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Bill Analysis
Legislative Service Commission

S.B. 179

124th General Assembly
(As Introduced)

Sen. Wachtmann

BILL SUMMARY

- Establishes immunity from civil liability for a health care entity or an individual who is a member of or works on behalf of a board or committee of a health care entity or corporation.
- Establishes a statutory presumption that a hospital is not negligent in its credentialing of its staff if the hospital is appropriately accredited by one of several specified private accrediting organizations.
- Specifies that proceedings and records within the scope of the peer review or utilization review functions of a review board, committee, or corporation of a health care entity or of a corporation are to be held in confidence and cannot be used in certain civil actions.
- Specifies that personal injury incident reports or risk management reports prepared or used by review boards, committees, risk management personnel, and corporations cannot be used in certain tort actions.
- Requires the state to defend a claim against, and pay any judgment or settlement arising out of a claim against, a state officer or employee who renders peer review or other review services in relation to specified health services pursuant to a contract with a state department, agency, or institution.

CONTENT AND OPERATION

Overview

Current law provides that a hospital, state or local society, or individual who is a member or employee of certain boards and committees engaged in health care review activities is not liable in damages to any person for any acts,

omissions, decisions, or other conduct within the scope of the functions of the committee. The immunity applies, for example, with respect to the activities of peer review committees, utilization review committees, and professional standards review committees. The bill, in effect, replaces all of the existing immunity statutes.

Immunity from liability relative to boards and committees of health care entities

(secs. 2305.25(A) and 2305.251(A))

The bill provides that neither a health care entity nor an individual who is a member of or works on behalf of a "board or committee of a health care entity or of a corporation" is liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the board, committee, or corporation.¹

For purposes of this provision, the bill specifies that a health care entity is a government entity, a for-profit or nonprofit corporation, a limited liability company, a partnership, a professional corporation, a utilization committee of a state or local society composed of physicians or podiatrists, or another health care organization, whether acting on its own behalf or on behalf of or in affiliation with other health care entities, that conducts as part of its purpose professional credentialing or quality review activities involving the competence or professional conduct of health care practitioners or providers.² The meaning of "corporation" is not specified.

Claims of negligent hospital credentialing

(secs. 2305.25(B) and (E) and 2305.251(B); sec. 3701.351, not in the bill)

Current law requires the governing body of every hospital to set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges. In referring to this requirement, the bill defines a "qualified person" as a member of

¹ *An amendment may be necessary to coordinate this provision with the bill's definition of "review board, committee, risk management personnel, or corporation."*

² *The bill does not continue a provision of existing law that would have expressly applied the bill's immunity provision to any member or employee of a nonprofit corporation engaged in performing the functions of a peer review committee of nursing home providers or administrators or of a peer review or professional standards review committee. However, the breadth of the bill's immunity provision appears to encompass the currently specified entities.*

the medical staff of a hospital or a person who has requested or who has clinical privileges at a hospital.

The bill provides that a hospital is presumed to not be negligent in the credentialing of a qualified person if the hospital proves by a preponderance of the evidence that at the time of the alleged negligent credentialing the hospital was accredited by the Joint Commission on the Accreditation of Healthcare Organizations, the American Osteopathic Association, or the National Committee for Quality Assurance. The provision applies to any institution that has been registered or licensed by the Ohio Department of Health as a hospital, and extends to any entity, other than an insurance company, that owns, controls, or is affiliated with an institution licensed or registered by the Department as a hospital.

Under the bill, the presumption that a hospital is not negligent may be rebutted only by proof, by a preponderance of the evidence, of one of the following:

(1) The credentialing and review requirements of the accrediting organization did not apply to the hospital, the qualified person, or the type of professional care that is the basis of the claim against the hospital.

(2) The hospital failed to comply with all material credentialing and review requirements of the accrediting organization that applied to the qualified person.

(3) The hospital, through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent qualified person with staff privileges at the hospital had developed a pattern of incompetence that indicated that the qualified person's privileges should have been limited prior to treating the plaintiff at the hospital.

(4) The hospital, through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent qualified person with staff privileges at the hospital would provide fraudulent medical treatment but failed to limit the qualified person's privileges prior to treating the plaintiff at the hospital.

Under the bill, if the plaintiff fails to rebut the presumption that an accredited hospital is not negligent in its credentialing activities, the court is required, on the motion of the hospital, to enter judgment in favor of the hospital on the claim of negligent credentialing.

