HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 839 Emergency Health Care Providers

SPONSOR(S): Homan and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 1640

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Courts		Bond	Bond
2) Safety & Security Council		Bond	Havlicak
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the government or its political subdivisions for the torts of officers or agents of such governments unless such immunity is expressly waived.

This bill extends the concept of sovereign immunity to healthcare entities and healthcare workers providing emergency medical services. The effect of such extension is that tort liability of an emergency medical provider would be limited in each tort incident to $100,000 per individual and $200,000 overall. The medical provider that caused the tort would be required to reimburse the state for monies paid out and would be subject to professional discipline for failure to reimburse the state for the liability.

This bill may have a fiscal effect on state government expenditures. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government -- This bill may increase government responsibility for health care costs.

Promote Personal Responsibility -- This bill limits the tort liability of certain entities and individuals.

B. EFFECT OF PROPOSED CHANGES:

Background

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the government or its political subdivisions for the torts of officers or agents of such governments unless such immunity is expressly waived.

Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive such immunity in part or in full by general law. Section 768.28, F.S., contains the limited waiver of sovereign immunity applicable to the state. Subsection (5) limits the recovery of any one person to $100,000 for one incidence and limits all recovery related to one incidence to a total of $200,000. Where the state's sovereign immunity applies, subsection (9) provides that the officers, employees and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.

In the context of emergency medicine, Florida only recognizes a limited tort liability. Section 768.13(2)(b), F.S., provides that a health care provider is only liable for "damages result[ing] from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences."

Effect of Bill

In general, this bill provides that licensed health care workers working in emergency care situations are deemed agents of the state and, therefore, are covered by the state's sovereign immunity. Specifically:

The bill makes the following legislative findings and intent:

> The Legislature finds and declares it to be of vital importance that emergency services and care be provided by hospitals, physicians, and emergency medical services providers to every person in need of such care. The Legislature finds that emergency services and care providers are critical elements in responding to disaster and emergency situations that might affect our local communities, state, and country. The Legislature recognizes the importance of maintaining a viable system of providing for the emergency medical needs of the state's residents and visitors. The Legislature and the Federal Government have required such providers of emergency medical services and care to provide emergency services and care to all persons who present themselves to hospitals seeking such care. The Legislature finds that the Legislature has further mandated that prehospital emergency medical treatment or transport may not be denied by emergency medical services providers to persons who have or are likely to have an emergency medical condition. Such governmental requirements have imposed a unilateral obligation for emergency services and care providers to provide services to all persons seeking emergency care without ensuring payment or other consideration for provision of such care. The Legislature also recognizes that emergency services and care providers provide a significant amount of uncompensated emergency medical care in furtherance of such governmental interest. The Legislature finds that a significant

proportion of the residents of this state who are uninsured or are Medicaid or Medicare recipients are unable to access needed health care on an elective basis because health care providers fear the increased risk of medical malpractice liability. The Legislature finds that such patients, in order to obtain medical care, are frequently forced to seek care through providers of emergency medical services and care. The Legislature finds that providers of emergency medical services and care in this state have reported significant problems with affordability of professional liability insurance, which is more expensive in Florida than the national average. The Legislature further finds that a significant number of specialist physicians have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital emergency departments due to increased medical malpractice liability exposure created by treating such emergency department patients, creating a void that has an adverse impact on emergency patient care. It is the intent of the Legislature that hospitals, emergency medical services providers, and physicians be able to ensure that patients who might need emergency medical services treatment or transportation or who present themselves to hospitals for emergency medical services and care have access to such needed services.

This bill defines the term "emergency health care providers" to include all persons and entities providing services pursuant to obligations imposed by s. 395.1041, F.S.,[1] or s. 401.45, F.S.,[2] except those persons or entities that are otherwise covered by s. 768.28, F.S. The term includes:

- An emergency medical services provider licensed under ch. 401, F.S., and persons operating as employees or agents of such an emergency medical services provider.[3]
- A hospital licensed under ch. 395, F.S., and persons operating as employees or agents of such a hospital.
- A physician licensed under ch. 458, F.S.,[4] ch. 459, F.S.,[5] ch. 460, F.S.,[6] or ch. 461, F.S.[7]
- A physician assistant licensed under ch. 458, F.S. or ch. 459, F.S.
- An emergency medical technician or paramedic certified under ch. 401, F.S.
- A registered nurse, nurse midwife, licensed practical nurse, or advanced registered nurse practitioner licensed or registered under part I of ch. 464, F.S.
- A midwife licensed under ch. 467, F.S.
- A health care professional association and its employees or agents or a corporate medical group and its employees or agents.
- Any student or medical resident who is enrolled in an accredited program or licensed program that prepares the student for licensure or certification in any of the professions listed above, the program that prepares the student for licensure or certification, and the entity responsible for training of the student or medical resident.
- Any receiving facility designated under ch. 394, F.S., and persons operating as employees or agents of the receiving facility when providing emergency treatment to a person presented for evaluation in accordance with ch. 394, F.S.[8]

---

[1] Section 395.1041, F.S., requires licensed hospitals with an emergency department must accept all emergency patients. The section further prohibits "patient dumping", the practice of transferring undesirable emergency patients to another facility.

[2] Section 401.45, F.S., generally requires that ambulance services and their employees must provide prehospital treatment and transport to any individual suffering from an emergency medical condition.

[3] Chapter 401, F.S., regulates ambulance and other medical transport services.

[4] Chapter 458, F.S., regulates physicians.

[5] Chapter 459, F.S., regulates osteopathic physicians.

