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 Health Regulation Committee

BILL: SB 1506

INTRODUCER: Senator Thrasher

SUBJECT: Medical Malpractice

DATE: February 8, 2012 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Stovall	HR	**Pre-meeting**
2.			JU	
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill extends sovereign immunity to emergency health care providers when providing emergency medical care or treatment as required under state law, unless the emergency health care provider opts out of this agency status. An emergency health care provider who is a physician must indemnify the state up to the liability limits of $200,000 per person and $300,000 total for a single incident. If the physician fails to indemnify the state, the Department of Health (DOH) is required to issue an emergency order suspending the physician's license, and the physician is subject to discipline under the applicable practice act.

The bill changes the burden of proof for a claimant in an action alleging a breach of the prevailing professional standard of care in an action for damages based on death or personal injury that allegedly resulted from the failure of a health care provider to order, perform, or administer supplemental diagnostic tests. The burden of proof is increased from a greater weight of the evidence to clear and convincing evidence.

The bill also authorizes a prospective defendant, or his or her legal representative, to conduct ex parte interviews of the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative. Notice of any intended interviews must be provided to the claimant at least 10 days before the date of the interview.

This bill substantially amends the following sections of the Florida Statutes: 766.102, 766.106, and 768.28.

II. Present Situation:

Standard of Proof in Medical Malpractice Actions

In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that the death or injury resulted from the negligence of a health care provider, the claimant has the burden of proving by the greater weight of evidence that the alleged action of the health care provider represented a breach of the prevailing professional standard of care for that health care provider. The prevailing professional standard of care is that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.[1] Nevertheless, s. 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."

Greater weight of the evidence means the "more persuasive and convincing force and effect of the entire evidence in the case."[2] Other statutes, such as license disciplinary statutes involving the revocation or suspension of a license, require a heightened standard of proof called "clear and convincing evidence."[3] 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.[4]

Medical Malpractice Presuit Investigation

Prior to the filing of a lawsuit, the person allegedly injured by medical negligence or a party bringing a wrongful death action arising from an alleged incidence of medical malpractice (the claimant) and the defendant (the health care professional or health care facility) are required to conduct presuit investigations to determine whether medical negligence occurred and what damages, if any, are appropriate.

The claimant is required to conduct an investigation[5] to ascertain that there are reasonable grounds to believe that:

- A named defendant in the litigation was negligent in the care or treatment of the claimant; and
- That negligence resulted in injury to the claimant.

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[1] S. 766.102, F.S.
[2] *Castillo v. E.I. Du Pont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1277 (Fla. 2003).
[3] *See e.g.,* ss. 458.331(3), and 459.015(3), F.S.
[4] *Inquiry Concerning Davey*, 645 So. 2d 398, 404 (Fla. 1994)(quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).
[5] S. 766.203, F.S.

After completion of the presuit investigation and prior to filing a complaint for medical negligence, a claimant shall notify each prospective defendant of intent to initiate litigation for medical negligence.[6] Notice to each prospective defendant must include, if available, 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, copies of all of the medical records relied upon by the expert in signing the affidavit, and an executed authorization for release of protected health information. The presuit notice is void if this authorization does not accompany the presuit notice.[7]

A suit may not be filed for a period of 90 days after notice is mailed to any prospective defendant. The statue of limitations is tolled during the 90-day period. During the 90-day period, the prospective defendant or the defendant's insurer or self-insurer shall conduct a presuit investigation to determine the liability of the defendant.

Before the defendant issues his or her response, the defendant or his or her insurer or self-insurer is required to ascertain whether there are reasonable grounds to believe that:

- The defendant was negligent in the care or treatment of the claimant; and
- That negligence resulted in injury to the claimant.

Corroboration of the lack of reasonable grounds for medical negligence litigation must be provided by submission of a verified written medical expert opinion which corroborates reasonable grounds for lack of negligent injury sufficient to support the response denying negligent injury.

At or before the end of the 90 days, the prospective defendant or the prospective defendant's insurer or self-insurer shall provide the claimant with a response:

- Rejecting the claim;
- Making a settlement offer; or
- Making an offer to arbitrate in which liability is deemed admitted and arbitration will be held only on the issue of damages. This offer may be made contingent upon a limit of general damages.

