

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Banking and Insurance Committee

BILL: SB 1500

INTRODUCER: Senator Latvala

SUBJECT: Foster Care Providers

DATE: March 27, 2011

REVISED: 4/11/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Burgess	BI	Pre-meeting
2.			CF	
3.			JU	
4.			BC	
5.				
6.				

I. Summary:

The Legislature established a community-based care system to strengthen community support and increase accountability for the state’s child welfare program. The system began in 1996 when the Legislature required the establishment of a minimum of five pilot programs to privatize foster care and related services through contracts with established, community-based care (CBCs) agencies. By 2006, the Department of Children and Families (DCF) had implemented the community-based care model statewide by contracting with 20 CBCs or lead agencies.

Pursuant to s. 409.1671, F.S., the CBCs and their subcontractors are required to meet certain state and federal requirements, including the maintenance of specified levels of liability insurance. The bill provides the following changes relating to liability insurance and tort actions:

- The bill reduces the general liability insurance coverage requirements for CBCs and subcontractors to \$500,000 per claim and a policy limit aggregate of \$1.5 million from the current \$1 million per claim and \$3 million per incident.
- In tort actions against CBC lead agencies and subcontractors:
 - Limits economic damages recoverable per claimant to \$500,000 and capped at \$1.5 million for all claimants per incident from the current \$1 million per liability claim. The bill also limits the total amount of economic damages recoverable by all claimants to \$2 million against a CBC and all subcontractors involved in the same incident.

- Limits noneconomic damages to \$200,000 per claimant and \$500,000 per incident. The bill also limits the total amount of noneconomic damages recoverable by all claimants to \$1 million against a CBC and all subcontractors involved in the same accident.
- The bill revises the DCF's duties and responsibilities relating to contracted services of CBCs.
 - Revises the DCF's responsibility in regards to such contracts by requiring the DCF to use diligent efforts to ensure that such services are delivered in accordance with federal and state requirements. Under current law, the DCF is required to retain responsibility for the quality of contracted services and programs and to ensure that such services are delivered in accordance with federal and state requirements.
 - Provides that the DCF is not liable in tort for acts or omissions of a lead agency, or a subcontractor of the lead agency, or the officers, agents, or employees of the lead agency or subcontractor.
 - Prohibits the DCF from requiring a lead agency or a subcontractor to indemnify DCF against the DCF's own acts or omission.
 - Prohibits the DCF from requiring a lead agency or subcontractor to include the DCF as an additional insured on any insurance policy.

This bill substantially amends section 409.1671 of the Florida Statutes.

II. Present Situation:

Overview of Community-Based Care System in Florida

The Legislature created the community-based care system to strengthen community support and increase accountability for the child welfare program. The Legislature found that the purpose of such outsourcing “is to increase the level of safety, security, and stability of children who are or become the responsibility of the state.”¹ Pursuant to s. 409.1671(e), F.S., the DCF is required to contract with a single agency, referred to as an “eligible lead community-based provider,” for the provision of child protective services in a community. Under this current system, lead agencies are responsible for providing foster care and related services, including family preservation, emergency shelter, and adoption. A competent lead agency must:

- Have the ability to coordinate, integrate, and manage all child protective services in the designated community, and to ensure continuity of care.
- Provide directly, or contract for through a local network of providers, no more than 35 percent of all child protective services.
- Accept accountability for meeting all related state and Federal outcome standards, and serve all children referred, regardless of the level of funding allocated to the community by the state.

The DCF is responsible for program oversight, operating the abuse hotline, child protective investigations, and the provision of child welfare legal services. Pursuant to s. 409.1671(2)(a), F.S., the DCF is responsible for contracting for the delivery, administration, or management of protective services, foster care, and other related services or programs, as appropriate. The DCF

¹ Section 409.1671(1)(f), F.S.

has the responsibility for the quality of contracted services and programs and is responsible for ensuring that services are delivered in accordance with applicable federal laws and regulations as well as state laws and contractual agreements. Notwithstanding the outsourcing of foster care and related services, the DCF retains custody of the children in foster care and remains responsible for the services they are provided.

