for HB 1267 requires all nursing homes to put in place an automatic sprinkler system by December 31, 2010. Rulemaking authority is provided to the Division of State Fire Marshal to implement and enforce this requirement. The CS also provides the Division of State Fire Marshal rulemaking authority to implement the loan guarantee program and associated provisions of the CS.

B. EFFECT OF PROPOSED CHANGES:

Nursing Home Liability

Background: The following background information is excerpted from the Final Report of the Joint Select Committee on Nursing Homes, March 1, 2004.¹

The 2001 Florida Legislature enacted landmark legislation, CS/CS/CS/SB 1202 (hereafter SB 1202), to deal with quality of care, tort reform, and insurance coverage in the nursing home industry. The CS required an increase in staffing in nursing homes over a three-year period, strengthened regulatory enforcement and quality oversight, established risk management and adverse incident reporting in nursing homes, required Medicaid reimbursement rebasing and full funding of direct patient care, provided significant tort reform, required nursing homes to maintain liability insurance coverage at all times, and required AHCA to seek a federal Medicaid waiver to use Medicaid funds to create and operate a long-term care risk-retention group for self-insurance purposes. The Legislature appropriated more than \$70 million in new funding to implement the provisions of SB 1202.

In February 2002, the Speaker of the House of Representatives appointed the House Select Committee on Liability Insurance for Long-Term Care Facilities, in response to concerns of representatives of the long-term care industry regarding the high costs and unavailability of the required liability insurance coverage. The Select Committee concluded that there was no consensus among the various organizations and interest groups participating in the debate over the existence or nature of a specific crisis in the nursing home industry. In December 2002, the Speaker of the House of Representatives and the President of the Senate appointed a Joint Select Committee on Nursing Homes to address the continuing crisis facing Florida's nursing homes in both obtaining and maintaining adequate insurance coverage. The Committee made a number of recommendations which were not adopted by the 2003 Legislature.

In November 2003, the Speaker of the House of Representatives and the President of the Senate re-appointed the Joint Select Committee on Nursing Homes (Joint Select Committee). The Speaker and the President asked the Committee to reconsider issues regarding the continuing liability insurance and lawsuit crisis facing Florida's long-term

¹ Available electronically at

<http://www.myfloridahouse.gov/LoadDoc.aspx?PublicationType=Committees&CommitteeID=2196&Session=2004&DocumentType=General+Publications&FileName=2343.pdf>

care facilities and to assess the impact of the reforms contained in SB 1202. After hearing testimony, the members of the Joint Select Committee agreed that:

- The Legislature should consider only comprehensive reform which provides access to courts while revitalizing the insurance market and ensuring access to quality and affordable nursing home care. For instance, to ensure access to courts and in order to make compensation available to victims of nursing home abuse and neglect, nursing homes need an incentive to carry professional liability insurance at a higher level. In order to provide such incentive for nursing homes to carry a specified minimum amount of liability insurance coverage, based on a per bed calculation, the Legislature could allow those nursing homes which carry a specified minimum amount of general and professional liability insurance to utilize a voluntary binding arbitration process with caps on non-economic damages. Such an option would provide at least a specified amount of financial assets to be available to the victim, which is not currently the case.
- The data collected by the state regarding lawsuits and recovery is insufficient, thus making it difficult for the Legislature to objectively determine whether the number of lawsuits against nursing homes is increasing or decreasing, or whether the costs of liability claims to the nursing home industry is going up or down.
- Nursing homes continue to be impacted by a combination of increasing liability insurance costs, competing demand for labor, with the consequent increase in labor costs, and limitations on state Medicaid reimbursement.
- At the [Joint Select] Committee's request, the Office of Insurance Regulation reevaluated the liability insurance market and reported that there has been no appreciable change in the availability of private liability insurance over the past year.
- General and professional liability insurance, with actual transfer-of-risk, is virtually unavailable in Florida. "Bare-bones" policies designed to provide minimal compliance with the statutory insurance requirement are available; however, the cost often exceeds the face value of the coverage offered in the policy. This situation is a crisis which threatens the continued existence of long-term care facilities in Florida.
- There is growing concern that the combination of minimal compliance liability policies and changes in nursing home corporate structures designed to limit liability have the potential of producing a situation in which an injured resident may have no hope of recovery of a legitimate claim.

