

ASSOCIATED INDUSTRIES OF FLORIDA
**LEGISLATIVE
INTERIM BRIEF**



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WEEKLY INTERIM LEGISLATIVE BRIEF FOR THE WEEK OF FEBRUARY 17-21, 2003
SOURCE: ASSOCIATED INDUSTRIES OF FLORIDA

MEDICAL MALPRACTICE

The House Insurance Committee heard testimony on the report of the governor's medical malpractice task force. William Large, the task force's staff director, described how the group arrived at its sixty recommendations. A panel of representatives of the insurance industry, health-care professionals, and trial lawyers then critiqued the findings. The panel consisted of Dr. Robert Cline, Florida Medical Association (FMA); Harvey Rosenfield, Foundation for Taxpayer and Consumer Rights; Rade Musulin, Florida Farm Bureau Insurance Companies; Robert White, First Professionals Insurance Company (FPIC); Neal Roth, Grossman & Roth; and Ralph Martinez, McEwan, Martinez, Luff, et al.

Each member of the panel offered potential solutions to Florida's medical malpractice crisis, i.e., monetary caps on non-economic damages, better enforcement of current insurance laws, new insurance laws, or a combination of measures.

Harvey Rosenfield, the Naderite consumer advocate from California, attributed reduced liability insurance rates in California to Proposition 103, not the cap on non-economic damages. Prop 103 was a California citizen's initiative enacted in 1988 that, among other things, mandated a rollback in insurance rates. The Committee was very interested hearing more about the effect of Prop 103. However, empirical evidence is unclear because California had already enacted award caps several years before the proposition was enacted. Therefore, it is dubious that Prop 103 was a necessary or sufficient cause of lower insurance rates for medical malpractice insurance in California.

Several Democrats on the Committee expressed clear opposition to enactment of monetary caps on damages awarded in malpractice lawsuits. It appears that they are more concerned about carrier practices than the rising frequency and severity of insured claims for medical malpractice. They voiced concern about the need for assurances that insurance companies will quickly roll back rates if the legislature enacts a cap on general damages.

Committee Chair, Representative Kim Berfield (R-Clearwater), affirmed that the Insurance Committee would consider a medical malpractice bill during the upcoming session.

This meeting revealed a portion of the trial bar's strategy for fending off caps: it will try to shift the focus of the debate from doctor versus lawyer, a face-off they know they cannot win, to one that makes insurance carriers the bad guys. Trial lawyers would prefer that legislators enact a rate rollback rather than caps. If lawmakers concur they will only succeed in prolonging the agony. Malpractice insurance is not just expensive; it's not available. If they artificially suppress rates, they will be forcing insurers to sell policies at an even greater loss, which will just make the insurance less available.

SPECIAL COMMENTARY

On average, insurance rates for medical liability coverage are lower in states such as California that have adopted reasonable caps on non-economic damages than rates for comparable coverage in non-cap states such as Florida. Over the long-term this conclusion holds true, regardless of the form of insurance rate regulation in the respective states.

In the final analysis, the medical liability issue for many rank-and-file legislators is ultimately reduced to the core political question: "Do I vote for the doctors or do I vote for the lawyers?" When the question is framed in this manner, the docs will likely prevail. Consequently, the other side is attempting to expand the scope of the conflict by demonizing the insurance industry. By blaming the insurance industry for high insurance rates, the trial attorneys hope to deflect legislators' attentions away from root causes of Florida's medical liability crisis, frivolous lawsuits and excessive judgments. So far, the strategy appears to be working.

On Wednesday, a press conference was held by the Coalition to Heal Healthcare in Florida, a broad-based alliance of more than 100 of the state's top medical and business groups. Associated Industries of Florida (AIF) participated in the press conference in support of legislative action this year.

Art Simon, AIF's Senior Vice President for Governmental Affairs, spoke at the press conference. "The business community cares about this issue," he said, "because employers pay for most of the health care coverage for working families in Florida."

"Reform in medical liability laws, and in particular passage of a reasonable cap on non-economic damages," he said, "is absolutely essential for health care cost containment." "Moreover," Simon noted, "employers are patients too! Access to quality health for ALL Floridians will suffer immeasurably, unless the Legislature acts this year to alleviate the medical liability crisis."

The \$250,000 cap on non-economic damages should bring insurance premium relief to doctors and hospitals, especially because Florida has tough rate regulation. Moreover, passage of reforms will attract some insurers back into the Florida market almost immediately. As such, the reforms will increase competition, which itself will drive down rates even further.

Vulnerability to large jury awards is why insurers have not returned to the Florida market. Therefore, AIF supports caps on non-economic damages for medical malpractice cases to improve the accessibility to and availability of high-quality health care.

WORKERS COMPENSATION

Representative Dennis Ross (R-Lakeland), who is the Chair of the Select Committee on Workers' Compensation, questioned panelists about restructuring the workers' compensation JUA to allow it to be used as a second tier of coverage and also about creating a state fund for the purchase of workers' compensation insurance to make it more affordable.