Overview: Commercial General Liability and Professional Liability Insurance

A commercial general liability policy insures for bodily injury to a third party caused by the insured and loss damage to property owned by third parties caused by the insured. Typically, a general liability policy limits the amount the insurer will pay for each claim for each person (a per-occurrence limit) or the total amount for the policy period (an aggregate limit). Professional liability insurance provides coverage for claims arising from a professional's faulty services or failure to meet the standard of service expected under the circumstances.

An additional insured is a person added to a policy as an insured but not as a named insured. Generally, ISO² endorsements furnish coverage to the additional insured for liability arising out of the named insured's work, operations, or premises.³ Once a party becomes an additional insured, the insurer is obligated to defend and indemnify that additional insured in accordance with the policy terms and conditions.⁴

In regards to defense costs, Rule 69O-167.007 F.A.C., clarifies that defense cost must be in addition to the policy limits. This rule applies to all admitted carriers.

Insurance Requirements for Lead Agencies and Subcontractors

Section 409.1671(h) and (j), F.S., requires lead agencies and their subcontractors to provide general liability insurance coverage as well as automobile insurance coverage. Lead agencies and subcontractors are required to maintain a minimum level of general liability insurance of \$1 million per claimant and \$3 million per incident. In addition to the mandatory liability insurance limits, current law allows for a yearly increase of 5 percent in the conditional limitation on damages available to claimants to account for the annual increase in the cost of goods and services. Economic⁵ damages per claimant are capped at \$1,550,000.⁶ Noneconomic⁷ damages per claimant are capped at \$310,000.⁸

² The Insurance Services Office (ISO) is an organization that produces standard insurance forms. In Florida, forms and rates require approval by the Office of Insurance Regulation pursuant to the insurance code.

³ What Does an Additional Insured Endorsement Cover? <http://www.irmi.com/expert/articles/2000/postel07.aspx> (last visited March 27, 2011).

⁴ Last, William C., *Additional Insured Endorsements Revisited*.

<http://www.lhfconstructlaw.com/CM/Articles/Articles121.asp> (Last visited March 27, 2011).

⁵ See, e.g., s. 766.202(3), F.S., defining "economic damages" as financial losses that would not have occurred but for the injury giving rise to the cause of action in tort, including, but not limited to, past and future medical expenses, wage loss, loss of future earnings capacity, funeral expenses, and loss of prospective net accumulations of an estate.

⁶ The original limit on economic damages was set at \$1,000,000, in ch. 2009-206, L.O.F. The current limit on economic damages includes the annual 5 percent increase allowed by law.

⁷ See, e.g., s. 766.202(8), F.S., defining "noneconomic damages" as non-financial losses that would not have occurred but for the injury giving rise to the cause of action in tort, including, but not limited to, pain and suffering, loss of support and services, loss of companionship or consortium, inconvenience, physical impairment, mental anguish, disfigurement, and loss of capacity for enjoyment of life.

⁸ The original limit on noneconomic damages per claimant was set at \$200,000 in ch. 2009-206, L.O.F. The current limit on noneconomic damages includes the annual 5 percent increase allowed by law.

In addition, lead agencies and subcontractors must maintain minimum bodily injury liability insurance coverage of \$100,000 per claim and \$300,000 per incident. Providers also must maintain \$1,000,000 in non-owned automobile insurance coverage. This coverage is secondary to the primary insurance coverage of \$100,000 per claim and \$300,000 per incident that must be maintained by employees of lead agencies or subcontractors who use their personal vehicles to transport children and families in the course of providing services.

In addition to the statutory insurance requirements, the DCF also requires CBCs to maintain professional liability insurance and to name the DCF as an additional insured. The statutory and contractual coverage requirements do not appear to be risk-based since the minimum levels of coverage do not appear to take into consideration the size or volume of services provided by a particular CBC.