Current Requirements: General and professional liability insurance coverage² must be maintained by all licensed nursing homes. Current law, however, does not set specific policy amounts. Proof of liability insurance is submitted with the annual licensure renewal application. AHCA maintains the amount of general and professional liability insurance per occurrence in the licensure database.

Punitive damages against nursing homes are generally limited to the greater of three times the amount of compensatory damages awarded to each claimant or the sum of \$1 million. However, if the fact finder determines that wrongful conduct is proven to exist and leading to the damages, was motivated by unreasonable financial gain, and that the likelihood of injury resulting from the wrongful conduct was known to the decision maker/defendant, the punitive damages can be increased to the greater of four times the amount of the compensatory damages awarded to each claimant, or the sum of \$4 million.

² S. 400.141(20), F.S.

Current law also provides for the involvement of volunteers in nursing homes. Section 400.1413, F.S., requires that the nursing home be aware of and coordinate volunteer activities and provides that nursing homes may require volunteers to sign in and out with staff of the nursing home upon entering or leaving the facility, wear an identification badge while in the building, and participate in a facility orientation and training program.

Proposed Changes to Nursing Home Liability: CS for HB 1267 provides the following legislative findings:

- Liability insurance premiums for community-based nursing home facilities have dramatically increased, resulting in increased costs for nursing home patients and functional unavailability of insurance coverage.
- The primary cause of increased premiums has been the increase in loss payment to claimants caused by increases in the amount of paid claims.
- The high cost of liability claims for community-based nursing homes can be alleviated by imposing limitations on damages, while preserving the parties' rights to a jury trial.
- Non-profit nursing facilities rank higher than for-profit facilities according to AHCA quality of care standards, and the majority of Gold Seal³ facilities are non-profit.
- Excessive awards of noneconomic damages threaten the ability of community-based nursing home facilities to continue to provide patient care; a reasonable limitation on those damages will reduce the high cost of claims without jeopardizing parties' rights to a jury trial.

The bill defines a community-based nursing home facility to be any nursing home facility that meets the following eligibility requirements:

- The number of beds in the facility may not exceed 240.
- The facility must obtain 400 hours of assistance from onsite volunteers each month, and maintain records of that assistance.
- The facility must maintain general and professional liability insurance coverage in force at all times with limits not less than \$250,000 per claim and \$500,000 per annual aggregate. No more than 10 percent of the limits may be used to fund defense attorney fees and costs.
- The facility must be a not-for-profit corporation.

AHCA reports that of the 678 currently licensed nursing homes in the state, 92 fit three of the four criteria. Because AHCA does not collect data regarding the number of volunteer hours obtained by a facility, it cannot determine how many of the 92 nursing homes would qualify as community-based nursing home facilities. Accordingly, the proposed limitations on liability would not apply to the majority of licensed nursing homes.

The bill provides a limit on non-economic damages against a community-based nursing home facility or its subcontractors of \$200,000 per claimant regardless of the number of defendants or individual claimants. This limitation applies to actions for violations of patient's rights or for acts of negligence. The bill defines subcontractor to include only those subcontractors that perform direct care services.

The bill allows a claims bill to be brought on behalf of a claimant for the amount of the award in excess of the limits. It requires offset of collateral source payments in accordance with s. 768.76, F.S.⁴

The bill provides that a community-based facility is not liable in tort for the acts or omissions of its subcontractors or the officers, agents or employees of its subcontractors. It provides that this is the exclusive liability, except as provided elsewhere in the section and in s. 400.0237, F.S.,⁵ for:

³ The Gold Seal Program is an award and recognition program for nursing facilities that demonstrate excellence in long-term care over a sustained period. See s. 400.235, F.S.

⁴ Relating to collateral sources of indemnity.

- the facility
- its subcontractors
- each employee of the facility and its subcontractors when acting in furtherance of the employer's business, including the transportation of clients served in privately owned vehicles
- any sole proprietor, partner, corporate officer, director, supervisor, or other person who in the course and scope of his or her duties acts in a managerial or policymaking capacity and the conduct causing the injury arose within the course and scope of those activities.

The bill provides that the limitation is not applicable to a facility, subcontractor, or its employee in the event of intentional misconduct or gross negligence, nor when the employee is assigned primarily to unrelated works in public or private employment.

Nursing Home Firesafety

Firesafety Sprinkler Systems. Automatic fire sprinklers have been in use in the U.S. since 1874 according to information provided by fire suppression system contractors. The Division of State Fire Marshal (the Fire Marshal) within DFS is responsible for protecting Floridians from fire hazards under chapter 633, F.S.

Section 633.025, F.S., directs the State Fire Marshal, along with each municipality, county and special district with firesafety responsibilities, to adopt the most current edition of the National Fire Protection Association (NFPA) 101, Life Safety Code. That Code provides standards for fire alarms, fire suppression systems, and automatic sprinkler systems for various buildings, including buildings occupied as "health care occupancies" which include nursing homes. Under the Code, hazardous areas within nursing homes include boiler and fuel-fired heater rooms, laundries, paint shops, repair shops, soiled linen rooms, trash collection rooms, specified storage rooms, and laboratories employing flammable or combustible materials.

The Fire Marshal reports that installation of automatic sprinkler systems prevents fire and the toxic smoke and gases produced by fire. When sprinklers are present in a building, the chances of dying in a fire are cut by one-half to two-thirds, compared to building fires where sprinklers are not present. When measured by the average number of deaths per thousand fires in 1994-1998, the reduction associated with sprinklers is 82 percent for properties that care for the aged or sick. The costs associated to insure properties with sprinkler systems are also less, compared to the insurance costs for buildings with no sprinkler systems.

Nursing Homes. In 2003, fires in nursing homes occurred in two states. In Tennessee, a fire in a nursing home killed eight people, and in Connecticut, sixteen patients died in a nursing home fire. Officials in those two states reported that there were no sprinkler systems in the buildings.

The Insurance Regulatory Trust Fund is created by s. 624.523, F.S. It is funded by a variety of insurance-related fees, including fines, taxes, application fees and license fees required by the Insurance Code.

Pursuant to part II of chapter 400, F.S., nursing homes are licensed by AHCA. According to AHCA, nursing homes are required⁶ to comply with the minimum standards of the National Fire Protection Association (NFPA) 101, Life Safety Code, as adopted by the Fire Marshal, and with the Florida Building Code under s. 553.73, F.S. However, the firesafety and Building Code provisions do not require all existing nursing homes to be fully sprinklered because the automatic sprinkler system standards are dependent on the specific physical plant conditions of each nursing home, such as construction type, height in stories, size of facility, and other similar provisions.

⁵ Providing for the award of punitive damages against a nursing home under certain circumstances.

⁶ S. 400.232, F.S.

AHCA reports there are currently 35 existing nursing home facilities in the state that are not “fully” sprinklered; however, these facilities are still in compliance with all the aforementioned standards and codes. According to AHCA, the 35 affected nursing homes have approximately 4,300 to 5,000 beds which are either partially sprinklered or completely without sprinklers. This represents about 5 percent of Florida’s total nursing home beds.

Proposed Changes to Nursing Home Fire Sprinkler Requirements: The bill requires all nursing homes to be protected by approved automatic sprinkler systems and specifies a time schedule for compliance:

- Each “hazardous area” of a nursing home, as defined by the National Fire Protection Association, must be protected by an approved sprinkler system by December 31, 2008; and
- The entire nursing home must be protected by an approved sprinkler system by December 31, 2010.

The bill authorizes the Fire Marshal to grant two 1-year extensions for installing sprinkler systems in nonhazardous areas of nursing homes, but prohibits extensions for installing systems in hazardous areas of such homes. The bill authorizes DFS to adopt rules, enforce the sprinkler system standards, and impose administrative sanctions for nursing homes that violate these provisions.