Failure of the prospective defendant or insurer or self-insurer to reply to the notice within 90 days after receipt is deemed a final rejection of the claim for purposes of this provision.

Discovery and Admissibility of Evidence

Statements, discussions, written documents, reports, or other work product generated by the presuit screening process are not discoverable or admissible in any civil action for any purpose by the opposing party.[8] All participants, including, but not limited to, physicians, investigators,

[6] S. 766.106, F.S.

[7] S. 766.1065(1), F.S. If the authorization is revoked, the presuit notice is deemed retroactively void from the date of issuance, and any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void.

[8] However, the presuit expert witness opinions are subject to discovery under s. 766.203(4), F.S.

witnesses, and employees or associates of the defendant, are immune from civil liability arising from participation in the presuit screening process.[9]

Upon receipt by a prospective defendant of a notice of claim, the parties are required to make discoverable information available without undertaking formal discovery. Informal discovery may be used to obtain unsworn statements, the production of documents or things, and physical and mental examinations as follows:[10]

- Unsworn statements – Any party may require other parties to appear for the taking of an unsworn statement. Unsworn statements may be used only for the purpose of presuit screening and are not discoverable or admissible in any civil action for any purpose by any party.
- Documents or things – Any party may request discovery of documents or things. This includes medical records.
- Physical and mental examination – A prospective defendant may require an injured claimant to be examined by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination of behalf of all potential defendants. The examination report is available to the parties and their attorney and may be used only for the purpose of presuit screening. Otherwise the examination is confidential.
- Written questions – Any party may request answers to written questions.
- Unsworn statements of treating health care providers – The statements must be limited to those areas that are potentially relevant to the claim. Reasonable notice and an opportunity to be heard must be given to the claimant before taking unsworn statements. The claimant, or claimant's legal representative, has the right to attend the taking of these unsworn statements.

The failure to cooperate on the part of any party during the presuit investigation may be grounds to strike any claim made, or defense raised in the suit.[11]

Sovereign Immunity Generally

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.

Under this law, 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.

Instead, the state steps in as the party litigant and defends against the claim. The recovery by any one person is limited to $200,000 for one incident and the total recovery related to one incident is

[9] S. 766.106(5), F.S.
[10] S. 766.106(6), F.S.
[11] S. 766.106(7), F.S.

limited to $300,000. For purposes of this analysis, when the term sovereign immunity it used, it means the application of sovereign immunity and the limited waiver of sovereign immunity as provided in s. 768.28, F.S.

Extension of Sovereign Immunity to Agents

Agents are generally covered under the provisions of sovereign immunity based upon a contractual relationship, such as in s. 766.1115, F.S., related to the Access to Health Care Act, or as a volunteer to a state agency, such as in part IV of ch. 110, F.S.

Under the school health services program, health care entities receive a limitation on their civil liability under the doctrine of sovereign immunity. Under s. 381.0056(10), F.S., any health care entity that provides school health services under contract with the DOH under a school health services plan developed under the act, and as part of a school nurse service public-private partnership, is deemed to be a corporation acting primarily as an instrumentality of Florida solely for the purpose of limiting liability under s. 768.28(5), F.S.

Additional persons identified in s. 768.28, F.S., are designated as agents for purposes of sovereign immunity. These include:

- A Florida Health Services Corps member while providing uncompensated services to medically indigent persons who are referred by the DOH;
- A public defender or her or his employee or agent, including, among others, an assistant public defender and an investigator;
- Health care providers or vendors, or any of their employees or agents, that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates of the state correctional system. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- Regional poison control centers that are coordinated and supervised under the DOH. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- Operators, dispatchers, and providers of security for rail services and rail facility maintenance providers in the South Florida Rail Corridor, or any of their employees or agents, that are under contract with the South Florida Regional Transportation Authority or the Department of Transportation;
- A professional firm and its employees that provide monitoring and inspection services of state roadway, bridge, or other transportation facility construction projects pursuant to a contract with the Department of Transportation. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- Providers and vendors, and their employees or agents, under contract with the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity;
- A nonprofit independent college or university located and charted in this state which owns or operates an accredited medical school, or any of its employees or agents, and which has agreed in an affiliation agreement or other contract to provide, or permit its employees or

