



Civil Justice Subcommittee

Wednesday, February 20, 2013

11:30 AM

404 HOB

Will Weatherford
Speaker

Larry Metz
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, February 20, 2013 11:30 am

End Date and Time: Wednesday, February 20, 2013 03:30 pm

Location: 404 HOB

Duration: 4.00 hrs

Consideration of the following bill(s):

HB 9 Involuntary Examinations under the Baker Act by Campbell

HB 405 Claims of Exemption from Garnishment by Spano

HB 587 Damages for Medical or Health Care Services by Hood

Consideration of the following proposed committee bill(s):

PCB CJS 13-03 -- Judicial Nominating Commissions

NOTICE FINALIZED on 02/13/2013 14:48 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 9 Involuntary Examinations under the Baker Act
SPONSOR(S): Campbell
TIED BILLS: None **IDEN./SIM. BILLS:** SB 110

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Quality Subcommittee	13 Y, 0 N	Guzzo	O'Callaghan
2) Civil Justice Subcommittee		Williams <i>AW</i>	Bond <i>NB</i>
3) Health & Human Services Committee			

SUMMARY ANALYSIS

In 1971, the legislature passed the Florida Mental Health Act (also known as "The Baker Act") to address mental health needs of individuals in the state. The Baker Act allows for voluntary and involuntary examination of an individual and establishes procedures for the court, law enforcement and the medical community that ensure the preservation of an individual's rights relating to medical services.

The Baker Act authorizes involuntary examination of an individual who appears to have a mental illness and who, because of mental illness, presents a substantial threat of harm to themselves or others. Involuntary examination may be initiated by certain medical professionals, namely physicians, clinical psychologists, psychiatric nurses, mental health counselors, marriage and family therapists, and clinical social workers.

The bill adds Advanced Registered Nurse Practitioners and Physician Assistants to the list of medical professionals who may execute a certificate for involuntary examination of a person.

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

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Involuntary Examination (Baker Act)

In 1971, the legislature passed the Florida Mental Health Act (also known as "The Baker Act") to address mental health needs in the state.¹ Chapter 394, Part I, F.S., provides authority and process for the voluntary and involuntary examination of persons with evidence of a mental illness and the subsequent inpatient or outpatient placement of individuals for treatment. The Department of Children and Families (DCF) administers this law through receiving facilities which provide for the examination of persons with evidence of a mental illness. Receiving facilities are designated by DCF and may be public or private facilities which provide for the involuntary examination and short term treatment of persons who meet criteria under this act.² Subsequent to examination at a receiving facility, a person who requires further treatment may be transported to a treatment facility. Treatment facilities designated by DCF are state hospitals (e.g. Florida State Hospital) which provide extended treatment and hospitalization beyond what is provided in a receiving facility.³

Current law provides that an involuntary examination may be initiated for a person if there is reason to believe the person has a mental illness and because of the illness:⁴

- The person has refused a voluntary examination after explanation of the purpose of the exam; or
- The person is unable to determine for themselves that an examination is needed and is likely to suffer from self-neglect, substantial harm to themselves, or be a danger to themselves or others.

An involuntary examination may be initiated by any of the following:⁵

- A circuit court may enter an *ex parte* order stating a person meets the criteria for involuntary examination.
- A law enforcement officer, as defined in s. 943.10, F.S., may take a person into custody who appears to meet the criteria for involuntary examination and transport them to a receiving facility for examination.

In addition, the following persons may issue a certificate stating that a person who has been examined within the preceding 48 hours meets the criteria for involuntary examination:⁶

- A physician licensed under ch. 458, F.S., or an osteopathic physician licensed under ch. 459, F.S., who has experience in the diagnosis and treatment of mental and nervous disorders.
- A physician employed by a facility operated by the United States Department of Veterans Affairs which qualifies as a receiving or treatment facility.
- A clinical psychologist, as defined in s. 490.003(7), F.S., with 3 years of postdoctoral experience in the practice of clinical psychology, inclusive of the experience required for

¹ Section 1, ch. 71-131, L.O.F.

² Section 394.455(26), F.S.

³ Section 394.455(32), F.S.

⁴ Section 394.463(1), F.S.

⁵ Section 394.463(2)(a), F.S.

⁶ *Id.*

licensure, or a psychologist employed by a facility operated by the United States Department of Veterans Affairs that qualifies as a receiving or treatment facility.

- A psychiatric nurse licensed under part I of ch. 464, F.S., who has a master's degree or a doctorate in psychiatric nursing and 2 years of post-master's clinical experience under the supervision of a physician.
- A mental health counselor licensed under ch. 491, F.S.
- A marriage and family therapist licensed under ch. 491, F.S.⁷
- A clinical social worker licensed under ch. 491, F.S.⁸

During 2011, there were 150,466 involuntary examinations initiated in the state. Law enforcement initiated almost half of the involuntary exams (49.21 percent) followed by mental health professionals (48.73 percent) and then *ex parte* orders by judges (2.06 percent).⁹

Physician Assistants (PA)

Sections 458.347(7) and 459.022(7), F.S., govern the licensure of physician assistants (PAs) in Florida. PAs are licensed by the Department of Health (DOH) and are regulated by the Florida Council on Physician Assistants (Council) and either the Florida Board of Medicine (Board of Medicine) for PAs licensed under ch. 458, F.S., or the Florida Board of Osteopathic Medicine (Osteopathic Board) for PAs licensed under ch. 459, F.S. Currently there are 5,348 active licensed PAs in Florida.¹⁰

PAs may only practice under the direct or indirect supervision of a medical doctor or doctor of osteopathic medicine with whom they have a clinical relationship. A supervising physician may only delegate tasks and procedures to the physician assistant that are within the supervising physician's scope of practice.¹¹ The supervising physician is responsible and liable for any and all acts of the PA and may not supervise more than four PAs at any time.¹²

PAs are regulated through the respective physician practice acts.¹³ Each of the medical practice acts has a corresponding board (i.e., the Board of Medicine and Osteopathic Board). The duty of a Board and its members is to make disciplinary decisions concerning whether a doctor or PA was practicing medicine within the confines of their practice act.¹⁴

To become licensed as a PA in Florida, an applicant must demonstrate to the Council:¹⁵ passage of the National Commission on Certification of Physician Assistant exam, completion of the application, completion of a PA training program; a sworn, notarized statement of felony convictions; a sworn statement of denial or revocation of licensure in any state, letters of recommendation from physicians;¹⁶ payment of a licensure fee; and completion of a two hour course on the prevention of

⁷ Marriage and Family Therapists use practice methods of a psychological nature to evaluate, assess, diagnose, treat and prevent emotional and mental disorders or dysfunctions. Section 491.003(8), F.S.

⁸ Clinical Social Workers are required by law to have experience in providing psychotherapy and counseling. Section 491.003(3), F.S.

⁹ Christy, A. (2013). *Report of Baker Act Data*. Tampa, FL; University of South Florida, Louis de la Parte Florida Mental Health Institute. Available at: <http://bakeract.fmhi.usf.edu/> (last visited February 15, 2013).

¹⁰ Florida Department of Health, Medical Quality Assurance Annual Report 2011-2012.

¹¹ Rule 64B8-30.012(1), F.A.C., and Rule 64B15-6.010(1), F.A.C.

¹² Section 458.347(3), F.S., and s. 459.022(3), F.S.

¹³ Chapters. 458 and 459, F.S.

¹⁴ Section 458.347(12), F.S., and s. 459.022(12), F.S.

¹⁵ Section 458.347(7), F.S., and s. 459.022(7), F.S.

