HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #:   HJR 1337   Medical Liability Claimant's Compensation
SPONSOR(S): Rep. Troutman
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Thomas	Havlicak
2)			
3)			
4)			
5)			

SUMMARY ANALYSIS

The joint resolution creates a new section in Article I of Florida's Constitution. Article I contains Florida's constitutional Declaration of Rights. The new section relates to a claimant's right to fair compensation in medical liability claims. The new constitutional provision guarantees a certain share of damages for a claimant in medical liability claim lawsuits. Under the provision, the claimant must receive at least 70 percent of the first $250,000 of all damages received, exclusive of the payment of costs associated with the litigation, and at least 90 percent of all damages received in excess of $250,000, exclusive of the payment of costs. The provision applies whether the damages are collected by judgment, settlement, or otherwise and applies regardless of the number of defendants involved in the matter.

Pursuant to Article XI, section 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The proposed amendment shall then be submitted to the electors at the next general election held more than ninety days after the joint resolution is filed with the custodian of state records, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and limited to a single amendment or revision.

This joint resolution appears to have minimal fiscal impact on the state.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[X]
2. Lower taxes?	Yes[]	No[]	N/A[X]
3. Expand individual freedom?	Yes[]	No[X]	N/A[]
4. Increase personal responsibility?	Yes[]	No[X]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[X]

For any principle that received a "no" above, please explain:

Expand individual freedom: The joint resolution places certain limits on the ability of individuals to contract for legal representation in medical liability cases.

Increase personal responsibility: The joint resolution protects claimants in medical liability cases from the consequences of making agreements for legal representation that fall outside the parameters of this proposal.

B. EFFECT OF PROPOSED CHANGES:

The joint resolution creates a new section in Article I of Florida's Constitution. Article I contains Florida's constitutional Declaration of Rights. The new section relates to a claimant's right to fair compensation in medical liability claims. The new constitutional provision guarantees a certain share of damages for a claimant in medical liability claim lawsuits. Under the provision, the claimant must receive at least 70 percent of the first $250,000 of all damages received, exclusive of the payment of costs associated with the litigation, and at least 90 percent of all damages received in excess of $250,000, exclusive of the payment of costs. The provision applies whether the damages are collected by judgment, settlement, or otherwise and applies regardless of the number of defendants involved in the matter.

When a plaintiff's attorney agrees to take a case on a contingency fee basis, he or she agrees to charge the client a fixed percentage of the plaintiff's award or settlement, usually between 33 and 1/3 percent and 50 percent. If the plaintiff wins the case (or receives a settlement), the attorney's fee would be the agreed upon percentage of the award or settlement. Costs of the litigation are typically paid from the claimant's share of any award. If the plaintiff loses the case (receives no award), the plaintiff's attorney does not receive a fee.

Regulation of the Practice of Law in Florida

Pursuant to the State Constitution, the Florida Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.[1] In 1925, the Legislature addressed the issue of governance over the admission of lawyers and practice of law in this State.[2] This legislation provided for a State Board of Law Examiners and prescribed their duties and responsibilities. Those already admitted to practice under the provisions of law or rules of court existing at the time of such admission were grandfathered in and subsequent to the act, those wishing to practice law in this State had to first obtain a certificate of authority from the State Board of Law

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[1] Article V, sec. 15, FLA. CONST.
[2] Chapter 10175, L.O.F. (1925).

Examiners. In 1955, the Legislature codified the Supreme Court's authority to govern and regulate admissions of attorneys and counselors to practice law.[3]

Florida Bar Rules Regulating Attorneys Fees

The Florida Bar is an official arm of the Florida Supreme Court and is charged with the administration of the regulation of attorneys. The Court has adopted rules for the Florida Bar which regulate Florida's licensed attorneys. These rules provide that an attorney may not charge a "clearly excessive fee."[4] Under these rules, a fee is "clearly excessive" if:

> (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

> (2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.[5]

Contingency fee arrangements must "be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated."[6] Contingency fees are prohibited "in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement" and in "representing a defendant in a criminal case."[7] A contingency fee, without prior court approval, is presumed "clearly excessive," if it exceeds the following parameters:

> a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

> 1. 33 1/3% of any recovery up to $1 million; plus

> 2. 30% of any portion of the recovery between $1 million and $2 million; plus

> 3. 20% of any portion of the recovery exceeding $2 million.

> b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

> 1. 40% of any recovery up to $1 million; plus

> 2. 30% of any portion of the recovery between $1 million and $2 million; plus

> 3. 20% of any portion of the recovery exceeding $2 million.

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[3] Chapter 29796, ss. 1,2, and 7, L.O.F. (1955).
[4] Rules Regulating the Fla. Bar 4-1.5(a).
[5] *Id.*
[6] Rules Regulating the Fla. Bar 4-1.5(f)(1).
[7] Rules Regulating the Fla. Bar 4-1.5(f)(3).