Commercial general liability insurance covers bodily injury and property damage arising out of an accident and generally excludes coverage for the abuse, neglect, and other types of errors and omissions claims to which lead community-based providers and subcontractors are exposed. Generally, some type of liability insurance or rider would cover these risks. The statute does not mandate such coverage. However, the availability and affordability of such coverage is indeterminate at this time.

The limits on liability provided for lead agencies and their subcontractors are not applicable if the lead agency or the subcontractor “acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression when such acts result in injury or death or such acts proximately cause such injury or death...”⁹ Culpable negligence is defined as “reckless indifference or grossly careless disregard of human life.”¹⁰ Further, the statute authorizes “a claim bill may be brought on behalf of a claimant pursuant to s. 768.28 for any amount exceeding the limits” provided to lead agencies and their subcontractors.¹¹

Each contract with a CBC provider is required to provide for the payment by the DCF to the provider of a reasonable administrative cost in addition to funding for the provision of services pursuant to s. 409.1671, F.S. Administrative costs would generally include operating costs such as insurance premiums.

Sovereign Immunity

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 state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the 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.

⁹ Section 4909.1671(1)(i) and (k), F.S.

¹⁰ *Id.*

¹¹ Section 409.1671(1)(h) and (j), F.S.

Under this statute, officers, employees, and agents of the state will not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.¹² Instead, the state steps in as the party litigant and defends against the claim. Subsection (5) limits the recovery of any one person to \$100,000 for one incident and limits all recovery related to one incident to a total of \$200,000.¹³ Parties may pursue a claim bill with the Legislature for any excess judgment or equitable claim that is not recovered from a state agency or other entity covered by the waiver of sovereign immunity.¹⁴

Division of Risk Management of the Department of Financial Services

The division is responsible for the management of claims reported by or against state agencies for coverage under the self-insurance fund known as the “State Risk Management Trust Fund.” The division has the responsibility of investigating, evaluating, negotiating, defending, and making appropriate disposition of claims/lawsuits filed against the state because of a negligent act or omission. Investigations of claims are conducted by staff and/or in concert with a contracted adjusting service. The Attorney General’s Office, contract law firms, or state agency attorneys provide defense of litigated claims.

General liability coverage is one of the types of coverage provided through the trust fund. For purposes of general liability coverage, the state is liable for damages for injury, death, or loss of property caused by the negligence of its employees, agents or volunteers while acting within the course and scope of their employment or responsibilities. The self-insurance coverage includes premises and operations, personal injury, and professional liability. In accordance with s. 768.28, F.S., the limits of liability (under the waiver of sovereign immunity law) are \$100,000 per person’s claim, \$200,000 per occurrence for all claims.

The division provides coverage to the DCF for claims from foster children alleging negligence or civil rights violations relating to their care. Prior to the creation of CBC’s and the privatization of foster care, the DCF provided all foster care services. The division does not provide coverage to the CBC’s or their subcontractors. Consequently, the division does not have any data on how many claims the CBC’s or their subcontractors have received or paid since their creation.

III. Effect of Proposed Changes:

Section 1 amends s. 409.1671, F.S., relating to liability insurance requirements and limits of liability for CBCs, CBC subcontractors, and the DCF.

¹² Section 768.28(9)(a), F.S.

¹³ Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., effective October 1, 2011, to increase the limits to \$200,000 for one person for one incident and \$300,000 for all recovery related to one incident, to apply to claims arising on or after that effective date.

¹⁴ Section 768.28(5), F.S., provides that any portion of a judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature.

The bill reduces the mandatory general liability insurance coverage requirement for lead agencies and subcontractors to \$500,000 per claim and a policy limit aggregate of \$1.5 million from \$1 million per claim and \$3 million per incident.

The limit on economic damages available to a claimant is reduced to \$500,000 per claim and capped at \$1.5 million for all claimants per incident from \$1 million per liability claim. The total amount of economic damages recoverable by all claimants is limited to \$2 million against a CBC and all subcontractors involved in the same incident.