¹⁶ Rule 64B8-30.003(1), F.A.C., and Rule 64B15-6.003(1), F.A.C.

medical errors, error reduction and prevention, and patient safety.¹⁷ Licensure renewal occurs biennially.¹⁸

PAs are not required by law to have experience in the diagnosis and treatment of mental and nervous disorders. However, in 2008 Attorney General Bill McCollum issued an opinion stating that:

*A physician assistant licensed pursuant to Chapter 458 or 459, F.S., may refer a patient for involuntary evaluation pursuant to section 394.463, F.S., provided that the physician assistant has experience regarding the diagnosis and treatment of mental and nervous disorders and such tasks as are within the supervising physician's scope of practice.*¹⁹

Advanced Registered Nurse Practitioner (ARNP)

Part I of ch. 464, F.S., governs the licensure and regulation of nurses in Florida. Nurses are licensed by DOH and are regulated by the Board of Nursing. Licensure requirements to practice professional nursing include completion of education requirements,²⁰ demonstration of passage of a department-approved examination, a clean criminal background screening, and payment of applicable fees.²¹ Renewal is biennial and contingent upon completion of certain continuing medical education requirements.

A nurse who holds a license to practice professional nursing may be certified as an ARNP under s. 464.012, F.S., if the nurse meets one or more of the following requirements:

- Completion of a post basic education program of at least one academic year that prepares nurses for advanced or specialized practice;
- Certification by a specialty board, such as a registered nurse anesthetist or nurse midwife; or
- Possession of a master's degree in a nursing clinical specialty area.

Current law defines three categories of ARNPs: certified registered nurse anesthetists, certified nurse midwives, and nurse practitioners.²² All ARNPs, regardless of practice category, may only practice within the framework of an established protocol and under the supervision of an allopathic or osteopathic physician or a dentist.²³ ARNPs may carry out treatments as specified in statute, including:²⁴

- Monitoring and altering drug therapies;
- Initiating appropriate therapies for certain conditions;
- Performing additional functions as may be determined by rule in accordance with s. 464.003(2), F.S.,²⁵ and
- Ordering diagnostic tests and physical and occupational therapy.

¹⁷ Rule 64B8-30.003(3), F.A.C., and Rule 64B-15-6.003(4), F.A.C.

¹⁸ Section 458.347(7)(c), F.S. Rule 64B8-30.019, F.A.C., establishes the initial licensure and renewal fee schedule.

Section 459.022(7)(b), F.S. Rule 64B15-6.013, F.A.C., establishes the initial licensure and renewal fee schedule.

¹⁹ See, 08-31 Fla. Op. Att'y Gen. (2008).

Available at: www.dcf.state.fl.us/programs/samh/MentalHealth/laws/agopinion.pdf (last visited February 15, 2013).

²⁰ Rule 64B9-4.003, F.A.C., provides that an Advanced Nursing Program shall be at least one year long and shall include theory in the biological, behavioral, nursing and medical sciences relevant to the area of advanced practice in addition to clinical expertise with a qualified preceptor.

²¹ Section 464.009, F.S., provides an alternative to licensure by examination for nurses through licensure by endorsement.

²² Section 464.012(2), F.S.

²³ Section 464.012(3), F.S.

²⁴ *Id.*

²⁵ Section 464.003(2), F.S., defines "Advanced or Specialized Nursing Practice" to include additional activities that an ARNP may perform as approved by the Board of Nursing.

In addition to the above allowed acts, ARNPs may also perform other acts as authorized by statute and within his or her specialty.²⁶ Further, if it is within the ARNPs established protocol, the ARNP may establish behavioral problems and diagnosis and make treatment recommendations.²⁷

There are 14,440 active, licensed ARNPs in Florida.²⁸

Effect of Proposed Changes:

The bill amends s. 394.463, F.S., to add that a Physician Assistant (PA) or an Advanced Registered Nurse Practitioner (ARNP) may execute a certificate stating that a person who the ARNP or PA has examined within the preceding 48 hours appears to meet the criteria for involuntary examination for mental illness.

B. SECTION DIRECTORY:

Section 1: Amends s. 394.463, F.S., relating to involuntary examination.

Section 2: Provides an effective date of July 1, 2013.

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.

²⁶ Section 464.012(4), F.S.

²⁷ Section 464.012(4)(c)5, F.S.

²⁸ Florida Department of Health, Medical Quality Assurance Annual Report 2011-2012.

STORAGE NAME: h0009b.CJS.DOCX

DATE: 2/18/2013

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:

Current law provides that a physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist and clinical social worker may execute certificates for involuntary examination. These professions have been defined under The Baker Act. The bill amends current law to allow an advanced registered nurse practitioner or physician assistant to execute a certificate for involuntary examination, but does not create a definition for these professions. This would allow any advanced registered nurse practitioner or physician assistant, regardless of their specialization, to initiate an involuntary examination under the Baker Act.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

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1 A bill to be entitled
 2 An act relating to involuntary examinations under the
 3 Baker Act; amending s. 394.463, F.S.; authorizing
 4 physician assistants and advanced registered nurse
 5 practitioners to initiate involuntary examinations
 6 under the Baker Act of persons believed to have mental
 7 illness; providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Paragraph (a) of subsection (2) of section
 12 394.463, Florida Statutes, is amended to read:

13 394.463 Involuntary examination.—

14 (2) INVOLUNTARY EXAMINATION.—

15 (a) An involuntary examination may be initiated by any one
 16 of the following means:

17 1. A court may enter an ex parte order stating that a
 18 person appears to meet the criteria for involuntary examination,
 19 giving the findings on which that conclusion is based. The ex
 20 parte order for involuntary examination must be based on sworn
 21 testimony, written or oral. If other less restrictive means are
 22 not available, such as voluntary appearance for outpatient
 23 evaluation, a law enforcement officer, or other designated agent
 24 of the court, shall take the person into custody and deliver him
 25 or her to the nearest receiving facility for involuntary
 26 examination. The order of the court shall be made a part of the
 27 patient's clinical record. No fee shall be charged for the
 28 filing of an order under this subsection. Any receiving facility

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29 accepting the patient based on this order must send a copy of
 30 the order to the Agency for Health Care Administration on the
 31 next working day. The order shall be valid only until executed
 32 or, if not executed, for the period specified in the order
 33 itself. If no time limit is specified in the order, the order
 34 shall be valid for 7 days after the date that the order was
 35 signed.

36 2. A law enforcement officer shall take a person who
 37 appears to meet the criteria for involuntary examination into
 38 custody and deliver the person or have him or her delivered to
 39 the nearest receiving facility for examination. The officer
 40 shall execute a written report detailing the circumstances under
 41 which the person was taken into custody, and the report shall be
 42 made a part of the patient's clinical record. Any receiving
 43 facility accepting the patient based on this report must send a
 44 copy of the report to the Agency for Health Care Administration
 45 on the next working day.

46 3. A physician, physician assistant, clinical
 47 psychologist, psychiatric nurse, mental health counselor,
 48 marriage and family therapist, ~~or~~ clinical social worker, or
 49 advanced registered nurse practitioner may execute a certificate
 50 stating that he or she has examined a person within the
 51 preceding 48 hours and finds that the person appears to meet the
 52 criteria for involuntary examination and stating the
 53 observations upon which that conclusion is based. If other less
 54 restrictive means are not available, such as voluntary
 55 appearance for outpatient evaluation, a law enforcement officer
 56 shall take the person named in the certificate into custody and

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57 deliver him or her to the nearest receiving facility for
58 involuntary examination. The law enforcement officer shall
59 execute a written report detailing the circumstances under which
60 the person was taken into custody. The report and certificate
61 shall be made a part of the patient's clinical record. Any
62 receiving facility accepting the patient based on this
63 certificate must send a copy of the certificate to the Agency
64 for Health Care Administration on the next working day.