Applicability of the immunity and negligent credentialing provisions

(sec. 2305.251(C) and (D))

With respect to its provisions on immunity from liability and negligent hospital credentialing, the bill specifies the following:

(1) Nothing in those provisions otherwise relieves any individual or health care entity from liability arising from treatment of a patient or resident.

(2) Nothing in the provisions may be construed as creating an exception to the bill's provisions, as described below, pertaining to the confidential treatment of proceedings and records of review boards, committees, and corporations.

(3) A person who provides information under the specified provisions, without malice and in the reasonable belief that the information is warranted by the facts known to the person, is not subject to suit for civil damages as a result of providing the information.

Proceedings and records of review boards, committees, and corporations

(secs. 2305.25(E) and (F) and 2305.252)

The bill provides that proceedings and records within the scope of the peer review or utilization review functions of a "review board, committee, or corporation" of a health care entity or of a corporation are to be held in confidence and are not subject to discovery or introduction in evidence in any civil action against a health care professional or any health care entity arising out of matters that are the subject of evaluation and review by the review board, committee, or corporation. The provision extends to the same hospitals to which the bill's negligent credentialing provisions apply, as well as to a long-term care facility, a not-for-profit health care corporation that is a member of a hospital or long-term care facility or of which a hospital or long-term care facility is a member.

For purposes of this confidentiality provision, the bill specifies that a review board, committee, or corporation includes any of the following:

(1) A peer review committee of any of the health care entities to which the bill's immunity from liability provisions apply, as described above. The bill specifies that a "peer review committee" is a utilization review committee, quality assessment committee, performance improvement committee, tissue committee, credentialing committee, or other committee that conducts professional credentialing or quality review activities involving the competence or professional conduct of health care practitioners or health care providers.

(2) A peer review committee of a hospital or long-term care facility, a nonprofit health care corporation or long-term care facility that is a member of the hospital or of which the hospital or facility is a member, or a community mental health center.

(3) "A board or committee of a hospital, long-term care facility or of a health care entity when reviewing professional qualifications or activities of a qualified person or a provider[.]"

(4) A utilization committee of a state or local society composed of physicians or podiatrists.

(5) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of physicians, including podiatrists, or composed of dentists, optometrists, psychologists, or pharmacists.

(6) A peer review committee of a health insuring corporation that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers that adversely affects or could adversely affect the health or welfare of any patient. The bill continues the requirement that the committee have at least a two-thirds majority of member physicians in active practice. Also continued is the specification that the immunity applies to a peer review committee of a wholly owned subsidiary of a health insuring corporation.

(7) A peer review committee of a sickness and accident insurer authorized to do insurance business in Ohio that has at least a two-thirds majority of member physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of health care providers that adversely affects or could adversely affect the health or welfare of any patient.

(8) A peer review committee of a sickness and accident insurer authorized to do insurance business in Ohio that has at least a two-thirds majority of member physicians in active practice and that conducts professional credentialing and quality review activities involving the competence or professional conduct of a health care facility that has contracted with the insurer to provide health care services to insureds, which conduct adversely affects, or could adversely affect, the health or welfare of any patient.

(9) A peer review committee of any medical professional liability insurer authorized to do insurance business in Ohio that conducts professional quality review activities involving the competence or professional conduct of health care

providers that adversely affects or could adversely affect the health or welfare of any patient.

The bill provides that a person in attendance at a meeting of a review board, committee, or corporation or serving as a member or employee of a review board, committee, or corporation is not permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the review board, committee, or corporation or as to any finding, recommendation, evaluation, opinion, or other action of the review board, committee, or corporation or a member or employee of it. The bill provides that information, documents, or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented during proceedings of a review board, committee, or corporation provided that the documents are obtained from the original source. The bill provides that any person testifying before a review board, committee, or corporation or who is a member or employee of the review board, committee, or corporation cannot be prevented from testifying as to matters within the person's knowledge, but the witness cannot be asked about the witness's testimony before the review board, committee, or corporation or opinion formed by the witness as a result of the review board, committee, or corporation hearing. The bill specifies that an order by a court to produce for discovery or for use at trial the proceedings or records described above is a final order.

Incident reports and risk management reports

(secs. 2305.25(C) and (G) and 2305.253)

The bill establishes restrictions on the use of incident reports and risk management reports in certain civil actions. The bill describes an "incident report or risk management report" as a report of an incident involving injury or potential injury to a patient as a result of patient care by a health care entity that is prepared by or for the use of a review board, committee, risk management personnel, or corporation and is within the scope of the functions of that review board, committee, risk management personnel, or corporation.

