

Summary – Final version of AB 404

From: Executive Committee of Your Nevada Doctors (YND)

June 9th, 2023

On Monday, June 5th, 2023, AB 404, as amended, was voted out of the Legislature and sent to the Governor for approval. After dramatic changes to the bill, a number of stakeholder groups spoke in support of the amended bill, **including YND**.

For 3 years, **YND** has been heavily engaged in working to prevent the Nevada Justice Association (NJA) from significantly changing current voter supported laws enacted after passage of the Medical Establishment's initiative from November of 2004. Since 2004, Nevada has had one of the most tightly written statutes to assist in keeping a lid on Medical Malpractice Insurance rates in our region of the country. Nevada is a highly litigious state. This 20-year period has resulted in stabilization of physician medical malpractice policy rates and some decreases in rates depending on specialty, location in Nevada and, of course, on individual ratings.

This 2023 Legislative Session brought a huge set of pressures on our existing medical malpractice laws including:

- Democrat majorities in both the Senate and Assembly, many of whom are attorneys.
- NJA's donations to candidates in last year's elections showed a purposeful and successful pattern to expand the Democrat majority – achieving a supermajority in the Assembly and one seat away from a supermajority in the Senate.
- A general sense in Carson City (which included Democrats, Republicans and the Governor) that an update to the existing medical malpractice laws was needed since they had not been “updated” in 20 years. The difficult part was determining how much change was reasonable and would not disrupt the market and, ultimately, access to care.

These challenges were partially offset by the Governor's commitment to not sign a destabilizing version of a medical malpractice bill.

During the legislative session there were two bills introduced:

The first was **AB 209**, which among other things, would have repealed all the medical malpractice protections from the 2004 initiative and required providers to carry \$1.0M/\$3.0M insurance coverage in order to practice in Nevada.

This bill did not make it out of the Assembly Committee in great part due to the public pressure on the committee by all of our **YND** Stakeholders, including Physician Groups, Advance Practice Provider Associations, the Nevada Hospital Association, Nevada State Medical Association, our Medical Schools, Planned Parenthood and Chambers of Commerce throughout Nevada to total more than 50 community and business entities.

The second was **AB 404**, which as introduced provided a \$2.5M cap on non-economic damages indexed for inflation and repealed much of the medical malpractice protections as well. It met resistance, similar to the previous bill but the Democrat majority would not let the bill die. In hopes that the opposing stakeholders would work together, it was pushed out of the Assembly Committee to the floor only to be further tied up with amendment after amendment that did nothing but worsen it. What cleared the Assembly was another disastrous, poorly worded bill.

YND's coalition facilitated several thousand coordinated emails to the legislature in opposition to both of these bills causing legislators to think hard about supporting either of these bills.

Once AB 404 made it to the Senate Judiciary Committee, the Chair of the Committee met with stakeholder representatives in Carson City and implored the groups to find a middle ground. The Chair indicated that some version would come out of her committee and all stakeholders should be concerned about what the bill would include - further pushing all parties towards compromise.

Eventually a less than optimal compromise for all parties was reached through a series of some public and a number of private and painful negotiations (many of which did not include direct input from **YND**) to get to the final version of AB 404. We all know politics can be ugly up close. It was here.

AB 404 as amended and passed, has 3 elements only, listed here:

1. Non-Economic Damages will move from a cap of \$350K to a cap of \$750K over a five-year period (2024 – 2028) via an increase of \$80K per year. After this is fully in effect, this cap will rise 2.1% annually beginning January 1, 2029, for 20 years.
2. The Statute of Limitations will move from 1 to 2 years from the date the injured person discovered the injury and remains 3 years from the date of the injury, whichever occurs first.
3. Attorneys will still have a cap on their percentage of collections from plaintiff awards. The cap will go from a tiered cap to a flat cap of 35% of the award which will result in higher fees paid to trial attorneys.

In addition, there is a verbal “agreement” among (1) the Governor, (2) the Speaker of the Assembly, (3) the Senate Majority Leader, and (4) Stakeholders that this compromise bill will preclude all parties from coming back to the Nevada Legislature for any changes to the medical malpractice statute for 10 years. This sounds promising, but nothing like this can be codified nor put into a contract.

Background behind the deal:

YND had worked hard to limit the Non-Economic Damages cap to rise only to \$550K over 4 years and to not allow the Statute of Limitations to expand. This did not hold. Some behind the scenes deal-making without **YND** involved helped us, and some harmed our cause. The final cap in AB 404 is not dissimilar to most states in the Western U.S.

NON-ECONOMIC DAMAGES

- a) NJA initially wanted no limit on Non-Economic Damages via AB 209
- b) They then moved down to a \$2.5M cap.
- c) And then down to a bifurcated cap at \$2.0M for a claim that included a hospital (this cap applied to all those named in the claim including providers) and a cap of \$550K for all others including critical assess hospitals. This bifurcated cap for claims in a hospital and all claims outside a hospital confused the impact on providers and left everyone at high risk.
- d) All of these disastrous caps would have required most every Provider in Nevada to have a \$2M per case liability policy.
- e) The Governor did not want a cap over \$1M. As a result, the trial attorneys proposed a \$950K cap, and this was reduced to \$750K (halfway between our \$550K proposal and NJA's \$950K proposal).

Additional elements that would have been unacceptable that were included until the last minute:

- a) Retroactivity on the Statute of Limitations and to extend the statute to 2 and 4 years.
- b) Removal of Several Liability
- c) Removal of the unique “Trauma Cap” that protects the community docs who come into UMC with their own liability coverage.
- d) Language in AB 404 to clarify every Intermediate Care Facility, Nursing Home, SNF, Hospice and Home Nursing programs in Nevada had no cap on Non-Economic Damages
- e) Elimination of periodic payments to plaintiffs.

Let us be clear. **The final AB 404 is not what YND wanted.**

However, based on the proposed amended language, nearly all legislators supported the changes and the Governor's Office was no longer concerned the amendment would cause destabilization of the medical malpractice insurance market.

After careful deliberation, the **YND Board** voted to support the amendment since the only path of resistance would have been to loudly convince the Governor at the last minute NOT to sign the bill and then initiate AND win an expensive initiative petition at a time when Nevada's Medical Malpractice market was not in crisis.

It is uncertain if the elements of the final bill (with the gradual increase in the non-economic cap) will materially & adversely affect professional liability coverage in Nevada or recruitment or retention of physicians and

advance practice providers. **YND is prepared** to work with several stakeholders to monitor this impact. This data is hard to gather, but with assistance from certain resources, we should be able to see an overall trend for the effects of this bill year over year.

YND is proud of all the efforts we and YND stakeholders took. We believe this work minimized the changes to Nevada's Medical Malpractice protections - that left unchecked - would have devastated the Medical Malpractice Insurance market in Nevada. Ultimately, Nevada patients' access to care would have worsened, as some doctors would stop practicing, limit their practices, or move to other states. Further, recruitment of physicians would have been even more difficult.

YND has appreciated everyone's dedication to focusing on our fellow citizens' healthcare access and expanding our healthcare workforce.

Thank you to all our constituents.