



Update on Medical Liability

Senate to Vote Senate Bill 281 Week of November 19

The Ohio Senate will hold one more hearing on Senate Bill 281, Wednesday, November 20, 2002 in the afternoon after the Senate Session in the North Hearing Room on the 2nd Floor. Testimony will be taken at this hearing, amendments will be taken, and the bill is to be reported out of the Senate Insurance, Commerce and Labor Committee. The Senate anticipates Senate Bill 281 being voted upon on the floor of the Ohio Senate on Thursday, November 21, 2002.

State Representative Tim Grendell Introduces House Bill 665

The Ohio House of Representatives introduced their version of the bill on November 14, 2002, House Bill 665; the bill is expected to be referred to the House Civil and Commercial Law Committee and hearings are to be held on November 19, 20, and 21, 2002:

November 19, 2002 at 1:00 pm in House Room 114	Sponsor Hearing
November 20, 2002 at 9:30 am in House Room 114	Proponent Hearing
November 21, 2002 at 9:00 am in House Room 116	Proponent, Opponent and Interested Party Hearing

State Representative Tim Grendell (R-Chesterland) introduced House Bill 665, which he believes stands a good chance of meeting any constitutional challenge. The House Bill differs from the Senate Bill and contains the caps on non-economic damages that were included in House Bill 350 (1996). The legislation will have non-economic damage limits of \$250,000 or an amount that is equal to three times the plaintiff's economic loss, as determined by the trier of fact, to a maximum of \$500,000 for non-catastrophic injuries and \$1 million or \$35,000 times the number of years remaining in the plaintiff's expected life for catastrophic injuries. The limits will apply after the jury has rendered its verdict by a mandatory remittitur or new trial concept. House Bill 665 places limits on attorney contingency fees, but House Bill 665 does have a provision allowing the trier of fact (judge or jury) to permit additional attorney's fees above the contingent caps when warranted. House Bill 665 also contains a frivolous suit provision that provides for the recovery of attorney's fees by the defendants when plaintiffs file frivolous malpractice suits.

Legislation on Reestablishing the JUA and SRF and Other Ideas for Solving Rising Malpractice Premiums

The Chair of the House Civil and Commercial Law Committee, State Representative John Willamowski (R – Lima) has introduced a bill to re-create the Joint Underwriting Association (JUA) to provide for the operation of the JUA relative to the issuance of medical malpractice insurance and to establish a stabilization reserve fund for the JUA. The bill places limits on the commission charged by a broker or agent for any policy of insurance issued by or on behalf of the JUA to a physician to not exceed 5% of the amount of the premium for such policy and in no case is the commission to exceed \$150.00.

Senator Eric Fingerhut (D-Cleveland) and Representative Ed Jerse (D-Euclid) will be introducing a package of bills to address malpractice rates. The Democrats believe that Senate Bill 281 will restrict "the rights of injured patients without placing any responsibility on the insurance industry." The Democrats do not believe Senate Bill 281 will work.

Fingerhut and Jerse are expected to introduce four bills. The first will reinstate the Joint Underwriting Authority (JUA), a state fund that serves as an insurer of last resort for Ohio's doctors and medical facilities. According to Fingerhut, "the JUA was created in response to the last medical malpractice insurance crisis in Ohio, and was effective in moderating rates The JUA also guaranteed that no provider would be without insurance at all." The JUA was disbanded in 1991 with \$50 million in the fund. He said legislators were told that it was no longer needed and the money was used to balance the budget.

The second bill creates a permanent commission to monitor medical malpractice insurance rates and report regularly to the Ohio General Assembly on the cost and availability of such insurance in Ohio. The third bill is to crack down on frivolous lawsuits by increasing the penalties for lawyers and parties that file baseless lawsuits, and by allowing judges to sanction lawyers and parties on their own initiative.

The fourth bill will focus on preventing price gouging in the private medical malpractice market in Ohio. Under this bill, medical malpractice insurers could not raise rates for any Ohio customer more than five percent from year to year without permission from the Ohio Department of Insurance.

Hearings on Senate Bill 281

The Senate Insurance, Commerce and Labor Committee held hearings on Senate Bill 281, the medical malpractice reform legislation, on Tuesday, November 12, 2002 and Thursday, November 14, 2002.