agents to provide patient services as agents of a teaching hospital.[12] The contract must provide for indemnification of the teaching hospital, up to the waiver of sovereign immunity limits, by the agency for any liability incurred which was caused by the negligence of the college or university or its employees or agents; and
- Certain health care practitioners, under contract with a state university board of trustees to provide medical services to student athletes. The contract must provide for indemnification of the state for any liabilities incurred up to statutory limits of the waiver of sovereign immunity.

When not specified in statute, the existence of an agency relationship is generally a question of fact to be resolved by the fact finder based on the facts and circumstances of a particular case. The factors required to establish an agency relationship are: acknowledgment by the principal that the agent will act for him; the agent's acceptance of the undertaking; and control by the principal over the actions of the agent.[13]

Emergency Departments

There are 209 hospitals in the state with a dedicated emergency department (ED).[14] Some hospital EDs and physicians employed in those EDs are currently covered by sovereign immunity. There are 34 public hospitals in the state that are part of the state or a county, hospital district, or hospital authority with sovereign immunity. In addition, attending physicians and resident physicians affiliated with state universities have sovereign immunity. In calendar year 2010, there were 8,117,359 emergency department visits in the state.[15]

Emergency Services and Care Provisions

Section 395.1041, F.S., requires every hospital that has an ED to provide emergency services and care to any person upon request, or when emergency services and care are requested on behalf of a person, without regard to the person's race, ethnicity, religion, national origin, citizenship, age, sex, preexisting medical condition, physical or mental handicap, insurance status, economic status, or ability to pay for medical services. Emergency services and care means appropriate screening, examination, and evaluation to determine if an emergency medical condition[16] exists

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[12] Teaching hospitals is defined in s. 768.28(10)(f), F.S., to mean a teaching hospital as defined in s. 408.07 which is owned or operated by the state, a county or municipality, a public health trust, a special taxing district, a governmental entity having health care responsibilities, or a not-for-profit entity that operates such facility as an agent of the state, or a political subdivision of the state, under a lease or other contract.

[13] See *Goldschmidt v. Holman,* 571 So.2d 422 (Fla. 1990); *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265, 1268; and *Theodore ex rel. Theodore v. Graham*, 733 So2d 538 (Fla 4th DCA), rev. denied, 737 So.2d 551 (Fla. 1999), where the court determined that the government did not retain actual control or the right to control the physician's professional judgment over patient treatment decisions.

[14] *See* the Hospital ER Services list as of 2/3/2011 published by the Agency for Health Care Administration, available at: <http://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Hospital_Outpatient/forms/HospitalERServicesInventory.pdf> (Last visited on February 7, 2012).

[15] Information available at: < http://www.floridahealthfinder.gov/researchers/OrderData/order-note.aspx#emergency> (Last visited on February 7, 2012).

[16] An emergency medical condition means a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following: (1) serious jeopardy to patient health, including a pregnant woman or fetus; (2) serious impairment of bodily functions; or (3) serious dysfunction of any bodily organ or part. With respect to a pregnant woman this includes: (1)

and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition, within the service capability of the facility. These services must be provided *at all times* unless the Agency for Health Care Administration (Agency) has granted an exemption. Hospitals are required to maintain a list of "on-call" critical care physicians (specialists) available to the hospital.[17]

The Federal Emergency Medical Treatment and Labor Act[18] (EMTALA) was enacted to ensure public access to emergency services regardless of a person's ability to pay and applies to a hospital with an ED that participates in the Medicare program. Most Florida hospitals participate in Medicare. Similar to Florida's access to emergency services and care law, EMTALA specifies that a hospital with an ED must provide for an appropriate medical screening examination to determine whether an emergency medical condition exists for any individual who comes to an ED and requests examination or treatment of a medical condition. If an emergency medical condition exists, the hospital must provide, within the staff and facilities available at the hospital, further medical examination and treatment as may be required to stabilize the medical condition for transfer of the patient to another medical facility or discharge. In this context, to stabilize means that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from the facility or that a pregnant woman has delivered the child and the placenta. In certain situations, a patient who is not stabilized may be transferred to another hospital.

