



Sub. S.B. 179*

124th General Assembly
(As Reported by H. Civil and Commercial Law)

Sens. Wachtmann, Jacobson, Prentiss, Mumper

BILL SUMMARY

- Grants immunity from civil liability to a health care entity, or a member of or an individual who works for or on behalf of a peer review committee of a health care entity for any acts, omissions, decisions, or other conduct within the scope of the functions of a peer review committee of the health care entity.
- Establishes a rebuttable presumption that a hospital is not negligent in its credentialing of an individual who has, or has applied for, staff membership or professional privileges at the hospital, and that a health insuring corporation or sickness and accident insurer is not negligent in the credentialing of an individual who is, or has applied to be, a participating provider if the hospital, corporation, or insurer proves by a preponderance of the evidence that, at the time of the alleged negligent credentialing, the hospital, corporation, or insurer was accredited by one of specified private accrediting organizations.
- Provides that proceedings and records within the scope of a peer review committee are to be held in confidence and establishes restrictions regarding their use in certain civil actions.
- Establishes restrictions on the use in tort actions of a peer review committee incident report or risk management report (a report of an incident involving injury or potential injury to a patient as a result of patient care by a health care provider).

* *This analysis was prepared before the report of the House Civil and Commercial Law Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

- 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. (Existing R.C. 2305.25.) The bill, in effect, replaces all of the existing immunity statutes.

Immunity from liability relative to peer review committees of health care entities

The bill provides that a health care entity is not liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of a peer review committee of the health care entity. The bill further provides that neither a member of a peer review committee nor an individual who works for or on behalf of a peer review committee of a health care entity is liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the peer review committee. (R.C. 2305.251(A).)

For purposes of these immunity provisions, the bill defines a *health care entity* as an entity, whether acting on its own behalf or on behalf of or in affiliation with other health care entities, that conducts as part of its regular business activities professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers, including both individuals and entities that provide health care.¹ Health

¹ *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. (Existing R.C. 2305.25, 2nd to last paragraph.) However, the breadth of the bill's immunity provision appears to encompass the currently specified entities.*

care entity includes those entities, regardless of whether it is a government entity; for-profit or nonprofit corporation; limited liability company; partnership; professional corporation; state or local society composed of physicians, dentists, optometrists, psychologists, or pharmacists; or other health care organization.² (R.C. 2305.25(A).)

The bill defines *peer review committee* as a utilization review committee, quality assessment committee, performance improvement committee, tissue committee, credentialing committee, or other committee that either (1) conducts professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers, including both individuals who provide health care and entities that provide health care, or (2) conducts any other attendant hearing process initiated as a result of a peer review committee's recommendations or actions (R.C. 2305.25(E)(1)).

The bill further defines *peer review committee* to include all of the following (R.C. 2305.05(E)(2)):

(1) A peer review committee of a *hospital* or long-term care facility or a peer review committee of a nonprofit health care corporation that is a member of the hospital or long-term care facility or of which the hospital or facility is a member;³

(2) A peer review committee of a community mental health center;

(3) A board or committee of a hospital, a long-term care facility, or other health care entity when reviewing professional qualifications or activities of health care providers, including both individuals who provide health care and entities that provide health care;

(4) A peer review committee, professional standards review committee, or arbitration committee of a state or local society composed of members who are in active practice as physicians, dentists, optometrists, psychologists, or pharmacists;

² The bill defines "physician" as an individual authorized to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery (R.C. 2305.25(F)).

³ The bill defines "hospital" as either (1) an institution that has been registered or licensed by the Department of Health as a hospital or (2) an entity, other than an insurance company authorized to do business in Ohio, that owns, controls, or is affiliated with an institution that has been registered or licensed by the Department of Health as a hospital (R.C. 2305.25(C)).

(5) A peer review committee of a *health insuring corporation* 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;⁴

(6) A peer review committee of a health insuring corporation 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 health insuring corporation to provide health care services to enrollees, which conduct adversely affects, or could adversely affect, the health or welfare of any patient;

(7) A peer review committee of a *sickness and accident insurer* that has at least a two-thirds majority of 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;⁵

(8) A peer review committee of a sickness and accident insurer that has at least a two-thirds majority of 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 insurer authorized under the Insurance Law to do the business of medical professional liability insurance 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;

(10) Any other peer review committee of a health care entity.

⁴ *The bill defines "health insuring corporation" as an entity that holds a certificate of authority under the Health Insuring Corporation Law, and includes wholly owned subsidiaries of a health insuring corporation (R.C. 2305.25(B)).*

⁵ *The bill defines "sickness and accident insurer" as an entity authorized under the Insurance Law to do the business of sickness and accident insurance in Ohio (R.C. 2305.25(G)).*

Claims of negligent hospital credentialing

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 on applications for staff membership or professional privileges. These standards and procedures must be made available for public inspection. (R.C. 3701.351(A)--not in the bill.)

The bill provides that a hospital is presumed to not be negligent in the credentialing of an individual who has, or has applied for, staff membership or professional privileges at the hospital pursuant to the law governing the procedures for those applications and a health insuring corporation or sickness and accident insurer are presumed to not be negligent in the credentialing of an individual who is, or has applied to be, a participating provider, if the hospital, health insuring corporation, or sickness and accident insurer proves by a preponderance of the evidence that, at the time of the alleged negligent credentialing of the individual, the hospital, health insuring corporation, or sickness and accident insurer was accredited by the Joint Commission on Accreditation of Healthcare Organizations, the American Osteopathic Association, the National Committee for Quality Assurance, or the Utilization Review Accreditation Commission.