Tuesday, November 12, 2002 Hearing

Steve Chappellear, *Ohio State Bar Association (OSBA)* President, testified at the hearing as an interested party. He said that the OSBA has not taken a position on the bill but has serious concerns as to whether it can withstand a constitutional challenge. Noting that there was little reliable evidence to show an increase in malpractice lawsuit filings, he said that we need to have the facts before concluding there is a crisis. He pointed out that the Committee has not heard from the insurance industry on this issue.

Testifying in opposition to the bill was **John Lancione**, *Ohio Academy of Trial Lawyers*. He said that we currently do not have the answer to what is causing the high malpractice premium rates and finding the true cause of the high premiums rests on the shoulders of the Ohio General Assembly. He said that Senate Bill 281 will not solve the problems but will only shift the burden of cost of an injury to the innocent victim, private medical insurance, and the taxpayers of Ohio. He said that under Senate Bill 281, the statute of repose begins the date of the act of malpractice and then the victim has three years from that date to file suit. Insurance Committee Chairman Scott Nein (R – Middletown) was very concerned because he thought the statute of repose was three years from the date of discovery. Nein said he planned to look into the issue further.

Lawrence E. Smarr, *Physician Insurers Association of America (PIAA)* President, testified as a proponent of the bill. He explained that PIAA is an insurance organization made up of provider-owned and operated liability insurance companies. He said there is a medical liability crisis in Ohio not a medical liability *insurance* crisis, noting that the problem is with the affordability and availability of insurance and how it affects access for patients. He said his members invest 80% in bonds and only 13% in stocks; therefore, investments are stable and only suffer from low interest rates. In addition, Smarr said that more than 50% of all premiums and investment income for his members goes to attorney's fees on both the defense and plaintiff sides.

Dr. Bryan Batchelder, *Ohio Academy of Family Physicians (OAFP)*, a proponent, said that two years ago his liability premiums increased by \$4000 and last year they increased by \$21,000 and he was faced with the possibility of giving up obstetrics. He decided to continue this year but cannot continue the financial hardship it has created. He was informed on Monday that to continue family practice obstetrics, his premium would be over \$58,000 and he would be limited to thirty deliveries per year. Because insurance companies will not increase reimbursement rates, he cannot pass the costs along to third party payers and his only option will be to give up obstetrics. This would mean that there would no longer be an obstetrician providing care in Morrow County. Senate Bill 281 would stabilize the liability premiums and allow physicians to continue treating Ohio citizens

Dr. John Clough, *Cleveland Clinic Foundation and Academy of Medicine of Cleveland (AMC/NOMA)*, also testified as a proponent of the bill. He said that Ohio is one of twelve states with a malpractice litigation crisis. He said that malpractice litigation hurts the quality of care, citing that hospitals have reported having difficulty getting adequate physician coverage, and have curtailed, closed or discontinued services due to high liability insurance premiums. He said malpractice litigation hurts patient access and drives up the costs of health care. He said that tort reform has been shown to reduce malpractice insurance premiums in other states and we need to study which components of tort reform will be most effective in protecting access to Ohioans to the broad range of high-quality medical services to which they are accustomed.

Also testifying in support of the bill was **Dr. John A. Bastulli**, *AMC/NOMA*. Bastulli cited an AMC/NOMA physician survey, which showed that physicians from the Northeastern Ohio region are planning to leave the state, or leave the practice of medicine due to increases in their professional liability insurance premiums. He said that soaring jury awards and litigation costs are the major culprit of the malpractice crisis in Ohio. He said Senate Bill 281 would alleviate these problems by placing caps on non-economic damages and attorney contingency fees but would still allow patients to receive fair compensation in true cases of medical negligence. Noting that Ohio is on the brink of a medical disaster, Bastulli said that Ohio must join other states in enacting reasonable medical liability reforms or public access to quality care will be limited.

