

Judiciary Reform

BILLS THAT PASSED

HJR 7111 by Representative Eisnaugle – Supreme Court Reform

This is a constitutional amendment that will appear on the 2012 ballot. This is was a controversial issue that, in its original form, would have expanded the Supreme Court from seven to ten members and split it into Civil and Criminal divisions, each with five justices.

Should this legislation be approved by sixty percent of voters:

- The Senate will confirm new justices to the Florida Supreme Court.
- The Legislature, by simple majority vote instead of two thirds majority vote, may over rule court rules.
- Investigations of judicial misconduct, which is currently confidential, will be available to the House of Representatives in before impeachment proceedings.

The effective date has not been specified.

06/21/11 - Signed by Officers and filed with Secretary of State

BILLS THAT FAILED

SB 2170 / HB 7101 by Senator Bogdanoff and Representative Gaetz – Judicial Nominating Commissions

Current law provides that five of the nine members of each judicial nominating commission are appointed solely by the Governor, while the other four members are appointed by the Governor from a list of nominees provided by The Florida Bar. Members of the judicial nominating commissions serve 4 year staggered terms.

This bill would have provided that:

- Judicial nominating commissions consist of 7 members.
- All members of each judicial nominating commission be appointed by the Governor.
- Members of a judicial nominating commission be appointed to a term concurrent with the term of the Governor.

SJR 1672 / HJR 7039 by Senator Flores and Representative Hager – Retention of Justices and Judges

This joint resolution would have changed the retention requirements for Supreme Court justices and judges of the district courts of appeal that are on the ballot in retention elections to 60%. If a justice or judge was not approved by at least 60% of the voters in an election, a vacancy would exist in the office effective at the end of the justice or judge's term. The 60% requirement would apply to circuit and county judges in any circuit or county that changes to a retention election system for selecting and retaining judges.

Tort Reform

BILLS THAT PASSED

SB 142 by Senator Richter – Crashworthiness

This is the bill that changes the apportionment of damages in products liability cases in which a plaintiff alleges an enhanced injury. More specifically, the fact finder in these cases must consider the fault of all persons who contributed to the accident when apportioning fault among the parties who contributed to the accident.

The bill reorganizes the comparative fault statute by moving the definition of “negligence action” to the definitions subsection in the current comparative fault statute and also includes a definition of “products liability action.”

The bill also contains intent language and legislative findings that the provisions in the bill are intended to be applied retroactively and overrule *D’Amario v. Ford Motor Co.*

The bill has an effective date upon becoming law.

06/23/11

Approved by Governor; Chapter No. 2011-215

HB 479 by Representative Horner – Medical Malpractice

This is the bill that makes many changes that will affect medial malpractice litigation in Florida. **The bill has an effective date of October 1, 2011, and applies to causes of action accruing on or after that date.** This bill:

- Allows a prospective defendant to interview a claimant's health care providers without the presence of the claimant if the prospective defendant provides 10 days notice of the intent to interview. It requires the claimant to execute an authorization for release of health information.
- Creates an "expert witness certificate" that an expert witness who is licensed in another jurisdiction must obtain before testifying in a medical negligence case or providing an affidavit in the pre-suit portion of a medical negligence case. This bill provides for discipline against the license of a physician, osteopathic physician or dentist that provides misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine or the practice of dentistry.
- Provides for the creation of an informed consent form related to cataract surgery. Such a form is admissible in evidence and its use creates a rebuttable presumption that the physician properly disclosed the risks of cataract surgery.
- Provides that medical malpractice insurance contracts must contain a clause stating whether the physician or dentist has a right to "veto" any admission of

- liability or offer of judgment made within policy limits by the insurer. Current law prohibits such provisions in medical malpractice insurance contracts.
- Provides that records, policies, or testimony of an insurer's reimbursement policies or reimbursement decisions relating to the care provided to the plaintiff are not admissible in any civil action and provides that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible in any medical negligence case.
 - Provides that a plaintiff in a medical negligence action must prove by clear and convincing evidence that the failure of a health care provider to order, perform, or administer supplemental diagnostic tests is a breach of the standard of care.
 - Provides that a hospital is not liable for the negligence of a health care provider with whom the hospital has entered into a contract unless the hospital expressly directs or exercises actual control over the specific conduct which caused the injury.
 - Provides additional immunity from civil liability for volunteer team physicians.

06/27/11

Approved by Governor; Chapter No. 2011-233

SB 1676 by Senator Thrasher – Sovereign Immunity for Health Care Providers

This bill provides sovereign immunity to any Florida not-for-profit college or university that owns or operates an accredited medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a public teaching hospital. It provides that the medical school or any of its employees or agents that have agreed in an affiliation agreement or other contract to provide patient services as agents of a public teaching hospital, are agents of the state and are immune from liability for torts in the same manner and to the same extent as the teaching hospital and its governmental owner or operator while acting within the scope of and pursuant to guidelines in the contract. The bill specifies additional requirements on the contract to clarify the applicability of the Public Records Law.

