

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7021 PCB HHS 22-01 Covid-19-related Claims Against Health Care Providers

SPONSOR(S): Health & Human Services Committee, Burton

TIED BILLS: IDEN./SIM. BILLS: SB 610, SB 7014

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	15 Y, 5 N	McElroy	Calamas
1) Judiciary Committee	15 Y, 5 N	Mawn	Kramer

SUMMARY ANALYSIS

New mutations of the COVID-19 virus continue to prolong the duration of the current pandemic. Scientific knowledge of COVID-19 continues to grow exponentially due to the novel and ever-evolving nature of the disease. Likewise, guidance to health care providers and long-term care facilities for treatment and infection prevention has rapidly changed as understanding of the disease has evolved. In response, the Legislature passed CS/SB 72 in 2021, which, among other things, created s. 768.381, F.S., establishing certain liability protections for health care providers. Specifically, this section provides heightened civil liability protections to certain health care providers for claims brought by patients and residents related to:

- The diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- The provision of a novel or experimental COVID-19 treatment;
- The transmission of COVID-19;
- The delay or cancellation of a surgery or a medical procedure, test, or appointment in certain situations;
- An act or omission with respect to an emergency medical condition in certain situations; or
- The treatment of a patient with COVID-19 whose injuries were directly related to an exacerbation of preexisting conditions by COVID-19.

Current law requires a plaintiff who brings a COVID-19-related claim against a health care provider to prove by the greater weight of the evidence that the defendant was grossly negligent or committed intentional misconduct. The law also enumerates certain affirmative defenses available to defendants against such claims.

The health care provider liability protections apply to COVID-19-related claims that accrued before CS/SB 72's effective date and within 1 year after the bill's effective date. CS/SB 72 became law on March 29, 2021. Thus, these liability protections will not apply to any claim that accrues after March 29, 2022.

HB 7021 extends the heightened civil liability protections for health care providers established in s. 768.381, F.S., to COVID-19-related claims accruing before June 1, 2023.

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

The bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

New mutations of the COVID-19 virus continue to prolong the duration of the current pandemic. Scientific knowledge of COVID-19 continues to grow exponentially due to the novel and ever-evolving nature of the disease. Likewise, guidance to health care providers and long-term care facilities for treatment and infection prevention has rapidly changed as understanding of the disease has evolved. In response, the Legislature passed CS/SB 72 in 2021, which, among other things, created s. 768.381, F.S., establishing certain liability protections for health care providers. Specifically, this section provides heightened civil liability protections to certain health care providers for civil liability claims based on a breach of duty owed to a patient or resident related to:

- The diagnosis or treatment of, or failure to diagnose or treat, a person for COVID-19;
- The provision of a novel or experimental COVID-19 treatment;
- The transmission of COVID-19;
- The delay or cancellation of a surgery or medical procedure, test, or appointment in certain situations;
- An act or omission with respect to an emergency medical condition, which act or omission was due to a lack of resources directly caused by the COVID-19 pandemic; or
- The treatment of a patient with COVID-19 whose injuries were directly related to an exacerbation of preexisting conditions by COVID-19.

The health care provider liability protection covers:

- Any activity, service, agency, or facility regulated by the Agency for Health Care Administration, including hospitals, health care clinics, nursing homes, assisted living facilities, and home health agencies.
- A clinical laboratory providing services in the state or services to health care providers in the state, if the clinical laboratory is certified by the Centers for Medicare and Medicaid Services under the federal Clinical Laboratory Improvement Amendments and the federal rules adopted thereunder.
- Federally qualified health care centers.
- Any site providing health care services which was established for the purpose of responding to the COVID-19 pandemic under any federal or state order, declaration, or waiver.
- Licensed acupuncturists, medical physicians, osteopathic physicians, chiropractors, podiatrists, naturopathic physicians, optometrists, nurses, pharmacists, dentists, dental hygienists, midwives, electrologists, massage therapists, opticians, physical therapists, psychologists, clinical social workers, mental health counselors, marriage and family therapists, speech-language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, nutritionists, athletic trainers, orthotists, pedorthists, prosthetists, clinical laboratory personnel, medical physicists, radiological personnel, and home health aides;
- Clinical and non-clinical staff of licensed substance abuse and mental health providers.
- Licensed continuing care facilities.
- Pharmacies.

