

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill removes the options for physicians to meet their financial obligation through self-insurance or “going bare.”

Safeguard individual liberty/Promote Personal Responsibility – The bill removes the options for physicians to self-insure. This may increase the likelihood of judgment payout in malpractice suits.

B. EFFECT OF PROPOSED CHANGES

HB 665 with CS removes the option for physicians to meet their financial obligation through self-insurance.

The bill amends ss. 458.320 and 459.0085, F.S., to conform escrow account requirements to “letter of credit” requirements. The bill also requires physicians who meet their financial responsibility requirements with a “letter of credit” or escrow account to meet the minimum annual aggregate financial responsibility requirements.

Minimum aggregate financial responsibility requirements are \$300,000 for physicians without hospital privileges, and \$750,000 for physicians with hospital privileges.

The bill amends ss. 458.331 and 459.015, F.S., to require a licensed physician assistant, designated by the Council on Physician Assistants, to sit on the physician assistant disciplinary Probable Cause Panel of the Board of Medicine. Currently, when a physician assistant disciplinary case is heard before the Probable Cause Panel of the Florida Board of Medicine, the panel is made up of only physicians. Usually disciplinary panels include at least one peer member.

This bill will take effect upon become law.

PRESENT SITUATION

Physician Financial Responsibility

DOH requires allopathic physicians (MDs) and osteopathic physicians (DOs) to have financial responsibility as a requisite for licensure and licensure renewal. Physicians may meet this requirement by purchasing malpractice insurance, opening an escrow account, getting a letter of credit, or through self-insurance. If a physician is a government employee, holds a limited license, practices as part of a teaching post at a teaching hospital, does not practice in the state of Florida, or is retired, the physician is exempt from financial responsibility requirements. Physicians who are exempt from financial responsibility or choose to self-insure, must post notice in their waiting room to alert their patients that they have decided not to carry medical malpractice insurance. DOH audits approximately 3 percent of physician licensure renewals yearly to verify financial responsibility. In 2004, DOH licensed approximately 49,000 allopathic physicians and 4,200 osteopathic physicians.

Self-Insurance or “Going Bare”

Physicians received the option to meet their financial responsibility through self-insurance in the 1986 Tort Reform and Insurance Act. This option is only available to physicians; all other health professionals that are required to maintain financial responsibility do not have the option to self-insure.¹ Not all states allow physicians the option to self-insure, at least 13 states require physicians to carry a minimum level of liability insurance for licensure and/or qualify for state liability reforms.²

¹ Acupuncturists, chiropractors, podiatrists, midwives, dentists, and advanced registered nurse practitioners, under Florida statute, do not have the option to fulfill their financial responsibility through self-insurance.

² American Medical Association, 2005.

According to the Board of Medicine, approximately seven percent of Florida physicians (3,600) chose to “go bare” in 2004. The Department of Health (DOH) reports that in the past 8 years there have been no osteopathic cases involving judgments related to physicians that have “gone bare” (no medical malpractice coverage) and five cases involving allopathic physicians. In each of the allopathic cases the Board of Medicine required suspension of the licensee until proof of payment or a payment plan for the judgment was provided.

There have been a few cases of self-insured physicians who, when faced with a judgment against them, went bankrupt instead of paying the injured patient.³ Courts have not consistently found hospitals liable for physicians who refuse to pay a judgment against them but courts have noted the growing controversy.⁴

Insurance Rates for Doctors

DOH has raised concerns regarding the availability of insurance coverage for physicians at the current legally required minimum amount. If coverage cannot be obtained by physicians at the level provided in the bill there could be a problem with access to patient care in Florida. However, the bill still provides that a physician may meet their financial responsibility through a letter of credit or an escrow account.

CURRENT STATUTORY PROVISIONS

Department of Health Licensing Procedures

Currently, DOH requires an affidavit of financial responsibility for physicians and osteopaths. Physicians have 5 different ways to fulfill their financial responsibility. They may choose one of the following options:

Letter of Credit or Escrow Accounts

- A physician who does not have hospital staff privileges may establish an irrevocable letter of credit or an escrow account in an amount of \$100,000/\$300,000, in accordance with Chapter 675, F.S., for a letter of credit, and s. 625.52, F.S., for an escrow account;
- A physician with hospital staff privileges can establish an irrevocable letter of credit or escrow account in an amount of \$250,000/\$750,000, in accordance with Chapter 675, F.S., for a letter of credit, and s. 625.52, F.S., for an escrow account;

Liability Insurance

- A physician who does not have hospital staff privileges may obtain professional liability coverage in an amount not less than \$100,000 per claim, with a minimum annual aggregate of not less than \$300,000 from an authorized insurer as defined under s. 624.09, F.S.; from the Joint Underwriting Association established under s. 627.351(4), F.S.; or through a plan of self-insurance as provided in s. 627.357, F.S.;
- A physician with hospital staff privileges can obtain professional liability coverage in an amount not less than \$250,000 per claim, with a minimum annual aggregate of not less than \$750,000 from an authorized insurer as defined under s. 624.09, F.S.; from a surplus lines insurer as defined under s. 629.914(2), F.S.; from a risk retention group as defined under s. 627.942, F.S.; from the Joint Underwriting Association established under s. 627.351(4), F.S.; or through a plan of self-insurance as provided in s.627.357, F.S.

