

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 17 Damages
SPONSOR(S): Civil Justice Subcommittee, Leek
TIED BILLS: IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 5 N, As CS	Jones	Poche
2) Commerce Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A tort is a civil wrong for which the law provides a remedy. The purpose of tort law is to fairly compensate a person harmed by another person's wrongful acts, whether intentional or negligent. In a negligence action in Florida, the compensation a plaintiff recovers is reduced to the extent the plaintiff or a third party contributed to the injury.

A healthy tort liability system benefits society as a whole, but a flawed system generates exorbitant damages and unpredictability, causing:

- Increased costs across the economy;
- Increased risks of doing business;
- Higher insurance premiums;
- Increased healthcare costs;
- Declining availability of medical services; and
- Deterrence of economic development and job creation activities.

Florida has the highest tort system costs among U.S. states as a percentage of state gross domestic product, at 3.6%. In 2016, the total amount paid in costs and compensation within Florida's tort system averaged \$4,442 for each Florida household. Over the past few decades, the Legislature has attempted to reduce the costs of the tort system by prohibiting courts from awarding unreasonable or inaccurate damages.

CS/HB 17 modifies the damages recoverable in a tort action by:

- Requiring medical damages in certain tort actions to be accurately calculated, based on actual amounts paid for medical care, and ensuring the jury is not misled by the amount billed.
- Limiting the amount of noneconomic damages recoverable in a civil tort lawsuit to \$1 million.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida's Tort Law System

A tort is a civil wrong for which the law provides a remedy. The purpose of tort liability law is to fairly compensate a person harmed by the wrongful act of another, whether intentional or negligent.

When a state's tort liability system is functioning properly, it:

- Provides a fair and equitable forum to resolve disputes;
- Appropriately compensates legitimately-harmed persons;
- Reduces conflict;
- Encourages companies to produce safe products; and
- Deters undesirable behavior.¹

On the other hand, a flawed tort liability system is unpredictable and generates exorbitant levels of damages, causing:

- Increased costs across the economy;
- Increased risks of doing business;
- Greater incentives to file meritless lawsuits;
- Higher insurance premiums;
- Increased healthcare costs;
- Declining availability of medical services; and
- Deterrence of economic development and job creation activities.²

Florida has the fifth-worst liability system, according to the U.S. Chamber of Commerce Institute for Legal Reform's most recent "Lawsuit Climate Survey."³ The city of Miami and Miami-Dade County are singled out as having a particularly unfair and unreasonable litigation environment. The survey asked respondents to grade each state's liability system on:

- Overall treatment of tort and contract litigation;
- Enforcing meaningful venue requirements;
- Treatment of class action suits and mass consolidation suits;
- Damages;
- Proportional discovery;
- Scientific and technical evidence;
- Trial judge impartiality and fairness;
- Fairness of juries; and
- Quality of appellate review.

The American Tort Reform Foundation's annual report ranks Florida as the second-worst "judicial hellhole" in the United States, indicating that Florida's courts systematically apply laws and procedures unfairly towards defendants in civil cases.⁴ The report notes several factors contributing to this landscape, including lack of legislative action and Florida Supreme Court opinions that expanded liability and invalidated reforms.⁵

¹ The Perryman Group, *Potential Economic Benefits of Tort Reform in Florida*, CITIZENS AGAINST LAWSUIT ABUSE (Sept. 2018), <https://cdn.p2a.co/385013/PKpghW4BPS15392676823kGn5yy2F1>.

² *Id.* at 2, 5.

³ *2017 Lawsuit Climate Survey: Ranking the States*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Sept. 12, 2017), <https://www.instituteforlegalreform.com/research/2017-lawsuit-climate-survey-ranking-the-states->.

⁴ AMERICAN TORT REFORM FOUNDATION, *Judicial Hellholes*, <http://www.judicialhellholes.org/wp-content/uploads/2018/11/judicial-hellholes-report-2018-2019.pdf> (last visited Mar. 3, 2019).

⁵ *Id.* at 12.

