

[Legislative REPORT]

By CHRISTINE JORDAN SEXTON

Physicians are not marching outside the Capitol, clad in white coats holding placards demanding lower insurance costs, like last year. Yet 2006 could be the year of significant medical malpractice reform.

The elimination of "joint and several" liability in lawsuits has passed the Legislature and bills to limit the use of medical expert witness testimony as well as an effort to make it more difficult to recover settlements from teaching hospitals are moving through the Florida Legislature.

The Florida Senate on March 30 agreed to eliminate the application of joint and several liability in its entirety in lawsuits in Florida and sent the legislation to Gov. Jeb Bush. It was the No. 1 issue for House Speaker Allan Bense, R-Panama City, and spells medical malpractice relief for Florida's providers, especially hospitals.

"You know, in my business, I have a saying: 'When you win, don't brag; when you lose don't whine.' Today was a good day," Bense said after the vote, adding, "To me it wasn't Bense versus the Trial Bar. It was a fairness issue."

Bush issued a release after the vote applauding "Florida's business community for uniting in their support" of the bill. "Repeal of this law will help Florida to sustain an economic climate that continues to attract businesses and create new jobs for Floridians. Repealing the law removes a barrier for businesses considering relocating to Florida."

"I look forward to signing this important legislation, removing an unfair burden on Florida businesses, and making our state more competitive in our efforts to recruit high paying

jobs," Bush continued. "Floridians have worked too hard and our state has come too far to allow abusive litigation to continue."

If Bush receives the bill during the legislative session, he has seven days to act upon it. If he receives the bill after session, he has 15 days to sign it into law.

The bill, HB 145, passed by a 27-13 vote in the Senate and a 93-27 vote in the House. It becomes effective the day it is signed into law and applies to all causes of action that accrue on or after that date.

Specifically, HB 145 eliminates language that allowed joint and several liability to be applied to economic damages and, replaces it with comparative fault, instead. As a result, liability is based on degree of fault, as is the case with non-economic damages today. Until now, though, joint and several has applied to economic damages, such as ongoing medical bills.

Eliminating joint and several liability was a recommendation advanced by the Governor's Select Task Force on Healthcare Professional Liability Insurance in 2003. The task force voted unanimously to eliminate joint and several liability, noting in its final report that "modern times and fundamental fairness dictate the apportionment of fault among all parties who caused the harm to the plaintiff for both economic and non-economic damages."

The task report also states: "The fact that one defendant may be insolvent or for other reasons immune from payment of damages should not shift the burden to another defendant to fund the total amount of damages, beyond the degree of fault to that defendant."

Florida Hospital Association (FHA) General Counsel Bill Bell said the elimination of the doctrine of joint and several liability is beneficial for the entire medical community and that it helps bring predictability to the costs of insurance.

"It means anytime they (hospitals, physicians and nurses) are sued, they will be able to evaluate a case and their potential liability based just on their own level of negligence. It means their liability insurance or self-insurance won't have to factor into the premium the cost of covering both the insured and potential other defendants without the ability to pay," Bell explained. "It will make it easier to evaluate claims for potential settlement or trial."

Expert witness reform

The repeal of joint and several liability may not be the only significant change that doctors may see this year to Florida's medical malpractice laws. And while Bense said he's not actively pushing any other major tort reforms this session, he will let other measures come to the House floor if there's enough support among members.

During the third week of session, the Senate Health Care Committee approved two bills that would further crack down on med mal related litigation.

The committee overwhelmingly approved SB 2686, a bill backed by the Florida Medical Association (FMA), which limits who can testify in a medical malpractice case, and SB 2160, filed by Sen. Burt Saunders, R-Naples. The latter bill reduces liability for any medical claims for a handful of teaching hospitals across the state so long as the facilities are certified by the state Agency for Health Care Administration (AHCA) as a "patient safety facility."



Saunders

SB 2686 goes to the Judiciary Committee next, which is chaired by Sen. Dan Webster, R-Winter Garden, also the bill sponsor. Its counterpart, HB 1561, hasn't been heard in the House yet.

The bill requires physicians who provide expert witness testimony to either be licensed in the state of Florida or to obtain a certificate from the Board of Medicine or the Board of Osteopathic Medicine before testifying in a medical suit. The application must be approved or denied by the board within five days and allows the medical boards to adopt rules to implement the new requirement.

The bill also amends the laws governing medical and osteopathic physicians to make clear that their licenses can be revoked for providing misleading, deceptive or fraudulent testimony related to the practice of medicine.

Before being approved, the Senate Health Care Committee adopted three amendments, all sponsored by Sen. Dennis Jones, R-Seminole. One of the amendments requires a "court of competent jurisdiction" to determine that the testimony was fraudulent, as opposed to the physician-dominated Board of Medicine. The other two amendments make clear that the certification requirements also apply to

The theory of **Joint and Several Liability** allows that each defendant in a legal action is responsible for the entire amount of damages that a plaintiff is seeking, regardless of their relative degree of responsibility for the damages involved. This has come to be known as the 'deep pocket' rule because it has had the effect of turning lawsuits into all out searches to find the most financially lucrative defendants.

'Deep pockets'

physicians who are testifying in any civil, criminal or administrative proceeding — and not just suits involving medical malpractice.

Damages limited

While the debate lingered on the FMA-supported bill, time was limited and the committee hurriedly moved SB 2160 to reduce liability for certain teaching hospitals: Jackson Memorial Hospital (Miami), Mount Sinai Medical Center (Miami Beach), Orlando Regional Medical Center, Tampa General Hospital, Shands-Jacksonville, and Shands University of Florida (Gainesville).