65 Section 2. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405 Claims of Exemption from Garnishment
SPONSOR(S): Spano and Grant
TIED BILLS: None **IDEN./SIM. BILLS:** SB 592

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary <i>JML</i>	Bond <i>NB</i>
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Garnishment is a creditor's means to collect a monetary judgment through seizure of the debtor's property held by a third party. Current law provides that certain property is exempt from creditor claims.

If a debtor claims that garnished property is exempt and should not be transferred from the third party to the creditor, the creditor has 3 business days to respond if the claim of exemption is delivered by hand or 8 business days to respond if the claim of exemption is mailed. If there is no timely response, the garnishment fails and the debtor keeps the property. The bill increases the number of business days for a plaintiff to respond from 3 to 8 for a hand delivered claim and from 8 to 14 for a mailed claim of exemption.

Current law requires forms applicable to garnishment to be delivered directly to parties, which is contrary to normal legal practice. This bill allows for delivery to a party's attorney.

While current law requires the debtor to certify under oath and penalty of perjury to the facts underlying the claim of exemption, the statutory form does not include the oath. This bill corrects the statutory form for use by a debtor.

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

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

When a litigant obtains a judgment against another litigant, it can sometimes be difficult to collect the judgment. Garnishment is a method to do so, created by statute and unknown to common law.¹ The party to whom the judgment is owed is known as the "creditor" or "judgment creditor," while the party against whom the judgment will be garnished is known as the "garnishee" or the "debtor".²

Garnishment is a statutory remedy, controlled by ch. 77, F.S., and ch. 222, F.S. Section 222.12, F.S., was originally passed into law in 1875,³ while s. 77.041, F.S., was originally passed into law in 2000.⁴ A writ of garnishment is generally filed after a judgment has been entered against the debtor,⁵ however there is a procedure for issuance of a garnishment prior to judgment⁶ in cases other than a tort action.⁷ For a debtor without assets to satisfy the judgment, the creditor may file a continuing writ of garnishment against salary or wages.⁸ A garnishment may also be filed against any tangible or intangible personal property of the defendant.⁹

As in other forms of remedies available to a creditor, there are limits on collection. State constitutional and statutory law and federal law provide that certain property of a debtor is exempt from creditor claims. Exemptions include, usually with qualification, but are not limited to:

- Homestead real property;¹⁰
- Personal property to the value of \$1000;¹¹
- Head of family wages;¹²
- Firefighters' pensions;¹³
- Medical savings account;¹⁴
- Motor vehicles;¹⁵
- Pension benefits;¹⁶
- Veterans' benefits;¹⁷ and
- Workers' compensation payments.¹⁸

¹ *Robinson v. Robinson*, 18 So.2d 29, 31 (Fla. 1944).

² While it may be easier to think of the creditor as the plaintiff in the lawsuit and the debtor as the defendant, there are circumstances where the defendant wins the case and receives a judgment against the plaintiff. Accordingly, it is more accurate to refer to creditor and debtor.

³ Section 2, ch. 2065, L.O.F. (1875).

⁴ Section 22, ch. 2000-258, L.O.F.

⁵ Section 77.03, F.S.

⁶ Section 77.031, F.S.

⁷ Section 77.02, F.S.

⁸ Section 77.0305, F.S.

⁹ Section 77.01, F.S.

¹⁰ Fla. Const., Art. 10, Sec. 4.

¹¹ *Id.*

¹² Section 222.11, F.S.

¹³ Section 175.241, F.S.

¹⁴ Section 222.22, F.S.

¹⁵ Section 222.25, F.S.

¹⁶ Section 222.21, F.S.

¹⁷ Section 744.626, F.S.

¹⁸ Section 61.14, F.S.

The statute provides a form for the notice that the clerk of the court must furnish to an individual debtor upon the application for a writ of garnishment. The notice informs the debtor that he or she may have certain assets that are exempt from garnishment. The exemptions are not automatic and must be timely affirmatively asserted by the debtor. If the debtor fails to timely claim an exemption, the creditor is entitled to a default judgment (and is entitled to the property garnished).¹⁹

The clerk is also required to furnish the debtor with a statutory form for a claim of exemption. The statutory form lists some common exemptions that the defendant may check, along with a request for a hearing and a signature line for the debtor.²⁰ While s. 222.12, F.S., requires that a claim of exemption be filed under oath, the statutory form as s. 77.041(1), F.S., does not contain the legal language necessary to effectuate a sworn statement.

Section 77.041(2), F.S., provides that, if a claim of exemption is timely filed by the debtor, the creditor has 3 business days to file an objection to the claim of exemption if the defendant hand delivers the form and 8 business days if the defendant mails the form. Section 222.12, F.S., however, provides that the creditor's objection must be filed within 2 business days. If the creditor does not timely respond to the claim of exemption, the clerk must automatically dissolve the writ of garnishment.²¹

Upon the filing by a debtor of a claim of exemption, and the timely filing of an objection by the creditor, a hearing will be held as soon as practicable to determine the validity of the exemptions claimed.²²

It is unclear why there are conflicting statutes regarding claims of exemption. The passage of s. 77.041, F.S., may have been intended to replace s. 222.12, F.S., but the courts have not interpreted it that way.²³ A trial court decision dissolved a writ of garnishment because the plaintiff's answers to the defendant's claims of exemption were not sufficient under s. 77.041(3), F.S., to "contest" the claims because the plaintiff's answers were general denials, rather than specifically contesting each claim. The appellate court reversed, claiming that the trial court erred by narrowly focusing on the word "contest" in s. 77.041(3), F.S., and that the procedure in s. 77.041, F.S., supplements, rather than replaces s. 222.12, F.S.²⁴

Effects of the Bill

This bill amends s. 77.041, F.S., to extend the time that a creditor has to file an objection to a defendant's exemption request to 8 business days for a hand-delivered form and 14 business days for a mailed form.

The bill allows delivery of documents to the plaintiff or defendant's attorney, rather than requiring delivery to the plaintiff or defendant himself or herself.

The bill also modifies the statutory form to include certification under oath and penalty of perjury that the debtor mailed the form on the date stated and that the statements made in the claim of exemption are true to the best of the debtor's knowledge and belief.

The bill repeals s. 222.12, F.S., the 1875 statute relating to proceedings for exemption.

B. SECTION DIRECTORY:

Section 1 amends s. 77.041, F.S., relating to notice to individual defendant for claim of exemption from garnishment and the procedures for a hearing.

¹⁹ Section 77.081, F.S.

²⁰ Section 77.041, F.S.

²¹ *Id.*

²² Section 77.041(3), F.S.

²³ *Cadle Co. v. Pegasus Ranch, Inc.*, 920 So.2d 1276 (Fla. 4th DCA 2006).

²⁴ *Id.*

Section 2 repeals s. 222.12, F.S., relating to proceedings for exemption.

Section 3 provides an effective date of July 1, 2013.

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:

None.

D. FISCAL COMMENTS:

None.

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:

The bill allows a defendant to either hand deliver the claim of exemption or to send it by mail. However, the certification statement in the statutory form (as lines 97-102) only contains language related to

mailing of the completed form. It does not contain language that a debtor could use to certify that he or she hand delivered the form.