Flaws within the tort system are expensive. In 2016, the costs and compensation paid in the U.S. tort system were about \$429 billion, or 2.3% of the country's gross domestic product (GDP).⁶ Florida has the highest tort system costs among states as a percentage of state GDP, at 3.6%.⁷ In 2016, the total costs and compensation paid within Florida's tort system averaged \$4,442 for each Florida household.⁸ Excessive tort costs in Florida are estimated to annually cost the state economy:

- \$7.6 billion in direct costs;
- \$11.8 billion in annual output;
- 126,139 jobs;⁹
- \$614.8 million in State revenues; and
- \$516 million in local government revenues.¹⁰

Evidence Regarding Collateral Source Payments

Background

The aim of tort law is to fairly compensate an injured person for another person's wrongful act. To this end, a court may award an injured person damages for past and future medical expenses.¹¹

History of the Collateral Source Rule

At common law, the collateral source rule prohibited a court's reducing damages for benefits the plaintiff received from collateral sources, like insurance payments or contractual discounts negotiated by the plaintiff's health maintenance organization (HMO).¹² The existence of such collateral sources was inadmissible at trial, based on the rationale that such evidence could mislead the jury on the issue of liability and cause the jury to believe the plaintiff was seeking multiple payments for the same injury.¹³ At common law, an injured person in a personal injury action could recover the full value of the medical services billed, regardless of whether the injured person ever paid the full amount to the medical provider.

The Legislature modified the collateral source rule by enacting the Tort Reform and Insurance Act of 1986 (the Act).¹⁴ The Act requires the court to reduce an award by the total amount of all collateral sources the plaintiff receives, unless a subrogation or reimbursement right¹⁵ exists.¹⁶ The court can reduce past and future damages, but the collateral source rule still prohibits the jury from hearing evidence of collateral sources at trial.¹⁷

⁶ Paul Hinton, David KcKnight, and Lawrence Powell, *Costs and Compensation of the U.S. Tort System*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Oct. 24, 2018), <https://www.instituteforlegalreform.com/research/2018-costs-and-compensation-of-the-us-tort-system>.

⁷ *Id.*

⁸ *Id.*

⁹ The Perryman Group, *supra* at 11-13 (calculating the number of Florida jobs lost by comparing Florida to Ohio and using integrated simulations to measure the dynamic effects on productivity and other economic phenomena).

¹⁰ *Id.* (calculating these figures by comparing Florida to the benchmark state of Ohio, which has enacted tort reforms and ranks near the middle of the Institute for Legal Reform rankings).

¹¹ 17 Fla. Jur 2d Damages s. 7.

¹² Robert E. Gordon & Justin Linn, *Goble, Thyssenkrupp, and the Collateral Source Rule: Resolving The Ongoing Conflict*, 84 FLA. B.J. 18 (2010).

¹³ *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991).

¹⁴ Ch. 86-160, Laws of Fla.; Gordon, *supra* at 18.

¹⁵ "Subrogation" is a process where an insurer pays a loss under an insurance policy and is entitled to all of the rights and remedies belonging to the insured. Black's Law Dictionary (10th ed. 2014). A court's reduction of damages when a right of reimbursement or subrogation exists can cause an inaccurately low award.

¹⁶ S. 768.76(1), F.S.

¹⁷ Gordon, *supra* at 18 (citing *Gormley*, 587 So.2d at 458); see Victor E. Schwartz & Cary Silverman, *Truth in Damages: Florida Juries Should Base Personal Injury Awards on Actual Costs of Treatment, Not Inflated Medical Bills*, <https://www.fljustice.org/files/124353479.pdf> (last visited Mar. 3, 2019).

Medical Billing and Letters of Protection

In a typical personal injury case, a plaintiff receives treatment from a health care provider for his or her injuries. Different providers may have different rates for the same procedure based on various factors.¹⁸ The "list price" of the procedure is rarely the price actually paid. A third party, such as an insurance company, rather than the patient, often negotiates the price of the procedure. The difference between the amount billed (the list price) and the amount paid (the negotiated price), if awarded, is a windfall to the plaintiff, called "phantom damages."¹⁹

When a plaintiff is treated for injuries, he or she may agree to a "letter of protection" with the medical provider, which sets the value of the medical care rendered. The medical provider agrees to defer collection of the medical bill until the plaintiff recovers damages from a lawsuit, at which point the medical provider is paid from the lawsuit's proceeds. The letter of protection's valuation of the medical bills may not accurately reflect what the plaintiff would pay out-of-pocket or what a third party would pay.²⁰

Case Law

Florida case law on admissibility of collateral source medical payments is complicated and sometimes inconsistent. In *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984), the Florida Supreme Court (Court) ruled that the jury could consider the value of unearned governmental or charitable medical services to determine the reasonable cost of the plaintiff's future medical care.²¹

But in 2015, the Court retreated from its decision in *Stanley*, holding Medicare, Medicaid, and "social legislation benefits" inadmissible for the purpose of determining the reasonable cost of future medical care.²² The Court reasoned that the *Stanley* decision was too difficult for courts to apply and that tortfeasors and their insurers should "not enjoy such a windfall at the expense of taxpayers who fund social legislation benefits."²³

