HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 385 Medical Malpractice
SPONSOR(S): Judiciary Committee; Civil Justice Subcommittee; Gaetz; Renuart and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1506

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Bond	Bond
2) Judiciary Committee	11 Y, 2 N, As CS	Bond	Havlicak
3) Government Operations Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

This bill allows a prospective defendant in a medical malpractice action to interview a claimant's health care providers without the presence of the claimant if the prospective defendant provides 10 days notice of the intent to interview.

This bill provides that a plaintiff in a medical negligence action must prove by clear and convincing evidence that the failure of a health care provider to order, perform, or administer supplemental diagnostic tests is a breach of the standard of care.

Medical professionals on duty in a hospital emergency room or trauma center are 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 medical professionals 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, osteopathic physician, podiatrist or dentist working in a hospital emergency room or trauma center is an agent of the state protected by sovereign immunity. These medical professionals may elect to opt out of sovereign immunity, and may later opt back in. A medical professional covered by the sovereign immunity protection recognized in this bill is required to reimburse the state for claims and costs up to 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:

Medical Malpractice Actions - 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.

Standard of Proof in Medical Malpractice Cases Relating to Supplemental Diagnostic Tests

Section 766.102(4), F.S., provides that the "failure of a health care provider to order, perform, or administer supplemental diagnostic tests shall not be actionable if the health care provider acted in good faith and with due regard for the prevailing professional standard of care."

Section 766.102, F.S., provides that a claimant in a medical negligence action must prove by "the greater weight of the evidence" that actions of the health care provider represented a breach of the prevailing professional standard of care. Greater weight of the evidence means the "more persuasive and convincing force and effect of the entire evidence in the case."[1]

Other statutes, such as license disciplinary statutes, require a heightened standard of proof called "clear and convincing evidence." Clear and convincing evidence has been described as follows:

> [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.[2]

Section 766.111, F.S., prohibits a health care provider from ordering, procuring, providing, or administering unnecessary diagnostic tests.

The bill provides that the claimant in a medical negligence case where the death or injury resulted from a failure of a health care provider to order, perform, or administer supplemental diagnostic tests must prove that the health care provider breached the standard of care by clear and convincing evidence. This bill would have the effect of making such claims more difficult to prove. Standards of proof in other medical negligence cases would remain unchanged.

Interviews with Treating Health Care Providers in Medical Malpractice Cases

Background

Section 766.203(2), F.S., requires a claimant (a prospective medical malpractice plaintiff) to investigate whether there are any reasonable grounds to believe that a health care provider was negligent in the care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[3] After completion of presuit

[1] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So.2d 1264, 1277 (Fla. 2003).
[2] *Inquiry Concerning Davey*, 645 So.2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).
[3] Section 766.203(2), F.S.

investigation, a claimant must send a presuit notice to each prospective defendant.[4] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[5] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[6] for failure to provide presuit discovery.[7]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[8] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[9] Informal discovery includes:

1. Unsworn statements - Any party may require any other party to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Unsworn statements - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating health care providers. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[10]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[11]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which point arbitration will be held only on the issue of damages.[12] Failure to respond constitutes a rejection of the claim.[13] If the defendant rejects the claim, the claimant can file a lawsuit.

Ex Parte Interviews with Physicians by Defense Counsel

In many civil cases, counsel for any party can meet with any potential witness who is willing to speak without notice to the opposing counsel. In 1984, the Florida Supreme Court ruled that there was no

[4] Section 766.106(2)(a), F.S.
[5] Section 766.106(2)(a), F.S.
[6] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[7] Section 766.106(2)(a), F.S.
[8] Section 766.106(3), (4), F.S.
[9] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.
[10] Section 766.106(6), F.S.
[11] Section 766.106(5), F.S.
[12] Section 766.106(3)(b), F.S.
[13] Section 766.106(3)(c), F.S.

common law or statutory privilege of confidentiality as to physician-patient communications[14] and that there was no prohibition on defense counsel communicating with a claimant's physicians. In 1988, the Legislature enacted a statute to create a physician-patient privilege.[15] The current version of the statute provides, in relevant part:

> Except as otherwise provided in this section and in s. 440.13(4)(c), [patient medical records] may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care or treatment of the patient, except upon written authorization of the patient.[16]

The statute provides some exceptions to the confidentiality in medical malpractice cases but the Florida Supreme Court has ruled that defense counsel are barred by the statute from having an ex parte conference with a claimant's current treating physicians.[17]

The Governor's Select Task Force on Healthcare Professional Liability Insurance noted problems caused by the inability of defense counsel to interview a claimant's treating physicians:

> [T]he defendant is frequently in the position of having to investigate the plaintiff's medical history or current condition in order to discover other possible causes of the plaintiff's injury that could be used in defending the action. In addition, this information is often useful in determining the strength of the plaintiff's case, which the defendant could use to decide whether to settle the claim or proceed to trial. It is often necessary to interview several of the plaintiff's treating healthcare providers in order to acquire this information. But, because formal discovery is an expensive and time consuming process, defendants are often unable to adequately gather this information in preparation of their defense.[18]

Opponents of allowing defendants access to ex parte interviews with treating physicians argued the system was not broken. The report continued:

> The problem the Legislature corrected was the private, closed-door meetings between insurance adjusters, defense lawyers, and the person being sued. Typically, the person being sued would speak with his or her colleagues and say "I need your help here. I'm getting sued. I need you to help me out on either the causation issue or the liability issue or the damage issue.
>
> The present system is not broken. Crafting language to go back prior to 1988, to allow unfettered access, is not appropriate. To allow a situation where a defense lawyer or an insurance adjuster and the doctor go to see a patient's treating physician on an informal basis would further drive a wedge between that physician and the patient.[19]