The bill adds language to the statutory form for the debtor to certify under oath as to the facts contained in the claim, but repeals the statutory requirement for the form to be signed under oath. The mere inclusion of a requirement in a form may not be legally sufficient to impose the requirement. The bill should perhaps be amended to add a substantive law requirement in s. 77.041, F.S., for certification under oath.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to claims of exemption from
 3 garnishment; amending s. 77.041, F.S.; revising the
 4 contents of a notice to defendants of rights against
 5 garnishment of wages, money, and other property;
 6 increasing the period of time in which a plaintiff may
 7 file a claim contesting a defendant's claim of
 8 exemption; repealing s. 222.12, F.S., relating to
 9 proceedings for claims of exemption from garnishment;
 10 providing an effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. Subsections (1) and (3) of section 77.041,
 15 Florida Statutes, are amended to read:

16 77.041 Notice to individual defendant for claim of
 17 exemption from garnishment; procedure for hearing.—

18 (1) Upon application for a writ of garnishment by a
 19 plaintiff, if the defendant is an individual, the clerk of the
 20 court shall attach to the writ the following "Notice to
 21 Defendant":

22 NOTICE TO DEFENDANT OF RIGHT AGAINST
 23 GARNISHMENT OF WAGES, MONEY,
 24 AND OTHER PROPERTY

25 The Writ of Garnishment delivered to you with this Notice
 26 means that wages, money, and other property belonging to you
 27 have been garnished to pay a court judgment against you.

28 HOWEVER, YOU MAY BE ABLE TO KEEP OR RECOVER YOUR WAGES, MONEY,

29 OR PROPERTY. READ THIS NOTICE CAREFULLY.

30 State and federal laws provide that certain wages, money,
 31 and property, even if deposited in a bank, savings and loan, or
 32 credit union, may not be taken to pay certain types of court
 33 judgments. Such wages, money, and property are exempt from
 34 garnishment. The major exemptions are listed below on the form
 35 for Claim of Exemption and Request for Hearing. This list does
 36 not include all possible exemptions. You should consult a lawyer
 37 for specific advice.

38 IF AN EXEMPTION FROM GARNISHMENT APPLIES TO YOU AND YOU WANT TO
 39 KEEP YOUR WAGES, MONEY, AND OTHER PROPERTY FROM BEING GARNISHED,
 40 OR TO GET BACK ANYTHING ALREADY TAKEN, YOU MUST COMPLETE A FORM
 41 FOR CLAIM OF EXEMPTION AND REQUEST FOR HEARING AS SET FORTH
 42 BELOW AND HAVE THE FORM NOTARIZED. IF YOU HAVE A VALID
 43 EXEMPTION, YOU MUST FILE THE FORM WITH THE CLERK'S OFFICE WITHIN
 44 20 DAYS AFTER THE DATE YOU RECEIVE THIS NOTICE OR YOU MAY LOSE
 45 IMPORTANT RIGHTS. YOU MUST ALSO MAIL OR DELIVER A COPY OF THIS
 46 FORM TO THE PLAINTIFF OR THE PLAINTIFF'S ATTORNEY AND THE
 47 GARNISHEE OR THE GARNISHEE'S ATTORNEY AT THE ADDRESSES LISTED ON
 48 THE WRIT OF GARNISHMENT. NOTE THAT THE FORM REQUIRES YOU TO
 49 COMPLETE A CERTIFICATION THAT YOU MAILED COPIES TO THE PLAINTIFF
 50 OR THE PLAINTIFF'S ATTORNEY AND GARNISHEE OR THE GARNISHEE'S
 51 ATTORNEY.

52 If you request a hearing, it will be held as soon as
 53 possible after your request is received by the court. The
 54 plaintiff must file any objection within 8 ~~3~~ business days if
 55 you hand delivered to the plaintiff or the plaintiff's attorney
 56 a copy of the form for Claim of Exemption and Request for

57 | Hearing or, alternatively, 14 & business days if you mailed a
 58 | copy of the form for claim and request to the plaintiff or the
 59 | plaintiff's attorney. If the plaintiff files an objection to
 60 | your Claim of Exemption and Request for Hearing, the clerk will
 61 | notify you and the other parties of the time and date of the
 62 | hearing. You may attend the hearing with or without an attorney.
 63 | If the plaintiff fails to file an objection, no hearing is
 64 | required, the writ of garnishment will be dissolved, and your
 65 | wages, money, or property will be released.

66 | IF YOU HAVE A VALID EXEMPTION, YOU SHOULD FILE THE FORM FOR
 67 | CLAIM OF EXEMPTION IMMEDIATELY TO KEEP YOUR WAGES, MONEY, OR
 68 | PROPERTY FROM BEING APPLIED TO THE COURT JUDGMENT. THE CLERK
 69 | CANNOT GIVE YOU LEGAL ADVICE. IF YOU NEED LEGAL ASSISTANCE, YOU
 70 | SHOULD SEE A LAWYER. IF YOU CANNOT AFFORD A PRIVATE LAWYER,
 71 | LEGAL SERVICES MAY BE AVAILABLE. CONTACT YOUR LOCAL BAR
 72 | ASSOCIATION OR ASK THE CLERK'S OFFICE ABOUT ANY LEGAL SERVICES
 73 | PROGRAM IN YOUR AREA.

74 | CLAIM OF EXEMPTION AND
 75 | REQUEST FOR HEARING

76 | I claim exemptions from garnishment under the following
 77 | categories as checked:

78 | 1. Head of family wages. (~~You must~~ Check
 either a. or b. below if applicable.)

79 | a. I provide more than one-half of the
 support for a child or other dependent and
 have net earnings of \$750 or less per week.

80

..... b. I provide more than one-half of the support for a child or other dependent, have net earnings of more than \$750 per week, but have not agreed in writing to have my wages garnished.

81

..... 2. Social Security benefits.

82

..... 3. Supplemental Security Income benefits.

83

..... 4. Public assistance (welfare).

84

..... 5. Workers' Compensation.

85

..... 6. Reemployment assistance or unemployment compensation.

86

..... 7. Veterans' benefits.

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..... 8. Retirement or profit-sharing benefits or pension money.

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..... 9. Life insurance benefits or cash surrender value of a life insurance policy or proceeds of annuity contract.

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..... 10. Disability income benefits.

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.... 11. Prepaid College Trust Fund or Medical Savings Account.

.... 12. Other exemptions as provided by law.
.....(explain)

I request a hearing to decide the validity of my claim. Notice of the hearing should be given to me at:

Address:

Telephone number:.....

I CERTIFY UNDER OATH AND PENALTY OF PERJURY that a copy of this CLAIM OF EXEMPTION AND REQUEST FOR HEARING has been furnished by U.S. Mail on (insert date) , to: (insert names and addresses of Plaintiff or Plaintiff's attorney and of Garnishee or Garnishee's attorney to whom this document was mailed) .

I FURTHER CERTIFY UNDER OATH AND PENALTY OF PERJURY that the statements made in this request are true to the best of my knowledge and belief.

.....

Defendant's signature

Date.....

STATE OF FLORIDA

COUNTY OF

Sworn and subscribed to before me this day of ...(month and year)...., by ...(name of person making statement)...

114 Notary Public/Deputy Clerk
 115 Personally KnownOR Produced Identification....
 116 Type of Identification Produced.....

117 (3) Upon the filing by a defendant of a claim of exemption
 118 and request for hearing, a hearing will be held as soon as is
 119 practicable to determine the validity of the claimed exemptions.
 120 If the plaintiff does not file a sworn written statement that
 121 contests the defendant's claim of exemption within 8 ~~3~~ business
 122 days after hand delivering the claim and request or,
 123 alternatively, 14 ~~8~~ business days, if the claim and request were
 124 served by mail, no hearing is required and the clerk must
 125 automatically dissolve the writ and notify the parties of the
 126 dissolution by mail.

127 Section 2. Section 222.12, Florida Statutes, is repealed.

128 Section 3. This act shall take effect July 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 587 Damages for Medical or Health Care Services

SPONSOR(S): Hood, Jr.