The Fourth District Court of Appeal (DCA) held that if Medicare or another governmental plan paid for past medical care, the jury should be free to consider the amounts actually paid by the governmental plan; and that any verdict for past medical expenses should be reduced to the amount Medicare actually paid to the provider.²⁴ The Fourth DCA has also held that evidence of entitlement to future Medicaid benefits is inadmissible, where such evidence is not relevant to the issue of the plaintiff's future medical care.²⁵ In another case, a medical provider billed the plaintiff, and the plaintiff's private health insurer paid an amount less than the billed amount due to a contract between the provider and insurer. The Court required the jury's award reduced to the amount actually paid.²⁶

In contrast, where the plaintiff was not insured and personally negotiated his bills to a lower amount, the Fourth DCA held the jury should hear evidence of the originally-charged amount of the bills, reasoning that the lower price the plaintiff actually paid was negotiated rather than received from a gratuitous source.²⁷

¹⁸ Sarah Kliff and Dan Keating, *One Hospital Charges \$8,000—Another, \$38,000*, WASHINGTON POST (May 8, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/08/one-hospital-charges-8000-another-38000/?utm_term=.ec6886353b67.

¹⁹ *Goble v. Frohman*, 901 So. 2d 830, 832 (Fla. 2005).

²⁰ Caroline C. Pace, Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values, 49-APR Hous. Law. 24, 27 (2012).

²¹ *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514, 515 (Fla. 1984).

²² *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1256-57 (Fla. 2015).

²³ *Id.* at 1256.

²⁴ *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2003).

²⁵ *Velilla v. VIP Care Pavilion, Ltd.*, 861 So. 2d 69, 71-72 (Fla. 4th DCA 2003).

²⁶ *Goble*, 901 So. 2d at 832; see also *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA 2010).

²⁷ *Durse v. Henn*, 68 So. 3d 271, 277 (Fla. 4th DCA 2011).

When the jury is aware of the billed amount but unaware of the amount actually paid, the jury may believe the plaintiff's damages are more severe than they actually are. The jury may use the inflated billed amount as a benchmark to calculate other damages, such as:

- Subjective, noneconomic damages, like pain and suffering or mental anguish, and
- Future medical damages.²⁸

Effect of Proposed Changes

CS/HB 17 establishes a uniform method for accurately determining damages due a plaintiff in an action for tort or contract damages. A plaintiff's recovery for medical treatment is based on the accurate value of the services provided, rather than on an inflated amount billed by the medical provider.

Under the bill, a court's calculation of medical damages depends on the paying entity and the manner in which medical bills are still due, as follows:

- If the plaintiff has already paid for past medical services in full, the maximum amount recoverable is the actual amount paid to the provider, plus any copay or deductible paid by the plaintiff. The billed amount is inadmissible.
- If a government program or private health insurance paid for medical services in full, and no balance is due the provider except a copayment or deductible, the maximum amount recoverable is the actual amount paid to the provider, plus any copayment or deductible owed by the plaintiff. The billed amount is inadmissible.
- If an amount is owed the medical provider for past services, the maximum amount recoverable is the amount accepted from Medicare for such services in the same geographical area. The billed amount may be admitted.
- If the plaintiff seeks damages for future medical or health care services, the maximum amount recoverable is the amount accepted from Medicare for such services in the same geographical area.²⁹ The billed amount may be admitted.

Moreover, if Medicaid, Medicare, or a payor regulated under the Florida Insurance Code covered or is covering the plaintiff's medical services and gives notice of a lien or subrogation claim for past medical expenses, the maximum amount recoverable and admissible into evidence is the amount of the lien or subrogation claim plus any copayments or deductibles paid by the plaintiff. If a lien is asserted by any entity other than Medicaid, Medicare, or a regulated payor, the maximum amount recoverable is the amount accepted from Medicare for such services in the same geographical area.

These standards provide for an accurate assessment of medical damages, regardless of whether the medical bill is already paid or whether the plaintiff has a letter of protection to defer payment until the litigation is over. The bill also prohibits the discovery or disclosure of any contracts between health care providers and insurers or HMOs and provides that such contracts are inadmissible at trial.

These provisions apply only to actions to recover tort or contract damages that arise after the effective date of the bill. The bill has no other application or effect regarding compensation paid to providers of medical or health care services.