The bill uses the term "tort action" to describe the civil actions affected by its restrictions on the use of the reports. In doing so, the bill specifies that a tort action is a civil action for damages for injury, death, or loss to a patient of a health care entity. The bill further specifies that a tort action includes a product liability claim but does not include a civil action for a breach of contract or another agreement between persons.

In its establishment of restrictions on the use of incident reports and risk management reports, the bill does the following:

(1) Specifies that an incident report or risk management report and the contents of an incident report or risk management report are not subject to discovery in, and are not admissible in evidence in the trial of, a tort action.

(2) Prohibits an individual who prepares or has knowledge of the contents of an incident report or risk management report from testifying or being required to testify in a tort action as to the contents of the report.

(3) Specifies that the bill's restrictions on the use of the reports do not prohibit or limit the discovery or admissibility of testimony or evidence relating to patient care that is within a person's personal knowledge.

(4) Specifies that the bill's restrictions on the use of the reports do not affect certain provisions of existing law that describe, impose, or confer an immunity from tort or other civil liability, a forfeiture of an immunity from tort or other civil liability, a requirement of confidentiality, a limitation upon the use of information, data, reports, or records, tort or other civil liability, or a limitation upon discovery of matter, introduction into evidence of matter, or testimony pertaining to matter in a tort or other civil action.

(5) Specifies that the provisions described above do not affect a privileged communication between an attorney and the attorney's client as described in current law.

Legal representation and indemnification of certain state officers and employees

(sec. 109.36; secs. 9.87 and 109.361, not in the bill)

Under current law, the Attorney General is required to represent and defend certain state officers and employees in civil actions instituted against them. The requirement extends to a person who renders specified health services pursuant to a contract with a department, agency, or institution of the state. All expenses and court costs incurred by the Attorney General in making the defense must be paid by the employer of the officer or employee. The availability of representation by the Attorney General does not deprive an officer or employee of the right to select counsel or settle a case at the person's own expense.

Current law also requires the state to indemnify these state officers and employees from liability incurred in the performance of their duties. This must be done by paying any judgment in, or amount negotiated in settlement of, a civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction.³ One million dollars per occurrence is the maximum aggregate

³ *Current law provides immunity from liability to these officers and employees for most civil actions that arise under Ohio law for damage or injury caused in the performance of*

amount of indemnification that may be paid directly from state funds to or on behalf of an officer or employee, regardless of the number of persons who suffer damage, injury, or death as a result of the occurrence. The Director of Administrative Services is authorized to purchase insurance to provide coverage for amounts in excess of \$1 million per occurrence.

The bill expands the list of officers and employees who are covered under the state's duty to provide legal representation and indemnification by including certain officers or employees who render review services related to health care. Specifically, the bill extends these provisions to a person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state.⁴

Technical changes

(secs. 1751.21, 2305.38, 4715.03, 4723.28, 4730.26, 4731.22, 4731.36, 4734.45, 4760.14, and 4762.14; Section 3)

The bill includes several sections of the Revised Code for the purpose of changing cross-references to correspond with the bill's other changes. In R.C. 2305.38, the bill includes additional stylistic changes. In R.C. 3701.74, which deals with access to copies of medical records, the bill includes changes that are necessary to harmonize conflicting provisions that resulted from concurrent amendments to that section by the 123rd General Assembly.

COMMENT

Am. Sub. H.B. 350 of the 121st General Assembly ("the Tort Reform Act of 1996") included changes to the peer review statutes that were similar to the changes being proposed by this bill. The Tort Reform Act, however, was declared to be unconstitutional by the Ohio Supreme Court in *State, ex rel. Ohio Academy*

official duties. The immunity does not apply to civil actions that arise out of the operation of a motor vehicle, civil actions in which the state is the plaintiff, cases in which a person's actions were manifestly outside the scope of the person's employment or official responsibilities, and cases in which the person acted with malicious purpose, in bad faith, or in a wanton or reckless manner. (Sec. 9.86, not in the bill.)

⁴ *Black's Law Dictionary, 7th edition, defines "cause of action" as a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.*

of Trial Lawyers, v. Sheward (1999), 86 Ohio St.3d 451. In 2001, with the enactment of Sub. S.B. 108, the 124th General Assembly repealed the Tort Reform Act and revived the law as it previously existed, with certain modifications.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	10-16-01	p. 975

s0179-i.124/kl

