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Patient's Right To Know About Adverse Medical Incidents

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On November 2, 2004, Florida residents will be asked to vote on a proposed amendment to the Florida Constitution that would permit patients and prospective patients of health care providers to obtain information concerning adverse medical incidents.

The Florida Legislature has enacted provisions relating to a patient's bill of rights and responsibilities, including provisions relating to information about practitioners' qualifications, treatment and financial aspects of patient care. The Legislature has, however, restricted public access to information concerning particular health care providers or facility's investigations, incidents or history of acts, neglect, or defaults that have injured patients or had the potential to injure patients. Advocacy groups have taken the position that this information may be important to a patient.

The stated purpose of this amendment is to create a constitutional right for a patient or potential patient to know and have access to records of a health care facility or provider's adverse medical incidents, including medical malpractice and other acts which have caused or have the potential to cause injury or death. This right to know is to be balanced against an individual patient's rights to privacy and dignity, so that the information available relates to the practitioner or facility as opposed to individuals who may have been or are patients.

In a July 30, 2004 online report, the American Bar Association reported the legal profession was spending millions arguing for passage of the amendment. The advocacy group that drafted the lawyer's medical malpractice amendments, Floridians for Patient Protection, has raised more than \$11.6 million for the constitutional amendment campaign, with more than

\$7.2 million collected in the first quarter of 2004.¹

A poll conducted on behalf of the advocacy group in May shows 78 percent of Florida voters would vote for the patients'-right-to-know amendment.²

The Florida Supreme Court was recently asked to decide whether the language of the amendment clearly and accurately reflects what the amendment would actually do. After hearing oral arguments, the high Court rendered an opinion that approved the amendment, the ballot title and summary for placement on the November ballot. The proposed amendment provides as follows:

Amendment of Florida Constitution: Art. X, Fla. Const., is amended by inserting the following new section at the end thereof, to read:

Section 22. Patients' Right to Know About Adverse Medical Incidents.

(a) In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.

(b) In providing such access, the identity of patients involved in the incidents shall not be disclosed, and any privacy restrictions imposed by federal law shall be maintained.

(c) For purposes of this section, the following terms have the following meanings:

(1) The phrases "health care facility" and "health care provider" have the meaning given in general law related to a patient's rights and responsibilities.

(2) The term "patient" means an individual who has sought, is seeking, is undergoing, or has undergone care or treatment in a health care facility or by a health care provider.



(3) The phrase “adverse medical incident” means medical negligence, intentional misconduct, and any other act, neglect, or default of a health care facility or health care provider that caused or could have caused injury to or death of a patient, including, but not limited to, those incidents that are required by state or federal law to be reported to any governmental agency or body, and incidents that are reported to or reviewed by any health care facility peer review, risk management, quality assurance, credentials, or similar committee, or any representative of any such committees.

(4) The phrase “have access to any records” means, in addition to any other procedure for producing such records provided by general law, making the records available for inspection and copying upon formal or informal request by the patient or a representative of the patient, provided that current records which have been made publicly available by publication or on the Internet may be “provided” by reference to the location at which the records are publicly available.

Currently, Florida law restricts information available to patients related to investigations of adverse medical incidents. This amendment would give patients the right to review, upon request, records of adverse incidents – commonly known as incident or quality assurance reports. If approved by a majority of the people, this proposal would become effective as early as November 2004.

Unquestionably, this amendment would affect current law, which exempts the records of investigations, proceedings and records of a peer review panel from discovery in a civil or administrative action. However, the amendment, as it stands, appears to limit its application to health care facilities or health care providers. The question then becomes what constitutes a health care provider.

In reviewing Florida Statutes, courts have been plagued by a lack of comprehensive definitions, including a definitive statement as to who are considered “health care providers.”¹ For example, throughout the medical malpractice statute, the term “health care

provider” has three different definitions, the broadest of which defines “health care provider” as

hospitals, physicians, osteopaths, podiatrist, dentists, chiropractors, naturopaths, nurses, clinical laboratories, physician’s assistants, physical therapist and physical therapist assistants, health maintenance organizations, ambulatory surgical centers, blood banks, plasma centers, industrial clinics, and renal dialysis facilities, or professional associations, partnerships, corporations, joint ventures, or other associations for professional activity by health care providers.⁴

Noticeably absent from this definition are nursing homes and assisted living facilities. Chapter 400 of the Florida Statutes governs both and each has its own set of rules when it comes to the disclosure of incident reports. However, one can expect to see the scope of this amendment stretched to its limits in an attempt to circumvent those specific rules. In their opposition briefs to the Supreme Court, opponents unsuccessfully argued this very notion. The concern is that the amendment restricts the power of the judiciary to interpret the rules related to discovery as applied to disclosure of incident reports.

