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Capitol Report

Government Affairs and Lobbying

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To keep you informed of legislative changes resulting from the 2011 Florida Regular Legislative Session, Carlton Fields' **Government Law and Consulting** practice group is pleased to provide you with our latest legislative summary concerning medical malpractice tort reform enacted by the 2011 Florida Legislature. As of this writing, the bills discussed below are awaiting review by the Governor and are subject to his veto authority. The reader is encouraged to check the ultimate status of the bill by visiting the Legislature's web site (*www.leg.state.fl.us)*. Please select the "Enrolled" (ER) version of the bill.

CS/CS/CS/CS/HB-479 & CS/HB-7109
Medical Malpractice

Going into the 2011, legislators promised medical malpractice tort reform and delivered CS/CS/CS/CS/HB 479 and Section 28 of CS/HB 7109. Hospitals and physicians had also hoped that the final reform package would have included access to subsequent treating physicians, which case law currently prohibits, and a statutory "fix" to bar hospitals from being sued for damages caused by non-employee doctors; however, these provisions did not survive the floor fight. But, there is still plenty of medical malpractice tort reform. If approved by the Governor, effective October 1, 2011 as applied to causes of action accruing on or after that date, the key provisions in CS/CS/CS/CS/HB 479 include:

Out-of-State Expert Witness Certificate:

The bill requires any out-of-state physician or dentist with an active and valid license from somewhere other than Florida, who wishes to provide expert testimony in Florida, to obtain a certificate from the Board of Medicine, Board of Osteopathic Medicine, or Board of Dentistry, respectively. The certificate provides the necessary nexus to Florida, so that the respective boards have authority to discipline a physician or dentist (in-state or out-of-state with certificate) for providing deceptive or fraudulent expert witness testimony related to the practice of medicine.

Informed Consent Form for Cataract Surgery:

The bill creates a new subsection (6) under both ss. 458.351 and 459.026, F.S. to expressly authorize the Boards of Medicine to adopt by rule a standard informed consent form that would clearly and uniformly list the recognized risks of cataract surgery, which is the most commonly performed surgery in Florida. The new subsections also clarify that upon

signature by the patient of the standard informed consent form, a rebuttable presumption is made that the doctor properly disclosed the risks. Further, incidents resulting from recognized specific risks would no longer be "adverse incidents" for reporting purposes.

Authority to Settle Insurance Contracts:

As amended, s. 627.4147, F.S. permits physicians to enter into insurance contracts that give the physician authority to approve or deny settlement of the insurance claim, provided the insurer voluntarily offers such a policy. Likewise, insurance companies are permitted, but not required, to provide policies that allow this physician settlement decision.

Admissibility of Reimbursement Policies:

The bill amends s. 766.102, F.S. to provide that records, policies, or testimony of an insurer's reimbursement policies or reimbursement determinations are not admissible to show the deviation of care or to prove medical negligence. In addition, noncompliance with a federal rule, regulation, or standard may not be used as evidence in a medical negligence action.

Authorization for Release of Protected Health Information:

Section 766.1065, F.S. is created to require that presuit notice in a medical negligence action must include an authorization for release of protected health information and provides requirements for a standardized form. If the release authorization does not accompany the presuit notice, then the presuit notice is void. If the release authorization is revoked, the presuit notice and any tolling or postponement effect the release had on the statute of limitations is deemed retroactively void. The bill also amends s. 766.206, F.S. such that if the authorization for release of protected medical information included with the presuit notice is not completed in good faith or does not comply with reasonable investigation requirements, the court shall dismiss the claim.

Scientific Diagnostic Disease Methodologies:

Section (3) of s. 766.110, F.S. is created to allow health care facilities' medical review committees to adopt scientific diagnostic disease technologies to ensure comprehensive risk management for disease diagnoses.

Liability of Volunteer Team Physicians:

Section 768.135, F.S. is amended to address the concerns raised in *Weiss v. Pratt*, 53 So.2d 395 (Fla. 4th DCA 2011). As amended, immunity protections are extended to volunteer team physicians for malpractice liability unless the medical care was given in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

Limitation of Medical Malpractice Damages for Medicaid Recipients:

Additionally, although not included in HB-479, as passed it is important to note for medical malpractice purposes that CS/HB-7109 added a new subsection (6) to s. 766.118, F.S.,

which limits non-economic damages in medical malpractice actions for medical practitioners who provide services and care to Medicaid recipients unless the practitioner acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Specifically, the provision limits noneconomic damages to no more than $300,000 per claimant and limits liability to a practitioner to no more than $200,000 in noneconomic damages, unless the claimant pleads and proves that the practitioner acted in a wrongful manner. If approved by the Governor, this provision would be effective July 1, 2011.

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