

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 97 Dentists & Dental Hygienists

**SPONSOR(S):** Magar; Spano and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 142

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Cary	Bond
2) Health & Human Services Committee	15 Y, 0 N	Castagna	Calamas
3) Judiciary Committee		Cary	Havlicak

### SUMMARY ANALYSIS

Section 766.1115, F.S., the Access to Health Care Act (Act), was enacted to provide sovereign immunity to health care professionals who contract with the state to provide free medical care for indigent persons. The contract must be for “volunteer, uncompensated services” for the benefit of low-income recipients. Dentists and dental hygienists licensed by the state are among those health care professionals that are protected by sovereign immunity under the Act.

The bill allows a dentist or dental hygienist to accept reimbursement of some or all of a patient's dental laboratory costs without being considered to have accepted compensation, thus retaining sovereign immunity protection.

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

The bill provides an effective date of July 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### History of Sovereign Immunity

The legal doctrine of sovereign immunity prevents a government from being sued in its own courts without its consent.<sup>1</sup> According to United States Supreme Court Justice Oliver Wendell Holmes, citing the noted 17th century Hobbes work, *Leviathan*, “a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”<sup>2</sup> State governments in the United States, as sovereigns, inherently possess sovereign immunity.<sup>3</sup>

##### Sovereign Immunity in Florida

The Florida Constitution addresses sovereign immunity as follows:

Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.<sup>4</sup>

The Florida Constitution grants “absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment.”<sup>5</sup> The state has waived its sovereign immunity in tort actions and the state may be liable to the same extent as a private individual under like circumstances.<sup>6</sup> However, the Legislature has capped damages in suits against the state.<sup>7</sup> The current cap on damages is \$200,000 per person and \$300,000 per incident.<sup>8</sup>

##### Exceptions to Sovereign Immunity in Florida

There are exceptions to the otherwise broad waiver of governmental tort immunity when the government is performing a discretionary function and when the government has a public duty.<sup>9</sup> Whether the particular facts of a case bring the case within one of these exceptions is complex. One court described the problem as such: “Although these exceptions are somewhat elusive and are not susceptible to neat formulations which fit all cases, the courts have nonetheless attempted to articulate these exceptions in general terms.”<sup>10</sup>

##### Parties That May Claim Sovereign Immunity in Florida

As discussed above, the state has provided a limited waiver of sovereign immunity in some circumstances. A party may sue the state or one of its agencies or subdivisions in a tort action.<sup>11</sup> The statutes define state agencies or subdivisions to include executive departments, the legislature, the judicial branch, and independent establishments of the state, such as state university boards of

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<sup>1</sup> Black’s Law Dictionary, 3rd Pocket Edition, 2006.

<sup>2</sup> *Kawananakoa v Polyblank*, 205 U.S. 349, 353 (1907).

<sup>3</sup> See, e.g., Fla. Jur. 2d, Government Tort Liability, Sec. 1.

<sup>4</sup> FLA. CONST., Art. X, s. 13.

<sup>5</sup> *Cir. Ct. of the Twelfth Jud. Cir. v. Dep’t of Natural Resources*, 339 So.2d 1113, 1114 (Fla. 1976).

<sup>6</sup> Section 768.28(1), F.S.

<sup>7</sup> Section 768.28(5), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> *Seguine v. City of Miami*, 627 So.2d 14, 16 (Fla. 3d DCA 1993).

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

<sup>11</sup> Section 768.28(1), F.S.

trustees, counties and municipalities, and corporations primarily acting as instrumentalities or agencies of the state, including the Florida Space Authority.<sup>12</sup>

Whether a corporation is primarily acting as an instrumentality or agency of the state primarily depends on the level of governmental control over the performance and day-to-day operations of the corporation.<sup>13</sup> The analysis tends to be heavily fact-dependent, while also considering the intent of the Legislature. For example, the University of Central Florida Athletics Association was found to have sovereign immunity<sup>14</sup> while the University of Florida's Shands Hospital was not.<sup>15</sup>

An individual state employee or agent of the state is also immune if the employee is acting within the scope of his employment so long as the acts are not done in bad faith or with a wanton and willful disregard of human rights, safety or property.<sup>16</sup> Many agencies or individuals that do not work directly for the state have been granted sovereign immunity under certain circumstances. Among those are:

