HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 385 Sovereign Immunity
SPONSOR(S): Civil Justice Subcommittee; Gaetz and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 614

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Bond	Bond
2) Health Care Appropriations Subcommittee			
3) Health & Human Services Committee			
4) Judiciary Committee			

SUMMARY ANALYSIS

A physician on duty in a hospital emergency room or trauma center is required by federal and state law to evaluate any individual who presents himself or herself as needing medical treatment, and provide emergency medical treatment, regardless of whether the individual pays or has the ability to pay for such services. This bill makes legislative findings declaring that these physicians are agents of the government performing a government duty.

Sovereign immunity is a legal concept that protects governments from being sued without their consent. The protection is often extended to government contractors performing governmental functions. This bill provides that a physician working in a hospital emergency room or trauma center is an agent of the state protected by sovereign immunity. A physician may elect to opt out of sovereign immunity, and may later opt back in. A physician covered by the sovereign immunity protection is required to reimburse the state for claims and costs up the sovereign immunity limits, and the failure to reimburse the state is grounds for discipline against the medical license.

This bill does not appear to have a fiscal impact on local governments. This bill has an unknown potential negative fiscal impact on state government expenditures.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background - In General

In general, a person has a common law cause of action against another for personal injury occasioned by the other's negligence. The term "medical malpractice" refers to personal injury lawsuits related to negligence committed by medical professionals. Negligence actions in general are governed by ch. 768, F.S.; medical malpractice actions are also governed by ch. 766, F.S.

Background - Mandated Emergency Medical Treatment

Under current law, certain health care providers are obligated under state and federal law to provide emergency services.

Section 395.1041(3)(a), F.S., requires every general hospital which has an emergency department to provide emergency services and care for any emergency medical condition when:

- Any person requests emergency services and care; or
- Emergency services and care are requested on behalf of a person by an emergency medical services provider who is rendering care to or transporting the person; or by another hospital when such hospital is seeking a medically necessary transfer.

Section 395.1041(3)(f), F.S., requires emergency services and care to be provided regardless of whether the patient is insured or otherwise able to pay for services.

Section 401.45, F.S(1), F.S. provides that a licensed basic life support service, advanced life support service, or air ambulance service may not deny needed prehospital treatment or transport for an emergency medical condition to any person.

Similarly, federal law requires hospitals to provide a "medical screening evaluation" regardless of an individual's ability to pay.[1]

Background - Liability Laws Specific Related to Emergency Medical Treatment

A health care practitioner providing mandated emergency medical treatment is not liable for civil damages related to such services unless the injured patient can show that the practitioner acted with "a reckless disregard for the consequences so as to affect the life or health of another."[2]

An award of noneconomic damages[3] related to medical malpractice caused by a medical practitioner providing emergency services and care is limited to $150,000 per claimant and $300,000 per incident.[4] There is no limit on the corresponding economic damages.

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[1] 42 U.S.C. s. 1395dd., which reads at subsection (a):

> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

[2] Section 768.13(2)(b), F.S.

[3] Noneconomic damages are often referred to as "pain and suffering."

[4] Section 766.118(4), F.S.

Background - Sovereign Immunity

Sovereign Immunity is a "doctrine which precludes bringing suit against the government without its consent."[5] The Florida Constitution recognizes that the concept of sovereign immunity applies to the state[6], although the state may waive its immunity through an enactment of general law.[7] Sovereign immunity extends to all subdivisions of the state, including counties and school boards.

In 1973, the Legislature enacted s. 768.28, F.S., a partial waiver of sovereign immunity, allowing individuals to sue state government and its subdivisions. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of [the] state . . . . "

Section 768.28(5), F.S., imposes a $200,000 limit on the government's liability to a single person, and a $300,000 total limit on liability for claims arising out of a single incident. These limits have been upheld as constitutional.[8] The limit applies to the total of economic and noneconomic damages.

An injured party may obtain a judgment in excess of the statutory limits, but cannot enforce payment above the limit. The Legislature may, by general law, provide for payment in excess of the statutory cap by virtue of a claims bill.[9] The courts have explained:

> Even if he is able to obtain a judgment against the Department of Transportation in excess of the settlement amount and goes to the legislature to seek a claims bill with the judgment in hand, this does not mean that the liability of the Department has been conclusively established. The legislature will still conduct its own independent hearing to determine whether public funds would be expended, much like a non jury trial. After all this, the legislature, in its discretion, may still decline to grant him any relief.[10]

Section 768.28(9)(b)2., F.S., defines the term "officer, employee, or agent" (which are the persons to whom sovereign immunity applies). Several identified groups are included in the definition, including health care providers when providing contract services pursuant to s. 766.1115, F.S. That section provides that certain health care providers who contract with the state are considered agents of the state, and thus entitled to the protection of sovereign immunity.

