



## **The Right Answer Is Both Simple and Difficult** *Understanding Florida's Medical Malpractice Problem*

*By Curtis Leonard, Executive Vice President, The James Madison Institute*

### **Confused? Go Fly a Kite**

Usually when politicians explain that an issue is complex or that it requires a multi-faceted, nuanced approach it means that they are ducking the simple, politically difficult solution. Such is the case with medical insurance liability reform. The Florida Senate is behaving as if the medical malpractice insurance liability crisis is rocket science when, in reality, it is no more difficult to understand than flying a kite. The nut of the issue is that Florida doctors and hospitals unfortunately get sued. Health care providers get insurance in order to cover the costs of getting sued. The costs of this insurance are skyrocketing. Medical liability insurance costs are skyrocketing because of the accelerating frequency in enormous jury awards under “non economic damages.” Other states have capped the potential payout under non economic damages, solving the problem. Now is that complicated?

This couldn't be any simpler if it were converted into a rhyming sing-along on “Sesame Street.” The Florida Senate, always reminding people how difficult this issue is, ponderously advanced, and in the Senate Judiciary and Appropriations Committees *went after the insurance companies and health care providers*. While the plaintiff's attorneys are grumpy about the Senate package including sovereign immunity for doctors and hospitals providing emergency room care—they're used to winning every battle—they are left largely unscathed in the Senate's proposal.

### **Genius, Sheer Genius**

When compared with the Senate, the Florida House and the governor suddenly look like Mensa International candidates. Both parties reviewed the data available nationwide, data so uncomplicated it could be included in *Barney* coloring books, and concluded that noneconomic damage awards should be capped at \$250,000. The plaintiff's attorneys do not like that. Since they get nearly 70 cents of every dollar in noneconomic damage awards, this proposal could put a pinch on a plaintiffs' attorneys' plans to buy a Caribbean island or a private Lear jet to fly to the islands.

### **Ignore Market Forces and Jam the Insurance Companies: No One Likes Them, Anyway**

The Senate leadership complains to critics that this issue is sooooo complicated and that it is sophomoric to just slam a cap on noneconomic damages while using an arbitrary number like \$250,000. There's also that little issue of the plaintiffs' attorneys being upset, too, but they don't like to talk about that. Instead, the Senate proposal uses the very sophisticated approach of mandating that insurance companies roll back their rates to 2002 levels. The Florida market had over 50 medical liability carriers just a few years ago. Now there are six. And the Senate's solution, by fiat, is to simply require that they roll back their rates. They apparently got this notion from *The Terminator School of Economics*, which dictates that when supply and demand are out of whack, the supplier should be whacked and whacked again. The Judiciary

Committee must have been tempted to include a provision that mandated, “every day be sunny and bright,” but that would have been unenforceable.

### **I’m Not an Actuary, But I Play One in the Senate**

Again, carefully tiptoeing around the plaintiffs’ attorneys, the Florida Senate is also proposing a state insurance fund for health care providers. The state would act as an insurer of last resort, insuring providers if the insurance carriers can’t get their rates back to the 2002 levels for one year. So, instead of addressing the one issue that has totally deformed Florida’s insurance market and chased carriers out completely, the Senate recommends that the state get involved. In the Senate judiciary committee, one Senate co-sponsor of the amendment creating the state insurance plan suggested that he’d just “played with the numbers” to come up with how much liability the state could absorb. One can only guess that this issue is so complex and difficult that not even certified professional actuaries could help; the Senators are now resorting to clicking an abacus in their offices to get the right numbers. So, as a matter of policy, instead of capping noneconomic damages, the Senate has decided that a better move is for the state to act as a money-laundering operation for the plaintiff’s attorneys. Why don’t they “play with the numbers” some more and simply cut the plaintiff’s attorneys a state check directly and save all the doctors, jurists, defense attorneys, and consumers the time and stress?