Under current law, a plaintiff bringing a COVID-19-related claim against a health care provider must:

- Plead the claim with particularity; and if the plaintiff fails to do so, the court must dismiss the complaint.
- Prove by the greater weight of the evidence that the defendant was grossly negligent or committed intentional misconduct.

Moreover, if a health care provider proves by the greater weight of the evidence the existence of an affirmative defense applicable to a specific COVID-19-related claim, the health care provider has no

liability for that claim. The affirmative defenses that may apply to a COVID-19-related claim include, in addition to other affirmative defenses recognized by law, the health care provider's:

- Substantial compliance with government-issued health standards specifically relating to COVID-19 or other relevant standards.
- Substantial compliance with government-issued health standards relating to infectious diseases in the absence of standards specifically applicable to COVID-19.
- Substantial compliance with any applicable government-issued health standards relating to COVID-19 or other relevant standards if the standards were in conflict.
- Impossibility of substantial compliance with government-issued health standards because of:
 - Widespread shortages of necessary supplies, materials, equipment, or personnel.
 - Insufficient time to implement the standards.

The applicable statute of limitations for a COVID-19-related claim against a health care provider:

- Arising out of the transmission, diagnosis, or treatment of COVID-19 is one year after the later of the:
 - Date of death due to COVID-19;
 - Hospitalization related to COVID-19; or
 - First diagnosis of COVID-19 which forms the basis of the action.
- Not arising out of the transmission, diagnosis, or treatment of COVID-19 is one year after the cause of action accrues.

The health care provider liability protections apply to COVID-19-related claims that accrued before CS/SB 72's effective date and within 1 year after the bill's effective date. CS/SB 72 became law on March 29, 2021.¹ Thus, these liability protections will not apply to any COVID-19-related claim that accrues after March 29, 2022.

Effect of Proposed Bill

HB 7021 extends the heightened civil liability protections for health care providers established in s. 768.381, F.S., to COVID-19-related claims that accrue before June 1, 2023.²

The bill takes effect upon becoming a law.

B. SECTION DIRECTORY:

Section 1: Amends s. 768.381, F.S., relating to COVID-19-related claims against health care providers.

Section 2: Provides an effective date of upon becoming a law.

¹ See ch. 2021-1, Laws of Fla.

² During the 2021 Special Session B, the Legislature enacted HB 1B which contained several COVID-19 specific provisions. Each of these provisions are set to expire on June 1, 2023. See ch. 2021-272, Laws of Fla.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill extends a COVID-19-related liability limitation for health care providers created by CS/SB 72 (2021), which may reduce the number of claims filed in the state court system.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill extends immunities and processes that may reduce the financial risk of health care providers and long-term care facilities during the COVID-19 pandemic. This may increase the likelihood that such providers and facilities will remain solvent through the pendency of the pandemic.

D. FISCAL COMMENTS:

None.

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:

Access to Courts

The Florida Constitution provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."³ In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court established a test to determine when the Legislature may restrict a judicial remedy. Where citizens have had a historical right of access to the courts, whether through statute or common law, the Legislature can only eliminate a judicial remedy under two circumstances. First, if it asserts a valid public purpose, the Legislature may restrict access to the courts if it provides a reasonable alternative to litigation.⁴ Second, if the Legislature finds that there is an overpowering public necessity and that there is no alternative method for meeting that necessity, it may restrict access to the courts.⁵

CS/SB 72 (2021) made legislative findings of an overpowering public necessity, in light of the unprecedented nature of the COVID-19 pandemic. Moreover, HB CS/SB 72 (2021), HB 7021 does

³ Art. I, s. 21, Fla. Const.

⁴ See *Kluger*, 281 So. 2d at 4.

⁵ *Id.*

not eliminate civil liability for a COVID-19-related claim, but rather provides a safe harbor for health care providers in certain circumstances.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES