

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6065 **Quality of Long-Term Care Facility Improvement Trust Fund**

SPONSOR(S): Mariano

TIED BILLS: **IDEN./SIM. BILLS:** SB 1880

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	16 Y, 0 N	Mawn	Jones
2) Health Care Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In Florida, nursing home and assisted living facility (“ALF”) residents have specific legal rights, including the right to receive adequate and appropriate health care and protective and support services. A nursing home or ALF resident whose rights are violated may have a cause of action against the facility. Florida law provides a comprehensive framework for litigation and recovery in such causes of action, including provisions for presuit notice, mediation, availability of records, and punitive damages.

Punitive damages are not compensation for an injury; rather, they are private fines imposed by civil juries to punish reprehensible conduct and deter its future occurrence. A nursing home or an ALF may be liable for punitive damages if a judge or jury finds, by clear and convincing evidence, that the facility actively and knowingly participated in intentional misconduct or engaged in conduct that constituted gross negligence and contributed to the claimant’s loss, damages, or injury.

The Quality of Long-Term Care Facility Improvement Trust Fund (“Trust Fund”) was created in 2001, within the Agency for Health Care Administration, to support activities and programs directly related to the care of nursing home and ALF residents. Punitive damages awarded in a claim against a nursing home or ALF must be split equally between the claimant and the Trust Fund. However, since 2008, only two punitive damages awards have resulted in Trust Fund deposits and no direct long-term care projects have been funded from those monies.

HB 6065 deletes the requirement that punitive damages awarded in a claim against a nursing home or an ALF be split equally between the claimant and the Trust Fund. The bill also makes conforming changes to ss. 400.0239 and 429.298, F.S., to remove, as a source of funding for the Trust Fund, the proceeds generated from punitive damages awards in civil actions against nursing homes and ALFs.

The bill will eliminate a Trust Fund revenue source, but it does not appear that doing so will have a meaningful impact on the Trust Fund. Thus, the bill may have an insignificant impact on state government but does not appear to have a fiscal impact on local government.

The bill provides an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In Florida, long-term care facilities include nursing home facilities and assisted living facilities (“ALFs”). A nursing home is a residential facility where a person lives or where a person can stay temporarily. A temporary nursing home stay may be for respite care or recuperation after hospitalization.¹ An ALF is a residential establishment, or part of a residential establishment, that provides housing, meals, and one or more personal services² for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.³ Every nursing home or ALF resident has specified rights.

Litigation against Nursing Homes and ALFs

Section 400.022, F.S., specifies the legal rights of nursing home residents, while s. 429.28, F.S., specifies the rights of ALF residents, including the right to receive adequate and appropriate health care and protective and support services. A resident whose rights are violated by a nursing home or an ALF⁴ has a cause of action against the facility.⁵ Florida law provides a comprehensive framework for litigation and recovery against a nursing home or an ALF, including provisions for presuit notice, mediation, availability of records, and punitive damages.⁶

Named Defendants in Nursing Home Cases

If a cause of action for violation of a nursing home resident's rights alleges direct or vicarious liability for the resident's personal injury or death, the claim may only be brought against:⁷

- The licensee;⁸
- The licensee's management or consulting company;⁹
- The licensee's managing employees; and
- Any direct caregivers, whether employees or contractors.

However, a cause of action cannot be brought against a passive investor.¹⁰

Before a person other than the licensee, the licensee's management or consulting company, the licensee's managing employees, or a direct caregiver employee may be named as a defendant in a lawsuit alleging violation of a nursing home resident's rights, the court or arbitration panel must find sufficient evidence that the:

- Individual or entity owed a duty of reasonable care to the resident;

¹ Florida Department of Elder Affairs, *Nursing Homes*, <http://elderaffairs.state.fl.us/doea/nh.php> (last visited Mar. 12, 2021).

² A personal service is direct physical assistance with, or supervision of, the activities of daily living and the self-administration of medication. Activities of daily living include ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks. Ss. 429.02(1) and 429.02(16), F.S.

³ S. 429.02(5), F.S. An ALF does not include an adult family-care home or a non-transient public lodging establishment.

⁴ Ss. 400.02 and 429.29, F.S.,

⁵ The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of the deceased resident regardless of the cause of death. Ss. 400.023(1) and 429.29, F.S.

⁶ Ss. 400.023–400.0238 and 429.29–429.298, F.S.

⁷ S. 400.023(1), F.S.

⁸ “Licensee” means an individual, corporation, partnership, firm, association, governmental entity, or other entity that is issued a permit, registration, certificate, or license by the Agency for Healthcare Administration, and that is legally responsible for all nursing home facility operation aspects. S. 400.023(2)(a), F.S.

