

**The Florida Senate**  
**PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT**

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

Prepared By: Higher Education Committee

BILL: CS/SB 2012

INTRODUCER: Committee on Higher Education and Senator Oelrich

SUBJECT: Postsecondary Education

DATE: March 21, 2007      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Matthews</u>	<u>HE</u>	<u>Fav/CS</u>
2.	_____	_____	<u>HR</u>	_____
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>HA</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This bill removes the State Board of Education’s authority to secure liability insurance for certain entities, including university students, boards of trustees, and state universities. The State Board of Education’s authority to secure liability insurance is replaced, in its entirety, with that of the Board of Governors. This transfer of authority also applies to the securing of insurance for the H. Lee Moffitt Cancer Center and Research Institute, and the Johnnie B. Byrd, Sr., Alzheimer’s Center and Research Institute.

This bill authorizes disclosure of patient care information by physicians and other health care providers, and other agents or employees of participants in a self-insurance program with self-insurance council members, staff, and attorneys hired by the self-insurance program, under specified circumstances. This bill clarifies that these communications do not violate confidentiality rules or law.

The limitation on the usage of self-insurance trust fund and revenues generated by that fund to pay only for claims and administration expenses is lifted.

This bill grants university boards of trustees the right to intervene in medical negligence civil actions filed against an affiliated hospital or health care facility where an employee or agent provided care, which is the subject of the litigation.

This bill provides that university faculty practice plan entities operate as the university’s agent, not as service providers or employers.

This bill substantially amends sections 1004.24, 1004.43, 1004.445, and 1012.965 of the Florida Statutes.

## II. Present Situation:

### **Self-insurance Programs for Universities**

Section 1004.24, F.S., authorizes the State Board of Education to secure, or provide as a self-insurer, comprehensive general liability insurance, to include professional liability insurance for health care.<sup>1</sup> Through this authority, insurance may be provided to such entities as a university board of trustees, state university students, and a state university.

### **Physician-Patient Privilege and Presuit Investigations in Medical Negligence Actions**

Section 456.057, F.S., addresses ownership and control of patient records. Disclosure of medical records and discussions about a patient's medical conditions are generally prohibited without written authorization of the patient. An exception exists in workers' compensation claim cases, such that an employee who reports an injury or illness alleged to be work-related waives the physician-patient privilege regarding medical records and information detailing the condition or complaint.<sup>2</sup> Other than the workers' compensation exception, disclosure is limited to the following situations:

- To a person, firm, or corporation that has procured or furnished the examination or treatment, at issue, with the patient's consent;
- When a compulsory physical examination is made, pursuant to a lawsuit party request;
- In a civil or criminal action, through a court-issued subpoena with proper patient notice;
- For statistical and scientific research, provided patient identity is protected; or
- To a regional poison control center in certain circumstances.<sup>3</sup>

An additional exception exists for medical negligence actions when a health care practitioner or provider is or reasonably expects to be named as a defendant, regarding information disclosed to a health care practitioner by a patient in the course of care and treatment. Communications are limited to disclosure to other health care practitioners and providers involved in the patient's care and treatment.<sup>4</sup>

Section 766.106, F.S., requires a claimant to provide notice to prospective defendants after presuit investigation and before filing a complaint. Notice is required to include a list of health care providers within the prior two years of the alleged date of negligence who treated or evaluated the claimant, and copies of certain medical records.<sup>5</sup> During the period of informal discovery, s. 766.106(6), F.S., requires a personal injury or wrongful death claimant to sign a medical information release to permit a prospective defendant or his or her legal representative to take unsworn statements of the claimant's treating physicians. Limited to presuit screening

---

<sup>1</sup> s. 1004.24(1), F.S.

<sup>2</sup> s. 440.13(4)(c), F.S.

<sup>3</sup> s. 456.057(7)(a), F.S.

<sup>4</sup> s. 456.057(8), F.S.

<sup>5</sup> s. 766.106(2)(a), F.S.

purposes, these statements are not discoverable or admissible in any subsequent civil proceeding.<sup>6</sup>

### **Sovereign Immunity**

Sovereign immunity is provided to the state, its agencies, and subdivisions. Section 768.28, F.S., provides a waiver of sovereign immunity in tort actions, subject to certain limits.<sup>7</sup> In these instances, liability is capped at \$100,000 per claim and \$200,000 in the aggregate, which represents all claims or judgments arising out of the same incident or occurrence.<sup>8</sup> University boards of trustees are specifically designated as corporations acting as instrumentalities or agencies of the state, with the protection of sovereign immunity.<sup>9</sup>

## **III. Effect of Proposed Changes:**

### **Authority to Secure Liability Insurance**

This bill removes the State Board of Education's authority to secure liability insurance for the following entities:

- The State Board of Education;
- A university board of trustees, its officers, and its members;
- The faculty, and other employees and agents of a university board of trustees;
- State university students;
- A state university, or a college, school, institute, center, or an entity's program; and
- A corporation organized as a not-for-profit, and its directors, officers, employees, agents, where it is affiliated with a state university, under certain conditions;
- The H. Lee Moffitt Cancer Center and Research Institute; and
- The Johnnie B. Byrd, Sr., Alzheimer's Center and Research Institute.