Under the bill, the presumption that a hospital, health insuring corporation, or sickness and accident insurer 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, health insuring corporation, or sickness and accident insurer, the individual, or the type of professional care that is the basis of the claim against the hospital, health insuring corporation, or sickness and accident insurer.

(2) The hospital, health insuring corporation, or sickness and accident insurer failed to comply with all material credentialing and review requirements of the accrediting organization that applied to the individual.

(3) The hospital, health insuring corporation, or sickness and accident insurer, through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent individual had developed a pattern of incompetence or otherwise inappropriate behavior, either of which indicated that the individual's staff membership, professional privileges, or participation as a provider should have been limited prior to the individual's provision of professional care to the plaintiff.

(4) The hospital, health insuring corporation, or sickness and accident insurer, through its medical staff executive committee or its governing body and sufficiently in advance to take appropriate action, knew that a previously competent individual would provide fraudulent medical treatment but failed to limit the individual's staff membership, professional privileges, or participation as a provider prior to the individual's provision of professional care to the plaintiff.

If the plaintiff fails to rebut the presumption that an accredited hospital, health insuring corporation, or sickness and accident insurer is not negligent in its credentialing activities, the bill requires the court, on the motion of the hospital, health insuring corporation, or sickness and accident insurer, to enter judgment in favor of the hospital, health insuring corporation, or sickness and accident insurer on the claim of negligent credentialing. (R.C. 2305.251(B).)

The bill defines "health insuring corporation" as an entity that holds a certificate of authority under R.C. Chapter 1751. and includes a wholly owned subsidiary of a health insuring corporation and a "sickness and accident insurer" as an entity authorized under R.C. Title 39 to do the business of sickness and accident insurance in Ohio (R.C. 2305.25(B) and (G)).

Applicability of the immunity and negligent credentialing provisions

With respect to its provisions on immunity from liability and negligent hospital credentialing, the bill specifies the following (R.C. 2305.251(C) and (D)):

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

(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 peer review committees.

(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 peer review committees

Generally, current law provides for the confidentiality of proceedings and records of review committees specified in the law, and focuses on the nondiscoverability of, inadmissibility in evidence of, and prohibited testimony with respect to, matters pertaining to proceedings and actions of review committees. (Existing R.C. 2305.251.) The bill generally modifies the provisions of existing law.

The bill provides that proceedings and records within the scope of a peer review committee of a health care entity are to be held in confidence and are not subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider, including both individuals who provide health care and entities that provide health care, arising out of matters that are the subject of evaluation and review by the peer review committee. The bill further provides that an individual who attends a meeting of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee 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 peer review committee or as to any finding, recommendation, evaluation, opinion, or other action of the committee or a member thereof.

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 produced or presented during proceedings of a peer review committee, as long as the information, documents, or records are available only from the original sources and not from the peer review committee's proceedings or records.

The bill provides that an individual who testifies before a peer review committee, serves as a representative of a peer review committee, serves as a member of a peer review committee, works for or on behalf of a peer review committee, or provides information to a peer review committee cannot be prevented from testifying as to matters within the individual's knowledge, but the individual cannot be asked about the individual's testimony before the peer review committee, information the individual provided to the peer review committee, or any opinion the individual formed as a result of the peer review committee's activities.

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. (R.C. 2305.252.)

Incident reports and risk management reports

The bill establishes restrictions on the use of incident reports and risk management reports in certain civil actions. The bill defines "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 provided by a health care provider, including both individuals who provide health care and entities that provide health care, that is prepared by or for the use of a peer review committee of a health care

entity and is within the scope of the functions of that committee (R.C. 2305.25(D)).

The bill uses the term "tort action" to describe the civil actions affected by its restrictions on the use of the reports. The bill defines "tort action" as a civil action for damages for injury, death, or loss to a patient of a health care entity. The bill 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. (R.C. 2305.25(H).)

In its establishment of restrictions on the use of incident reports and risk management reports, the bill does the following (R.C. 2305.253):

(1) It 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, notwithstanding any contrary provision of existing law or the bill.

(2) It 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) It 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 an individual's personal knowledge.

(4) It specifies that the bill's restrictions on the use of the reports do not affect certain provisions of existing law or the bill 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 on 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) It 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

Under current law, the Attorney General generally 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. (R.C. 109.36 and R.C. 109.361--not in the bill.)

Current law also generally 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.⁶ One million dollars per occurrence is the maximum aggregate 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. (R.C. 9.87(A) and (C)--not in the bill.)

The bill expands the types 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.⁷ (R.C. 109.36(A)(1)(c).)

Technical 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

⁶ *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 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. (R.C. 9.86, not in the bill.)*

⁷ *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.*

resulted from concurrent amendments to that section by Sub. H.B. 508 and Sub. H.B. 506 of the 123rd General Assembly (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 (R.C. 1751.21, 2305.38, 4715.03, 4723.28, 4730.26, 4731.22, 4731.36, 4734.45, 4760.14, and 4762.14).

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 found unconstitutional by the Ohio Supreme Court in *State, ex rel. Ohio Academy of Trial Lawyers, v. Sheward* (1999), 86 Ohio St.3d 451. The Supreme Court did not specifically declare the peer review statutes (former R.C. 2305.25, 2305.251, and 2305.252) unconstitutional for violation of substantive constitutional rights, although they were invalidated as part of the Tort Reform Act, which was declared unconstitutional *in toto* for violating the one-subject rule of the Ohio Constitution. 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
Reported, S. Health, Human Services & Aging	03-19-02	pp. 1592-1593
Passed Senate (24-8)	03-20-02	pp. 1629-1630
Reported, H. Civil & Commercial Law	---	---

S0179-RH.124/jc