⁹ “Management or consulting company” means an individual or entity who contracts with or receives a fee from a licensee to provide any of the following services for a nursing home facility: hiring or firing of the administrator or director of nursing; controlling or having control over a facility's staffing levels; having control over a facility's budget; or implementing and enforcing a facility's policies and procedures. S. 400.023(2)(b), F.S.

¹⁰ “Passive investor” means an individual or entity that has an interest in a facility but does not participate in the facility's decision-making or operations. S. 400.023(1), F.S.

- Individual or entity breached that duty; and
- Breach of duty was a legal cause of the resident's loss, injury, damage, or death.¹¹

Once the court or arbitration panel makes this finding, and a proposed amended pleading asserts that the cause of action arose out of the conduct, transaction, or occurrence set forth in the original pleading, the proposed amendment is considered to relate back to the original pleading.¹²

Damages Options

If a violation of rights resulted in a nursing home or ALF resident's death, the resident's estate must choose either survival damages under s. 46.021, F.S.,¹³ or wrongful death damages under s. 768.21, F.S.¹⁴ This choice must be made after the verdict and before the court enters the judgment.¹⁵

Punitive Damages and Limitations

Punitive damages are not compensation for an injury; rather, they are private fines imposed by civil juries to punish reprehensible conduct and deter its future occurrence.¹⁶ A nursing home or ALF may be liable for punitive damages only if the judge or jury finds, by clear and convincing evidence, that the facility actively and knowingly engaged in intentional misconduct¹⁷ or in conduct that constituted gross negligence¹⁸ and contributed to the claimant's loss, damages, or injury.¹⁹

Punitive damages are generally limited to three times the amount of compensatory damages or \$1 million, whichever is greater.²⁰ However, a jury may award punitive damages not exceeding the greater of four times the amount of compensatory damages or \$4 million, if it finds that the:²¹

- Conduct was motivated primarily by unreasonable financial gain; and
- Unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant.

Additionally, there is no punitive damages cap if a jury determines that the:

- Defendant acted with specific intent to harm the claimant; and
- Defendant's conduct did in fact harm the claimant.²²

¹¹ S. 400.023(4), F.S.

¹² An amended pleading that relates back is considered to have been filed when the original lawsuit was filed for purposes of determining compliance with the statute of limitations. S. 400.023(3)(b), F.S.

¹³ Survival damages allow a cause of action to survive a party's death and to be brought in his or her name.

¹⁴ Wrongful death damages are brought by a decedent's survivors to recover for certain losses related to the decedent's death.

¹⁵ Ss. 400.023(1)(b) and 429.29(1), F.S.

¹⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

¹⁷ Intentional misconduct means that the nursing home had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage. Ss. 400.0237(2)(a) and 429.297(2)(b), F.S.

¹⁸ Gross negligence means that a nursing home's or ALF's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. Ss. 400.0237(2)(b) and 429.297(2)(b)F.S.

¹⁹ Ss. 400.0237(2) and 429.297(2), F.S.

²⁰ Ss. 400.0238(1)(a) and 429.298(1)(a), F.S.

²¹ Ss. 400.0238(4)(b) and 429.298(1)(b), F.S.

²² Ss. 400.0238(4)(c) and 429.298(1)(c), F.S.

Quality of Long-Term Care Facility Improvement Trust Fund

The Quality of Long-Term Care Facility Improvement Trust Fund (“Trust Fund”), created in 2001,²³ supports activities and programs directly related to the care of nursing home and ALF residents.²⁴ Section 400.0239, F.S., places the Trust Fund within the Agency for Health Care Administration (“AHCA”).²⁵ Trust Fund expenditures can be made for:²⁶

- Development and operation of a mentoring program for increasing the competence, professionalism, and career preparation of long-term care facility direct care staff, including nurses, nursing assistances, and social service and dietary personnel.
- Development and implementation of specialized training programs for long-term care facility personnel who provide direct care of residents:
 - With Alzheimer's Disease or other dementia;
 - At risk of developing pressure sores; and
 - With special nutrition and hydration needs.
- Provision of economic and other incentives to enhance the stability and career development of the nursing home direct care workforce, including paid sabbaticals for exemplary direct care career staff to visit facilities throughout the state to train and motivate younger workers to commit to long-term care careers.
- Promotion and support for the formation and active involvement of resident and family councils in the improvement of nursing home care.