Retrofitting and Loan Guarantee Program. The bill permits the State Fire Marshal, with the assistance of the Division of Treasury, to establish a limited guarantee program to be known as the “State Fire Marshal Nursing Home Fire Protection Loan Guarantee Program” to be funded with \$4 million from the Insurance Regulatory Trust Fund. The Fire Marshal will solicit proposals from and select private financial institutions approved as state depositories to provide loans to the affected nursing homes. The bill requires the Fire Marshal to approve loan applications for fire protection plans to ensure that the systems meet the Firesafety Code.

The loan guarantee program will accept applications until June 30, 2006. The program may not guarantee any limited loan guarantee agreement for a period longer than ten years. Each guarantee is limited to 50 percent of the principal. Both the state and approved lenders will hold a security interest in the property for the duration of the loan.

C. SECTION DIRECTORY:

Section 1: Amends s. 400.023, F.S.; adds subsection (8); provides legislative findings relating to excessive awards of non-economic damages against community-based nursing home facilities; limits the liability of community-based nursing home facilities and their subcontractors; specifies nonapplication of limitations of liability to certain persons under certain circumstances; defines and provides requirements to qualify as “community-based nursing home facility;” defines “subcontractor;” requires AHCA to verify compliance with certain criteria.

Section 2: Amends s. 633.022, F.S.; adds subsection (4); requires each licensed nursing home to possess an approved, supervised automatic sprinkler system in accordance with national standards and fire codes; provides dates for compliance with the requirement to install sprinkler systems; provides rulemaking authority to implement and enforce the requirements of this section.

Section 3: Creates s. 633.024, F.S.; provides legislative intent relating to the creation and operation of a limited loan guarantee program to assist nursing homes in retrofitting for sprinkler systems.

Section 4: Creates s. 633.0245, F.S.; provides authority to establish the State Fire Marshal Nursing Home Fire Protection Loan Guarantee Program to be funded from the existing Insurance Regulatory Trust Fund; provides rulemaking authority to prescribe application form.

Section 5: Provides an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Nursing Home Liability:

AHCA reports the following: The bill requires AHCA to collect, maintain, analyze and verify data regarding the utilization of volunteers within community-based nursing homes. Verification of such data may include random sampling of volunteer records, interviews with facility staff and volunteers and other means necessary to determine compliance. In addition, the Agency would be required to collect and maintain data regarding the annual aggregate of general and professional liability insurance. Although not included in the bill, one FTE, a Health Services and Facilities Consultant, pay grade 24, would be required by the Agency (to be located in the Health Care Regulation budget entity) in order to process, analyze and verify the additional data. Approximately \$64,452 will be required the first year and \$61,842 each additional year. Funding is not provided in the bill; therefore, General Revenue funds would be required.

Nursing Home Firesafety:

The following information is based on a fiscal analysis from AHCA dated March 31, 2005.

If the costs associated with retrofitting currently exempted nursing homes are passed on in the Medicaid cost-report, the state share (from the General Revenue Fund) would be approximately \$162,531 per year over the 5 years authorized in the CS for implementation.

- The cost estimates are based on a cost of \$3 per square foot
- for 35 facilities at 42,000 square feet each
- average cost per facility \$126,000
- for a total of approximately 1.47 million square feet
- \$4,410,000 in total project costs

This analysis assumes:

- All 35 facilities install sprinklers in year 1
- Reimbursement is based on Fair Rental Value System (FRVS)
- No providers are limited to their per Bed Standard Limitation
- All providers are 73 percent on their FRVS Indexing Curve
- Allocating the costs over the 5 and one-half years allowing for implementation for a total cost per year

The bill authorizes use of Medicaid funds available for capital improvements to help pay for sprinkler system installation and authorizes a 5-year repayment period. Any Medicaid funds used for sprinkler system installation must come from existing Medicaid appropriations.

The Division of State Fire Marshal will administer the Nursing Home Fire Protection Loan Guarantee Program. The Division reports that it can operate the loan program within existing resources. The guarantee account will be funded from monies and interest earned from the existing Insurance Regulatory Trust Fund. The bill specifies that a maximum of \$4 million from the trust fund may be used for the loan guarantee program. State monies will be paid only for defaulted

loans, at a rate of 50 percent of the total loan amount and only after the lending institution exhausts all normal remedies available for loan defaults.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Nursing Home Liability:

AHCA advises that the reduction of the damage award potential against community-based nursing facilities may serve to reduce the premiums charged for liability insurance.

The increased minimum standard of general and professional liability insurance for community-based nursing homes will not affect Medicaid reimbursement. If a community-based nursing home must increase its liability insurance coverage, it could result in an increase in costs to the facility. The operating component of the Medicaid per diem which reimburses these costs is capped for all facilities. Therefore, the premiums for insurance may increase, but that increase will not be reflected by an increase in Medicaid reimbursement to those facilities.

Nursing Home Firesafety:

Nursing homes that are not already compliant will be required to install sprinkler systems. Some of those costs may be reimbursed by Medicaid funds available for capital improvements. The total estimate for compliance by the 35 affected nursing homes is approximately \$4.41 million.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This CS does not affect counties or municipalities.

2. Other:

Nursing Home Liability:

The imposition of caps on noneconomic damages may implicate review about possible infringement on the right of access to the courts. To impose a provision that does restrict access to courts that meets the constitutional test established by the Florida Supreme Court in *Kluger v. White*⁷, the Legislature must (1) provide a reasonable alternative remedy or commensurate benefit, or (2) make

⁷ *Kluger v. White*, 281 So.2d 1 (Fla. 1973)

a legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.⁸

The bill may present equal protection concerns. It establishes two classes of nursing homes: community-based nursing home facilities, for whom noneconomic damages are capped, and all other nursing homes, for whom no cap exists. The bill also provides for two classes of claimants: those who may file a claims bill to recover noneconomic damage awards in excess of the cap, *i.e.*, those claiming against community-based nursing home facilities, and claimants against other nursing homes, who may not file a claims bill.

The bill includes a provision which may be interpreted as a prohibited special law. Specifically, the bill allows for a claims bill to be filed on behalf of a claimant who is awarded noneconomic damages in excess of the cap. The claims bill could result in the state expending general revenue as payment of the damages caused by the community-based nursing home facility. Article III, Section 11, of the Florida Constitution prohibits such special laws pertaining to disposal of public property for private purposes.

B. RULE-MAKING AUTHORITY:

Nursing Home Firesafety:

The Division of State Fire Marshal is granted rulemaking authority to:

- Implement and enforce the requirement that nursing homes be protected by an automatic sprinkler system
- Implement the loan guarantee program and associated provisions of the CS.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides legislative findings addressing the “functional unavailability of insurance coverage.” As reported by the Joint Select Committee, many nursing homes comply with licensing requirements by acquiring a so-called “compliance policy.” These policies provide the minimum-required coverage (\$25,000) for annual premiums in excess of the coverage offered. Some nursing homes have structured their corporate entities in such a way that they are “judgment proof,” thereby limiting a claimant’s ability to recover damages. Because this insurance environment affects all nursing homes, it is unclear how the limitations on damages available to relatively few eligible nursing homes will result in a reduction in the high cost of claims.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its April 6, 2005, meeting, the Committee on Elder & Long-Term Care adopted seven amendments to HB 1267 and favorably reported a Committee Substitute. The amendments change the bill as follows:

- Adds a finding that non-profit nursing facilities rank higher than for-profit facilities in quality of care standards
- Applies the caps on noneconomic damages to all claimants on an incident
- Provides that the limitation on liability is not applicable in the event of intentional misconduct or gross negligence as defined in s. 400.0237, F.S.
- Deletes the definition of “culpably negligent”
- Provides that the limits of the general and professional liability insurance coverage must be not less than \$250,000 per claim and not less than \$500,000 in annual aggregate
- Provides that no more than 10 percent of the insurance limits may be used to fund defense attorney fees and costs.

⁸ It is likely that the *Kluger* test would be applied at least to those claims arising out of negligence since actions in negligence existed at common law. See *Kluger* at page 3. A civil action for violation of resident’s rights was not created until 1980 in Section 3, Chapter 80-186, L.O.F.

- Defines “subcontractor”

This analysis is drafted to the Committee Substitute.