Mary Ann Stiles , AIF's general counsel, expressed the business community's opposition to the creation of a state fund that would compete against private insurance carriers. She argued that even if the state could run an insurance company better than the private sector, it would still need reforms to make it work.

The meeting also featured testimony from Kevin McCarty, director of the Office of Insurance Regulation and member of the Governor's Commission on Workers' Compensation Reform. He presented the findings and recommendations of the commission, the gist which was: The system needs fixing and it needs fixing this year.

At an evening meeting of the House Select Committee on Workers' Compensation, chaired by Representative Dennis Ross (R-Lakeland), a number of small construction contractors testified about the difficulty they faced in obtaining workers' compensation coverage. Citing the high costs they asked the committee to continue the exclusions from workers' compensation coverage that they now enjoy. As part of the Coalition of Business and Insurance Industry, AIF is advocating complete repeal of the construction exclusions, although the coalition's legislative proposal includes protections for small construction companies.

The Committee also received testimony from a few injured workers who claimed that the system was very confusing and needed to be streamlined so that medical and indemnity benefits would be received more timely.

The Select Committee on Workers' Compensation plans to hold its next two meetings during the week of March 3, 2003, which is the first week of the Legislative Session.

The only solution to the crisis in the availability and affordability of workers' compensation insurance is adoption of the full menu of reforms that will return the system to its proper function, which is to serve employers and their employees who get injured on the job.

AUTO INSURANCE/PIP REFORM

This week the Senate Select Committee on Automobile Insurance/PIP Reform met to consider some possible changes to Florida's no-fault system for auto insurance, particularly an alternative design referred to as the Choice Auto Plan.

The Choice Auto Plan offers auto-insurance consumers an option between a no-fault plan or the traditional tort system. The customer with a personal-injury protection (PIP) policy who was injured in an automobile would be eligible for a set schedule of benefits and would not be able to pursue economic or non-economic damages. If the insured selected the tort plan under the Choice scheme, however, he would purchase liability coverage and uninsured motorist coverage, which would be used if one party in the accident had no-fault coverage and the other had tort coverage.

In view of concerns about the cost-effectiveness of Florida's no-fault automobile insurance law, it is unlikely that the Legislature will embrace an extension of the no-fault concept this year. More viable remedies will focus on steps to combat fraud and reduce the level of attorney involvement in personal injury claims.

AIF favors reform of Florida's automobile-insurance law to return stability to the no-fault insurance market by reducing unnecessary litigation over medical and lost-wage benefits.

NURSING-HOMES

On Monday, the Joint Select Committee on Nursing Homes took testimony from all sides on a proposal by the nursing-home industry to cap liability through an arbitration process similar to the one that applies to claims of medical malpractice. Speaking in favor of the status-quo was AARP and the Academy of Florida Trial Lawyers. Several committee members raised the concern that implementation of a cap on awards could lead to increased frequency of claims.

Later in the week, the Joint Select Committee, on an eight-to-four vote, sent its package of recommendations to the House and Senate leadership. The proposals are intended to improve nursing-home quality and to revive the insurance market by imposing further limits on damages in lawsuits against the facilities.

Most notable, the recommendations would replicate in the nursing-home liability statute the medical-malpractice contingent cap on damages. It provides for a \$250,000 cap on pain and suffering damages in cases resolved by voluntary binding arbitration, and a \$350,000 cap in cases where the claimant rejects a provider's offer to accept responsibility and determine damages binding arbitration.

The arbitration provision and contingent cap would only apply to medical incidents, however, not custodial claims. In addition, the cap would not apply when there is intentional misconduct or gross negligence. So, these provisions are not likely to alleviate the ongoing nursing home liability insurance crisis.

Nursing home insurers have not returned to the Florida market because the Legislature has failed to enact meaningful tort reform to control excessive damage awards in civil lawsuits. AIF supports caps on non-economic damages for nursing-home liability cases to improve the accessibility to and availability of high-quality health care.

SPECIAL COMMENTARY

Workers compensation, automobile insurance, medical malpractice, and liability insurance for nursing homes are all "front burner issues" in the Legislature this year. This is highly unusual. More often than not the Legislature tackles one only high profile insurance issue each year. That is due to the inherent complexity and inevitable controversy that permeates public policy debate on insurance matters. In a nutshell, the Legislature's ambitious insurance agenda may be too much for the members to handle in one sitting, particularly in the House where term limits have taken a toll on legislative experience. Regrettably, this situation may lead to sub-optimal outcomes on each of the major issues, as important measures are either abandoned or traded away in the legislative process.

NO SMOKING IN THE WORKPLACE

The Senate Select Committee on Constitutional Amendment Implementation met to consider proposed recommendations for implementation of Amendment 6, which voters approved last November to ban workplace smoking.