The Trust Fund is funded through a combination of:

- General revenue appropriations;
- The Civil Money Penalty Fund; and
- Fifty percent of any punitive damages awarded in lawsuits against a nursing home or ALF.²⁷

Punitive Damages

Sections 400.0238, F.S., and 429.298, F.S., require the amount of punitive damages awarded in a claim against a nursing home or ALF, respectively, to be split equally between the claimant and the Trust Fund.

Civil Money Penalty Funds

Civil Money Penalties (“CMP”) are monetary penalties imposed by the Centers for Medicare and Medicaid Services against nursing facilities that have failed to maintain compliance with federal long-term care facility requirements. A portion of these funds are returned to states and may be used for projects supporting activities that benefit nursing facility residents or that protect and improve their quality of life or care. CMP funds may be used for:²⁸

- Training;
- Transition preparation;
- Culture change/quality of life;
- Projects that support resident and family councils; and
- Resident transition due to facility closure or downsizing.

²³ Ch. 2001-205, Laws of Fla.

²⁴ Office of the Assistant Secretary for Planning and Evaluation, *State Nursing Home Quality Improvement Programs*, <https://aspe.hhs.gov/report/state-nursing-home-quality-improvement-programs-site-visit-and-synthesis-report/funding-quality-long-term-care-facility-improvement-trust-fund> (last visited Mar. 12, 2021).

²⁵ S. 400.0239(1), F.S.

²⁶ S. 400.0239(2), F.S.

²⁷ S. 400.0238(4), F.S.

²⁸ Agency for Health Care Administration, *Nursing Home Civil Money Penalty (CMP) Reinvestment Projects*, https://ahca.myflorida.com/MCHQ/Health_Facility_Regulation/Long_Term_Care/CMP.shtml (last visited Mar. 12, 2021)

AHCA began this project in 2005 in an effort to use federal CMP funds to support innovative ideas that directly impact the quality of care or life of nursing home residents. The ideas proposed must be innovative to the facility, to the state, or to long-term care.²⁹

Trust Fund Balance

As of December 31, 2019,³⁰ the total balance in the Trust Fund was \$29,965,929.58.³¹ This amount includes \$473,475.19 deposited from two punitive damages awards and \$29,492,454.39 deposited from Civil Money Penalty Funds.³² The total spent from the Trust Fund in FY 2018-2019 was \$157,228.97.³³ Since its creation, AHCA estimates that approximately \$1,040,990.53 has been spent from the Trust Fund.³⁴

As of the 2020 legislative session, no punitive damages funds had been spent from the Trust Fund.³⁵ The majority of proceeds in the Trust Fund are deposited from nursing home federal civil monetary penalties, but these funds may only be used for resident-related projects in nursing homes, while funds from punitive damages may be used for ALF-related projects.³⁶ While current law directs the Clerk of Court to send certified copies of punitive damages jury verdicts to the Chief Financial Officer of the Department of Financial Services, AHCA is unaware of any actions taken to monitor the verdicts to ensure a portion of the punitive damages go into the Trust Fund.³⁷

Effect of Proposed Changes

HB 6065 deletes the requirement that punitive damages awarded in a claim against a nursing home or an ALF be split equally between the claimant and the Trust Fund. This will result in a plaintiff being able to keep an entire punitive damages award. The bill also makes conforming changes to ss. 400.0239 and 429.298, F.S., to remove, as a source of funding for the Trust Fund, the proceeds generated from punitive damages awards in civil actions against nursing homes and ALFs.

The bill provides an effective date of July 1, 2021.

B. SECTION DIRECTORY:

Section 1: Amends s. 400.0238, F.S., relating to punitive damages; limitation.

Section 2: Amends s. 400.0239, F.S., relating to Quality of Long-Term Care Facility Improvement Trust Fund.

Section 3: Amends s. 429.298, F.S., relating to punitive damages; limitation.

Section 4: Provides an effective date of July 1, 2021.

²⁹ *Id.*

³⁰ As of the date of this analysis, AHCA has not provided updated Trust Fund data.

³¹ Email from James Kotas, Deputy Chief of Staff/Legislative Affairs Director, Agency for Health Care Administration, received January 10, 2020.

³² *Id.*

³³ *Id.*

³⁴ Florida Agency for Health Care Administration, Agency Analysis of 2020 House Bill 6029, p. 2 (Jan 8, 2020).

³⁵ *Id.*

³⁶ According to AHCA, no direct assisted living projects have been funded to date, but there is interest in expanding programs developed for nursing home staff to include assisted living staff. *Id.*

³⁷ *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill will eliminate a Trust Fund revenue source, but it does not appear that doing so will have a meaningful impact on the Trust Fund given that only two punitive damages deposit awards have been submitted to the fund in the last 12 years.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES