

BRYON H. SHORT
STATE REPRESENTATIVE
Seventh District



HOUSE OF REPRESENTATIVES
STATE OF DELAWARE
LEGISLATIVE HALL
DOVER, DELAWARE 19901

COMMITTEES
Economic Development, Banking,
Insurance & Commerce, Chair
Energy
Housing & Community Affairs
Revenue & Finance
Veterans Affairs

Economic Development Committee
Meeting Minutes
June 23, 2010

Chairman Short called the meeting to order at 1:16 p.m. Members present included Representatives D. E. Williams, Bennett, Hudson, Ramone, Brady, Viola, and Keeley. For a list of guest present, please see attached.

Chairman Short choose to address **HB 473, AN ACT TO AMEND TITLE 18 OF THE DELAWARE CODE REQUIRING PROPERTY AND CASUALTY INSURERS TO ANNUALLY SUBMIT A STATEMENT OF ACTUARIAL OPINION**, and recognized Linda Sizemore, the Chief Examiner for the Department of Insurance (DOI). Ms. Sizemore explained that this is a consumer protection bill. Insurance companies typically fail because they do not accurately measure the necessary amount of reserve liability. This bill would require insurance companies to include a "Statement of Actuarial Opinion" with our materials that are annually given to DOI. Ms. Sizemore stated that most of the information is already accounted for through check lists. This bill is needed in order for Delaware to conform to the recent standards set by the commissioners of the 50 states. Chairman Short asked if these standards will ultimately be in all of the states, to which Ms. Sizemore stated that the law is based off of model language that will be used by all the states. Chairman Short also asked if there is any language for an amendment. Ms. Sizemore explained that the original draft of the bill had one additional paragraph that has since been removed.

Rep. Bennett moved to release the bill from committee; Rep. D. E. Williams seconded the motion. The bill was released from committee on a 0-6-0 vote.

Next, Chairman Short addressed **SB 223, AN ACT TO AMEND TITLE 18 OF THE DELAWARE CODE RELATING TO INSURANCE**. Rep. Keeley, the bill's prime sponsor, was unable to present the bill; Chairman Short asked Mike Migliore, attorney for the House of Representatives, to explain the bill. Mr. Migliore stated that this bill deals with affidavits of merit, which are used in medical malpractice cases to provide expert opinions. Rep. Hudson asked for a practical example. Mr. Migliore explained that if an incident occurs at a hospital that results in a patient being hurt and filing a medical malpractice claim, the claim must be accompanied by an affidavit of merit. The affidavit of merit helps to keep cases without cause from going to court. This bill is a response to a recent case where a nurse signed the affidavit of merit, instead of a physician. Judge Richard R. Cooch, the presiding judge on the case, ruled that a nurse could sign the

affidavit of merit because the medical malpractice complaint was filed against a nurse. Chairman Short commented that the question is: When can a person, other than a physician, sign an affidavit of merit? He also stated that he is interested in both sides' comments pertaining to this issue and had read Judge Cooch's opinion regarding this issue. Chairman Short apologized to the public in regards to confusion pertaining to which representatives were listed on the bill.

Chairman Short recognized Bruce Hudson, a local attorney. Mr. Hudson stated that he was one of the original six who drafted the current statute. He recalls that the meeting was very contentious due to what each party wanted. At this past meeting, both attorneys and doctors were present for the creation of the current statute, which created the affidavit of merit. The current bill is a housekeeping bill that doesn't hurt or help any side but creates judicial economy. Mr. Hudson referenced a case presided by Judge John A. Parkins, Jr., where a hospital was the defendant, and it was decided that a doctor was not an appropriate expert for the hospital. The current law requires that the expert be board certified in the specialization. Mr. Hudson stated that this bill replaces the word "medicine" in the current statute with "healthcare provider," which is already defined within the Delaware Code. This will provide consistency within the law.

Rep. Bennett asked if the expert has to be board certified or can a judge use their discretion in deciding if an expert can sign the affidavit. Mr. Hudson stated that the existing law states that the expert must be board certified in some area. Rep. Bennett asked if all fields are treated the same, to which Mr. Hudson answered yes.

Rep. Hudson asked if the Medical Society had been asked about this bill. Mr. Hudson responded that the Medical Society is aware of the bill and has expressed its resistance to it. Mr. Hudson stated the he felt their resistance did not make sense because the defendant in a case should have been an expert that is licensed and practicing within their field. He cited an example with a physician's assistant, stating that a physician's assistant is licensed in their field and should be allowed to act as an expert.

Rep. Ramone asked how long ago the meeting was that created the current statute and why the meeting was called. Mr. Hudson stated that the meeting was seven years ago, and it was called by the committee members at that time. Rep. Ramone commented that he was surprised that a similar meeting was not called to deal with this current issue. Chairman Short commented that he believes the same process happened as before, with a bill being introduced and then the committee members asking for the two parties, doctors and attorneys, to meet to decide the statute.

Next, Chairman Short recognized Bob Byrd, representing the Delaware Medical Society. Mr. Byrd stated the Medical Society is not happy with the current bill because there are many small practices, which employ one to three employees that are corporations in Delaware. The Medical Society feels strongly that if there is a medical malpractice suit against the practice, a physician should be the expert signing the affidavit. The current legislation opens these practices up to increased risk. Mr. Byrd stated his client's willingness to work with the Delaware Trial Lawyers Association (DTLA) on this issue.

Chairman Short asked if Mr. Byrd sees a conflict in the existing statute. Mr. Byrd stated that it will be beneficial to clarify in law this issue but it has already been clarified by the courts.

Chairman Short, addressing Mr. Migliore, asked if Judge Cooch's comment, at the end of his opinion of the case, should be given much weight. The comment urged the General Assembly to look into this issue and possibly draft legislation. Mr. Migliore stated that the comment does not need to be given much weight; the opinion can be used by lower courts but does not need to be followed.

Chairman Short recognized Laird Stabler, representing the Nursing Home Association, who expressed his concerns with the bill. He stated that if a physician's assistant is acting under the orders of a physician, a physician should sign the affidavit of merit.

Finally, Chairman Short recognized Shaku Bhaya, of the DTLA. Ms. Bhaya stated, in reference to Judge Cooch's opinion, that his comment to the General Assembly is not common. Also, as the statute is written, each defendant's attorney will need to make an argument to defend the choice to use an expert other than a physician; this places a burden on the courts. Additionally, judges can have different decisions, which will result in more litigation. Finally, these are not typical cases and increasingly the courts are hearing more cases that involve nursing homes or other non-physician parties. Ms. Bhaya stated that the group who created the legislation seven years ago was not thinking of nursing home cases.

Mr. Migliore asked if the two judges who have made a decision concerning this issue have been on the same side of the argument. Ms. Bhaya responded that the two judges were consistent in their opinions but inconsistencies could happen. Ms. Bhaya believes that this legislation will stop unnecessary litigation. Rep. Ramone asked how long ago this case was, to which Ms. Bhaya stated that the case occurred in June 2008. Rep. Ramone stated his concern that this bill was not developed with a group including both doctors and attorneys. Ms. Bhaya stated that the original bill was much longer; after the Senate amendment, the Medical Society wanted more to be done concerning substantive issues, not procedural issues.

Rep. Viola moved to release the bill from committee; Rep. Keeley seconded the motion. The bill was released from committee on a 0-6-0 vote.

Chairman Short adjourned the meeting at 2:00 p.m.

Respectfully submitted by,

Jordan L. Fischer