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Florida Legislature caves in to big business

By limiting your right to a jury trial when you are injured or die from medical neglect

The Seventh Amendment, *Constitution of The United States*, enacted in 1791, states as follows:

"In suits at common law...the right to trial by jury shall be preserved."

In clear contravention of the document on which this country was founded, the Florida Legislature has recently passed a law limiting victims' rights in cases involving medical malpractice by putting a cap on damages, including pain and mental anguish, as well as loss of the ability to enjoy life, at no more than \$500,000. The alleged reasons for taking away the rights of injured victims were an effort to lower insurance premiums for physicians and to stem the "tide" of physicians leaving the state, the premise being that taking away victims' rights, in court, will lower premiums and that doctors are fleeing the state of Florida because of increased medical malpractice premiums. Neither of those reasons is true.

A Harvard University study in 1990 concluded that as many as 100,000 deaths a year might be as a result of mistakes in hospitals. Nine years later, in 1999, the Institute of Medicine, a branch of the National Academy of Science, put the fatal medical malpractice error rate at nearly the same number. These aren't the trial lawyers talking. These are two of the most respected medical groups in the country. They are also disinterested medical expert groups that have no dog in the fight over medical malpractice caps. By the way, these are deaths (not including injuries) that are due to **preventable** medical malpractice. The number of deaths due to preventable medical malpractice exceeds the number of deaths due to motor vehicle accidents (43,458), breast cancer (42,297), and AIDS (16,516) combined. This will give you some idea of the magnitude of the problem. The amount of money devoted to saving American lives is vastly disproportionate. The federal government spent \$655 million on breast cancer prevention, \$128 million on auto safety, and \$3.5 billion on AIDS prevention. Only \$55 million has been committed this year, for the first time, to improving patient safety. The number of Floridians who will die of breast cancer (2,600), AIDS (1,809), and homicides (980) combined matches the upper estimate of deaths (5,400) that occur in Florida each year due to medical malpractice.

Doctors, insurers, and their political allies have mounted a massive disinformation campaign in Florida and elsewhere, attempting to convince lawmakers and the public that the way to address rising medical malpractice insurance rates is to drastically curtail victims' rights in lawsuits, rather than

reduce medical errors and reform the pricing practices of the insurance industry. The solution set forth by the doctors and insurers—namely, to "cap damages"—would do nothing to address the root causes for the increases in insurance premiums: bottom-line business decisions by insurance companies in lowballing premiums when interest rates are high to win a price war and get money to invest, and the alarming number of preventable medical errors, many of them committed by a small percentage of practicing doctors. The *Wall Street Journal* found last year that jury awards had little to do with driving up malpractice costs. "There was more evidence that lowballing premiums to win a price war is catching up with insurers and that new companies were attracted by an accounting practice—sound familiar?—that made malpractice profits look higher than reality."

Let's face it, doctors don't want to be sued for their mistakes. This state already has (surprise, surprise) a method for a doctor to "cap damages" in a medical malpractice case. All he has to do is admit that he was wrong and noneconomic damages can be capped at \$350,000 (less than the recent legislation!). How many doctors actually admit to a mistake? Answer: Very, very few. It is the general experience of trial lawyers around the state that an admission of liability to cap damages occurs less than two percent of the time. The difference is that, now, they don't have to admit liability and still can cap damages. This will drive cases to court instead of away from it, since the insurance companies for the doctors will now take cases to trial that they otherwise would have settled since they can adopt a "What's the worst that can happen?" mentality. If their exposure is capped, they can afford to take a chance that they might put one over on a jury and win a case that they should have paid. When their exposure is not capped, they get concerned with taking a clear-mistake case to a jury because of the potential for the jury to return a just verdict. Additionally, verdicts have forced a number of extremely good reforms that would not have been undertaken otherwise.

What finally forced Ford Motor Company to redesign the fuel tank in its Pinto automobile? A civil jury verdict.

What finally forced the E. H. Robbins Company to remove the lethal Dalkon shield from the marketplace (although not before thousands of women were maimed)? A civil jury verdict.

What finally forced hospitals to use medical "bracelets" identifying patients by name and number on their wrists? A civil jury verdict.

(continued on back page)

We believe no one deserves to have insult added to injury.

PHARMACISTS' ERRORS

No one really knows how many patients receive incorrectly dispensed prescriptions annually.