- Department of Corrections-contracted health care providers;<sup>17</sup>
- Department of Health-supervised regional poison control centers;<sup>18</sup>
- Department of Transportation contractors, if the tort is not an automobile accident;<sup>19</sup>
- Department of Juvenile Justice contractors;<sup>20</sup> and
- Health care professionals who contract to provide free medical care to indigent residents.<sup>21</sup>

### Volunteer Health Services Program

The Access to Health Care Act (Act) was enacted to provide sovereign immunity to health care professionals who contract with the state to provide free medical care for indigent residents.<sup>22</sup> The contract must be for "volunteer, uncompensated services" for the benefit of low-income recipients.<sup>23</sup> Dentist and dental hygienists licensed by the state are among those health care professionals that are protected by sovereign immunity.<sup>24</sup> To be protected, the governmental contractor must not accept compensation and must provide written notice to each patient or the patient's legal representative, which must be acknowledged in writing, that the provider is covered under s. 768.28, F.S., for purposes of actions related to medical negligence.<sup>25</sup>

The individual accepting services through this contracted provider may not have medical or dental care coverage for the illness, injury, or condition in which medical or dental care is sought.<sup>26</sup> The services not covered under this program include experimental procedures and clinically unproven procedures.<sup>27</sup> The governmental contractor has the authority to determine whether a procedure is covered.<sup>28</sup>

A provider's government contractor must not receive compensation for any services provided under the contract and "must not bill or accept compensation from the recipient, or any public or private third-

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<sup>12</sup> Section 768.28(2), F.S.

<sup>13</sup> *UCF Athletics Ass'n Inc. v. Plancher*, 121 So.3d 1097, 1106 (Fla. 5th DCA 2013).

<sup>14</sup> *Id.*

<sup>15</sup> *Shands Teaching Hospital & Clinics, Inc. v. Lee*, 478 So.2d 77 (Fla. 1st DCA 1985). *But see* s. 768.28(10)(f), F.S., which now grants teaching hospitals sovereign immunity.

<sup>16</sup> Section 768.28(9)(a), F.S.

<sup>17</sup> Section 768.28(10)(a), F.S.

<sup>18</sup> Section 768.28(10)(c), F.S.

<sup>19</sup> Section 768.28(10)(e), F.S.

<sup>20</sup> Section 768.28(11), F.S.

<sup>21</sup> Section 766.1115(2), F.S.

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

<sup>23</sup> Section 766.1115(3)(a), F.S.

<sup>24</sup> Section 766.1115(3)(d)(13), F.S.

<sup>25</sup> Section 766.1115(5), F.S.

<sup>26</sup> Rule 64I-2.002, F.A.C.

<sup>27</sup> Rule 64I-2.006, F.A.C.

<sup>28</sup> *Id.*

party payer, for the specific services provided to the low-income recipients covered by the contract.”<sup>29</sup> Additionally, the health care provider may not subcontract for the provision of services under the Act.<sup>30</sup>

In 2012-2013 there were a total of 13,543 licensed health care providers who were contractual agents providing uncompensated services under the Act. Of these providers, approximately 1,501 were licensed dentists or dental hygienists. Total goods and services provided by all contractual agents for uncompensated care totaled approximately \$294,427,678 in 2013.<sup>31</sup>

### **Effect of Proposed Changes**

The bill amends s. 766.1115, F.S., to allow a patient of a health care provider licensed under ch. 466, F.S. (dentists and dental hygienists) and providing uncompensated services under the Act to make a monetary contribution towards dental laboratory costs, but the contribution may not exceed the actual laboratory costs. The monetary contribution is not considered compensation to the health care provider and, therefore, the health care provider retains sovereign immunity protection.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 766.1115, F.S., relating to health care providers and creation of agency relationship with governmental contractors.

Section 2 provides an effective date of July 1, 2014.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

#### **D. FISCAL COMMENTS:**

None.

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<sup>29</sup> Section 766.1115(3)(a), F.S.

<sup>30</sup> Section 766.1115(4), F.S.

<sup>31</sup> *Volunteer Health Services Annual Report*, Florida Department of Health, January 2014, accessible at: <http://www.floridahealth.gov/provider-and-partner-resources/getting-involved-in-public-health/volunteerism-volunteer-opportunities/index.html> (last visited March 3, 2014).

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

n/a