In 2003, the Legislature amended s. 706.106, F.S., to require a claimant to execute a medical information release to allow prospective defendants to take unsworn statements of the claimant's treating physician on issues relating to the personal injury or wrongful death during the presuit process. The claimant and counsel are entitled to notice, an opportunity to be heard, and to attend the taking of the statement. The legislation did not provide for ex parte interviews by defense counsel with a claimant's treating physicians.[20]

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[14] See *Coralluzzo v. Fass*, 671 So.2d 149 (Fla. 1984).
[15] Chapter 88-208, L.O.F.
[16] Section 456.057(7)(a), F.S.
[17] *See Acosta v. Richter*, 671 So.2d 149 (Fla. 1996).
[18] *Report of the Govenor's Select Task Force on Healthcare Professional Liability Insurance* (2003) at p. 231. The Report can be accessed at www.doh.state.fl.us/myflorida/DOH-Large-Final%20Book.pdf (last accessed January 26, 2012).
[19] *Id.* at 233 (internal footnotes omitted).
[20] Chapter 2003-416, Laws of Florida.

Effect of the Bill - Interviews

This bill provides that a prospective defendant or his or her legal representative may interview the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative. This bill provides that a prospective defendant or his or her representative must provide the claimant with 10 days notice prior such interview.

Medical Malpractice Cases Related to Emergency Medical Treatment

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.[21]

Background - Liability Laws 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."[22]

An award of noneconomic damages[23] 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.[24] There is no limit on the corresponding economic damages.

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[21] 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.

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

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

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

Background - Sovereign Immunity

Sovereign Immunity is a "doctrine which precludes bringing suit against the government without its consent."[25] The Florida Constitution recognizes that the concept of sovereign immunity applies to the state[26], although the state may waive its immunity through an enactment of general law.[27] 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.[28] 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.[29] 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.[30]

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.[31]
- A health care entity providing services as part of a school nurse services contract.[32]
- Members of the Florida Health Services Corps who provide medical care to indigent persons in medically underserved areas.[33]

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

- 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.[34]

- A business contracted with by the Department of Business and Professional Regulation under the Management Privatization Act.[35]

- Physicians retained by the Florida State Boxing Commission.[36]

- Health care providers under contract to provide uncompensated care to indigent state residents.[37]

- Health care providers or vendors under contract with the Department of Corrections to provide inmate care.[38]

- 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 or the Department of Transportation.[39]

- Professional firms that provide monitoring and inspection services of work required for state roadway, bridge or other transportation facility projects.[40]

- A provider or vendor under contract with the Department of Juvenile Justice to provide juvenile and family services. [41]

- Health care practitioners under contract with state universities to provide medical services to student athletes.[42]

- 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.[43]

Effect of Bill - Sovereign Immunity and Medical Malpractice Occurring in Emergency Settings

This bill amends s. 768.28, F.S., to provide that an emergency health care provider compelled to provide medical services in an emergency room is an agent of the state and thus entitled to sovereign immunity protection.

[34] Sections 455.221(3) and 456.009(3), F.S.
[35] Section 455.32(4), F.S.
[36] Section 548.046(1), F.S.
[37] Section 768.28(9)(b), F.S.
[38] Section 768.28(10)(a), F.S.
[39] Section 768.28(10)(d), F.S.
[40] Section 768.28(10)(e), F.S.
[41] Section 768.28(11)(a), F.S.
[42] Section 768.28(12)(a), F.S.
[43] Section 768.28(10)(f), F.S.

The term "emergency health care provider" is defined by the bill to include the following medical professionals:

- A physician licensed under ch. 458, F.S.
- An osteopathic physician licensed under ch. 459, F.S.
- A podiatrist licensed under ch. 461, F.S.
- A dentist licensed under ch. 466, F.S.

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 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.

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 of this Bill

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. 766.102, F.S., regarding medical negligence, standards of recovery.

Section 3 amends s. 766.106, F.S., regarding notice before filing an action for medical negligence.

Section 4 amends s. 768.28, F.S., regarding sovereign immunity for emergency health care workers.

Section 5 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.[44] The potential uncollectible amount cannot be reliably estimated.[45]

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.

[44] 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.

[45] 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).

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.[46]

The courts have shown inconsistent treatment of this provision. Some caps on damages have been found unconstitutional,[47] but more recently others have been found constitutional.[48] The creation of an alternative recovery system has been found constitutional.[49]

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.[50]

C. DRAFTING ISSUES OR OTHER COMMENTS:

In calendar year 2010, there were 8,117,359 emergency room visits in the state.[51] 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.[52]

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.[53]

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[46] *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).
[47] 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.").
[48] 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).
[49] *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).
[50] Department of Health, Bill Analysis, Economic Statement and Fiscal Note, dated December 7, 2011.
[51] http://www.floridahealthfinder.gov/researchers/OrderData/order-note.aspx#emergency accessed January 26, 2012.
[52] *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.
[53] Senate interim report 2008-138, at page 1.

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.

On January 27, 2012, the Judiciary Committee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute adds podiatrists and dentists to the definition of "emergency health care provider," which definition controls who is covered by sovereign immunity. The committee substitute also added provisions on interviews with treating physicians and the burden of proof required in a claim of negligent failure to order a diagnostic test. This analysis is written to the proposed committee substitute adopted by the Judiciary Committee.