Dr. Dale Cowan, *AMC/NOMA*, testified as a proponent of the bill. He said that the impetus for reforming medical liability laws in Ohio is due to medical liability actions filed against physicians, increases in the amounts of judgments and settlements, and increasing costs of medical malpractice insurance. He said data by the Ohio Department of Insurance does not support opponents' claims that assert that increases in premiums are due to poor performance investments by insurance companies. In addition, Cowan cautioned members of the Committee that some have misrepresented the data included in the Institute of Medicine's Report on medical errors which indicated the number of deaths as a result of malpractice per year. He said a majority of these errors may have been systemic errors in the healthcare system and do not represent individual physician malpractice. He said the legislature has the ability to stabilize physician manpower, ensure patient access to care, and promote reviews and assessment of practices to minimize or eliminate errors.

Dr. William Rogers, *American College of Emergency Physicians (ACEP)*, also a proponent of the bill, said that Senate Bill 281 would strengthen the practice climate for all Ohio physicians, and improve access to primary, specialty, and subspecialty care for all patients seen in Ohio's emergency departments. He noted that many emergency physician groups have found a doubling or tripling of insurance premiums from the year 2001 to 2002. Declining reimbursements by all payors and escalating medical malpractice premiums have proven to be a double whammy to many of the consultants who provide coverage to emergency departments across the state. In addition, neurosurgeons, vascular, orthopedic, and cardio thoracic surgeons, amongst others, have limited practices, withdrawn privileges from outlying suburban or community hospitals, and forgone riskier practices, such as being available for trauma call from the emergency department. Senate Bill 281 would provide much needed support to Ohio's emergency and trauma care system and reassure providers they should not limit their practices, withdraw services, relocate to another state, or otherwise modify their services to patients out of fear of litigation or rising insurance rates.

Thursday, November 14, 2002 Hearing

Lee Covington, *Director of the Ohio Department of Insurance*, said that Senate Bill 281 should be passed expeditiously. He pointed out that it has been said that premiums have increased due to bad investments by malpractice insurance companies but in reality the vast majority of their investments are in fixed income instruments, which are stable. The portfolios of medical malpractice insurers are composed 80% in the bond market. Investment income is not what is causing the increases in rates. He said that the primary cause of premium increases over the last five years has been an increase in loss and loss adjustment expenses. He explained that loss ratios are the portion of every premium dollar that is paid to claimants and loss adjustment expenses are incurred in the process of settling claims on things such as attorneys' fees and fees for expert witnesses. Premiums have not kept up with loss and loss adjustment expenses. He said that Senate Bill 281 would stem the rising tide of jury verdicts through common sense legal reform while preserving the rights of patients to hold negligent providers accountable.

Dale H. Hileman, Eastern Ohio Development Alliance and Chairman of Guernsey Health Systems Board of Trustees for Southeastern Ohio Regional Medical Center, testified as a proponent of the bill. He encouraged the Committee to support Senate Bill 281 and help maintain and attract doctors and healthcare workers to Ohio. He said that healthcare has an economic impact on our region and state, noting that hospitals are valuable community assets employing 240,000 people in Ohio and contribute \$40 billion annually to our economy. He said that the healthcare system attracts new businesses of all types to a community and noted that since the year 2000 eleven hospitals have closed within our state. A vibrant healthcare system is vital to retain, expand and attract industry to Ohio.

Raymond Mazotta, *OHIC Insurance Company* President, said that their investment income is stable but is insufficient to cover underwriting losses. In addition, the average cost per claim is increasing significantly and premium rate changes have not been sufficient to cover their costs. He said tort reform would lower premium rates, noting that Ohio rates are twice that of Indiana's, which has a \$250,000 cap. He said the situation needs urgent attention as doctors and hospitals will not be able to afford these high rates indefinitely. He said that Wisconsin caps non-economic damages at \$400,000 and gave an example of a case in Wisconsin in May of 2002 that OHIC paid a total claim of \$6.7 million.

Senate Leadership

The Ohio Senate Republicans and Democrats have named their leadership teams for 2003:

Senate Republicans

President	Senator Doug White (R – Manchester)
President Pro Tem.	Senator Randy Gardner (R – Bowling Green)
Assist Pres. Pro Tem.	Senator Jay Hottinger (R – Newark)
Majority Whip	Senator Jeff Jacobson (R – Phillipsburg)

Senate Democrats

Minority Leader	Senator Greg DiDonato (D – New Philadelphia)
Assist. Min. Leader Senator	Mark Mallory (D – Cincinnati)
Minority Whip	Senator C. J. Prentiss (D – Cleveland)
Assist. Min. Whip	Senator Teresa Fedor (D – Toledo)

Other Happenings at State House

Video Lottery Terminals

Legalization of VLT's, video lottery terminals is being considered once again in the Ohio Senate as a method of raising money for education in Ohio.