However, what is known is that:

- In 2002, researchers found medication errors in one in five doses administered in 36 health-care facilities in two states.
- The Institute of Medicine reports that hospitals alone are responsible for medication errors that cost more than \$2 billion annually.
- More than 7,000 patients died from medication mistakes in 1993, up from just under 3,000 deaths in 1983, according to a university study.

The health-care industry has embarked on improving medication dispensing by appointing pharmacists to hospital treatment teams and using computerization to verify prescriptions, doses, and timing.

Patients can take an active role in making sure they get the right prescriptions. When picking up any medical prescription:

- Ask the pharmacist to verify that the prescribed medication has been dispensed for the medical condition it will control.
- Confirm the correct manufacturer, form, quantity, strength, and use schedule.
- Question the physician or pharmacist about potential side effects.
- Carefully read all accompanying literature to obtain effective treatment.
- Comply with all directions.
- Check with the physician if there are any questions.

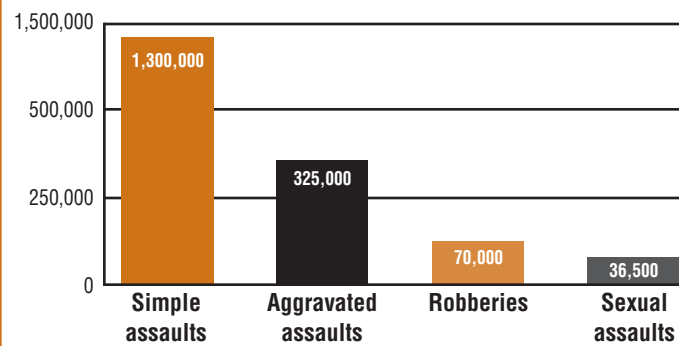
A misfilled prescription

Verify medication correctness with every refill. A diabetic woman who had taken a blood pressure-reducing medication for years was mistakenly given tablets with twice the dosage that the pharmacy's label indicated. After taking an increased dosage for several weeks, she suffered severe reactions and required hospitalization. Although her daughter discovered the medication error and the patient resumed normal dosages, she suffered a fatal heart attack. Her son and daughter sued on behalf of her estate, alleging the pharmacy was negligent and caused wrongful death by misfilling a prescription. Upon retrial, a jury awarded damages.

Workplace violence

Violence in the American workplace is becoming increasingly common. The following chart illustrates types of violent crimes committed in factories, businesses, and retail stores.

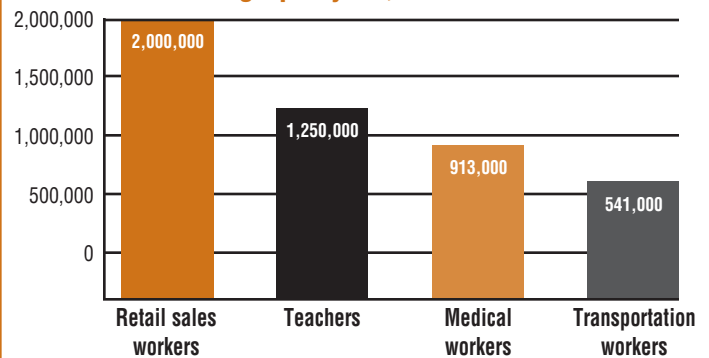
Types of violent crimes committed in workplaces, average per year, 1993-1999



Source: Bureau of Justice Statistics, National Crime Victimization Survey, *Violence in the Workplace, 1993-99* (2001)

Despite what the mass media report, employees at some workplaces are more prone to violence than others.

Types of workers victimized by crime, average per year, 1993-1999



Source: Bureau of Justice Statistics, National Crime Victimization Survey, *Violence in the Workplace, 1993-99* (2001)

Workplace crime takes its toll among workers in the form of injury, mental anguish, and even death. Victims' recourse is usually Workers' Compensation. However, in some cases, employees can seek legal remedy through premises liability, negligent or inadequate security, or from third parties, such as unions, franchisors, or security firms.

The employment manual

The estate of a deceased worker brutally murdered at a steel mill sued for damages. The plaintiff's lawyer won the estate's breach-of-duty-to-provide-employee-security case by using the company employee handbook. The manual stated that the employer would maintain a trained, responsive security force that would keep uninvited individuals—like those who committed the murder—away from the premises.

