ASSOCIATED INDUSTRIES OF FLORIDA
LEGISLATIVE WEEKLY UPDATE
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MEDICAL-LIABILITY REFORM: A POSITIVE STEP IN THE RIGHT DIRECTION

Although the new medical-liability reform bill is not yet available, enough information has been released to gauge its overall impact. The landmark bill culminates a legislative battle of historic proportions. In the end, what emerged from the cauldron of controversy is a compromise measure that clearly signals the beginning of the end of the 2003 medical-liability crisis.

> Please go to http://fbnnet.com/2003-Articles/AIFMedMal.htmAIF's statement regarding Medical Malpractice.

As Governor Jeb Bush said in this morning's press conference, it is "comprehensive way to begin to address the crisis." Even though supporters of lower damage caps (as were contained in the governor's original bill) are today somewhat disappointed, most observers agree that there is a lot to like in the compromise package. At the very least, the bill provides the opportunity for some immediate relief (especially for target defendants with deep pockets) and it lays a foundation for greater benefit over the long-term.

Special Session D will begin next Tuesday, August 12 at 10:00 a.m. and will end on Friday, August 15 at 7:00 p.m. The only item on the agenda will be the medical-liability legislation, which is expected to pass by a wide margin.

The Senate seems to have prevailed on issues involving the cap on non-economic damages although, on all issues there clearly was much give-and-take on both sides. The legislation divides medical-malpractice defendants into two categories. Practitioners of all kinds, which make up the first category, would have their exposure to non-economic damages arising from a single incident capped at $500,000 per claimant, for a maximum recovery of $1 million for multiple claimants. The cap can also be pierced up to $1 million in cases involving the most severe injuries. The same structure would be used for damages against defendants in the second category (hospitals, HMOs, Hospice providers, and other facilities) but the caps would be $750,000 per claimant and $1.5 million per incident.

Examples:

- One claimant winning a claim against one doctor could receive a maximum of $500,000 from the doctor.
- If there were two claimants, or if the one claimant could meet the standards for pierceability, the maximum recovery from one doctor would still be $500,000.
- If the case involved one claimant suing two doctors, the claimant could receive at most $500,000 unless the conditions surrounding the claim met the pierceability test, in which case the claimant could receive up to $1 million from the doctors.
- Two or more claimants suing two or more doctors could receive, at most, $1 million.
- One claimant winning a claim against one or more facilities could receive a maximum of $750,000 from any and all facilities involved in the claim.
- If there were two or more claimants, or if the one claimant could meet the standards for pierceability, the facilities could be assessed up to $1.5 million in non-economic damages.

In other words the most that any one doctor would ever pay would be $500,000. Under the most egregious circumstances (a pierceable claim) — or a single incident involving multiple claimants, negligent doctors, and one or more negligent facilities — the maximum aggregate recovery for non-economic damages would be $2.5 million. That is substantially less than the "sky's the limit" amount that a jury might award under present law.

A separate category is created for emergency room doctors, who would be subject to caps of $150,000 per claimant for a maximum of $300,000 per incident regardless of the number of claimants or defendants.

The caps may be pierced under one of two circumstances (with the exception of the emergency-room provider caps, which cannot be pierced):

- if a case involves death or permanent vegetative state
- a catastrophic injury occurs and the trial judge finds that a manifest injustice would occur if the lower cap was imposed; catastrophic injuries include permanent injuries including severe paralysis, amputations, severe brain injuries, severe burns, blindness, and loss of reproductive organs.

While this cap language constitutes a significant improvement over current law, it cannot be expected to have much of an immediate impact in insurance rates for rank-and-file physicians, most of whom purchase only $250,000 in coverage. In addition, the caps must withstand constitutional muster, before any real benefit can be realized.

Nevertheless, had damage caps at these levels been operative over the last decade or more (since the last medical malpractice crisis in the late 1980s) the problem today would be much less severe. So, enacting these caps today provides some hope that the situation a decade from now will be much better than it is today and "healthier" than it would have been but for passage of the compromise bill.

The bill's bad-faith provisions, which are not as strong as those originally proposed by Governor Bush, are still better than current law. The compromise language does not eliminate third-party bad-faith actions, but it does create safe harbors for insurers, which should help alleviate the threat that is driving the high rate of settlements in Florida.

There will be no state-sponsored insurance entity created by the new medical malpractice reform act. Instead, consistent with the recommendation of the governor's task force, the bill re-authorizes the formation of self-insurance funds to provide liability coverage for medical practitioners.

The bill includes a number of other provisions that are valuable because they remove some of the uncertainty that exists with respect to insurers' unlimited exposure to liability. Nevertheless it is not strong enough to draw an endorsement from the Florida Insurance Council.

> Please go to http://fbnnet.com/2003-Articles/InsuranceConcil.htm to view the Florida Insurance Council's press release.

HMOs derive substantial benefits from the proposed bill, which is important for employers seeking affordable health-care coverage for their employees. The bill limits HMO vicarious liability for medical malpractice unless the HMO specifically directed and actually controlled the conduct that caused the injury. HMOs and hospitals both will benefit from the caps, more so than most doctors will because the facilities are the deep-pocket defendants that face the threat of the heftiest claims; the $750,000/$1.5 million caps will provide a better shield for the facilities than the $500,000/$1 million will offer to doctors who typically hold policy limits that are lower than the caps.

The Florida Medical Association is withholding its support of the bill because it lacks a California-style flat cap of $250,000. In addition court challenges to the cap may further erode the benefits of this statutory reform.

> Pleas go to http://fbnnet.com/2003-Articles/FloridaMedicalAssociation.htm to view the Florida Medical Association press release.

The emergency-room doctors wanted sovereign immunity. They did not get it. Nevertheless, they did receive a more favorable cap on non-economic damages.

Governor Bush, Senate President Jim King (R-Jacksonville), and House Speaker Johnnie Byrd (R-Plant City) deserve acknowledgement for their leadership. The key negotiators, Representatives Dudley Goodlette (R-Naples) and Allan Bense (R-Panama City), along with Senators Tom Lee (R-Brandon) and Rod Smith (D-Gainesville) also deserve recognition for the long hours they spent in thoughtful debate.

In the end, they have reached a good compromise — perhaps the only one that was politically available. Does it go far enough? Maybe yes, maybe no. Only time will tell. The medical-liability crisis is deep-rooted. It did not arise overnight and it cannot be cured overnight.

The culmination of this hard-fought battle over medical-liability reform proves once again that institutional change is overwhelming incremental in nature. No lasting solution will be found, absent a long view. And the present bill, if upheld by the courts, can provide a solid foundation for long-term relief and future reform.

> Please go to http://fbnnet.com/2003-Articles/MedMalReformPackage.htm to view the Senate's explanation of the proposed bill.
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> Please go to http://fbnnet.com/2003-Articles/MedMalprvisions.htm to view the House of Representative's explanation of the proposed bill.
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> Please go to http://fbnnet.com/2003-Articles/MedMalDealreached.htm to view Video clips from this morning's press conference announcing the agreement.
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> Please go to http://fbnnet.com/2003-Articles/Medmaljoint.htm to view the press release from this morning's press conference announcing the agreement.

- 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.