Democrats Sandbagged by Amendment to Workers' Comp Legislation

The Ohio House of Representative Democrats unwittingly cast their votes in favor of a seven word amendment to Senate Bill 223 that would allow the Ohio Bureau of Workers' Compensation Oversight Commission to base the cost of its premiums not merely on a given industry's past experience history, but on future experience ratings. This amendment runs counter to an Ohio Supreme Court decision of June, 2002, which found that the Commission acted illegally when it ordered a credit of employer contributions to the State's Workers' Compensation Fund. The bill and the amendment passed unanimously, but after a short period of reflection, many Democrats opted to change their votes.

Senate Bill 223 requires the administrator of Workers' Compensation, or a self-insuring public employer for the peace officers, firefighters, and emergency medical workers employed by or volunteering for that self-insuring public employer, to pay the costs of conducting post-exposure medical diagnostic services, consistent with the standards of medical care existing at the time of the exposure, to investigate whether an injury or occupation disease was sustained by a peace officer, firefighter, or emergency medical worker when coming into contact with the blood or other body fluid of another person in the course of and arising out of the peace officer's, firefighters, or emergency medical worker's employment, or when responding to an inherently dangerous situation in the manner described and in accordance with the conditions specified: splash or spatter in the eye or mouth, including when received in the course of conducting mouth-to-mouth resuscitation; a puncture in the skin; or a cut in the skin or another opening in the skin such as an open sore, wound, lesion, abrasion, or ulcer.

The amended bill was agreed to by the Ohio Senate on November 14, 2002 and will go to the Governor for signing.

Senator Goodman Introduces Bill Regarding Physician Referrals

Senator David Goodman (R – Bexley) has introduced legislation to prohibit a physician or podiatrist from making certain referrals for inpatient hospital services and to make other revisions to the law prohibiting certain referrals for designated health services.

Amendment Includes Physician Assistants as Giving Physical Exams

Senate Bill 245, sponsored by State Senator Lynn Wachtmann provides that certain medical physical examinations required by statute may be performed by clinical nurse specialists, certified nurse practitioners, and certified nurse-midwives. This bill was amended in the House Health and Family Services Committee to allow physician assistants to perform the same physical examinations in accordance with their current scope of practice. Another hearing on this bill will be held November 20, 2002.

Drug Repository Legislation Passes Both Houses

House Bill 221, sponsored by State Representative Kirk Schuring, requires the Director of the Department of Health to establish a drug repository program for the collection and redistribution of unadulterated prescription drugs in their original sealed and tamper-evident unit dose packaging; requires the Pharmacy Board to adopt rules governing the drug repository program; permits the program to receive drugs from any person, including a drug manufacturer or health care facility, provided the drugs are donated at a pharmacy, hospital or nonprofit clinic that has elected to participate in the program; prohibits the resale of drugs donated to the repository program; in general, and grants program participants immunity from criminal and civil liability and professional discipline for matters related to donating, accepting, or dispensing drugs under the program. The bill was amended in the Senate Health, Human Services and Aging Committee to grant immunity to pharmaceutical companies for anything that might happen to drugs once they leave the normal supply chain. The bill passed the Ohio Senate on November 14, 2002 and will be sent to the Governor for signing.

Assisted Suicide Bill Awaits Floor Vote in Ohio Senate

House Bill 474 , sponsored by Senator Merle Kearns (R – Springfield), would declare that assisted suicides is against the public policy of the State of Ohio and would create the Compassion Care Task Force to study and make recommendations on treatment of intractable pain. The bill makes assisting a suicide grounds for disciplinary action by the State Nursing Board and by the State Medical Board. The bill was amended in the Senate Health, Human Services and Aging Committee to clarify that directives contained in living wills and durable powers of attorney should be followed and that this bill is not intended to limit the provisions of “comfort care”. The bill was reported out of the Senate Committee on November 13, 2002.

Additional information on these topics may be available on our web site at www.amcnoma.org.