

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 17 Damages

**SPONSOR(S):** Commerce Committee, 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	13 Y, 7 N, As CS	Barry	Hamon
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 by compensating injured parties fairly, resolving disputes, and discouraging undesirable behavior. A flawed tort liability system, in contrast, is detrimental to society as a whole by increasing costs and disputes, raising insurance premiums and healthcare costs, and stifling economic growth.

Florida has the highest tort liability system costs in the U.S. 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 liability system was the equivalent of \$4,442 for every household in the state. Recent attempts by the Legislature to address increasingly excessive costs of the tort liability system have been largely unsuccessful.

CS/HB 17 modifies the damages recoverable in certain tort actions by requiring juries in certain tort cases to consider an estimated value of medical services rendered based on an independent database of amounts actually paid by other patients for similar medical care, thereby ensuring juries in such cases do not rely solely on the amount billed by the provider of medical or health care services in determining damages.

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 Liability 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;
- Shifts the loss to responsible parties;
- Provides an incentive to prevent future harm; and
- Deters undesirable behavior.<sup>1</sup>

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 and costs 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.<sup>2</sup>

Florida has the fifth-worst tort liability system for business, according to the U.S. Chamber of Commerce Institute for Legal Reform's most recent "Lawsuit Climate Survey."<sup>3</sup> The Survey's questionnaire asked respondents to grade each state's liability system on the following criteria:

- 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 Survey noted that the City of Miami and Miami-Dade County are among a small number of local jurisdictions in the U.S. known for having a particularly unfair and unreasonable litigation environment.<sup>4</sup>

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<sup>1</sup> Am. Jur. 2d Torts § 2

<sup>2</sup> The Perryman Group, *Potential Economic Benefits of Tort Reform in Florida*, CITIZENS AGAINST LAWSUIT ABUSE (Sept. 2018), <https://cdn.p2a.co/385013/PKpghW4BPS15392676823kGn5yy2F1>.

<sup>3</sup> *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->.

<sup>4</sup> *Id.* at 10.

The financial and economic impacts of the tort liability system are substantial. In 2016, the costs and compensation paid in the U.S. tort liability system totaled \$429 billion, or 2.3% of national gross domestic product (GDP).<sup>5</sup> Relative to state GDP, Florida has higher tort liability system costs than any other state, at 3.6%.<sup>6</sup> In 2016, the total costs and compensation paid within Florida's tort liability system was the equivalent of \$4,442 for every household in the state.<sup>7</sup> 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;<sup>8</sup>
- \$614.8 million in State revenues; and
- \$516 million in local government revenues.<sup>9</sup>

## Calculation of Damages for Medical Expenses in Tort Cases

### 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.<sup>10</sup>

### *Collateral Source Rule*

At common law, the collateral source rule prohibited courts from reducing damages for benefits plaintiffs received from collateral sources, like insurance payments or contractual discounts negotiated by the plaintiff's health maintenance organization (HMO).<sup>11</sup> 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.<sup>12</sup> 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).<sup>13</sup> 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 right<sup>14</sup> exists.<sup>15</sup> 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.<sup>16</sup>

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<sup>5</sup> Paul Hinton, David McKnight, 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>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 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).

<sup>9</sup> *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).

<sup>10</sup> 17 Fla. Jur 2d Damages s. 7.

<sup>11</sup> Robert E. Gordon & Justin Linn, *Goble, Thyssenkrupp, and the Collateral Source Rule: Resolving The Ongoing Conflict*, 84 FLA. B.J. 18 (2010).

<sup>12</sup> *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991).

<sup>13</sup> Ch. 86-160, Laws of Fla.; Gordon, *supra* at 18.

<sup>14</sup> "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.

<sup>15</sup> S. 768.76(1), F.S.

