ASSOCIATED INDUSTRIES OF FLORIDA
LEGISLATIVE WEEKLY UPDATE
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FROM THE WEEK OF JUNE 16-20, 2003

During debate throughout the last week lawmakers reviewed data inferring that doctors are being sued more— and that they are being sued less. In some cases they heard testimony that out-of-control litigation had caused the medical-malpractice-liability crisis, while at other times they were told that the insurance industry was the culprit. In fact, some of the statistics established that a crisis existed while other evidence dismissed it as an urban legend.

So, if the numbers can't tell us what's happening how will anyone figure out which reform path to follow? Let's try some good old common sense.

Consider this. Doctors are shutting their doors. In some communities, women have to wait five or six months to receive mammograms. Patients needing kidney transplants in central Florida can no longer undergo the procedure at a facility near their homes. Citizens all over the state are losing access to the care they need because doctors and hospitals cannot afford the premiums they are charged for insurance that protects them if they are sued for medical malpractice.

Consider this. In 1994, there were more than 60 different companies offering medical-liability insurance policies to Florida doctors and hospitals. Today, there are four. Medical-liability premiums are skyrocketing, but these insurance companies have decided that they can't make money in the Florida marketplace.

Consider this. Trial lawyers pay good money to attend seminars with titles such as, "How to Win a Medical Malpractice Bad-Faith Claim." The business of suing doctors and hospitals is thriving, with top medical malpractice lawyers offering bounties to other attorneys who refer cases to them.

The fact is, when insurers leave the state or doctors close their practices, they stop making money. Shutting down a business is a last-gap measure taken only when someone is losing money, not making it.

So here's Florida's medical-liability situation in a nutshell: Lawyers are thriving, doctors and insurers are leaving the state.

You don't need to be a statistician to figure out what's wrong. Nevertheless, the members of the Florida Senate still can't commit themselves to strong litigation reforms, the only solution that holds any hope for protecting Floridians access to affordable, high-quality health care.

Here's an update on how the two chambers stand with respect to the most significant categories of reform.

NON-ECONOMIC DAMAGE CAPS

A cap on non-economic damages paid to victims of medical negligence holds the potential to provide long-term premium relief to health-care providers and facilities because they inject actuarial certainty. Briefly stated, actuaries help insurance companies calculate premiums by considering the best-case and worst-case scenarios and picking a rate somewhere between the two that meets competitive challenges without putting the carrier's bottom line at risk. A cap on damages reduces the amount at either end of the best/worst case spectrum. All caps, however, are not created equal.

The House and the governor provide for a hard cap of $250,000 per incident, no matter how many defendants or plaintiffs there are. Now keep in mind that this is not a cap on *economic* damages, which reimburse the plaintiff for out-of-pocket losses.

The Senate, on the other hand, has opted to include what is referred to as a rolling, or Texas-style, cap. Under SB 2B, medical-negligence defendants are divided up into three categories: providers, facilities, and others. All of the defendants in each category, no matter how many there are, cannot be hit with any more than $500,000 in non-economic damages, which translates to a $1.5-million cap if a lawsuit involved defendants in each of the three categories.

SB 2B takes the rolling-cap idea one step further, however, by setting a separate limit on non-economic damages in cases involving catastrophic injuries, ranging from loss of life to loss of reproductive function. The caps in these suits quadruple to $2 million per defendant category, for a maximum aggregate award of $6 million. The Senate bill also provides for the repeal of the caps effective September 1, 2006.

The Senate caps are so generous that their impact on rates will be negligible, at best, because they simply do not reduce the risks of an insurance companies face. Moreover, the Senate applies a yearly CPI adjustment to the statutory damage caps, which militates against permanent rate relief.

BAD FAITH

The reforms promising immediate rate relief are those provisions dealing with bad-faith actions against insurance carriers. In fact, Gov. Jeb Bush's bad-faith reform proposals have elicited the promise of a voluntary 20-percent rate rollback from state's largest medical malpractice insurance carrier. That same company has predicted that the Senate bill, conversely, would lead to a 10-percent rate increase. (Why? Because the Senate bill fails to include the necessary bad faith reforms and adds costly new requirements for medical screening panels and non-binding mediation prior to formal commencement of litigation.)

The House, the Senate, and the Bush package all give an insurance carrier bad-faith immunity during certain periods and for varying lengths of time prior to the time a claim goes to file. The three provisions are *different.* Each has its virtues, when compared to current law. Only the *governor's* recommendation, however, is strong enough to trigger a rate reduction.

The House and Senate bad-faith reforms are significantly weaker than the governor's in one important respect. Bad-faith actions traditionally arise from the contractual obligation between the insurer and the insured. In Florida, thanks to a state Supreme Court decision, a third party to that contractual relationship can initiate a claim against the insurance company; in the case of medical malpractice that would be the injured patient. The threat of a bad-faith claim increases the risks for insurers to the point that they settle claims that they otherwise wouldn't at amounts higher than the circumstances warrant.

The governor's package would eliminate third-party bad-faith claims, aligning Florida law with tradition and with the standards that prevail in other jurisdictions. That reform alone would drive down costs significantly. Neither the Senate nor the House includes that change.

As it stands now, the one reform — bad faith — that promises immediate relief is the one reform that will not pass. The governor's strong bad-faith language makes it possible for him to include a provision rolling rates back to 20 percent below their April level, unless an insurer could prove that the rollback would cause it economic harm.

The Senate simply mandates a rollback to January 1, 2002 rates for all policies issued or renewed during the year ending July 1, 2004, but doesn't give carriers the means to reduce the costs that drive rates upward. The Senate does include an escape clause similar to the governor's, making the rate rollback a meaningless gesture that increases red tape but does nothing to heal the market. The House mandates a new rate filing for all carriers but does not dictate prices as the Senate bill does.

SOVEREIGN IMMUNITY

As we reported in the June 17 *Daily Brief,* the governor has attempted to protect access to emergency-room care by extending sovereign immunity to facilities and providers. The governor's proposal 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.

At the beginning of the week, the Senate favored the sovereign immunity provisions, while the House rejected them. By the end of the week, the positions had reversed. SB 2B no longer provides any form of sovereign immunity while the House confers the privilege on a larger universe than the governor's bill, including nurses, technicians, and residents.

Next week lawmakers are supposed to complete the task of passing much needed medical liability reforms. However, consensus on major points of contention is nowhere in sight. At least they're trying!

Senate President Jim King (R-Jacksonville) has appointed a select committee to further examine the medical liability problem and explore bases for compromise with the governor and the House. Although a meeting is scheduled for next Tuesday, absent a breakthrough in private negotiations, it is dubious that the issue will be quickly resolved.

At this writing it seems that the bad faith issue is most problematic to House and Senate lawmakers. If the governor's bad faith reform is rejected, the immediate 20 percent rollback in premiums will also be lost. Moreover, some lawmakers said that they would only support the damage cap, if a significant rate rollback was included in the bill. Hence, the whole bill may be in jeopardy. And even if a bill passes, doctors and hospitals will be confronted with another rate *increase* next year, absent a better bad faith law.

- 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.