Section 401.45, F.S., relating to emergency medical services, provides that a person may not be denied needed prehospital treatment or transport. In addition, this section provides that a general hospital or a specialty hospital that has an ED may not deny a person treatment for any emergency medical condition that will deteriorate from a failure to provide such treatment.

Physician Availability in Emergency Departments

The availability of physicians, especially physician specialists, in hospital EDs has been a concern in Florida and nationwide for several years. The Florida Senate Committee on Health Regulation studied this situation in the 2007-2008 interim and issued Interim Project Report 2008-138, *Availability of Physicians and Physician Specialists for Hospital Emergency Services and Care* in November, 2007.[19] The report found that there are multiple reasons why physicians are unavailable for on-call coverage in hospital EDs and the problem varies by locality, specialty, and hospital. However, in 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

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that there is inadequate time to effect safe transfer to another hospital prior to delivery; (2) that a transfer may pose a threat to the health and safety of the patient or fetus; or (3) that there is evidence of the onset and persistence of uterine contractions or rupture of the membranes. See s. 395.002(8), F.S.

[17] Rule 59A-3.255(6), Florida Administrative Code.

[18] Section 1867 of the Social Security Act, 42 U.S.C. s 1395dd.

[19] This report is available at: <http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-138hr.pdf > (Last visited on March 2, 2010). An addendum to the report was subsequently published and is available at: <http://www.flsenate.gov/data/Publications/2008/Senate/reports/interim_reports/pdf/2008-138ahr.pdf> (Last visited on March 2, 2010).

unknown to the physician. In some cases, however, the problem is simply an inadequate supply of a particular type of specialist in the market.

Good Samaritan Act

Under the Good Samaritan Act in s. 768.13, F.S., a health care provider, including a hospital, providing emergency services imposed under the three emergency services and care provisions, s. 395.1041, F.S., EMTALA, or prehospital treatment or transport services in s. 401.45, F.S., has limited tort liability. Under this law, a health care provider is only liable for damages resulting from providing, or failing to provide, medical care or treatment under circumstances demonstrating a reckless disregard for the consequences so as to affect the life or health of another.

Limitation of Noneconomic Damages

Section 766.118(4) and (5), F.S., provides for a limitation on noneconomic damages for the negligence of practitioners and nonpractitioners providing emergency services and care, emergency medical services, or services pursuant to the EMTALA requirements to persons with whom the practitioner does not have a then-existing health care patient-practitioner relationship for that medical condition. The limitation applies to practitioners and nonpractitioners who are not covered by sovereign immunity under s. 768.28, F.S.

Under this provision, the noneconomic damages are limited to $150,000 per claimant, with the total recoverable by all claimants limited to $300,000 in a cause of action for personal injury or wrongful death arising from medical negligence of practitioners. The noneconomic damages are limited to $750,000 per claimant, with the total recoverable by all claimants limited to $1.5 million for defendants other than practitioners.

These limitations apply to noneconomic damages awarded as a result of any act or omission of providing medical care or treatment, including diagnosis, that occurs prior to the time the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient. If surgery is required as a result of the emergency within a reasonable time after the patient in stabilized, then these limitations apply to any act or omission of providing medical care or treatment which occurs prior to the stabilization of the patient following the surgery.

Statutory Immunity from Civil Liability

Florida law also provides for immunity from civil liability for certain persons in certain situations. These persons are not acting as instrumentalities of the state. Examples include:

- Section 768.13, F.S., related to the Good Samaritan Act, as it applies to any person, including those licensed to practice medicine, who gratuitously provide emergency care or treatment related to and arising out a declared emergency or the scene of an emergency outside of a place having proper medical equipment;
- Section 768.1325, F.S., related to the Cardiac Arrest Survival Act for certain persons using an automated external defibrillator device;

- Section 768.1345, F.S., related to immunity from a professional malpractice action when a licensed professional is providing professional services during a period of a declared emergency for which no compensation is sought or received;
- Section 768.135, F.S., related to a volunteer physician for a school athletic team;
- Section 768.1355, F.S., related to the Florida Volunteer Protection Act; and
- Section 768.137, F.S., related to protecting a farmer who gratuitously allows a person to enter upon his or her land to remove farm produce or crops remaining in the fields following the harvest.