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to $1 million; plus

2. 20% of any portion of the recovery between $1 million and $2 million; plus

3. 15% of any portion of the recovery exceeding $2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.[8]

Before entering into a contingent fee contract, an attorney must provide the client with a copy of the statement of client's rights as provided by Florida Bar rules and must ensure that the client has "a full and complete opportunity to understand each of the rights as set forth therein."[9]

California's Cap on Attorney Contingency Fees in Medical Liability Claims

California limits the amount attorneys in medical malpractice cases can collect under a contingency fee arrangement to 40% of the first $50,000, 33 1/3 % of the next $50,000, 25% of the next $500,000, and 15% of any amount that exceeds $600,000.[10] These limits apply regardless of whether the recovery is by settlement, arbitration, or judgment. If the contingency fee arrangement is based on an award of periodic payments, the court must place a total value on the payments based on the projected life expectancy of the claimant, and then calculate the contingency fee percentage. These provisions have been upheld by the California Supreme Court.[11]

Research found three other similar state schemes which were upheld by the courts in the respective jurisdictions – Tennessee, Indiana and Delaware.[12] However, one court decision was found where a similar state law was struck as violative of New Hampshire's equal protection provision.[13]

C. SECTION DIRECTORY:

The legislation is a joint resolution proposing a constitutional amendment and, therefore, does not contain bill sections.

The joint resolution proposes the creation of Section 26 of Article I of the State Constitution to provide for a claimant's right to fair compensation in medical liability claims.

The joint resolution further proposes the creation of Section 26 of Article XII of the State Constitution to provide an effective date of November 3, 2004.

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[8] Rules Regulating the Fla. Bar 4-1.5(f)(4)(B).
[9] Rules Regulating the Fla. Bar 4-1.5(f)(4)(C).
[10] California Bus. and Prof. Code § 6146.
[11] *Roa v. Lodi Medical Group, Inc,* 695 P.2d 164 (1985).
[12] *Newton v. Cox*, 878 S.W.2d 105 (Tenn.), *cert denied*, 115 S. Ct. 189 (1994); *Johnson v. St. Vincent Hospital*, 404 N.E.2d 585 (Ind. 1980); and *DiFilippo v. Beck*, 520 F. Supp. 1009 (D. Del. 1981).
[13] *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The State Constitution requires that a proposed amendment to the constitution be published in one newspaper of general circulation in each county in which a newspaper is published, once in the tenth week and once in the sixth week immediately preceding the week in which the election is held.[14] The Division of Elections estimates that the cost of compliance would be approximately $35,000.[15]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local governments' revenues.

2. Expenditures:

   The bill does not appear to have any impact on local governments' expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

   If adopted by the citizens of Florida when presented on the 2004 general election ballot, this proposed constitutional amendment would have a significant economic impact on the private sector. For those attorneys representing clients in successful medical liability claims involving a contingency fee, their compensation will be limited compared to their ability to be compensated under current law. For those client's receiving monetary awards based on medical liability awards involving a contingency fee, their share of the award will increase. If the proposed constitutional amendment leads to less attorneys willing to handle such cases and therefore, less cases are brought, then insurance companies may pay less in claims based on medical liability.

D. FISCAL COMMENTS:

   None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

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[14] See Article XI, section (5)(c), Fla. Constitution.
[15] Estimate based on 2002 advertising rates.

2. Other:

Article XI, s. 1, Fla. Const., provides that a constitutional amendment may be proposed by joint resolution of the Legislature. Final passage in the House and Senate requires a three-fifths vote in each house. Passage in a committee requires a simple majority vote. If the joint resolution is passed in this session, Art. XI, s. 5, Fla. Const., provides that the proposed amendment would be placed before the electorate at the 2004 general election, unless it is submitted at an earlier special election pursuant to a law enacted by an affirmative vote of three-fourths of the membership of each house of the Legislature and is limited to a single amendment or revision.[16] Once in the tenth week, and once in the sixth week immediately preceding the week in which the election is held, the proposed amendment or revision, with notice of the date of election at which it will be submitted to the electors, must be published in one newspaper of general circulation in each county in which a newspaper is published.

The ballot summary must be sufficient to provide fair notice of the contents and effect of the amendment.[17] Further, the ballot summary must fully advise the electorate of all consequences of the proposal[18] and cannot be misleading or ambiguous.[19] This ballot summary appears to meet constitutional requirements.

B. RULE-MAKING AUTHORITY:

The bill does not raise the need for rules or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A

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[16] The 2004 general election is on November 2, 2004.
[17] *Advisory Opinion to the Attorney General re: Stop Early Release of Prisoners,* 642 So.2d 724 (Fla. 1994).
[18] *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000).
[19] *Smith v. American Airlines, Inc.*, 606 So.2d 618 (Fla. 1992).