Pregnancy discrimination

Several key laws, including Title VII of the Civil Rights Act of 1964 and an amendment, the Pregnancy Discrimination Act, require employers who hire 15 or more workers to treat pregnant women the same as other applicants or employees affected with similar abilities or limitations.

Q: Can an employer refuse to hire a pregnant woman?

A: No. As long as she can perform her job's tasks, an employer cannot refuse to hire a woman because of her pregnancy or pregnancy-related condition.

Q: What if a woman is temporarily unable to do her work because of pregnancy?

A: The employer must treat her as it would any other temporarily disabled employee by adjusting job tasks, reassigning other available work tasks, or granting disability leave or leave without pay.

Q: Must an employer grant maternity leave?

A: Yes. Employees have the right to ask for voluntary leave for pregnancy, childbirth, and parenting under a company's short-term disability plan or the Family and Medical Leave Act.

Q: How does pregnancy and maternity leave affect other employee benefits?

A: Employers must treat employees who have pregnancy-related disabilities identically to other temporarily disabled employees for salary increases, accrued vacation, seniority, and other benefits.

Q: How long does an employer have to hold a job for a woman on pregnancy leave?

A: The same length of time as it holds jobs open for other employees on sick or disability leave.



Consult Human Resources or legal counsel for pregnancy-rights questions.

Oral vs. written contracts

For many people, their word is their bond in business transactions or personal deals. So a lot of buying, selling, and bartering is accomplished through oral contracts, which are earnest and mutual promises to do things.

Usually, these kinds of contracts are pledges to provide products or services for money. They are legally enforceable in court if either party, such as a business and a customer, cannot agree that the terms or conditions of the contract were met.

Oral contracts are subject to many misunderstandings. Language confusion is one. "I'll have it ready for you Friday" may mean "this Friday" or "a week from this Friday." Hearing problems can also mix up results. "Part 6D" can be heard as "Part 60." Physicians' poor handwriting has always put them, and pharmacists, at risk for prescription errors.

It's almost always best for anyone involved in a personal or commercial arrangement to document all oral contracts with simple memos or e-mails. That gives everyone a record of the offer to do something, when it should be done, the acceptance agreement, and the consideration—the money or other value—to be exchanged in the transaction.

Problems with oral contracts should be discussed with an attorney.

CREDIT-REPORT ERRORS

Any consumer who wants to obtain a credit card, secure a loan such as a mortgage, or conduct most kinds of business needs to have an acceptable credit rating.

Three major agencies—Equifax, Experian, and Trans Union—compile individual consumer credit data and provide almost all of the credit-reporting services used by businesses, lenders, and anyone else investigating a person's credit quality.

Most credit reports issued by these companies have four parts:

Identifying information, such as name, address, Social Security number, date of birth, and other basics consumers provide when they apply for credit.

Credit information on accounts, including creditor names, dates accounts were opened, credit limits, debt, payment patterns, and other data from companies consumers do business with.

Public record details feature bankruptcy and court records, financial judgments, tax liens, and other information from public sources.

Inquiries identify anyone who has asked for a consumer's credit report.

When agencies err

After information appears in a credit report, it can be difficult to change—even if it's incorrect. A study of more than 100 credit reports found that nearly a third contained serious errors that could have jeopardized getting a car loan, mortgage, or employment.

Litigation has increased over the past several years, and a fairly recent case shows how consumers can fight for their rights. An Oregon woman continually asked Trans Union to remove inaccuracies from her credit report for six years. She sued the agency after she was unfairly denied a mortgage. Her attorney won her the largest-ever award under the Fair Credit Reporting Act; her award included compensatory and punitive damages.

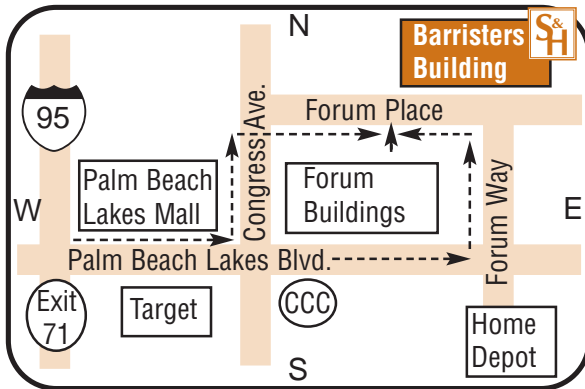
Anyone facing serious credit-reporting problems should obtain legal counsel.