The bill establishes medical malpractice limits at all teaching hospitals once a teaching hospital is certified as a patient safety facility. For those facilities, non-economic damages would be limited to a maximum \$500,000, regardless of the number of claimants and claims.

Awards of economic damages would be offset by collateral payments and any available offsets. Awards for future economic losses would be offset by future collateral source payments. After the offset of collateral sources and at the option of the hospital, future economic damages can either be reduced by the court to present value or paid through periodic payments in the form of an annuity or reversionary trust.

The Academy of Florida Trial Lawyers opposed the bill, which was amended four times before being passed by an 8-2 vote. The bill provides legislative findings that the state is in the “midst of a prolonged medical malpractice insurance crisis” and that “there is no alternative method that addresses the overwhelming public necessity to implement patient safety measures and limit provider liability.”

In order to qualify as a patient safety facility, the hospital must do a number of things, including establishing a system for the tracking of quality and patient safety indicators that AHCA will target through rule. Additionally the facility must also develop a program to identify health-care providers on staff who may be eligible for an “early intervention” program that provides additional skills assessment and training. The program would be voluntary and participation in it would be confidential.

The bill also allows hospitals to extend liability insurance and self-insurance coverage to members of the medical staff, including physicians' practices, individually or through an association.

One amendment deleted section three

from the bill, which would have required insurers to issue policies with carve-outs for acts of medical negligence that occur at a hospital if they are covered under the hospital plan. The bill would take effect upon becoming law and also contains an edict that the “Legislature’s intent that the provisions of the act are self-executing.”

Scope of practice

Organized medicine came out in full force to kill a bill sponsored by House Commerce Committee Chairman Rep. Frank Farkas, R-St. Petersburg, that would have allowed advanced registered nurse practitioners (ARNPs) who provide services in rural health clinics — as well as nursing homes, assisted living facilities and veteran’s administration facilities — to prescribe controlled substances under the general supervision of a physician and in accordance with protocol. The bill was killed on a tie vote.

HB 485 would have created a statewide pilot project for ARNPs to administer the medicine. Farkas said afterward that the FMA is pushing an agenda that may be good for their licensed doctors, but bad for Floridians.

“[The FMA] thinks this is scope of practice,” Farkas said, “but they are cutting off the availability of health care.”

The committee moved to “temporarily pass” the bill after the tie vote, which means the measure technically is still alive but if it is not reconsidered at the next committee meeting, the bill will die for the session.

FMA Executive Vice President and Chief Executive Officer Sandy Mor-tham downplayed Farkas’ criticism and said the FMA has concerns with patient safety and that people in rural health clinics or nursing homes should not have different access to care. “Clearly our real concern with extenders is not being properly supervised.”

While the FMA played defense on HB 485, it actively is pushing HB 699, which in its earliest iteration, could have prevented health-care from being delivered at rural health clinics and places other than a doctor’s office.

HB 699 has gone through two rewrites and staff said the latest version of the measure is what all affected parties have agreed to sign off on. The Senate companion bill is

CS/SB 1216.

The bills limit the role of advance registered nurse practitioners and physician assistants who do not practice within a physician’s office or practice. It does exempt allied health professionals who work in designated rural health clinics and other similar — type settings from the new requirements.

The bill allows medical doctors and osteopaths to supervise four or less offices if the clinics provide “primary care,” or health-care services commonly provided to patients without referral from another practitioner, including obstetrical and gynecological services. It excludes dermatological services.

Medical doctors and osteopaths are allowed to supervise two or less offices if the care provided at the offsite clinic is “specialty,” or health-care services that are commonly provided to patients with a referral from another practitioner.

The bill has different guidelines for clinics that provide dermatological services.

PIP payments

Physicians won’t see their fees capped in Personal Injury Protection (PIP) insurance. The House and Senate are moving bills that would delay the elimination of PIP, which provides insured drivers a minimum of \$10,000 in health care for accident-related injuries. The no-fault system is slated to expire if the Legislature does not take steps to actively reinstate the system, which has been in place for more than 30 years.

There has been a fight between insurers — who would like to change what doctors and hospitals can charge for PIP related health care — and trial attorneys and health-care providers who would like the current fee-for-service system reinstated. There also is infighting between the insurance industry, with some carriers wanting to see the no-fault system abolished and replaced, instead, with tort. Other carriers want PIP reinstated, but with caps on what providers can charge.

Bense said he was surprised at the acrimony in the fight between doctors, insurers, lawyers and hospitals over whether to sunset PIP or reinstate it with some modifications. “I have never seen so much controversy,” Bense maintained. “It’s almost as bad as a tort issue.” ◆

Pay increase for rural Medicaid physicians debated

While the House and Senate spending panels haven’t funded nearly \$100 million in fee increases for Medicaid participating physicians, as advocated by Gov. Jeb Bush in his supplemental budget, legislators are considering, providing fee increases for physicians willing to serve rural Florida. There are two bills moving through the Legislature dealing with rural health: the still-unnumbered PCB HCR 06-06 in the House and CS/SB 2176 in the Senate. The bills would provide a 10 percent increase for physicians.

For over 17 years, *Florida Medical Business* (FMB) has remained the state’s most reputable and reliable health business news publication for the state’s 45,000 physicians, 3,000 hospital executives and thousands of other medical professionals, administrators and providers. For more information on our Award-Winning newspaper, call 800-327-3736 or visit www.FMBnews.com.