Florida law provides that a number of persons who perform public services are agents of the state and thus covered by sovereign immunity, including:

- Persons or organizations providing shelter space without compensation during an emergency.[11]
- A health care entity providing services as part of a school nurse services contract.[12]
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.[13]
- A person under contract to review materials, make site visits or provide expert testimony regarding complaints or applications received by the Department of Health or the Department of Business and Professional Regulation.[14]

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[5] Blacks Law Dictionary, at 1396 (6th ed. 1990).
[6] Article X, s. 13, Fla.Const.
[7] *See generally* Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 U.Fla.L.Rev. 1 (1992).
[8] *Berek v. Metropolitan Dade County*, 422 So.2d 838 (Fla. 1982); *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).
[9] *See generally* D. Stephen Kahn, *Legislative Claim Bills: A Practical Guide to a Potent(ial) Remedy*, FLA.B.J. 8 (April 1988).
[10] *Gerard v. Dept. of Transportation*, 472 So.2d 1170 (Fla. 1985).
[11] Section 252.51, F.S.
[12] Section 381.0056(10), F.S.
[13] Section 381.0302(11), F.S.
[14] Sections 455.221(3) and 456.009(3), F.S.

- A business contracted with by the Department of Business and Professional Regulation under the Management Privatization Act.[15]

- Physicians retained by the Florida State Boxing Commission.[16]

- Health care providers under contract to provide uncompensated care to indigent state residents.[17]

- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.[18]

- An operator, dispatcher, or other person or entity providing security or maintenance for rail services in the South Florida Rail Corridor, under contract with the Tri-County Commuter Rail Authority the Department of Transportation.[19]

- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.[20]

- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services. [21]

- Health care practitioners under contract with state universities to provide medical services to student athletes.[22]

- A not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a teaching hospital which is owned or operated by the state, a county, a municipality, a public health trust, a special taxing district, any other governmental entity having health care responsibilities, or a not-for-profit entity that operates such facilities as an agent of that governmental entity under a lease or other contract.[23]

Effect of Bill - Sovereign Immunity

This bill amends s. 768.28, F.S., to provide that all physicians compelled to provide medical services in emergency rooms are agents of the state and thus entitled to sovereign immunity protection.

The sovereign immunity law applies to a person who is an "officer, employee or agent" of the state. This bill amends the definition of an officer, employee or agent of the state to include any person who is an emergency health care provider providing emergency health care mandated by ss. 395.1041 or 401.45, F.S.

The bill limits the term "health care provider" to include only persons who are licensed under ch. 458 or 459, F.S. Those chapters regulate physicians and osteopathic physicians, respectively.

[15] Section 455.32(4), F.S.
[16] Section 548.046(1), F.S.
[17] Section 768.28(9)(b), F.S.
[18] Section 768.28(10)(a), F.S.
[19] Section 768.28(10)(d), F.S.
[20] Section 768.28(10)(e), F.S.
[21] Section 768.28(11)(a), F.S.
[22] Section 768.28(12)(a), F.S.
[23] Section 768.28(10)(f), F.S.

The bill allows a health care provider to opt out of sovereign immunity protection, and allows a provider who has opted out to opt back in. Notice must be given to the Department of Health, and is effective upon receipt by the department.

The bill defines, and thus limits the protections of the bill, to "emergency medical services", which is

> [A]ll screenings, examinations, and evaluations by a physician, hospital, or other person or entity acting pursuant to obligations imposed by s. 395.1041 or s. 401.45, and the care, treatment, surgery, or other medical services provided 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.

Effect of Bill - Repayment

The bill also requires a covered emergency health care provider to assume financial duties related to any claim. Initially, an injured person would seek payment from the state. The bill requires the physician to reimburse the state for judgments, settlement costs and all other liabilities incurred by the state. Repayment is limited to the statutory sovereign immunity limits ($200,000 per person, and a total of $300,000 for all claims related to a single incident). The failure of a physician to timely repay the state is grounds for emergency suspension of the medical license. The Department of Health must suspend the license if the physician is more than 30 days delinquent. The bill allows the department to negotiate a payment plan with a physician in lieu of full payment.

Effective Date

The bill is effective upon becoming law, and applies to causes of action that accrue on or after that date.

B. SECTION DIRECTORY:

Section 1 provides legislative findings.

Section 2 amends s. 768.28, F.S., regarding sovereign immunity for emergency health care workers.