The bill also limits noneconomic damages to \$200,000 per claimant and \$500,000 per incident. Currently, the noneconomic damages are limited to \$200,000 per claim. The bill limits the total amount of noneconomic damages recoverable by all claimants to \$1 million against a lead agency and all subcontractors involved in the same incident.

The bill repeals s. 409.1671(1)(l), F.S., thereby eliminating the 5 percent annual increase in the conditional limitations on economic and noneconomic damages.

The bill adds language to s. 409.1671(2)(a), F.S., to provide that the DCF is not liable in tort for the acts or omissions of a lead agency, or a subcontractor of a lead agency, or the officers, agents, or employees of a lead agency, or subcontractor of a lead agency. The DCF may not require a lead agency or subcontractor of a lead agency to indemnify the department for its own acts or omissions. Lastly, the department may not require a lead agency or subcontractor to include the department as an additional insured on any insurance policy.

The bill deletes legislative findings that the minimum levels of insurance were to be in excess of the rights of recovery under s. 768.28, F.S.

Section 2 provides that the bill will take effect July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Lower liability insurance limits should reduce insurance premiums for the CBCs and subcontractors. The elimination of the DCF as an additional insured may result in some indeterminate reduction in premiums for the CBCs.

The lower liability insurance requirements may limit the amount of money claimants can recover from CBCs and subcontractors.

C. Government Sector Impact:

According to the Division of Risk Management of the Department of Financial Services (DFS), the lower liability insurance requirements could result in foster children and their attorneys seeking more money from the state either in claims settlements or in claims bills. The DFS provided the following comments:

“The bill reduces the amounts of general liability insurance a CBC is required to carry, it also reduces the amounts a claimant can recover for economic and non-economic damages. If a claimant can recover sufficient money from a CBC, they are less likely to press their claim against DCF and Risk Management or to file a claims bill against DCF.”¹⁵

VI. Technical Deficiencies:**Commercial General Liability**

According to the Office of Insurance Regulation,¹⁶ typically general liability insurance is sold with an occurrence limit and an aggregate limit on the total cost of the claims occurring in an annual policy period. The bill requires a minimum of \$500,000 per claim with a policy limit of \$1.5 million. There is no standard legal definition of ‘incident’ within the typical context of general liability. These definitional issues can lead to litigation.

The additional limits of noneconomic damages on top of the economic damage limits for economic damage may create total costs on an occurrence that are higher than the legally mandated minimum per limits of insurance. That results in a situation where the damage caps do not match the required limits of insurance. Specifically, economic damages are capped at \$500,000 per claim and noneconomic damages are capped at \$200,000 per claim. The minimum general liability limit is \$500,000 per claim.

VII. Related Issues:

Under current law, insurers of lead community-based providers’ and subcontractors are not required to give the DCF written notice of any cancellation or nonrenewal and the lead

¹⁵ Department of Financial Services Bill Analysis of SB 1500, dated March 9, 2011.

¹⁶ Office of Insurance Regulation Comments, dated April 4, 2011.

community-based providers are not required to provide the DCF with copies of policies, endorsements, and certificates. Instead, the DCF contract with a CBC may require the insurer to give the DCF written notice of any intention to cancel or refuse to renew the policy at least 30 days prior to such action. The DCF needs notification of any cancellation or nonrenewal of a CBC policy and copies of policies, endorsements, and certificates in order to monitor compliance by the lead community-based providers and subcontractors with the statutory insurance coverage requirements. Gaps in coverage and other noncompliance by a CBC could result in liability exposure for the DCF. Pursuant to s. 627.4133, F.S., an insurer is required to provide notice to the named insured at least 45 days prior to nonrenewal, cancellation, or termination.

Although the bill does not amend the automobile insurance requirements, the provision in the law for personal automobile policies does not match the language present in most personal automobile policies. The current law requires a minimum bodily injury liability insurance of \$100,000 per claim and \$300,000 per incident on personal automobiles used by staff of a CBC or subcontractor. The OIR notes that the typical personal automobile insurance requirements are stated in terms of a monetary limit per person and another monetary limit for all damages resulting from any one automobile accident.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.