ASSOCIATED INDUSTRIES OF FLORIDA

LEGISLATIVE DAILY BRIEF

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FOR FEBRUARY 21, 2002

More Burdens on Employer's Health Insurance Carriers

HB 293 by Rep. Holly Benson (R-Pensacola) was passed today in the House Committee on Judicial Oversight. The Committee adopted a "strike everything" amendment that effectively rewrote the entire bill in an attempt to address the concerns with the legislation. However, after adopting this amendment, the bill was further amended, restoring language that creates a civil cause of action for non-payment by an insurance company. This, of course, is a typical move by the trial attorneys who wonder every day how they can change the law and make it easier to sue HMO's.

The medical profession claims that they need a civil cause of action as a "hammer" to make insurance companies pay in a more timely manner. However, if this bill were passed, it would unquestionably cause insurance premiums to rise as a result of costly, debilitating litigation. In addition, insurance companies would have to pay bills even if they are not submitted properly.

AIF is opposed to this bill in any form. So-called "well intended" legislation always seems to originally contain a "sneak attack" by trial lawyers with language empowering them to bring suit against HMO's with definitions and standards that would place the insurer at a costly, even crippling disadvantage. Florida's employers are the primary providers of health care benefits in Florida. Their ability to pay for this benefit must not be weakened any further by attorney-driven increases in their premiums. In addition, any problems with "prompt pay" lay at the feet of the medical practitioners, who, for whatever reasons, inadequately or unprofessionally administer their billing and provide the carriers with information that is inadequate, incomplete or just plain wrong.

Trial Attorneys Want to Sue Retailers for Providing Power Shopping Carts to the Disabled

Thankfully, the House Judicial Oversight Committee saw fit to pass HB 345 by Rep. Jeff Kottkamp (R-Cape Coral) today. The bill basically provides that if a retailer, such as our large Florida grocery stores, offers a motorized or powered shopping cart for use, they can't be sued if the patron using the cart suffers an accident harming the driver or others. Of course, the Academy of Florida Trial Lawyers testified in opposition to this. The Academy even suggested the notion that powered shopping cart users could be assessed a $1 – 5 fee for use of the cart with the dollars being applied to liability insurance for the retail operation! The Committee, largely made up of attorneys, including Rep. Kottkamp, was actually incredulous. Doing something that is all too rare in a Capitol saturated in otherworldly legal nuances, the Committee fell back on common sense and passed the bill.

In way of background, and to highlight what the Committee was paddling against legally, general tort law provides that the operator of any "instrumentality" (i.e. a golf cart) is liable in tort for the negligent operation of that instrumentality. The scary sounding "dangerous instrumentality doctrine" is a tort law concept that provides that the owner of a "dangerous instrumentality" is also liable in tort for all injuries caused by the negligent operation of that instrumentality. In practice, reference to the doctrine is unnecessary when the owner of the instrumentality is also the negligent operator of the instrumentality. The doctrine is really applicable to a loaned or rented property, like a golf cart. An increasingly common practice is retail stores providing, as a courtesy, powered shopping carts for use by disabled patrons. This bill defines "powered shopping cart", and provides that where a powered shopping cart is provided to a person gratuitously for use solely on the premises of the owner of the powered shopping cart, the dangerous instrumentality doctrine is not applicable.

AIF supports the bill. It would be tragic if a common courtesy such as powered shopping carts provided by retailers to disabled patrons were to be discontinued because the retailer faced financial ruin at the hand of a zealous trail lawyer.

Caution: Banana Peel Ahead!

The House Judicial Oversight Committee passed HB 1545 by Representative David Simmons (R-Altamonte Springs) today. The title of the bill sounds like a UFO documentary on late night cable television, "Negligence-Transitory Foreign Object." However, the topic of the bill is people slipping and falling on fruit or some other product on a business premise floor and then suing the store.

The need for this legislation was created by yet another unfortunate anti-business decision by the Florida Supreme Court last fall. The Florida Supreme Court struck again on November 15, 2001, handing down an opinion on a "Slip & Fall" case that only distantly had anything to do with prior precedent or pre-existing law. As the 2001 Presidential Election fiasco aptly demonstrated, the Court has little compunction about crafting an opinion only remotely connected with prior case law, establishing positions based on how they believe things "should be."

In question was the classic "slip and fall" litigation, where the plaintiff claimed injury on the store premises as a result of slipping on a banana and falling. In this *Owens v. Publix Supermarkets* case, the Court held that the plaintiff need only show that they fell as a result of the errant fruit product. Henceforth, the burden of proof immediately shifts to the defendant to prove non-negligence. The defendant must now show that its actions were reasonable both with regards to inspection and maintenance procedures.

Prior to this decision, the burden fell upon the plaintiff in a slip and fall case to show that the defendant had constructive knowledge of there being an errant fruit substance dangerously lurking on the premises' floor. This higher, and genuinely more practical standard, allowed on a fairly consistent basis defendants to obtain a summary final judgement without trial where proof was lacking. With this recent Court decision, every slip and fall case is virtually guaranteed to go before a jury. Needless to say, this decision by the Court will cost businesses millions of dollars each year. The Florida Supreme Court has simply turned the law on its head with its *Owens v. Publix Supermarkets* decision.

By dramatically shifting the burden of proof in slip and fall cases to the defendant, the Florida Supreme Court increased the legal exposure of Florida's employers exponentially by the tens of millions of dollars. The Florida Legislature must act to restore some sanity and clarity to a body of case law maimed by the Court. The bill that passed today represents a compromise between the interests of the trial attorneys and the business community. However, the bill still needs some "work" to get it closer to the necessary defenses businesses enjoyed prior to the *Owens* decision.

All Contractors Are Not On Board with Exemptions Supported by Homebuilders Association

AIF has received word today that an emergency meeting of construction contractors in the areas from Collier County to Hillsborough County was held to discuss the actions of the House Insurance Committee yesterday. Apparently, many of the homebuilders – yes the ones that do residential construction, are upset that the Florida Homebuilders Association successfully convinced the House Insurance Committee to gut the "exemptions" language in the House workers' compensation bill yesterday. Law- abiding contractors are tired of competing against contractors who through fraud and cunning are ducking providing workers' compensation coverage to their employees and enjoying the cost advantage on bids. The contractors that contacted AIF advised that the Homebuilders group in Tallahassee does not speak for *all* of the state homebuilders.

Patient Self-Referral Act – Kidney Dialysis

The Senate voted 26-11 on final passage to adopt SB 726 by Sen. Jack Latvala (R-Palm Harbor) on second reading today. The bill amends current "Patient Self-Referral" law, prohibiting kidney dialysis care providers from "self-referring" and performing their own "in-house" diagnostic lab work.

Two of the world's largest kidney dialysis companies have a major presence in Florida. In fact, one of these companies recently moved their North American headquarters to Ft. Lauderdale. Together, these companies employee hundreds of Floridians in high paying, high-tech, bio-medical jobs.
The analysis and lab work necessary for life-saving kidney dialysis treatment is extremely time sensitive and must be accomplished under extraordinarily rigid quality controls. It is very beneficial to the patient and the attending physician to have the lab work handled and coordinated by the center already performing the dialysis. The feedback is almost immediate, allowing the physician to monitor status and alter the care plan as needed.

This system has performed so well for patients - whose very existence is inextricably tied to proper dialysis and lab diagnosis - that a very small faction of competitors are seeking to pass SB 726 mandating what kind of labs the dialysis centers can make use of. This tinkering with the free market system would not only cost the state hundreds of high-end jobs but, much more importantly, put thousands of kidney dialysis patients at enormous risk.

The Florida Senate sent a message today to the Florida Business Community: "If you are too successful, we're coming after you." What this bill amounts to is statutory anti-trust action.

AIF opposes playing games with the Florida Statutes by passing a law solely intended to benefit a few who are unable to compete in the current, well-tested market system. As an added inefficiency in the health care marketplace, this proposal would serve as a cost-driver to the costs of health care and Florida's employers.

Alcoholic Beverage Attorney's Relief Act

Under a barrage of skeptical questioning by the House Judicial Oversight Committee Rep. Dan Gelber (D-Miami Beach) was forced to defer consideration of his bill, HB 1309. Rep. Gelber sought to change the liability standard for retailers or any person who sells or furnishes alcoholic beverages from "willfully and unlawfully" to "recklessly" as set forth by law.

Current law specifies that someone who sells or furnishes alcoholic beverages to a person under 21 years of age is not exposed to potential civil liability for any damages resulting from the underage drinker's intoxication, unless the seller or supplier provides the alcohol "willfully and unlawfully." This bill eliminated the "willfully and unlawfully" standard, and provided that someone supplying alcoholic beverages need only fail to request and check one of a list of identification documents in order to be exposed to potential liability for an underage drinker's torts.

Under intense opposition, Mr. Gelber offered the amendment providing the "reckless" standard, but the Committee was not pleased with that alternative. The Committee members, particularly Rep. Dudley Goodlette (R-Naples) and Rep. Allan Bense (R-Panama City), peppered Rep. Gelber with scenarios whereby someone could get sued under this new standard. The deal breaker for the Committee was when on of the hypothetical situations was presented to a Florida Academy of Trial Lawyers lobbyist ("if a kid breaks into *my* liquor cabinet, gets drunk, wrecks a car and people get hurt, do I get sued because the cabinet wasn't locked?") and she smiled, saying, "It would be up to the judge." Rep. Gelber seemed genuinely astonished that anyone would be opposed to the bill.

While the bill was "deferred" at the request of the sponsor, given that this is the last week of House Committee meetings, it is likely that the bill is dead for the 2002 Regular Session.

What this bill amounted to was a blatant attempt by the Florida Academy of Trial Lawyers to broaden the law so more lawsuits could be brought as a result of the decisions and actions of a law-breaking, drunken underage drinker. AIF opposes this bill.

Stay tuned to our daily brief and to our web site at www.fbnnet.com as the legislature makes some very important decisions on the state's economy. These decisions will have a major impact on the business community and AIF will be reporting to you everything that happens.

This report was prepared by Curt Leonard, Manager – Governmental Affairs at Associated Industries of Florida (AIF). Please send your comments or suggestions to us at aif@aif.com or call the Governmental Affairs department at (850)224-7173.

- For more information on all of the important legislative information concerning the business community, go to our "members only" Florida Business Network web site at http://fbnnet.com
- Send us your E-mail address and we will begin to send this report to you automatically via E-mail.