Self-Insurance or “Going Bare”

- A physician may elect not to carry medical malpractice insurance, in which case, the physician must agree to satisfy any adverse judgments up to minimum amounts pursuant to s. 458.320(5)(g)1. or 459.008S(5)(g)1., F.S. The physician must either post notice in the form of a “sign” prominently displayed in the reception area or provide a written statement to all patients. The notice must state

³ Daily Business Review, *Hospitals off hook for doctor’s malpractice*, March 9, 2005.

⁴ See *Baker v. Tenet Healthsystem Hospital Inc.*, 780 So.2d 170, 2001; *Robert v. A. Paschall*, 767 So.2d 1227, 2000; and *Mercy Hospital v. Baumgardner*, 870 So.2d 130, 2004.

that the physician has decided not to carry medical malpractice insurance, and the sign or notice must contain the wording specified in s. 458.320(5)(g) or 459.0085(5)(g), F.S.

Exemptions from Financial Responsibility

There are a number of provisions that exempt Florida physicians from financial responsibility. If the physician meets one of the following criteria they are exempt from financial responsibility coverage;

- A physician practices medicine exclusively as an officer, employee, or agent of the federal government, or of the state or its agencies and subdivisions;
- A physician holds a limited license issued pursuant to s. 458.317 or 495.0075, F.S. and practices only under the scope of the limited license;
- A physician does not practice in the state of the Florida;
- If a physician meets all of the following criteria:
 - They hold an active license to practice in this state or another state or some combination thereof for more than 15 years;
 - They are retired or maintain part-time practice of no more than 1000 patient contact hours per year;
 - They have had no more than two claims resulting in an indemnity exceeding \$10,000 within the previous five-year period;
 - They have not been convicted of or pled guilty to any criminal violation specified in Chapter 458 or 459, F.S.; and
 - They have not been subject, within the past ten years of practice, to license revocation or suspension, probation for a period of three years or longer, or a fine of \$500 or more for a violation of Chapter 458 or 459, F.S., or the medical practice act of another jurisdiction. A regulatory agency's acceptance of a relinquishment of license stipulation, consent order or other settlement offered in response to or in anticipation of filing administrative charges against a license shall be construed as an action against a license. They understand that if they claim this exception under this section that they must either post notice in the form of a sign, prominently displayed in the reception area or provide a written statement to any person to whom medical services are being provided, that they have decided not to carry medical malpractice insurance.
- A physician practices only in conjunction with their teaching duties at an accredited medical school or its teaching hospitals (interns and residents do not qualify for this exemption).

Physician Assistant Practice

Physician Assistants (PAs) are formally trained to provide diagnostic, therapeutic, and preventative healthcare services as delegated by a physician. Working as members of the healthcare team, they take medical histories, examine and treat patients, order and interpret laboratory tests and x-rays, make diagnoses, and prescribe medications. The Department of Health Reports there are 4,000 practicing PAs in Florida. PAs work under the supervision of a physician. However, PAs may be the principal care providers in rural or inner city clinics, where a physician is present for only 1 or 2 days each week. In such cases, the PA confers with the supervising physician as needed.

Currently, when a physician assistant disciplinary case is heard before the Probable Cause Panel of the Florida Board of Medicine, the panel is made up of only physicians. Usually disciplinary panels include at least one peer member.

C. SECTION DIRECTORY:

Section 1. Amends s. 458.320, F.S., to conform escrow account requirements to letter of credit requirements for allopathic physicians (MDs). The section also requires the letter of credit or escrow account meet the minimum annual aggregate financial responsibility required.

Section 2. Amends s. 458.331, F.S., to require physician assistant disciplinary cases heard before the Probable Cause Panel of the Florida Board of Medicine to have a licensed physician assistant, designated by the Council on Physician Assistants, sit on the Probable Cause Panel.

Section 3. Amends s. 459.0085, F.S., to conform escrow account requirements to letter of credit requirements for osteopathic physicians (DOs). The section also requires the letter of credit or escrow account meet the minimum annual aggregate financial responsibility required.

Section 4. Amends s. 459.015, F.S., to require physician assistant disciplinary cases heard before the Probable Cause Panel of the Florida Board of Medicine to have a licensed physician assistant, designated by the Council on Physician Assistants, sit on the Probable Cause Panel.

Section 5. Provides that the bill shall take effect upon becoming law.

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:

Recent medical school graduates may not have the necessary collateral for a "letter of credit" or an escrow account in the amounts required by the bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the Medical and Osteopathic Medical Boards to immediately promulgate rules for implementation.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Proponents of the bill have provided committee staff with information supporting the changes in this bill. Proponents assert that physicians who “go-bare” are hurting health care consumers. Further, proponents argue that if there is a judgment against a “bare” doctor and the doctor does not pay, the doctor gets disciplined by DOH but the injured patient and their family receive no compensation.

Opponents of the bill have expressed their concerns over the increase in financial responsibility requirements for physicians. They argue that this increase will drive much needed health professionals out of the state.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 30, 2005, the Health Care Regulation Committee adopted a strike-all amendment sponsored by Representative Farkas and two amendments to the strike-all sponsored by Representative Poppell.

- **Amendment 1:** Removes the increase in financial responsibility requirements for physicians, increases escrow account requirements, increases financial responsibility for escrow accounts and letter of credit, and removes the option for physicians to “go-bare.”
- **Amendment 2:** Amends Chapter 459 (Osteopathic Medicine) to place a licensed physician assistant designated by the council on physician assistants on the probable cause panel for physician assistant disciplinary cases.
- **Amendment 3:** Amends Chapter 458 (Allopathic Medicine) to place a licensed physician assistant designated by the council on physician assistants on the probable cause panel for physician assistant disciplinary cases.

The analysis is drafted to the committee substitute.