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Cary JMC	Bond NB
2) Health Innovation Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The purpose of personal injury law is to fairly compensate a person injured due to wrongful action of another. Damages may, in appropriate circumstances, be awarded to the injured person for medical expenses, lost wages, property damage, pain and suffering, and punitive damages. This bill changes how medical expenses are calculated.

Most providers of medical services offer (or are required) to discount their standard billing rates for the benefit of Medicaid, Medicare, or an insurance company. Under current law, a jury may hear and base its award on the standard billing rate. To arrive at the final compensation award, the trial judge reduces the award by applying the appropriate discount, if any. This reduction is based on the theory that the plaintiff would otherwise receive a windfall award.

In general, this bill moves the determination of the value of medical services from the trial court judge to the jury. Where the bill has already been paid, the jury is informed of the actual amount and the jury may not award a higher amount. Where the services have not been paid (which may apply to past damages and will always apply to future damages), the bill limits the amount recoverable to the maximum amount that is customarily accepted in payment for such services by providers in the same geographic area.

The bill also prohibits an injured party from being awarded reimbursement for a medical service that was not medically necessary.

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

The bill only applies to a cause of action that accrues after the effective date of the bill. The bill provides an effective date upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The purpose of personal injury law is to fairly compensate a person injured due to wrongful action of another. Damages may, in appropriate circumstances, be awarded to the injured person for medical expenses, lost wages, property damage, pain and suffering, and punitive damages.¹ This bill modifies the collateral source rule to change how medical expenses are calculated and awarded in personal injury lawsuits.

History of the Collateral Source Rule

At common law, the collateral source rule barred reduction of a personal injury verdict based on benefits received or payments made by collateral sources of indemnity. Further, the existence of such collateral sources was considered inadmissible at trial. As applied to damages in personal injury action, at common law an injured person was entitled to the full value of the medical services incurred regardless of whether the injured person ever paid the awarded sum to the medical provider.²

Section 768.76, F.S., created by the Tort Reform and Insurance Act of 1986³, redefined Florida's common law collateral source rule. The Act requires the court to reduce an "award by the total amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists."⁴ Although a verdict may be setoff under the Act, the common law collateral source rule still persists and bars the admission of the existence of collateral sources of indemnity at trial.⁵

Medical Billing

In a typical case, a plaintiff may see a health care provider within the plaintiff's Health Maintenance Organization (HMO) or Preferred Provider Organization (PPO) plan. The provider often has different rates for the same procedure based on the rate that the provider negotiated with the HMO or PPO, the rate Medicaid or Medicare will pay, or the rate that a cash customer would pay. The "list price" of the procedure is rarely the price that is actually paid, much in the same way that the list price of an automobile is often higher than the actual price that is negotiated by the purchaser. The difference is that in the medical industry it is often a third-party that negotiates down the price of the procedure rather than the patient. The difference between the amount billed and the amount paid, if awarded to a plaintiff, is sometimes referred to as "phantom damages".⁶

Current Practice

In order to honor the statutory setoff for collateral sources and honor the evidentiary rule prohibiting disclosure to the jury of the collateral source payment, the general practice in Florida courts is to accept into evidence the full value of the medical services. Post-trial, the court hears evidence and reduces the

¹ Fla.Jur.2d Damages s. 7, Feb. 2013.

² Gordon, *Goble, Thyssenkrupp, and the Collateral Source Rule: Resolving The Ongoing Conflict*, 84 Fla.B.J. 18 (December 2010).

³ L.O.F. 86-160.

⁴ Section 768.76(1), F.S.

⁵ Gordon. See also *Gormley v. GTE Prods. Corp.*, 587 So. 2d 455, 458 (Fla. 1991).

⁶ *Goble v. Frohman*, 901 So.2d 830, 832 (Fla. 2005).

amount of the judgment by the statutory setoff.⁷ This explanation simplifies the practice and has been perhaps changed by recent case law.

Recent case law interpretations of s. 768.76, F.S., have created confusion in the interpretation of the statute. The Supreme Court has ruled that the collateral source rule prohibits the awarding of the value of governmental or charitable medical services, but that the value of such services should be admissible to the jury for the purpose of determining the reasonable cost of medically necessary future care.⁸ If payments were made by Medicare or other governmental plan, only the amounts actually paid should be allowed into evidence.⁹ If, however, payments were made by an HMO or other health insurer, the full amount of the bills should be placed into evidence and, assuming the insurer has a right of subrogation and the providers have no right to seek payments for the balances, the amount of the contractual discounts should be set off post-verdict.¹⁰ However, a district court of appeal issued a broader ruling relating to a patient with a non-government insurance policy, reasoning that the payment of one's insurance premiums is sufficient to have the amount of the full billed cost of treatment into evidence even without the need to calculate future medical costs.¹¹ Another district court of appeal has specifically allowed the jury to hear evidence of the full amount of the bill where the plaintiff did not have health insurance, reasoning that the lower price as negotiated by the plaintiff was "earned in some way" by the plaintiff rather than received from a collateral source.¹²

Medically Necessary

There is a longstanding rule that allows a plaintiff to recover against the original tortfeasor as the proximate cause of an injury sustained in the treatment of said injury.¹³ The original tortfeasor remains liable unless subsequent care was "highly unusual, extraordinary or bizarre."¹⁴ Medical necessity is not based on the opinion of an expert, but rather it is based on the necessity of the treatment from the plaintiff's perspective.¹⁵ Thus, even if a treatment is deemed to be medically unnecessary by expert testimony, the defendant is liable for subsequent injury as a result of the unnecessary treatment if the treatment was entered into by the plaintiff in reasonable reliance on his or her doctor's advice:

It is certainly permissible for the defense to argue that the treatment the plaintiff underwent was not caused by the accident. It is an entirely different thing to argue, as the defendant did in the instant case, that the treatment was inappropriate and unnecessary. The defendant's argument could have led the jury to believe that if the plaintiff's doctor was wrong, the plaintiff couldn't recover damages for the treatment she underwent, even if the injuries she suffered in the car accident caused her to pursue treatment and she reasonably relied on her doctor's advice.¹⁶

Effect of the Bill

This bill creates s. 768.755, F.S., to modify both the limitation on recovery for medical expenses and to modify the rules of evidence regarding medical expenses.

⁷ *Sheffield v. Superior Ins. Co.*, 800 So.2d 197, 200 (Fla. 2001).

⁸ *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So.2d 514 (Fla. 1984).

⁹ *Thyssenkrupp Elevator Corp. v. Lasky*, 868 So.2d 547 (Fla. 4th DCA 2003).

¹⁰ *Goble v. Frohman*, 901 So.2d 830, 832 (Fla. 2005).

¹¹ *Nationwide Mut. Fire Ins. Co. v. Harrell*, 53 So.3d 1084 (Fla. 1st DCA 2010).

¹² See *Durse v. Henn*, 68 So.3d 271 (Fla. 4th DCA 2011).

¹³ *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977).

¹⁴ *Davidson v. Gaillard*, 584 So.2d 71 (Fla. 1st DCA 1991).

¹⁵ *Dungan v. Ford*, 632 So.2d 159, 163 (Fla. 1st DCA 1994).

¹⁶ *Costa v. Aberle*, 96 So.3d 959, 963 (Fla. 4th DCA 2012).

Limitations on Recovery

Where the medical service has been paid in full, the bill limits recovery of such medical expenses to the actual amount paid.

Where a medical provider claims a balance due or where a claim is for future services, the bill limits the amount recoverable in the suit to the maximum amount that is customarily accepted in payment for such services by providers in the same geographic area. The bill applies the same standard to a provider's lien on a judgment, unless Medicaid, Medicare, or a payor regulated under the Florida Insurance Code has covered the plaintiff's medical services and has given the notice of lien in the action, in which case the amount of the lien is the maximum amount recoverable and admissible into evidence.