[6] Chapter 460, F.S., regulates chiropractors.

[7] Chapter 461, F.S., regulates podiatric medicine.

[8] Chapter 394, F.S., regulates the provision of mental health services. A "receiving facility" under ch. 394, F.S., is defined at s. 394.455(26), F.S., as "any public or private facility designated by the [Department of Children and Family Services] to receive and hold involuntary patients under emergency condition or for psychiatric evaluation and to provide short-term treatment."

- Any other person or entity that is providing services pursuant to obligations imposed by s. 395.1041 or s. 401.45.

The bill defines "emergency medical services" to mean ambulance assessment, treatment, or transport services provided pursuant to obligations imposed by ss. 395.1041, or 401.45, F.S.; all screening, examination, and evaluation by a physician, hospital, or other person or entity acting pursuant to obligations imposed by ss. 395.1041 or 401.45, F.S.; and the care, treatment, surgery, or other medical services provided, whether as an outpatient or inpatient, to relieve or eliminate the emergency medical condition, including all medical services to eliminate the likelihood that the emergency medical condition will deteriorate or recur without further medical attention within a reasonable period of time.

This bill amends s. 768.28, F.S., to provide that the definition of "employee" for purposes of sovereign immunity of the state includes

> Any emergency health care provider acting pursuant to obligations imposed by s. 395.1041 or s. 401.45, except for persons or entities that are otherwise covered under this section.

This bill further provides that such emergency health care providers that are considered agents of the state must indemnify the state for any judgments, settlement costs, or other liabilities incurred, up to the liability limits of s. 768.28(5), F.S., namely, $100,000 per person and $200,000 total per incident.

Any emergency health care provider who is licensed by the state and who fails to indemnify the state after reasonable notice and written demand to do so is subject to an emergency suspension order of the regulating authority having jurisdiction over the licensee. The Department of Health is required to issue an emergency order suspending the license of any licensee under its jurisdiction or any licensee of a regulatory board within the Department of Health who, after 30 days following receipt of a notice from the Division of Risk Management of the Department of Financial Services that the licensee has failed to satisfy his or her obligation to indemnify the state or enter into a repayment agreement with the state for costs under this subsection, has not complied. The terms of such agreement must provide assurance of repayment of the obligation that is satisfactory to the state. Failure to pay is grounds for professional discipline.

If the emergency health care provider is a hospital licensed under ch. 395, F.S., and has failed to indemnify the state after reasonable notice and written demand to do so, any state funds payable to the licensed facility shall be withheld until the facility satisfies its obligation to indemnify the state or enters into a repayment agreement. The terms of such an agreement must provide assurance of repayment of the obligation which is satisfactory to the state. In addition, the Agency for Health Care Administration shall impose an administrative fine, not to exceed $10,000 per violation.

This bill takes effect upon becoming a law and applies to any cause of action accruing on or after that date.

C. SECTION DIRECTORY:

Section 1 provides legislative intent.

Section 2 amends s. 768.28, F.S., regarding the soverign immunity of the state.

Section 3 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   Unknown. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:
This bill will limit the possible damages that individuals may recover in certain medical malpractice torts.

D. FISCAL COMMENTS:
It is unknown how many cases this bill may affect. In FY 2005-2006, there were 1,363 professional malpractice cases filed with the Florida Courts.[9] This category covers all professional malpractice, including health care workers, attorneys, engineers, architects, and other professionals. It is unknown how many of those cases were of health care workers working in an emergency situation that would be covered by this bill.

This bill may have far reaching fiscal effects on government, individuals, and the economy in general. In addition to the primary benefit of this bill, namely encouraging health care providers to want to practice medicine in emergency rooms, it is believed that this bill may lead to lower healthcare costs, which benefits individual, business, and government purchasers of health care. Lower malpractice costs for health care workers and entities will directly benefit those workers and entities and is expected to reduce barriers to entry into the marketplace, which would further lower overall healthcare costs. On the other hand, any limit on recovery for tort inevitably leads to increased government spending under Medicaid, disability programs, and other public assistance programs that assist those persons whose limited tort recovery does not leave them funds for their support and medical care. In other words, a limit on tort recovery ultimately makes the state the insurer of last resort.

This bill provides that payment of claims up to the $100,000/$200,000 limits would be the state's responsibility, after which the state would have to seek reimbursement from the medical provider at fault. It is likely that some of those would be left unreimbursed by the provider due to death or insolvency of a provider.

[9] Florida's Trial Courts Statistical Reference Guide FY 2005-06.

This bill does not address reimbursement from health care providers should the Legislature pass a claims bill to benefit a person whose recovery is limited by this bill. Accordingly, it appears that any claims bills would likely have to be paid from General Revenue.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Article I, s. 21 of the Florida Constitution provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." In *Kluger v. White*, 281 So.2d 1 (Fla. 1973), the Florida Supreme Court ruled that this section means that:

> Where a right of access to the courts for redress of a particular injury has been provided [prior to 1968], the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

It is clear that persons had a right to file a suit for medical malpractice prior to 1968. Thus, for this bill to stand, a court will have to overrule *Kluger v. White*, or find that either:

- Limiting the liability of emergency medical providers is a reasonable alternative to having limited emergency medical coverage; or
- There is an "overpowering public necessity" for the tort limits created by this bill and there is no alternative method for meeting the public necessity but for limiting tort liability.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear under this bill who has the duty to provide a defense to a lawsuit or at what point in a case the defendant must allege or prove entitlement to the benefit of sovereign immunity.

D. STATEMENT OF THE SPONSOR
No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

n/a