Legal Opinion Letter

Vol. 32 No. 8 July 14, 2023

Washington Legal Foundation
Advocate for Freedom and Justice®
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Washington, DC 20036
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Florida Litigation Reforms Target Damage Windfalls for Plaintiffs—and Their Lawyers

by David I. Spector and James J. Duffy

In March, Florida Governor Ron DeSantis signed House Bill 837 "to decrease frivolous lawsuits and prevent predatory practices of trial attorneys who prey on hardworking Floridians." News Release, Gov. DeSantis, Governor Ron DeSantis Signs Comprehensive Legal Reforms into Law (Mar. 24, 2023), https://www.flgov.com/2023/03/24/governor-ron-desantis-signs-comprehensive-legal-reforms-into-law/. Judging by the reaction from the plaintiffs' bar, Governor DeSantis's characterization is not an overstatement. A record number of lawsuits were filed before the law became effective. In total, 280,122 cases were filed in March 2023 alone, 126.9% higher than the previous record of filed cases in a month set in May 2021.

House Bill 837 seeks to decrease frivolous lawsuits by repealing section 627.428, Florida Statutes, which provided for attorneys' fees, in contravention of the "American Rule," for plaintiffs who prevail in an action to recover benefits from an insurance carrier. The one-way attorneys' fee provision incentivized the plaintiffs' bar to pursue specious or *de minimis* claims by ensuring insurance companies would not be entitled to their attorneys' fees even if they were the prevailing party. The repeal of section 627.428 is widely expected to reduce this type of unnecessary litigation.

House Bill 837 also levels the playing field by providing much needed transparency regarding the cost of medical services provided to patients under a letter of protection. A letter of protection is a written agreement between a patient and a medical provider where the provider agrees to defer collection on its charges. In return, the provider receives a lien on the proceeds of the patient's future liability claim. Once the patient prevails on his or her liability claim, the patient's attorney cannot disperse the proceeds of the claim until the provider's lien is satisfied.

Letters of protection have received scrutiny because the amounts billed in connection with these cases are based on the provider's chargemaster, which reflects the list price the provider has set for each good or service offered by the provider. The prices listed in the chargemaster are unilaterally set by the provider and often bear no relation to the reasonable cost of the services. Indeed, the prices are often a multiple of what the provider would agree to accept from a commercial health care insurer. Further compounding the problem is that medical providers often require the patient to forego any available benefits under the patient's own private health insurance or a government program such as Medicare/Medicaid, which would limit the provider to accept either the negotiated rate or amount paid by a government program respectively. Thus, letters of protection allow providers to bill at excessive rates that bear no relation to the usual and customary charge in the medical community for such services and result in greater jury verdicts for patients who are pursuing a liability claim.

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House Bill 837 makes a monumental shift in Florida law regarding letters of protection in two critical ways. First, section 768.0247(3) requires the disclosure of a letter of protection as a condition precedent to asserting any claim for medical expenses in a personal injury or wrongful death suit.

Second, section 768.0247(3) makes key changes to the admissibility of evidence for unpaid medical bills that are secured by a letter of protection and provides fact finders with an objective framework for determining the reasonable value of a medical provider's charges. For past, but unpaid, medical bills for services rendered pursuant to a letter of protection agreement where the plaintiff has health care coverage, the evidence of the amount the claimant's health insurance would have paid the provider to satisfy the unpaid charges, plus the claimant's share of medical expenses under the contract/regulation had they obtained treatment pursuant to their health care coverage is admissible. If the claimant obtained treatment under a letter of protection and the health care provider transferred the right to receive their payment to a third party, then evidence of the amount the third party paid or agreed to pay the health care provider is admissible. These provisions are consistent with the long-recognized goal of making an injured plaintiff whole—not provide a windfall to the plaintiff (or their attorneys and providers) in the form of a damage award which is not rationally related to the actual amount of the medical expenses incurred.

Finally, House Bill 837 overturns the Florida Supreme Court's decision in *Worley v. Cent. Fla. Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18 (Fla. 2017) that the question of whether an attorney referred a client to a particular physician was protected by the attorney-client privilege. Defendants are now entitled to discover whether the plaintiff was referred to his or her medical providers by an attorney. Significantly, this change will allow defendants to explore whether the medical provider is biased towards the plaintiff based on the existence of a lucrative referral relationship with the plaintiff's lawyer.

ISBN 1056 3059