Medical Malpractice Insurance & Claims

The Office of Insurance Regulation (OIR) publishes a report annually on medical malpractice insurance and claims.[20] According to the most recent report of 2010 data that was published on October 1, 2011:

- In 2010, the Florida medical malpractice insurance companies reported 2,520 closed claims in Florida. This continues the annual decline in the number of closed claims reported by Florida medical malpractice insurance companies. For 2009, 2087 closed claims were reported, for 2008, 3,336 were reported, for 2007, 3,553 were reported, and for 2006, 3,811 closed claims were reported. [21]
- As in previous reports, the most commonly reported claims location was hospital inpatient facilities with 1,204 claims closed. The emergency room ranked third in the injury location with 318 closed claims (see page 44).

Division of Risk Management

The Division of Risk Management (DRM) within the Department of Financial Services is responsible for investigating and making appropriate dispositions of all general liability claims for damages filed against the state due to alleged negligent acts of state employees or agents of the state. When a state employee or agent whose acts are covered by sovereign immunity is sued, the DRM contracts with outside counsel to defend the lawsuit. For FY 2008-09, the DRM incurred $4,102,091 in attorney fees and expenses for general liability claims against the state.

III. Effect of Proposed Changes:

The bill provides Legislative findings and intent concerning the importance of the availability of emergency services and care from health care providers and maintaining a viable system of providing for the emergency medical needs of the state’s residents and visitors. Providers of emergency care are also a critical element in responding to natural disasters and emergency situations that may affect local communities, the state, and the country. Both state and federal

[20] Florida OIR 2011 Annual Report – October 1, 2011 *Medical Malpractice Financial Information Closed Claim Database and Rate Filings,* available at: <http://www.floir.com/siteDocuments/MedicalMalReport10012011.pdf > (Last visited on February 8, 2012).
[21] Florida OIR 2010 Annual Report – October 1, 2010 *Medical Malpractice Financial Information Closed Claim Database and Rate Filings,* available at: < http://www.floir.com/siteDocuments/MedicalMalReport10012010.pdf> (Last visited on February 8, 2012). *See also* Senate Bill *Analysis and Fiscal Impact Statement for SB 1474* (2010), available at: <http://archive.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&ElementID=JumpToBox&SubMenu=1&Year=2010&billnum=1474> (Last visited on February 8, 2012).

law require emergency medical services and care to be provided to all persons who present themselves to hospitals seeking such care. Furthermore, emergency medical treatment may not be denied by providers of emergency medical services to persons who have or are likely to have an emergency medical condition, regardless of a guarantee of payment or other consideration for the provision of such care. The Legislature further recognizes that providers of emergency medical services provide a significant amount of uncompensated emergency medical care in furtherance of this governmental interest.

The bill provides additional Legislative findings as follows:

- A significant proportion of the residents of this state who are uninsured or receive Medicaid or Medicare assistance are unable to access needed health care on an elective basis because health care providers fear the increased risk of medical malpractice liability. In order to obtain medical care, these patients frequently are forced to seek care through providers of emergency medical services.
- Providers of emergency medical services in this state have reported significant problems regarding the affordability of professional liability insurance. The cost of professional liability insurance in this state is more expensive than the national average. A significant number of physicians who hold a board certification in a specialty have resigned from serving on hospital staffs or have otherwise declined to provide on-call coverage to hospital emergency departments due to the increased exposure to medical malpractice liability created by treating patients admitted into the emergency department of a medical facility, thereby creating a void that has an adverse effect on emergency patient care.

It is the intent of the Legislature that hospitals, providers of emergency medical services, and physicians ensure that patients who need emergency medical treatment and who present themselves to hospitals for emergency medical services and care have access to these needed services.