The bill also creates a preponderance of the evidence standard for determining if a medical service is medically necessary. If the jury determines that any medical services were not medically necessary, the plaintiff may not recover damages for those services or other damages arising out of those services. The bill provides that the patient has no liability to the provider in such a situation, and provides an affirmative defense if the provider files an action to collect from the patient.

The bill requires a court to apply the collateral source rule of s. 768.76, F.S., after damages in compliance with the new provisions are awarded. This may allow the judge to modify an award that is improperly calculated by the jury. Otherwise, since this bill requires a jury to hear and account for collateral sources when calculating an award, this bill appears to make a set off under s. 768.76, F.S., unnecessary.

Medically Necessary

This bill appears to codify current law with respect to medically necessary treatment, as the bill does not appear to modify or overrule the Florida Supreme Court's *Dungan* holding that medical necessity is based on the plaintiff's reasonable reliance on his or her doctor's advice.

Admission of Evidence

The bill prohibits the admission into evidence of the billed amount, providing that only the paid amount is admissible into evidence.

Similar to how the enactment of s. 768.76, F.S., had the effect of abrogating the damages portion of the common law collateral source rule, the bill appears to abrogate the evidentiary effect of the common law collateral source rule. In effect, this bill completes the abrogation of the common law collateral source rule in Florida.

B. SECTION DIRECTORY:

Section 1 creates s. 768.755, F.S., relating to damages recoverable for medical or health care services.

Section 2 provides an effective date upon becoming a law and applies the bill prospectively.

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:

None.

D. FISCAL COMMENTS:

None.

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:

The bill appears to abrogate the remainder of the common law collateral source rule as it relates to personal injury or wrongful death causes of action. The Florida Supreme Court upheld an earlier statute partially abrogating the collateral source rule against a challenge on equal protection grounds. The plaintiffs in that case argued that the distinction between medical practitioners and other members of the public was arbitrary and unreasonable. The court determined that the collateral source rule did not implicate a suspect class or fundamental right and thus applied a rational basis test and upheld the statute. However, in the passage of that bill, the Legislature spelled out the legitimate state interests.¹⁷ The Supreme Court also addressed challenges based on access to courts, separation of power, and the Court's exclusive rulemaking authority and dismissed them as being "without merit."¹⁸ A District Court of Appeal also dismissed a claim based on due process in another case.¹⁹

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S. (the Evidence Code), and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, however, it may refuse to adopt the changes in the bill as a rule.

¹⁷ *Pinillos v. Cedars of Lebanon Hospital Corp.*, 403 So.2d 365, 367 (Fla. 1981).

¹⁸ *Id.* at 368.

¹⁹ *Lower Florida Keys Hospital Dist. v. Skelton*, 404 So.2d 832 (Fla. 3rd DCA 1981).

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for executive branch rulemaking or rulemaking authority. The bill appears to require court rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Lines 56-62 appear to limit the amount recoverable to the amount of a lien when a lien is filed by the provider. Although the term "lien" is appropriate in some contexts,²⁰ it appears to also be referencing a right of subrogation, which is similar to a lien. It may be appropriate to amend the section to reference both liens and rights of subrogation. Additionally, this provision appears to perhaps limit an injured person from receiving reimbursement for deductibles and co-pays.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

²⁰ For instance, Medicaid and some local hospital districts have a "lien" against a personal injury lawsuit.
STORAGE NAME: h0587.CJS.DOCX
DATE: 2/18/2013

1 A bill to be entitled
 2 An act relating to damages for medical or health care
 3 services; creating s. 768.755, F.S.; limiting recovery
 4 of damages for medical or health care services to
 5 amounts actually paid if no balance to the provider is
 6 outstanding; limiting recovery of such damages to
 7 amounts customarily accepted by providers in the same
 8 geographic area if a balance to the provider is
 9 outstanding; requiring medical or health care services
 10 to be medically necessary in order to be recoverable;
 11 providing that lack of medical necessity is an
 12 affirmative defense in an action for nonpayment;
 13 specifying that certain evidence shall be considered
 14 in determining the amounts customarily accepted;
 15 providing for reduction of awards under specified
 16 provisions; providing for applicability; providing an
 17 effective date.

18
 19 Be It Enacted by the Legislature of the State of Florida:
 20

21 Section 1. Section 768.755, Florida Statutes, is created
 22 to read:

23 768.755 Damages recoverable for medical or health care
 24 services.—In any action to which this part applies, damages for
 25 medical or health care services provided or to be provided to a
 26 claimant are recoverable only as provided in this section.

27 (1) With respect to any medical or health care services
 28 provided to the claimant for which an outstanding balance is not

29 due to the provider, the actual amounts remitted to the provider
 30 are the maximum amounts recoverable. In such circumstances, any
 31 difference between the amounts originally billed by the provider
 32 and the actual amounts remitted to the provider are not
 33 recoverable or admissible into evidence.

34 (2) With respect to any medical or health care services
 35 provided to the claimant for which an outstanding balance is
 36 claimed to be due to the provider, and to claims asserted for
 37 medical or health care services to be provided to the claimant
 38 in the future, the maximum amounts recoverable are the amounts
 39 customarily accepted in payment for such services by providers
 40 in the same geographic area. This limitation also applies to any
 41 lien asserted for such services in the action, except for those
 42 liens described in subsection (4).

43 (3) Damages for medical or health care services provided
 44 or to be provided to a claimant are recoverable only for those
 45 services determined, by a preponderance of the evidence, to be
 46 medically necessary. If it is determined that any of the
 47 claimant's medical or health care services provided or to be
 48 provided were or are not medically necessary, the claimant may
 49 not recover damages for such services or recover from the
 50 nonprovider defendant for any damages arising out of or related
 51 to such services. A patient is not liable to a provider for
 52 medical or health care services rendered if such services were
 53 not medically necessary, and nonpayment based on lack of medical
 54 necessity may be asserted as an affirmative defense in any
 55 action to recover such damages.

56 (4) Notwithstanding any other provision in this section to
 57 the contrary, if Medicaid, Medicare, or a payor regulated under
 58 the Florida Insurance Code has covered or is an insurer covering
 59 the claimant's medical or health care services and has given
 60 notice of assertion of a lien in the action, the amount of the
 61 lien shall be the maximum amount recoverable and admissible into
 62 evidence with respect to the covered services.

63 (5) After damages in compliance with this section are
 64 awarded to a claimant, the court shall apply s. 768.76 and
 65 reduce the amount of such award, as appropriate.

66 (6) This section applies only to actions for personal
 67 injury or wrongful death of the claimant and has no other
 68 application or effect regarding compensation paid to providers
 69 for medical or health care services.

70 Section 2. This act shall take effect upon becoming a law
 71 and shall apply to all causes of action arising on or after that
 72 date.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB CJS 13-03 Judicial Nominating Commissions

SPONSOR(S): Civil Justice Subcommittee

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Ward <i>AW</i>	Bond <i>NB</i>

SUMMARY ANALYSIS

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC). The number of members and composition of each JNC is provided for by statute. There is also a separate statewide nominating commission for Judges of Compensation Claims (JCC). The number of members and the composition of the commission are provided for by statute.

The bill:

- Provides that certain members of the JNC serve at the pleasure of the governor;
- Provides that each expired term or vacancy on a JNC is filled by appointment in the same manner as the member whose position is being filled;
- Deletes an obsolete provision regarding rule-making.
- Eliminates the statewide nominating commission for JCC's and provides that JCC's be appointed by the Governor from a list of persons nominated by the JNC for the First District Court of Appeal.