Section 3 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   Unknown likely negative fiscal impact on state expenditures. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may lower the cost to physicians for obtaining medical malpractice insurance coverage, and may lower possible recoveries by persons injured due to medical malpractice.

D. FISCAL COMMENTS:

State government will incur costs to investigate and cover the claims for health care providers providing services in an emergency room or trauma center in Florida. The state agency or division responsible for such claims is the Division of Risk Management in the Department of Financial Services. Although the bill requires responsible physicians to reimburse the state up to a limit, it is possible that state government may incur losses for uncollectible reimbursements.[24] The potential uncollectible amount cannot be reliably estimated.[25]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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 1, s. 21, Fla. Const., 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." The Florida Supreme Court has in the past found that this provision limits the ability of the Legislature to amend tort law. In the leading case, the Florida Supreme Court first explained the constitutional limitation on the ability of the Legislature to abolish a civil cause of action:

> We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., 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.[26]

The courts have shown inconsistent treatment of this provision. Some caps on damages have been found unconstitutional,[27] but more recently others have been found constitutional.[28] The creation of an alternative recovery system has been found constitutional.[29]

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[24] Situations that may lead to state financial loss include death, bankruptcy or insolvency of a physician. It is also possible that the claim plus claims handling expense could exceed the reimbursement limit.

[25] In reviewing similar bills in the past: In 2011 DFS estimated the potential loss as "UNKNOWN" (See analysis of 2011 HB 623 dated 2/22/2011) with little comment. In 2010 DFS estimated the potential loss at $34.5 million, but that version of the bill required the state to pay all claims handing expenses (See Senate bill analysis of 2010 SB 1474 dated 3/22/2010).

[26] *Kluger v. White,* 281 So.2d 1, 4 (Fla. 1973).

[27] A $450,000 cap on noneconomic damages applicable to all tort cases is unconstitutional. *Smith v. Dept. of Ins.*, 507 So.2d 1080 (Fla. 1987); but see, *Adams by and through Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 906 (Mo. 1992)("We doubt the wisdom of a rule of law that limits the legislature's ability to respond statutorily to changing societal concerns or correct previous policy positions upon receipt of better information.")

[28] Statutory caps on non-economic damages in medical malpractice actions at s. 766.118, F.S., are constitutional. *Estate of McCall ex rel. McCall v. U.S.*, 642 F.3d 944 (11th Cir. 2011); *M.D. v. U.S.*, 745 F.Supp.2d 1274 (Fla. M.D. 2010).

[29] *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974)(automobile no-fault insurance law); *Mahoney v. Sears, Roebuck & Co.*, 440 So.2d 1285 (Fla. 1983)(workers compensation law).

B. RULE-MAKING AUTHORITY:

The bill does not provide any new rulemaking authority. The Department of Health will have to amend rules relating to disciplinary actions to account for the changes made by this bill, which changes can be made within existing authority.[30]

C. DRAFTING ISSUES OR OTHER COMMENTS:

In calendar year 2010, there were 8,119,010 emergency room visits in the state.[31] Also in 2010, there were 2,520 medical malpractice claims closed by medical malpractice insurance carriers, of which 318 (12.6%) were identified as having occurred in an emergency room setting.[32]

A 2007 study by the Senate Committee on Health Regulation regarding the availability of physicians to work in emergency rooms found:

> [I]n general, physicians are reluctant to provide emergency on-call coverage due to the negative impact on their lifestyle, the perceived hostile medical malpractice climate, and the inability to obtain adequate compensation for services rendered. All of these reasons are disincentives to assuming liability for treating emergency patients previously unknown to the physician.[33]

The bill requires a covered emergency health care provider to reimburse the state for judgments, settlement costs and all other liabilities incurred by the state. It is unclear whether an emergency health care provider will have grounds or a means by which to object to defense strategies, settlements, or unreasonable costs.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment created a means for a physician to opt out of sovereign immunity, and to opt back in. The amendment also changed the "relating to" clause of the title. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

[30] Department of Health, Bill Analysis, Economic Statement and Fiscal Note, dated December 7, 2011.
[31] http://www.floridahealthfinder.gov/researchers/OrderData/order-note.aspx#emergency accessed November 30, 2011.
[32] *Florida Office of Insurance Regulation, 2011 Annual Report – October 1, 2011, Medical Malpractice Financial Information Closed Claim Database and Rate Filings*, at page 44. Note that settlements or judgments against uninsured practitioners would not be reflected here and there is no known means to determine claims experience of uninsured practitioners.
[33] Senate interim report 2008-138, at page 1.