ASSOCIATED INDUSTRIES OF FLORIDA
LEGISLATIVE DAILY BRIEF
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FROM JUNE 17, 2003

Today respective House and Senate committees closely examined pending legislation designed to redress the medical malpractice problem.

The House Select Committee on Medical Liability Insurance, chaired by Representative Dudley Goodlette (R-Naples) met to discuss HB 63B, that chamber's version of reform. Representative Goodlette was careful to point out that the House had progressed further on liability reform because of the work put in by the select committee over the past several months, which included taking public testimony in cities around the state.

Representative Goodlette informed members that Speaker Johnnie Byrd (R-Plant City) had yet to refer HB 63B to committee, thus they would only be discussing the bill, not voting or taking up amendments.

During the first two hours of the committee's workshop on the bill, the members reviewed each section of HB 63B, which is based on HB 1713, the House's reform package from the regular session. HB 63B incorporates language from portions of the governor's proposal and the Senate's regular session bills, representing compromise on some of the less contentious issues.

The most controversial of the so-called non-controversial provisions was a section of the bill designed to improve communication between patient and provider when an adverse outcome arises from care given in a licensed health-care facility. Testimony before the Governor's Select Task Force on Healthcare Professional Liability Insurance and the select committee had revealed that many medical malpractice actions arise because patients believe that adverse incidents are being swept under the rug by doctors and hospital staff. In fact, there is rarely a cover-up involved; facilities and providers are simply trying to inoculate themselves against a potential lawsuit. HB 63B tries to unravel this vicious cycle by providing immunity for any information released during these discussions. A patient could still bring a lawsuit but the notification of the adverse outcome could not be admitted in evidence during the trial.

Representatives Dan Gelber (D-Miami Beach) and Jack Seiler (D-Pompano Beach) expressed discomfort with such a large blanket of inadmissibility. The ensuing debate revealed the underlying disagreement among individual members over how deep and wide the shield against lawsuits should extend. There is no right or wrong answer to this deeply troublesome question. It is a matter of personal philosophy. Nevertheless, lawmakers must make choices in a tradeoff between limits on the right to sue and access to affordable, high-quality health care.

Also this morning the Senate Committee on Health, Aging, and Long-Term Care convened to consider SB 2B, the Senate's response to the medical malpractice crisis. The committee is chaired by Senator Burt Saunders (R-Naples). The vice chair is Senator Dennis Jones (R-Seminole), who also serves as Senate majority leader. Given that the special session is presently limited to four days – and Tuesday being Day Two – time constraints will not permit the Senate to hold any other committee meetings on the pending legislation.

As introduced, SB 2B (sponsored by Senators Saunders and Jones) contains provisions already familiar to the committee members – provisions of Senate Bills 560, 652, and 564 that originated in the Committee and passed comfortably though the whole senate during the regular session earlier this year. Therefore, most of today's committee debate focused on amendments that were introduced to improve the senate bill.

DAMAGE CAP

When it comes to a cap on damages, lawmakers are essentially continuing a debate that has been going on in Florida for more than two decades. In the late 1980s, a medical-malpractice-insurance crisis inspired one Florida governor to appoint an academic task force to conduct the most wide-ranging investigation of the causes and solutions of the crisis that had ever been undertaken in any state. That task force recommended against a cap in the belief that other reforms would obviate the need for such a drastic measure.

In 2002, Governor Bush appointed another academic task force to update the earlier group's work. After another exhaustive review of data and public opinion, the 2002 task force identified approximately 60 reforms that could help alleviate this latest medical-malpractice-insurance crisis. This time, however, the task force identified a California-style $250,000 cap on non-economic damages as the only change to the law that would result in long-lived savings on premiums.

A cap will not bring immediate relief to health-care providers, however, because of the lag time between the occurrence of an injury and the payment of a claim. Here's why: If a cap goes into effect *tomorrow*, any injury that happens *today* will be exempt from the limit on non-economic damages, regardless of the date of the trial. Therefore, the exposure doctors and their liability carriers face for unlimited pain and suffering damages does not disappear immediately upon passage of the damage cap. In addition, several years could pass before the insurance company even knows about the claim, much less has to pay anything for it. In other words, for the next few years insurance companies will be setting rates based on the calculation that non-economic damages are not yet capped.

In effect, the optimal benefit is phased in over time, roughly two to four years, provided that the limitation on damages is upheld by the courts.

Governor Bush strongly supports a $250,000 cap, which was endorsed by the House during the regular session. The Senate legislation contained no such provision.

Now, during Special Session B, the House is again moving forward with a bill that contains the cap on non-economic damages, albeit with lingering opposition by most Democrats and a few Republicans. In an important development, the Senate leadership has finally signaled a willingness to accept a reasonable cap on non-economic damages in medical malpractice cases. In Tuesday's meeting, the Senate committee amended SB 2B to include a cap on non-economic damages, the first time a Senate bill has included such a provision. The Senate proposal, however, is much weaker than the governor's. It limits pain and suffering damages to $500,000. For certain catastrophic injuries, however, *the sky's the limit*, because the $500,000 cap does not apply.

BAD FAITH

An excess verdict in a medical liability case inevitably leads to a lawsuit by the plaintiff against the insurance carrier for so-called bad-faith failure to settle within policy limits. Therefore, Florida's bad-faith law makes the decision to go to trial very risky for insurance carriers. This alone raises the settlement value and rate of settlement of cases in Florida.

This is particularly a problem in Florida where, due to excessively high premiums, doctors tend to maintain liability policies with minimum coverage levels. Consequently, almost every case in Florida presents the possibility that carriers may have to pay damage awards that exceed policy limits.

Bad faith judgments cannot be included as a loss-adjustment expense for purposes of rate-making. Therefore, Insurance carriers facing a high risk of bad faith actions have no way to recoup costs or predict them from an actuarial standpoint.

The governor's select task force recommended changes to Florida's insurance bad-faith law. During the regular session both the House and Senate included bad faith reforms in their respective medical malpractice bills, but the proposals were very different.

The House bill would give insurance companies 180 days to make a determination of whether to compensate claimants and in what amount, without opening the carriers up to a later claim of bad faith. The governor's bill excludes a bad-faith claim if the insurance carrier offers to settle at the policy limit at least 120 days prior to the start of the trial. Most of the House select committee members accept the necessity for bad-faith reforms of varying degrees of stringency, but the matter continues to unsettle senators.

The governor's proposal takes an extra step that is not included in the House or Senate bills by eliminating third-party claims of bad faith and restricting that privilege to policyholders, which would return Florida law to the standards imposed in most other jurisdictions.

Representative Don Brown (R-DeFuniak Springs) expressed some concern that the House was not adopting the governor's position, which would return the contractual duty to its historical bond of insurer-insured. It is the governor's entire reform package that promises to bring an immediate 20-percent rate reduction by the state's largest medical liability carrier. Retaining the ability of third parties to bring bad-faith claims may not bring the immediate relief that the governor's package promises.

The Senate also is seriously considering safe-harbor provisions to limit an insurer's exposure to liability for so-called bad faith, as recommended by the governor.

SOVEREIGN IMMUNITY

The governor's select task force recommended that sovereign immunity be extended to physicians and hospitals when rendering emergency medical services. This proposal is therefore included in the governor's bill. If approved, this provision would limit recoveries for malpractice committed when providing emergency care to $100,000 of economic and non-economic damages. Plaintiffs could then seek additional damages by means of a so-called "claims bill" which the Legislature may act upon at its discretion.

Sovereign immunity would ease financial pressures on hospitals and trauma centers that provide much needed critical care. In this context, however, sovereign immunity is not without its detractors. Ordinarily sovereign immunity applies to *public* officers and employees but the governor's proposal would also extend immunity to *private* doctors providing services in *private* hospitals to *private* (paying) patients, even in cases where the health care provider demonstrated a reckless disregard of the prevailing standard of emergency medical care.

This proposal is constitutionally suspect because he Florida Constitution gives the Legislature power to *waive* sovereign immunity, not to *confer* it.

In the regular session the House medical malpractice bill did not contain a provision granting sovereign immunity to doctors and hospitals for emergency medical care and neither does HB 63B. In the regular session the Senate bill contained a variant of sovereign immunity that immunized ER doctors up to $100,000, transferred excess liability to hospitals up to a limit of $2.5 million, and immunized the hospitals for amounts over that recovery limit.

In Tuesday's committee meeting, Senator Alex Villalobos (R-Miami) offered an amendment to delete the sovereign immunity provision from SB 2B altogether. The amendment passed on a voice vote. Therefore, the Senate has moved to the House position (but away from the governor's position) on the sovereign immunity issue.

Tomorrow the full Senate takes up SB 2B on the special order calendar. The amendatory process may provide a strong indication as to the viability of medical malpractice reform in this special session.

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