The State Board of Education's authority to secure liability insurance is replaced, in its entirety, with that of the Board of Governors.

### **Patient Care Disclosures and Confidentiality**

This bill authorizes disclosure of patient care information by physicians and other health care providers, and other agents or employees of participants in a self-insurance program with self-insurance council members, staff, and attorneys hired by the self-insurance program, under specified circumstances. Clarification is provided that these communications do not violate confidentiality rules or law. This bill expands current law on permissible disclosures of patient care information.

Both supporters and opponents of this provision identify the case of *Hannon v. Roper* in support of their respective arguments.<sup>10</sup> This medical malpractice case involved care given at the Shands

---

<sup>6</sup> s. 766.106(6)(b)1., F.S.

<sup>7</sup> s. 768.28(1), F.S.

<sup>8</sup> s. 768.28(5), F.S.

<sup>9</sup> s. 768.28(2), F.S.; s. 1001.72(5), F.S.

<sup>10</sup> 945 So.2d 534 (Fla. 1<sup>st</sup> DCA 2006).

Medical Center by a physician employed by the University of Florida College of Medicine.<sup>11</sup> The plaintiff challenged communications between attorney(s) hired by Shands to consult with the treating physician. Because neither the treating physician nor the health care provider for whom the treating physician works is a defendant or can reasonably expect to be named a defendant, the court reasoned, the medical negligence exception to privileged information in s. 456.057, F.S., does not apply.<sup>12</sup>

Opponents of this expansion assert that this language provides a way for affiliated hospitals to circumvent current confidentiality law, including case law, which prohibits private ex parte communications between university physicians and hospital attorneys, and may have the unintended consequence of facilitating collusion between the two parties.

Supporters indicate that current confidentiality laws preclude proper investigation of claims and potential claims by university self-insurance programs, including for presuit determinations. Additionally, these provisions impede the ability of the university to assess the extent to which it could or should be a defendant in the case.

#### **Limitation on Trust Fund and Revenues**

The limitation on the usage of self-insurance trust fund and revenues generated by that fund to pay only for claims and administration expenses is lifted.

#### **Board of Trustees Right to Intervene**

This bill grants university boards of trustees the unconditional right to intervene in medical negligence civil actions filed against an affiliated hospital or health care facility where an employee or agent provided care, which is the subject of the litigation. This bill specifies that a university assertion that an employee or agent of the university board of trustees is or was its agent is conclusive for purposes of the motion to intervene, although final resolution of the agency status is to be determined in court by the fact-finder.

Opponents of this provision indicate that this bill unfairly burdens plaintiffs in that sovereign immunity available to the public state universities does not extend to the affiliated hospitals. In providing the university boards of trustees an automatic right to intervene, a party is added to the suit whose allocation of fault is limited to sovereign immunity caps.

Supporters of a board of trustees' right to intervene assert that affiliated hospitals are typically treated as a "deep pocket" in litigation, regardless of their level of fault, and that a common plaintiff strategy is to not name the university as a party, due to its sovereign immunity.

#### **Designation of Faculty Practice Plans as Agents**

This bill provides that university faculty practice plan entities operate as the university's agent, not as service providers or employers of faculty physicians or other health care professionals. This bill additionally provides that the plan is part of the university board of trustee's provision of a clinical setting that is governed by the university board of trustees and its rules.

---

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 536.

The Board of Governors indicates in its analysis that medical malpractice actions have named university faculty practice plan entities as party-defendants, although these plans are not health care providers, and do not have an employment or agency relationship with the university health care providers.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Medical malpractice plaintiffs may receive less money in lawsuit awards, in instances where university boards of trustees intervene as a party, to cases where an affiliated hospital is already named as a defendant, due to sovereign immunity caps.<sup>13</sup>

C. Government Sector Impact:

The Board of Governors indicates that the authority granted to the university boards of trustees to intervene could result in additional legal costs to the universities. The impact of these costs is indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

---

<sup>13</sup> This is to be distinguished from existing authority which provides for an already named defendant to plead, by a preponderance of the evidence, the fault of a nonparty, for purposes of including the nonparty on the verdict form for apportionment of damages. (s. 768.81(3), F.S.)

---

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---

---

## **VIII. Summary of Amendments:**

None.

---

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

---