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

The bill becomes effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Judicial Nominating Commission

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC).¹ The number of members and composition of each JNC is provided for by statute.² When an appellate judgeship becomes vacant, candidates submit their applications to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list.³ Circuit and county court judges are determined by election,⁴ but vacancies on the circuit or county courts that occur between elections are filled in the same manner as vacancies on the appellate bench.⁵

Article V, s. 11(d), Fla. Const., provides that a JNC must be created by general law for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within that circuit. Section 43.291, F.S., implements the constitutional provisions. Each JNC consists of nine members appointed by the Governor.⁶ Members serve 4 year terms.⁷ All JNC members must be residents of the territorial jurisdiction serviced by the JNC to which the member is appointed.⁸

The Governor may appoint five of the nine members of each JNC without input from the Board of Governors of the Florida Bar. Two of those five appointees must be members of the Florida Bar who are engaged in the practice of law.⁹ The remaining four members are appointed by the Governor from a list of nominees selected and provided by the Board of Governors of the Florida Bar, which nominates three candidates for each position. The Governor may reject all of the nominees recommended for the position and request that the Board submit a new list of three different nominees who have not previously been recommended by the Board. These four members of the JNC must be members of the Florida Bar engaged in the practice of law.

The bill provides that members of the JNC, except the four members selected from a list provided by the Florida Bar, serve at the pleasure of the Governor. The bill also:

- Provides that each current member, other than those nominated by the Board of Governors, also serve at the pleasure of the Governor.
- Updates provisions relating to the staggering of terms for members selected from the list provided by the Board of Governors of the Florida Bar.
- Provides that an appointment to a JNC of a member selected from a list of nominees provided by the Board of Governors of the Florida Bar — unless it is to a vacant, unexpired term — is for 4 years;
- Provides that each expired term or vacancy is filled by appointment in the same manner as the member whose position is filled.

¹ See art. V, s.11(a), Fla. Const.

² See s. 43.291, F.S.

³ See art. V, s. 11(a), Fla. Const.

⁴ Circuits and counties may, by local option, choose to select judges in the same manner as appellate judges are selected. See art. V, s.10, Fla. Const.

⁵ See art. V, s. 11(b), Fla. Const.

⁶ Section 43.291(1), F.S.

⁷ Section 43.291(3), F.S.

⁸ Section 43.291(1)(a), (b), F.S.

⁹ Section 43.291(1)(b), F.S.

- Deletes an obsolete requirement that the Executive Office of the Governor establish uniform rules of procedure.

Statewide Nominating Commission for Judges of Compensation Claims (JCC)

There is a separate statewide nominating commission for JCC's.¹⁰ The Office of Compensation Claims is responsible for adjudicating disputes over workers' compensation benefits.¹¹ The number of members and the composition of the nominating commission are provided for in s. 440.45, F.S. Under current law, the commission must be composed of:

- Five members appointed by the Board of Governors of the Florida Bar from among Florida Bar members engaged in the practice of law.
- Five electors appointed by the Governor.
- Five electors selected and appointed by a majority vote of the other ten members of the commission.

Each group must contain at least one member of a minority group as defined in statute. In addition, an individual from each five-member group must live in each territorial jurisdiction of one of the five district courts of appeal. The statute also provides for staggered terms.

The bill eliminates the current commission and provides that a JCC must be appointed by the Governor from a list of three persons nominated by the JNC for the First District Court of Appeal.

B. SECTION DIRECTORY:

Section 1 amends s. 43.291, F.S., relating to judicial nominating commissions.

Section 2 amends s. 440.45, F.S., relating to the office of the judges of compensation claims.

Section 3 provides that the act takes effect upon becoming law.

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.

¹⁰ The Office of the Judges of Compensation Claims operates 17 district offices; there are 31 JCC's throughout the state. Office of the Judges of Compensation Claims, <http://www.jcc.state.fl.us/JCC/> (last visited Feb. 18, 2013).

¹¹ *Id.*

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.

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 require additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

1 A bill to be entitled
 2 An act relating to the judiciary; amending s. 43.291,
 3 F.S.; revising requirements for the appointment of
 4 members of judicial nominating commissions; providing
 5 that, with the exception of members selected from a
 6 list of nominees provided by the Board of Governors of
 7 The Florida Bar, a current member of a judicial
 8 nominating commission appointed by the Governor serves
 9 at the pleasure of the Governor; providing for each
 10 expired term or vacancy to be filled by appointment in
 11 the same manner as the member whose position is being
 12 filled; deleting obsolete provisions; deleting a
 13 requirement that the Executive Office of the Governor
 14 establish uniform rules of procedure consistent with
 15 the State Constitution when suspending for cause a
 16 member of a judicial nominating commission; amending
 17 s. 440.45, F.S.; providing that the judicial
 18 nominating commission for the First District Court of
 19 Appeal will nominate persons to the Office of the
 20 Judges of Compensation Claims; deleting provisions
 21 creating a nominating commission solely for the Office
 22 of the Judges of Compensation Claims; providing an
 23 effective date.

24
 25 Be It Enacted by the Legislature of the State of Florida:

26
 27 Section 1. Subsections (1), (3), and (5) of section
 28 43.291, Florida Statutes, are amended to read:

29 43.291 Judicial nominating commissions.—

30 (1) (a) Each judicial nominating commission shall be
 31 composed of the following members:

32 1.-(a) Four members of The Florida Bar, appointed by the
 33 Governor, who are engaged in the practice of law, each of whom
 34 is a resident of the territorial jurisdiction served by the
 35 commission to which the member is appointed. The Board of
 36 Governors of The Florida Bar shall submit to the Governor three
 37 recommended nominees for each position. The Governor shall
 38 select the appointee from the list of nominees recommended for
 39 that position, but the Governor may reject all of the nominees
 40 recommended for a position and request that the Board of
 41 Governors submit a new list of three different recommended
 42 nominees for that position who have not been previously
 43 recommended by the Board of Governors.

44 2.-(b) Five members appointed by the Governor who shall
 45 serve at the pleasure of the Governor, each of whom is a
 46 resident of the territorial jurisdiction served by the
 47 commission to which the member is appointed, of which at least
 48 two are members of The Florida Bar engaged in the practice of
 49 law. Notwithstanding any other law, each current member of a
 50 judicial nominating commission appointed by the Governor, other
 51 than those selected from a list of nominees provided by the
 52 Board of Governors of The Florida Bar, shall serve at the
 53 pleasure of the Governor.

54 (b) Each expired term or vacancy shall be filled by
 55 appointment in the same manner as the member whose position is
 56 being filled.

57 (3) Notwithstanding any other provision of this section,
 58 each current member of a judicial nominating commission selected
 59 from a list of nominees provided ~~appointed directly~~ by the Board
 60 of Governors of The Florida Bar shall serve the remainder of his
 61 or her term, unless removed for cause. ~~The terms of all other~~
 62 ~~members of a judicial nominating commission are hereby~~
 63 ~~terminated, and the Governor shall appoint new Members~~ selected
 64 from a list of nominees provided by the Board of Governors of
 65 The Florida Bar shall serve terms to each judicial nominating
 66 ~~commission~~ in the following manner:

67 (a) One appointment ~~Two appointments~~ for a term ~~terms~~
 68 ending July 1, 2016 ~~2002~~, one of which shall be an appointment
 69 ~~selected from nominations submitted by the Board of Governors of~~
 70 ~~The Florida Bar pursuant to paragraph (1)(a);~~

71 (b) Two appointments for terms ending July 1, 2014 ~~2003~~;
 72 and

73 (c) One appointment ~~Two appointments~~ for a term ~~terms~~
 74 ending July 1, 2015 ~~2004~~.