²⁸ Florida House of Representatives, Civil Justice Subcommittee Meeting Packet, February 20, 2019, [https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2019&DocumentType=Meeting Packets&FileName=cjs 2-20-19.pdf](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2019&DocumentType=Meeting%20Packets&FileName=cjs%202-20-19.pdf) (last visited Mar. 3, 2019).

²⁹ The cost and quality of medical services vary substantially across different U.S. regions. The U.S. government compiles information reflecting these variations. See CENTERS FOR MEDICARE & MEDICAID SERVICES, Medicare Geographic Variation, <https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/medicare-geographic-variation/index.html> (last visited Mar. 3, 2019).

Limits on Noneconomic Damages

Background

Noneconomic damages are nonfinancial losses resulting from an injury, which a plaintiff can recover in a lawsuit. Such damages include, but are not limited to:

- Pain and suffering;
- Inconvenience;
- Mental anguish;
- Disfigurement;
- Loss of capacity for enjoyment of life;
- Loss of consortium;
- Loss of companionship; and
- Other nonfinancial losses which cannot be calculated.³⁰

In 1986, the Legislature limited recovery of noneconomic damages to \$450,000 in the Tort Reform and Insurance Act (Act).³¹ The next year, the Court held the \$450,000 limit unconstitutional as an infringement on the state Constitution's right of access to courts,³² reasoning that the right of access to courts³³ prohibits the Legislature from limiting noneconomic damages as a whole unless:

- The Legislature provides a reasonable alternative remedy or commensurate benefit; or
- There is overpowering public necessity for abolishment of the right and no other method of meeting the public necessity exists.³⁴

Justice Overton, writing separately and joined by Justice Grimes, indicated he would have upheld the legislative cap on noneconomic damages, since the cap could ultimately result in better access to insurance:

It appears to me the record can also be read to conclude that the \$450,000 limitation on damages for noneconomic losses was an important factor in assuring that more tortfeasors will be covered by insurance and thereby allow more victims a source of recovery. Without question, making sure that insurance will be available for injured persons to recover damages for economic and noneconomic losses is clearly a justifiable legislative purpose. Most individuals and ordinary businesses cannot respond to a \$450,000 judgment without insurance coverage and the access-to-the-court requirement has no meaning whatever if there is no ability to collect a judgment. It is collecting a judgment—not filing a lawsuit—that counts.³⁵

Effect of Proposed Changes

CS/HB 17 limits recovery of noneconomic damages to \$1,000,000 per person for:

- Pain and suffering;
- Inconvenience;
- Mental anguish;
- Disfigurement;
- Loss of capacity for enjoyment of life;
- Loss of consortium;
- Loss of a decedent's companionship and protection;
- Lost parental companionship;

³⁰ See s. 766.202(8), F.S.; *Plantation Gen. Hosp. Ltd. Partnership v. DOAH*, 243 So. 3d 985, 992 (Fla. 4th DCA 2018).

³¹ Ch. 86-160, s. 59, Laws of Fla.

³² *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1087-89 (Fla. 1987).

³³ Art. I, s. 21, Fla. Const.

³⁴ *Smith*, 507 So. 2d at 1088 (citing *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)).

³⁵ *Smith*, 507 So. 2d at 1096 (Overton, J., specially concurring).

- Instruction and guidance; and
- Other nonpecuniary damages.

The jury may not be informed of the limit on noneconomic damages. The limit does not apply to:

- Punitive damages.
- Damages for an intentional tort.

The bill provides an effective date of July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Creates s. 768.755, F.S., relating to damages recoverable for cost of medical or health care services; evidence of amount of damages; applicability.

Section 2: Creates s. 768.82, F.S., relating to limit on noneconomic damages.

Section 3: Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

The bill may lower tort costs, leading to lower insurance costs, lower prices, and better availability of medical services. The savings are indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

In previous years, the Florida Supreme Court held certain limits on noneconomic damages to be unconstitutional, based on the circumstances of those cases.³⁶ However, courts must evaluate each case on its own facts and the Court may revisit previous cases when necessary because of changes in circumstances or legal error.³⁷

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 6, 2019, the Civil Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the rational use of a product language.
- Removed physical impairment from the list of noneconomic damages.
- Clarified that the noneconomic damages cap is inapplicable to punitive damages and damages for an intentional tort.
- Amended the bill title to “damages” to reflect changes made by the amendment.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

³⁶ *Estate of McCall*, 134 So. 3d 894; *Smith*, 507 So. 2d 1080; see also *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017).

³⁷ See, e.g., *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012) (“The doctrine of stare decisis bends where there has been a significant change in circumstances since the adoption of the legal rule or where there has been an error in legal analysis”).