Opponents to the proposal have also raised concerns about the effect that the amendment would have on work product and the attorney-client privilege. In its advisory opinion, the Supreme Court stated that certain records currently classified as work product may have to be disclosed to certain persons, violating the existing tenets of attorney-client privilege. The court asserts that these damaging affects are merely speculative at this time.

In sum, should the proposed amendment become the law of Florida, its impact on the structure of our health care systems could be substantially altered. The vague definition of what constitutes a health care provider only increases the amendment’s susceptibility to misuse. To learn more about this proposed amendment to the Florida Constitution and its impact on your facility, please contact Robin Khanal in our Jacksonville office, at 904-354-5500.

¹ Also on the November ballot is an amendment to pull the medical license of any doctor who loses three malpractice judgments; see also Siobhan Morrissey, *Med-Mal War Hits the Ballot*, 2004 A.B.A. J. E-Report Vol. 3, Issue 30.

² *Id.*

³ See *Integrated Health Care Services, Inc., et al., v. Lang-Redway*, 840 So. 2d 974 (Fla. 2002).

⁴ See *Id.* 2

Summary of Mississippi 2004 Legislation



On June 16, 2004, Mississippi Governor Barbour signed into law HB 13, the 2004 Tort Reform Act. This legislation significantly changes the legal rules governing civil litigation in the state, and addresses what reform advocates maintain to be contributing factors to Mississippi's notoriously large jury awards. The legislation, an addendum to the 2002 tort reform bill, is considered to be the most comprehensive tort reform package Mississippi has seen to date. The bill affects civil actions filed on or after September 1, 2004.

The 2004 Tort Reform package introduces innovative measures to curb mass tort suits, frivolous lawsuits and excessive jury awards. The bill amends existing sections and adds new sections to the Mississippi Code of 1972. Among the more progressive elements of the bill are those regarding venue selection, caps on awarding noneconomic and punitive damages, joint liability, additional liability protection to "Innocent Sellers", product liability, premise liability, and allocation of fault.

Venues

Section 1 of HB 13 amends Section 11-11-3, MS Code of 1972, by imposing stricter limits for establishing venue. Mississippi's contested option to establish venue in a civil action against a nonresident defendant at the discretion of the plaintiff, notwithstanding location of plaintiff's residence or domicile, or cause of action, has been a point of controversy. Advocates for stricter limits point to the ability of plaintiffs to establish venue in any county as a legal strategy known as forum shopping. This section of the bill also attempts to reduce mass tort litigation by requiring multiple plaintiffs to establish venues independently.

The act specifically addresses healthcare-related civil actions, stating, "any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy... for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred." Additionally, cases against a manufacturer are limited to the county where the principal place of business of the manufacturer is located, where a substantial act, omission or event that caused the injury occurred, or where the plaintiff obtained the product. The act does not disallow for transfer of cases to more convenient venues provided set factors are considered, nor does the act abolish the plaintiff's right to pursue cases transferred to another state.

Caps on Noneconomic Damages

Section 2 of HB 13 amends Section 11-1-60, Mississippi Code of 1972, by introducing a cap on noneconomic damages in plaintiff awards. The act reinstates the existing \$500,000 cap in medical liability cases and introduces a \$1 million limit in all other civil cases.

The amendment also creates a system based on pure allocation of fault for civil cases, rather than dividing the cost of noneconomic damages through a system of joint and several liability. Section 6 of HB 13 addresses this issue by amending Section 85-5-7, Mississippi Code of 1972. "Fault allocated under this subsection to an immune tort-feasor or a tort-feasor whose liability is limited by law shall not be reallocated to any other tort-feasors." This amendment is intended to curb mass tort liability, wherein another defendant is not responsible for damages beyond their percentage of fault.

Product Liability

Section 3 of HB 13 amends Section 11-1-63 by adding additional liability protection to "Innocent Sellers" of product(s) in suit. While the amendment fails to provide a definition for the term "constructive knowledge," the act does attempt to protect sellers from liability. HB 13 specifically states, "It is the intent of this section [3-h] to immunize innocent sellers who are not negligent, but instead are mere conduits of a product." Additionally, the section of 11-1-64 that states, "the procedure for dismissing a defendant whose liability is based solely on his status as a seller..." is repealed.

Punitive Damages

Section 4 amends 11-1-65 by further reducing caps on punitive damages for defendants with a net worth of \$500 million or less. These limits, which are based on the net worth of defendants alone, not the defendant's ability to pay, is intended to reduce frivolous or excessive lawsuits and jury awards.

Premise Liability

Section 5 of HB 13 amends Section 11-1-66, adding that no owner, occupant, lessee or managing agent of property is liable for the death or injury of an independent contractor or their employees "resulting from dangers which the contractor knew or reasonably should have known."