<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup>

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.<sup>19</sup>

## *Judicial Decisions*

Florida court decisions on admissibility of collateral source medical payments are 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.<sup>20</sup>

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.<sup>21</sup> The Court reasoned that the *Stanley* decision was too difficult for courts to apply and that tortfeasors (i.e., those who commit torts against others) and their insurers should "not enjoy such a windfall at the expense of taxpayers who fund social legislation benefits."<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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<sup>17</sup> 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](https://www.washingtonpost.com/news/wonk/wp/2013/05/08/one-hospital-charges-8000-another-38000/?utm_term=.ec6886353b67).

<sup>18</sup> *Goble v. Frohman*, 901 So. 2d 830, 832 (Fla. 2005).

<sup>19</sup> Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, 49-APR Hous. Law. 24, 27 (2012).

<sup>20</sup> *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514, 515 (Fla. 1984).

<sup>21</sup> *Joerg v. State Farm Mut. Auto. Ins. Co.*, 176 So. 3d 1247, 1256-57 (Fla. 2015).

<sup>22</sup> *Id.* at 1256.

<sup>23</sup> *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2003).

<sup>24</sup> *Velilla v. VIP Care Pavilion, Ltd.*, 861 So. 2d 69, 71-72 (Fla. 4th DCA 2003).

<sup>25</sup> *Goble*, 901 So. 2d at 832; see also *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So. 3d 1084 (Fla. 1st DCA 2010).

<sup>26</sup> *Durse v. Henn*, 68 So. 3d 271, 277 (Fla. 4th DCA 2011).

When a jury is made aware of the billed amount but remains unaware of the amount typically paid by other patients for similar services in the same area, it could reasonably conclude the plaintiff's damages are more severe than they actually are. Moreover, jurors may inadvertently use the inflated billed amount as a benchmark from which to calculate – and thereby also inflate – other damages, such as noneconomic damages (i.e., pain and suffering, mental anguish, etc.) and future medical expenses.<sup>27</sup>

### Effect of Proposed Changes

CS/HB 17 establishes an additional method and source of information to assist juries in accurately determining medical damages due to a plaintiff in an action for personal injury or wrongful death. The bill is intended to ensure that a plaintiff's recovery for medical treatment is based on established benchmarks used to determine the true value of the medical services provided, rather than based solely on the unpaid amount billed by the medical provider, which may be artificially high.

Under the bill, in cases where medical bills are unpaid and remain due and payable, juries would be required to consider objective data from a qualifying independent and objective database<sup>28</sup> of medical prices and costs specific to the location where the plaintiff received treatment,<sup>29</sup> as follows:

- If the plaintiff has health insurance provided by a government program (Medicare, Medicaid, etc.) but uses a letter of protection to defer payment for medical services rendered, the amount is calculated by consulting the database as to the usual and customary rate paid for similar medical services in the particular location, using the price representing the 50<sup>th</sup> percentile (or middle) of the range.
- If the plaintiff has private health insurance but uses a letter of protection to defer payment for medical services rendered, or if the plaintiff has no health insurance of any kind, the amount is calculated by consulting the database as to the usual and customary rate paid, using the price representing the 85<sup>th</sup> percentile (or upper 1/5) of the range.

These provisions apply only to actions for personal injury or wrongful death that arise on or after July 1, 2019. The bill has no other application or effect regarding compensation paid to providers of medical or health care services.

#### 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:** 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:

<sup>27</sup> 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).

<sup>28</sup> In order to be eligible under the bill, a database must be established under s. 408.05, F.S., or must be maintained by an independent, nonprofit organization and meet other requirements.

<sup>29</sup> 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).

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:**

To the extent the bill lowers tort costs, there may be lower costs for certain insurance products, medical services, and other products and services.

**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:

None.

**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.

On March 28, 2019, the Commerce Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed the provision limiting recovery of noneconomic damages to \$1 million.

- Added a provision that additional information must be provided to juries evaluating claims for medical damages in personal injury and wrongful death cases, and the information is derived from independent databases of prices, or “usual and customary” rates, for specific medical procedures in a particular geographic area used to calculate damages based on a specified percentile of all database prices.
- Amended the bill title to reflect changes made by the amendment.

This analysis is drafted to the committee substitute as passed by the Commerce Committee.