Section 2 amends s. 766.102, F.S., to change the burden of proof for a claimant in an action alleging a breach of the prevailing professional standard of care in an action for damages based on death or personal injury that allegedly resulted from the failure of a health care provider to order, perform, or administer supplemental diagnostic tests. The burden of proof is increased from greater weight of the evidence to clear and convincing evidence.

Section 3 amends s. 766.106, F.S., to authorize a prospective defendant, or his or her legal representative, to conduct ex parte interviews of the claimant's treating health care providers without the presence of the claimant or the claimant's legal representative. Notice of any intended interviews must be provided to the claimant at least 10 days before the date of the interview.

Section 4 amends s, 768.28, F.S., to extend sovereign immunity, and the waiver of sovereign immunity, to any emergency health care provider when providing emergency medical care or treatment as required under state law. These emergency health care providers are made agents of the state, unless already covered as an officer, employee, or agent of the state or of any of its subdivisions, or unless the emergency health care provider opts out of this agency status. Examples of emergency health care providers to which this agency status is extended include: private hospitals, physicians, dentists, nurses, emergency medical technicians, and paramedics.

An emergency health care provider who is a medical or osteopathic physician, licensed under ch. 458 or ch. 459, F.S., must indemnify the state for any judgments, settlement costs, or other liabilities incurred up to the liability limits of $200,000 per person and $300,000 total for a single incident.

An emergency health care provider who is licensed in this state who fails to indemnify the state after reasonable notice and written demand to do so is subject to an emergency suspension order of the provider's license. The DOH shall issue an emergency order suspending the physician's license within 30 days after receiving notice from the DRM that the licensee has failed to satisfy his or her obligation to indemnify the state or enter into a repayment agreement. Also, the failure to indemnify the state constitutes grounds for disciplinary action under the applicable practice act and under ch. 456, F.S., which provides general provisions for all health professions.

Section 5 provides an effective date of July 1, 2012.

Other Potential Implications:

The bill does not require a contractual relationship between the state and the emergency health care provider. It is not clear which state agency is responsible for the agency relationship and how control over the activities of the emergency health care provider will be accomplished in order to withstand a challenge to the agency relationship and the extension of sovereign immunity under this act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

This bill, if enacted, might be challenged as a violation of an individual's right of access to the courts. Article I, s. 21 of the Florida Constitution 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. In order to withstand such a challenge, the extension of sovereign immunity (and the waiver thereto) to these health care providers would need to meet the

test announced by the Florida Supreme Court in *Kluger v. White*.[22] Under that case, the Legislature must provide 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.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Certain health care providers who provide emergency services and care might experience reduced rates for malpractice insurance.

C. Government Sector Impact:

The DOH indicates there may be an indeterminate increase in the number of complaints filed with the DOH, emergency suspension orders, and disciplinary cases for physicians who fail to indemnify the state up to the limits of liability ($200,000/$300,000).

The fiscal impact is indeterminate at this time. The DRM indicates that additional staff to receive and adjust claims will be needed and here might be cash flow implications with respect to payments from the Risk Management Trust Fund and indemnification from providers. In addition, the bill only requires indemnification from allopathic and osteopathic physicians; however the bill provides coverage for all emergency health care providers. Any Claim Bills that the Legislature enacts as a result of excess judgments could also create a fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The informal discovery options include taking unsworn statements of treating health care providers. Lines 176 and 177 provide in existing law that the claimant or claimant's legal representative has the right to attend the taking of such unsworn statements. Lines 178 – 186 provides for ex parte interviews of treating health care providers without the presence of the claimant or the claimant's legal representative. Neither "unsworn statements" nor "ex parte interviews" are defined. To avoid inconsistency and potential litigation, it might be prudent to define or distinguish an unsworn statement and an ex parte interview.

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

The bill does not identify which state agency is responsible for providing the coverage for the agency relationship. The DRM advises that the Risk Management Fund can only cover agents of a named state department.[23]

Clarification might be needed if the requirement for a provider to indemnify the state for any judgments, settlement costs, or other liabilities incurred includes attorney defense fees and costs.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

[23] Department of Financial Services *Bill Analysis & Financial Impact Statement* for SB 1506, dated January 20, 2012, on file with the Senate Health Regulation Committee.