ASSOCIATED INDUSTRIES OF FLORIDA
LEGISLATIVE DAILY BRIEF
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FROM JUNE 18, 2003

When the Florida Senate convened this morning, Senate President Jim King (R-Jacksonville) invited Senator Evelyn Lynn (R-Ormond Beach) to say the opening prayer and assured her, "Take your time. Today we've got nothing but time." And at times, during this long day of lawmaking, the pace slowed to the dawdle of a native Floridian on a hot, muggy day.

Newspaper stories around the state trumpeting the Senate's approval of a limited cap on non-economic damages were drowned out by the headline from the *Tampa Tribune*: "Bush Backs Off Malpractice Cap." In fact, the governor was merely signaling his willingness to possibly consider something other than a California-style "hard cap" of $250,000 per incident, provided that the bill assures both immediate and permanent relief from exorbitant liability insurance premiums. Attainment of this result, he cautioned, will not be possible without a meaningful cap on damages.

Commencing at 3:00 in the afternoon, and lasting until about 9:00 in the evening, the House and Senate debated nearly a hundred amendments. The going was slow, but orderly, as legislators muddled their way through an array of difficult issues. Finally, when the day was done, the House had passed its medical malpractice bill (HB 63B) on a strong 92 to 23 vote. The Senate votes tomorrow.

What follows is a brief description of the floor action toady in the House and Senate.

HOUSE

The House defeated a number of amendments that endeavored to resurrect issues long resolved by the majority. House members beat back proposals to complicate the rate-making process, impose a rate freeze and subsequent rollback, and raise the $250,000 damage cap to $850,000 indexed to inflation.

Amendments that passed strengthened patient protections by expanding efforts to reduce medical errors. Several amendments sought to reduce unnecessary litigation. One notable change, offered by Representative David Simmons (R-Altamonte Springs), a respected attorney, bans attorney advertising that actively solicits medical malpractice business by urging people to file lawsuits. House members also approved an amendment by Representative Ken Sorensen (R-Tavernier) that imposes a modified loser pays rule. Under this amendment, the winner in a medical malpractice claim could collect attorney fees and costs from the losing party if the court found that the losing party had acted in bad faith or had filed a frivolous claim.

This afternoon's debate revealed the clear fault line between those who believe that patients and doctors will best be served by legislation that attacks the root cause of the crisis and those who insist that the entire problem can be solved by curbing the "greed" of insurance carriers. What those in the latter cap refuse to acknowledge is that Florida's market would be rife with carriers offering medical malpractice insurance policies if there was an opportunity to make a buck. Instead, health-care providers have watched their choices contract from 66 insurers to four since 1999, and they are left with skyrocketing premiums or the prospect that coverage will not be available at any price.

The problem lawmakers must face is the lack of competition, which has disappeared because Florida's litigation regime makes it impossible for medical-liability-insurance companies to predict the rates they need to set in order to make a reasonable profit. The threat of facing a Florida court exceeds the lure of the profit motive.

The members of the House of Representatives, particularly House Speaker Johnnie Byrd (R-Plant City) and Representatives Allan Bense (R-Panama City) and Dudley Goodlette (R-Naples), deserve special commendation for their support of meaningful medical liability reform.

In sum, the House bill is good – much better than the Senate counterpart, but not as good as the governor's proposal which has stronger language for curtailing oppressive bad faith lawsuits and a useful provision to reduce insurance rates by 20 percent due to actuarial benefits conferred by the proposed legislation.

In contrast, HB 63B merely calls for insurers to submit new rate filings for approval by state regulators. And, SB 2B by Senators Burt Saunders (R-Naples) and Dennis Jones (R-Seminole) purports to require a rollback to January 1, 2002 levels, even though insurance company actuaries have concluded that the bill, as amended yesterday in committee, provides no actuarial benefit whatsoever and indeed it may in fact prompt an increase (rather than a decrease) in insurance premiums.

SENATE

The Governor proposes a "hard cap" on non-economic damages in the amount of $250,000. The House bill adheres to the governor's recommendation. In contrast the pending Senate bill contains a $500,000 "soft cap" that allows unlimited pain and suffering damages for certain categories of egregious injuries. Today, the Senate further softened the damage cap by indexing it to the consumer price index. In addition, the Senate endorsed an amendment by Senator Debbie Wasserman Schultz (D-Pembroke Pines) that exempts more categories of damages from the statutory damage cap.

In 1985 Florida enacted a landmark financial responsibility (FR) law for practicing physicians. Under the FR law, a doctor with hospital staff privileges must be able to satisfy a medical malpractice judgment up to $250,000 or the doctor's license to practice medicine in Florida is suspended. Although most doctors satisfy the FR law by purchasing insurance, the law has always allowed doctors to "go bare" provided that at least $250,000 of any malpractice judgment is timely paid to the judgment creditor. Yesterday, in committee, senators adopted an amendment that revoked the ability of doctors to "go bare". This engendered a wave of protests from doctors around the state, particularly in South Florida where liability insurance coverage is especially expensive and a high percentage of physicians satisfy the FR law without insurance coverage. Consequently, today, the full Senate, voted in favor of an amendment to remove the FR revision from the malpractice bill, thereby reaffirming the current law.

Senator Tom Lee (R-Brandon) offered a series of amendments for "future repeal" on September 1, 2006 of the most important (and most contentious) provisions of the malpractice reform bill, including the revised faith law and the statutory cap on non-economic damages. From the perspective of doctors and others seeking immediate and permanent relief from the medical liability crisis, these amendments failed to improve the bill.

An amendment by Senator Mike Fasano (R-New Port Richey) triggered a lengthy discussion and debate. The amendment would bar an attorney from filing medical malpractice actions on behalf of any client or defend any such action, if the attorney is sanctioned three or more times in a five year period for filing frivolous claims or defenses. Interestingly, attorneys in the Senate were evenly split on the merits of the amendment. However, it failed on a voice vote.

Senator Gary Siplin (D-Orlando) offered an amendment to require board-certification of attorneys who represent clients in medical malpractice lawsuits. Here again, attorneys in the Senate were split on the issue – and here again it failed on a voice vote.

The Senate adjourned for the evening with about a dozen proposed amendments still pending on the bill. As such, the bill remains on the Senate special order calendar.

The special session is scheduled to end at midnight tomorrow (Thursday). If, somehow, progress is made overnight in the resolution of this issue, it is not unlikely that Governor Bush will extend the special session another day or two to allow the House and Senate sufficient time to finalize an agreement. If, however, House and Senate bill managers can not quickly reach a meeting of the minds on a malpractice bill – that satisfies the governor's criteria for minimum acceptable reforms – the session will end Thursday night with a whimper (and not a bang), and legislators will likely be compelled to return to Tallahassee next week for another special session.

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