### **It Must Be the Doctor’s Fault!**

The Senate package also requires doctors and hospitals to develop “patient safety plans” and new reporting standards to give consumers more information and state regulators an improved capacity to track problem doctors. This is typical posturing; the Senate acting as though it’s looking at, “all sides of the issue,” as if Florida’s streets are littered with bleeding and dying patients left there by sociopathic, unconscious doctors. Again, by acting as if the plaintiffs’ attorneys stand on holy ground, the Senate is only treating the symptoms of the problem and not the cause. Information on bad medical outcomes is hard to come by *because doctors and hospitals are told by their defense attorneys that they cannot admit anything on any outcome or they stand an excellent chance of being sued into oblivion*. In other words, the lawsuit industry has imposed a climate of fear on the medical profession, suffocating their more noble instincts at the behest of the more primal urge to simply survive to practice another day.

### **You Must Be Punished Severely**

In the medical liability insurance universe, economic damages are easy to calculate and anticipate. “Economic damages” represents the compensation awarded to a plaintiff to make the plaintiff “whole”—to make up for the cost of the bad medical outcome as it relates to their future ability to earn income. “Noneconomic damages” represents a combination of the Florida lottery and the Visigoths. Filled with righteous rage, the jury is given a calculator and instructed to use the enlightenment of Voltaire in compensating the plaintiff for their pain and suffering. The jurors, who typically assume that anyone wearing a tie must make at least \$300,000 a year, come up with astronomical award sums. Worse yet, these outrageous awards, totaling in the millions and multiplying like bored rabbits, become the basis for future lawsuit settlements. It’s got to stop. Think a second--is a \$190 million judgment against a hospital, bankrupting it and wrecking its services for a generation, really reasonable for one bad, even horrible, outcome? Is that civil justice?

The Senate medical liability insurance reform package is due to be heard on the Senate floor this week. Instead of hiding behind the notion that the issue of medical liability insurance reform is really, really difficult, the Senate should observe the following:

- The states that have a cap on noneconomic damages have much lower premiums than states that don’t.

- Nationwide and in Florida, mega-verdicts are increasing rapidly. The average award rose 76 percent from 1996 to 1999. Between 1999 and 2000, median malpractice awards increased nearly 43 percent.
- Sure, a straightforward cap is not great art, but is it any less creative than a bullying mandate that insurance companies (*those that are left*) reduce their rates for no apparent reason?
- There is no standard prescription or common practices to guide a jury in awarding noneconomic damages--it is a lottery driven by emotion, ignorance, personalities and any number of variables--barometric pressure, the color of the defendants' tie, whether or not the local lumber mill is still running, the condition of a nearby barn. Who knows?
- States governments aren't particularly good at insurance. If the Senate thinks that sponsoring a state insurance fund for health care providers is like state-funded homeowners insurance, they're in for a big surprise.
- In 1998, 50 insurance companies were writing professional liability insurance in Florida and, as of 2002, there were only 6 left. If insurance companies are "profiteering," they're doing it in a weird way by completely abandoning the market.
- Six insurance companies do not make for adequate competition. More carriers are needed in Florida to generate genuine competition that will result in rate decreases.
- States that have adopted medical malpractice reforms are seeing *decreasing* costs in premiums. If the current crisis is driven by the insurance companies, than why the decrease in other states?

One question that never seems to be asked is what would have happened to the patient if there were no medical care to begin with? Look up the obituaries of individuals before the birth of modern medicine and you'll get a good idea. The doctor is there to help. Out of the tens of thousands of doctors in Florida and other states, only a handful could ever be characterized as willfully negligent. Bad things happen. Medical care is as much an art as a science. The Senate is noodling in insurance practices and the professional practices of the medical profession as if somehow their wisdom is suitable to micromanage every variable. It's not necessary. The governor and the House leadership can recognize the obvious. Noneconomic damages need to be capped. It's just that simple.

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