75
 76 Every subsequent appointment of a member selected from a list of
 77 nominees provided by the Board of Governors of The Florida Bar,
 78 except an appointment to fill a vacant, unexpired term, shall be
 79 for 4 years. ~~Each expired term or vacancy shall be filled by~~
 80 ~~appointment in the same manner as the member whose position is~~
 81 ~~being filled.~~

82 (5) A member of a judicial nominating commission may be
 83 suspended for cause by the Governor ~~pursuant to uniform rules of~~
 84 ~~procedure established by the Executive Office of the Governor~~

85 consistent with s. 7, ~~of~~ Art. IV of the State Constitution.
 86 Section 2. Paragraph (a) of subsection (1), paragraphs (b)
 87 and (c) of subsection (2), and subsection (5) of section 440.45,
 88 Florida Statutes, are amended to read:
 89 440.45 Office of the Judges of Compensation Claims.—
 90 (1)(a) There is created the Office of the Judges of
 91 Compensation Claims within the Department of Management
 92 Services. The Office of the Judges of Compensation Claims shall
 93 be headed by the Deputy Chief Judge of Compensation Claims. The
 94 Deputy Chief Judge shall report to the director of the Division
 95 of Administrative Hearings. The Deputy Chief Judge shall be
 96 appointed by the Governor for a term of 4 years ~~from a list of~~
 97 ~~three names submitted by the statewide nominating commission~~
 98 ~~created under subsection (2)~~. The Deputy Chief Judge must
 99 demonstrate prior administrative experience and possess the same
 100 qualifications for appointment as a judge of compensation
 101 claims, and the procedure for reappointment of the Deputy Chief
 102 Judge will be the same as for reappointment of a judge of
 103 compensation claims. The office shall be a separate budget
 104 entity and the director of the Division of Administrative
 105 Hearings shall be its agency head for all purposes, including,
 106 but not limited to, rulemaking pursuant to subsection (4) and
 107 establishing agency policies and procedures. The Department of
 108 Management Services shall provide administrative support and
 109 service to the office to the extent requested by the director of
 110 the Division of Administrative Hearings but shall not direct,
 111 supervise, or control the Office of the Judges of Compensation
 112 Claims in any manner, including, but not limited to, personnel,

113 purchasing, budgetary matters, or property transactions. The
 114 operating budget of the Office of the Judges of Compensation
 115 Claims shall be paid out of the Workers' Compensation
 116 Administration Trust Fund established in s. 440.50.

117 (2)

118 (b) Except as provided in paragraph (c), the Governor
 119 shall appoint a judge of compensation claims from a list of
 120 three persons nominated by the judicial a statewide nominating
 121 commission for the First District Court of Appeal. ~~The statewide~~
 122 ~~nominating commission shall be composed of the following:~~

123 1. ~~Five members, at least one of whom must be a member of~~
 124 ~~a minority group as defined in s. 288.703, one of each who~~
 125 ~~resides in each of the territorial jurisdictions of the district~~
 126 ~~courts of appeal, appointed by the Board of Governors of The~~
 127 ~~Florida Bar from among The Florida Bar members who are engaged~~
 128 ~~in the practice of law. The Board of Governors shall appoint~~
 129 ~~members who reside in the odd numbered district court of appeal~~
 130 ~~jurisdictions to 4 year terms each, beginning July 1, 1999, and~~
 131 ~~members who reside in the even numbered district court of appeal~~
 132 ~~jurisdictions to 2 year terms each, beginning July 1, 1999.~~
 133 ~~Thereafter, each member shall be appointed for a 4 year term;~~

134 2. ~~Five electors, at least one of whom must be a member of~~
 135 ~~a minority group as defined in s. 288.703, one of each who~~
 136 ~~resides in each of the territorial jurisdictions of the district~~
 137 ~~courts of appeal, appointed by the Governor. The Governor shall~~
 138 ~~appoint members who reside in the odd numbered district court of~~
 139 ~~appeal jurisdictions to 2 year terms each, beginning July 1,~~
 140 ~~1999, and members who reside in the even numbered district court~~

141 ~~of appeal jurisdictions to 4 year terms each, beginning July 1,~~
 142 ~~1999. Thereafter, each member shall be appointed for a 4 year~~
 143 ~~term; and~~

144 ~~3. Five electors, at least one of whom must be a member of~~
 145 ~~a minority group as defined in s. 288.703, one of each who~~
 146 ~~resides in the territorial jurisdictions of the district courts~~
 147 ~~of appeal, selected and appointed by a majority vote of the~~
 148 ~~other 10 members of the commission. A majority of the other~~
 149 ~~members of the commission shall appoint members who reside in~~
 150 ~~the odd numbered district court of appeal jurisdictions to 2-~~
 151 ~~year terms each, beginning October 1, 1999, and members who~~
 152 ~~reside in the even numbered district court of appeal~~
 153 ~~jurisdictions to 4 year terms each, beginning October 1, 1999.~~
 154 ~~Thereafter, each member shall be appointed for a 4 year term.~~

155
 156 ~~A vacancy occurring on the commission shall be filled by the~~
 157 ~~original appointing authority for the unexpired balance of the~~
 158 ~~term. No attorney who appears before any judge of compensation~~
 159 ~~claims more than four times a year is eligible to serve on the~~
 160 ~~statewide nominating commission. The meetings and determinations~~
 161 ~~of the nominating commission as to the judges of compensation~~
 162 ~~claims shall be open to the public.~~

163 (c) Each judge of compensation claims shall be appointed
 164 for a term of 4 years, but during the term of office may be
 165 removed by the Governor for cause. Prior to the expiration of a
 166 judge's term of office, the statewide nominating commission
 167 shall review the judge's conduct and determine whether the
 168 judge's performance is satisfactory. Effective July 1, 2002, in

169 determining whether a judge's performance is satisfactory, the
 170 commission shall consider the extent to which the judge has met
 171 the requirements of this chapter, including, but not limited to,
 172 the requirements of ss. 440.25(1) and (4)(a)-(e), 440.34(2), and
 173 440.442. If the judge's performance is deemed satisfactory, the
 174 commission shall report its finding to the Governor no later
 175 than 6 months prior to the expiration of the judge's term of
 176 office. The Governor shall review the commission's report and
 177 may reappoint the judge for an additional 4-year term. If the
 178 Governor does not reappoint the judge, the Governor shall inform
 179 the commission. The judge shall remain in office until the
 180 Governor has appointed a successor judge in accordance with
 181 paragraphs (a) and (b). If a vacancy occurs during a judge's
 182 unexpired term, ~~the statewide nominating commission does not~~
 183 ~~find the judge's performance is satisfactory,~~ or the Governor
 184 does not reappoint the judge, the Governor shall appoint a
 185 successor judge for a term of 4 years in accordance with
 186 paragraph (b).

187 (5) Not later than December 1 of each year, the Office of
 188 the Judges of Compensation Claims shall issue a written report
 189 to the Governor, the House of Representatives, the Senate, and
 190 ~~The Florida Bar, and the statewide nominating commission~~
 191 summarizing the amount, cost, and outcome of all litigation
 192 resolved in the previous fiscal year; summarizing the
 193 disposition of mediation conferences, the number of mediation
 194 conferences held, the number of continuances granted for
 195 mediations and final hearings, the number and outcome of
 196 litigated cases, the amount of attorney's fees paid in each case

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197 | according to order year and accident year, and the number of
198 | final orders not issued within 30 days after the final hearing
199 | or closure of the hearing record; and recommending changes or
200 | improvements to the dispute resolution elements of the Workers'
201 | Compensation Law and regulations. If the Deputy Chief Judge
202 | finds that judges generally are unable to meet a particular
203 | statutory requirement for reasons beyond their control, the
204 | Deputy Chief Judge shall submit such findings and any
205 | recommendations to the Legislature.

206 | Section 3. This act shall take effect upon becoming a law.