Recommendations focused on defining the following four main issues: stand-alone bars; enforcement; the enclosed indoor workplace; and the definition of work.

The staff recommended that stand-alone bars, in which smoking will be allowed, should be identified based on a percentage of food sales. Enforcement would be triggered by the report of a complaint. Indoor workplaces would have to identify what qualified as a work space, where smoking would be prohibited, and what constituted non-workplace spaces, where it would be allowed. The committee also recommended that the Legislature clarify that, for the purposes of the amendment, work does not include non-commercial activities conducted exclusively by the members of community-service or social organizations, such as religious, veterans, fraternal, charitable, and other non-profit groups.

AIF will monitor the legislation written to implement Amendment 6 to ensure that it does not place undue burdens on employers and their ability to conduct business.

WATER RESOURCES

“Water, water everywhere, but not a drop to drink.” That seems to be the theme for the House Committee on Natural Resources.

The Subcommittee on Public Land and Water Resources heard testimony from the David Struhs, secretary of the Florida Department of Environmental Protection, regarding proposed changes to “Chapter 62-40, Water Resources Implementing Rule.” The rule has not undergone review in six years, despite its own requirement that it be reviewed every four years. In addition, amendments enacted by the Legislature in 1997, 1998, and 1999 have rendered portions of the rule obsolete. The rule now needs to be updated to address pressing water management issues such as increases in demand, water shortages, and problems with water quality.

The department’s problems in adopting a new rule are mostly centered on the issue of water reservation, which reserves water from use by permit. The law already allows the department to use water reservation as a tool to protect fish and wildlife as well as the public health safety. It is a power that the department will use in the Everglades restoration project. The business community, however, is concerned with the extent of the department’s water-reservation powers, which would hinder economic development.

Treatment of water resources is shaping up as a major issue for the 2003 Session, as manifested in legislation that would impose water concurrency requirements on new residential and commercial developments. This would have a chilling effect on economic growth and would remove the incentive for governmental entities to properly plan for expanding water resources through technology such as desalination.

AIF opposes all burdensome growth management provisions, including making new developments contingent on available water resources through a concurrency requirement. Government is responsible for providing sufficient infrastructure, not private enterprise.

EDUCATION

The Senate Education Committee heard a presentation from the Governor's office on the implementation of the class size amendment. Senators were extremely concerned that charter schools were not being considered as part of the reduction in class size as well as AP and IB programs. Additionally, the Governor's office explained that if charter schools are considered the same as public schools then they would qualify for the facilities funding that the public schools receive.

They also heard a very brief presentation on charter schools. Senators asked if the cap on charter schools should be removed. They were told that whether or not the cap is removed, charter schools will open as the demand grows – it is a supply and demand issue. Some areas might exceed the cap, while others will not.

Charter schools promote competition, which is sorely lacking in public education. Charter schools provide an outstanding opportunity for business recruitment and retention of qualified employees, especially when charter schools are placed at or near the employer's business. AIF supports increased state funding for the expansion of charter schools in Florida.

FINANCE AND TAXATION

The House Finance and Tax Committee met to discuss the fiscal impacts of permitting Video Lotteries Terminals (VLT) at Florida horse and dog tracks and jai alai frontons. Opponents complained about organized crime and compulsive gambling. Economists presented findings of a study of economic impacts of permitting VLTs in Florida. It is estimated that 42,000 jobs and \$1.5 million in income revenues will be created in the first year of implementation with state revenues increasing by approximately \$1.3 billion. After 5 years 51,000 jobs will be created and revenues to the state are estimated to increase upward to \$2 billion.

The Senate Committee on Finance and Taxation met this week and considered a Proposed Committee Bill (PCB) on Streamlined Sales Tax, which was presented by Senator Walter Campbell (D-Tamarac). The streamlined sales tax project, otherwise known as "sales tax simplification project", is an effort created by state governments, in conjunction with local governments and the private sector, to simplify and modernize sales and use tax collection and administration.

This measure is aimed at internet and catalog sales, which are growing exponentially each year. Under current Florida law, such sales are subject to Florida's sales and use tax. However, compliance is a major problem. Hence, Florida-based retailers, who impose and collect the tax, are placed at a competitive disadvantage.

The PCB was reported favorable by the committee (4 -0) with one amendment. A wide coalition of business interests in Florida, including AIF have joined in support of the Streamlined Sales Tax proposal. This legislation will level the playing field for retailers and assure greater compliance with the existing tax law.

AIF believes that the State of Florida should equalize the treatment of all retail vendors regarding the assessment and collection of state sales taxes. Furthermore, the state treasury would benefit from greater compliance by out-of-state vendors with Florida's tax code.

Please send your comments or suggestions to us at aif@aif.com or call the Governmental Affairs department at (850)224-7173.

- For more information on all of the important legislative information concerning the business community, go to our "members only" Florida Business Network web site at <http://fbnnet.com>
- Send us your E-mail address and we will begin to send this report to you automatically via E-mail.