CS/HB 19 – Liability for Termination of Pregnancies

CS for HB 19 would create a new statutory cause of action against physicians for women injured or emotionally distressed by a past abortion, and exempt that cause of action from the presuit investigation and informal discovery procedures applicable to all other medical malpractice claims. It would also extend the statute of limitations for this type of claim to four years from either the date of injury or from the time the woman knew or should have known of the injury, but in no case more than 10 years after the incident giving rise to the injury under a proposed statute of repose.

Current Law

Today, abortion is treated like all other medical procedures. If the procedure is performed negligently, and the patient is harmed, a civil cause of action for medical malpractice exists; conversely, if the procedure is performed in accordance with the standard of care, there is no cause of action for medical malpractice. Medical malpractice claims are subject to a two-year statute of limitations, measured from the time of the incident giving rise to the action or discovery of the incident, whichever is later. Unlike a statute of limitations, a statute of repose provides a substantive right to be free from liability after an established time period. Under the medical malpractice statute of repose, no medical malpractice action may be commenced later than four years from the date of an incident, subject to limited exceptions. § 95.11(4)(b), Fla. Stat.

A woman harmed by an abortion may also have a cause of action in tort, such as battery and intentional or negligent infliction of emotional distress. Such common-law torts are subject to a four-year statute of limitations. § 95.11(3)(a), (o), Fla. Stat.

CS for HB 19 Vastly Expands Physician Liability for a Subset of Malpractice Claims

Under CS for HB 19, a woman with a medical malpractice claim related to an abortion would have a four-year period in which to bring her claim, and what is more, she would benefit from a 10-year statute of repose instead of the four years currently given to most other medical malpractice claimants under section 95.11(4)(b), Florida Statutes.

For physicians' malpractice insurers, this expanded exposure must be priced into medical malpractice insurance coverage, and with increased coverage comes increased premiums and ultimately increased costs for patients. Insurers' actuarial estimates for premiums are made based on the "long tail" of claims, i.e., insurers must anticipate claims that will not be filed against physicians until several years after the service is delivered. Under current law, physicians' medical malpractice liability is effectively capped at four years by the statute of repose, and insurers have priced malpractice insurance accordingly. CS for HB 19 would drastically increase that "long tail"

of claims from four years to a decade. Insurers will undoubtedly have to recalculate premiums based on that larger window of liability for these physicians, and premiums will likely rise as a result.

CS for HB 19 would also drastically expand physicians' liability for emotional distress far beyond what any other defendant currently faces in Florida. Under current law, an ordinary intentional infliction of emotional distress ("IIED") claim may not be brought more than four years from the date the harm occurred, and not even the doctrine permitting later actions based on the plaintiff's delayed discovery of the harm saves a time-barred IIED claim. *See W.D. v. Archdiocese of Miami, Inc.*, 197 So. 3d 584, 589 (Fla. 4th DCA 2016). Now, under CS for HB 19, physicians must defend emotional distress claims for incidents that occurred up to a decade earlier. The reason statutes of limitations and repose exist is because it is unfair to allow any plaintiff to delay enforcement of a claim against a party who is left to shield himself from liability with nothing more than faded memories, discarded or partial records, and missing or deceased witnesses. This is the exact predicament a physician faces under CS for HB 19. Prohibited from relying upon the plaintiff's own signed, informed consent form to the procedure, to defend against a decade-old emotional distress claim, a physician can do little more than challenge the expert the plaintiff will most assuredly put on to substantiate the emotional injury suffered.

CS for HB 19 May Run Afoul of the Equal Protection Clause

CS for HB 19 also raises equal protection concerns as it extends special protections to women, including a longer statute of limitations and statute of repose for certain medical claims, and not male claimants. *See Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 908 (11th. Cir. 1997) (to survive equal protection challenge, sex-based classification must be "substantially related to an important governmental objective"). Moreover, the Florida Supreme Court has invalidated even neutral medical malpractice legislation on equal protection grounds when it "arbitrarily" distinguished between medical malpractice claimants. *See Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014). The Florida Supreme Court may just as likely find that CS for HB 19 violates equal protection and arbitrarily distinguishes between those injured by abortions and all other medical malpractice claimants.

Nothing demonstrates that current tort and medical malpractice law is insufficient to address harm suffered by women who have had abortions—certainly nothing that justifies vastly expanding physician liability and unraveling many medical malpractice reforms for this subset of medical malpractice claims. For these reasons, the Florida Justice Reform Institute opposes CS for HB 19.