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Florida Legislature caves in to big business *(continued from front page)*

What societal force is responsible for tempered safety glass, childproof caps, and safer job sites for construction workers? Civil jury verdicts.

Who are the men and women who invested their time, energy, and money in these causes against enormously well-heeled opposition where payment was contingent upon success? Civil trial lawyers.

Florida legislators heard expert testimony before passing this draconian bill that only one in every eight victims actually brings a lawsuit for medical malpractice, and that trial lawyers screen out many cases simply because they are too small to be worth their time.

"The effect is to have not too many lawsuits, but too few," said Edward A. Dauer, a University of Colorado law professor who chaired a Colorado commission on malpractice.

There are many calls to this office on point. One such caller said that he was supposed to go into a local hospital for appendix surgery, and his gall bladder was taken out instead. When he got back to his room after surgery, he was still in agonizing pain and was thought to be a "head case" until he was still complaining of the agonizing pain two days later. It finally occurred to the medical professionals to re-review his case, and it was found that he had the wrong organ taken out. He was then wheeled back to the operating room for the removal of his appendix. This, obviously, was a clear mistake. However, this office declined to handle this man's case, even though it was meritorious, because, ultimately, the right organ was taken out and he did not have any permanent effects from the loss of his gall bladder. The only "damages" would have been for three days of needless misery. We never investigated this case to find out who was to blame for ignoring this man's condition, or for taking out the wrong organ. This man lived. However, suppose the mistake had been made with surgery on the wrong leg, or suppose he had been given the wrong medicine, to which he was fatally allergic?

Today, hospitals in Florida are required to report such "adverse incidents" to the state licensing agency. Unfortunately, these reports are not public documents, so we have to take someone's word for it that these reports are in fact filed when they should be and that something good comes out of them. This is very doubtful.

According to Dauer, however, "risk management" in American hospitals tends to be more about reducing the risk of being successfully sued than about cutting the risk of doing things for which they deserve to be sued—for example, coaching personnel to take fewer notes since they might be subpoenaed as evidence against them. If that is wrong, so is the damage cap the legislature recently passed.

A recent United States Department of Health survey found that the allegation that doctors are "leaving the state" is false. In fact, there are more net physicians in Florida now than there have ever been. Certain rural areas need certain specialties, and that has always been a problem. But ask yourself whether you have ever been denied medical care because there wasn't a doctor available. In fact, looking at the TV ads, it appears that the practice must be fairly profitable to support the hundreds of thousands of dollars spent on advertising by ophthalmologists, heart doctors, hospitals, chiropractors, and others. I am sure the advertising bills for these commercials are greater than the insurance premiums being complained about. However, as we all know, this is a cost of doing business.

What is not frequently mentioned is that insurance premiums are a business expense. If a physician has a \$50,000 insurance premium but he's making \$500,000 a year, that premium represents only ten percent of his income. Since almost half of the premium can be written off as a business expense, the actual net effect is for the malpractice premium to represent five percent or less of the doctor's income. This is in line with almost every business that is active today.

None of us really believes we will ever be a victim of medical malpractice, or for that matter a car accident or a defective product. But accidents do happen to real people at a staggering physical and emotional cost. This recent statute, capping pain and suffering damages at \$500,000, discriminates against the elderly and the young. A 50-year-old captain of industry who suffers medical neglect and goes blind still gets to claim 15 years' worth of his million dollar salary in addition to the \$500,000 in noneconomic damages. An eight-year-old boy who suffers the identical injury and is blind can only obtain a maximum of \$500,000. One might argue that the boy's claim is much more valuable than the older man's claim, since he has many more years to live with his horrible handicap.

In the end, it is a travesty of justice to take away patients' legal rights in the name of protecting insurance company profits and doctors' incomes. The simple fact is that the legal system is all that Floridians have to ensure just compensation for injury and to force improvements in patient safety, as the regulatory system is not doing the job here or in most places across the country. Unfortunately, the human cost will be great, with thousands of unjust results in the court system, before we find out that limiting legal rights will not solve the problem—because they are not the cause.

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