The bill also creates non-statutory provisions of law for legislative findings regarding the role of and the need for teaching hospitals and graduate medical education for Florida residents.

The bill has an effective date upon becoming a law, and applies to all claims accruing on or after that date.

06/24/11

Approved by Governor; Chapter No. 2011-219

HB 7109 by Representative Schenck – Medicaid

This bill, watered down from its original version, installs a lower cap for how much a Medicaid patient is entitled to in lawsuits for noneconomic damages – generally pain and suffering. The new caps are \$200,000 per practitioner and \$300,000 per incident. In some circumstances, these caps can be pierced.

This bill became effective June 2, 2011. Chapter No. 2011-135.

Bill Was Discussed During the Office of EDR's Revenue Estimating Impact Conference; 06/17/11. No Votes Were Taken.

HB 277 by Representative Goodson – Statutes of Limitations for Wrongful Death

This bill changes the statute of limitations in a wrongful death action brought against the state or one of its agencies or subdivisions from four years to two years.

Current law requires that a claimant bringing a tort action against the state or one of its agencies or subdivisions present the claim in writing to the Department of Financial Services within 3 years after the claim accrues. This bill requires the claimant present the claim in writing to the Department of Financial Services within 2 years after claim accrues if the claim is for wrongful death. The bill also provides that if the Department of Financial Services does not act on the claim within 90 days, the claim is deemed denied.

The bill is effective July 1, 2011, applying to causes of action accruing on or after that date.

06/02/11 Approved by Governor; Chapter No. 2011-113

BILLS THAT FAILED

SB 822 / HB 391 by Senator Bogdanoff and Representative Metz – Frye vs. Daubert

This is the bill that would have established stricter standards on the type of expert witnesses allowed in trials. In evaluating whether testimony of a particular expert witness will be admitted in a Florida court, the court looks at whether the underlying basic principles of evidence are generally accepted within the scientific community. The standard is known as the Frye standard. This bill would have rejected the Frye standard and instead provided a three-part test to determine whether expert testimony would be admitted in a particular case, commonly referred to as the Daubert standard.

SB 288 / HB 605 by Senator Negron and Representative Steube – Design Professionals

This is the bill that would have limited the tort liability of licensed engineers, surveyors and mappers, architects, interior designers, and landscape architects (design professionals).

It would have limited the potential tort claims for recovery of economic damages resulting from a construction defect that may be filed by a claimant contracting for the professional services of a design professional. The tort liability limitation for design professionals would not have applied if: The contract for professional services of the design professional required professional liability insurance and the contracting party failed to maintain insurance coverage as specified in the contract; The claim related to economic damages resulting from personal injury; The claim related to damage to property that was not the subject of the contract; The contract or agreement was entered into before the effective date of the bill; or The professional services were performed before the effective date of the bill.

SB 1592 / HB 1187 by Senator Thrasher and Representative Baxley – Bad Faith Insurance Claims

This bill would have created specific statutory standards for a bad faith claim against an insurer which “apply equally and without limitation or exception to all common law remedies and causes of action for bad faith failure to settle.” It specified that a bad faith claim arises where the insurer acts “arbitrarily and contrary to the insured’s interests in

failing to settle claims within the policy limits if, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured.” Only an insured person or that person’s assignee would have a cause of action under the bill, thus eliminating a direct cause of action brought by a third-party claimant against an insurer without an assignment from the insured. In a bad faith action arising out of failure to settle with a third-party claimant, the insurer’s duty to offer policy limits does not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits which meets criteria specified in the bill. The bill also provided a process for insurers to facilitate settlement within policy limits in the event of multiple third-party claims.

SB 1694 by Senator Richter – PIP

This bill would have enacted limits on the attorney’s fee awards related to disputes under the Florida Motor Vehicle No-Fault Law. The bill limited attorney’s fees recovered pursuant to a No-Fault dispute to a maximum hourly rate of \$200 per hour, or:

For a disputed amount less than \$500, 15 times the disputed amount recovered, up to a total of \$5,000. For a disputed amount of \$500 or more but less than \$5,000, 10 times the disputed amount recovered, up to a total of \$10,000. For a disputed amount of \$5,000 up to \$10,000, five times the disputed amount recovered, up to a total of \$15,000. For class actions, three times the disputed amount recovered, up to a total of \$15,000.

The bill also prohibited using a contingency risk multiplier to calculate attorney’s fees recovered under the No-Fault Law.