

ASSOCIATED INDUSTRIES OF FLORIDA  
**LEGISLATIVE  
WEEKLY UPDATE**



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**FROM THE WEEK OF JUNE 23-27, 2003**

### **MUCH ADO ABOUT SOMETHING**

A casual visitor to the Capitol this week might not realize that a serious and intense debate over public policy was underway. In what may or may not be a positive note, Gov. Jeb Bush issued a long-anticipated proclamation late on Friday calling the Legislature back into special session from July 9 to 16. Whether Special Session C will bring break the deadlock over medical-liability-insurance reform, fostered by plaintiff lawyers, remains to be seen.

Please go to <http://www.aif.com/Articles-2003/SpcSessionC.htm> to view the Proclamation.

Prior to and throughout the regular session, plaintiff lawyers pursued a clear-cut strategy for defeating medical-malpractice-insurance reform: discredit the notion that a crisis even exists.

Their argument has already been rejected by the Governor's Select Task Force on Medical Liability Insurance and the House Select Committee on Medical Liability Insurance. Both groups, after thorough reviews and hours of testimony, rejected the plaintiff bar's red herring.

In Special Session B, however, the "What crisis?" camp found a new and friendlier venue in the Florida Senate. The resurrection of the plaintiff bar's voodoo-numbers ploy began with Democratic Senator Steven Geller, a Hallandale Beach trial lawyer, who hammered on the unreliability of insurance company statistics at every opportunity.

Eventually the murmur grew into a roar and on this past Wednesday Senate President Jim King (R-Jacksonville) announced that he wanted to subpoena insurance company executives and hire a forensic accountant to review their financial records. Later, Senate Minority Leader Senator Ron Klein (D-Delray Beach) piped in to urge a grand-jury investigation into the whole matter.

As we say in Tallahassee, that dog won't hunt. Insurance-company rates, profits, and investments are heavily regulated, formerly by the Department of Insurance, now the Office of Insurance Regulation. At Thursday's Cabinet meeting Kevin McCarty, the state's chief insurance regulator, repudiated the plaintiff lawyer allegations that medical-liability-insurance companies were hiking rates to make up for investment losses.

Please go to [http://www.sptimes.com/2003/06/27/State/Regulator\\_\\_Rate\\_hikes.shtml](http://www.sptimes.com/2003/06/27/State/Regulator__Rate_hikes.shtml) to view an *Associated Press* report on the Cabinet meeting

McCarty's agency has the statistics to prove that Florida's unusual litigation climate is driving the increases because insurers are pressured into settling claims for higher amounts that insurers in other states would reject or settle for lower amounts.

The Senate's power to issue subpoenas is rarely invoked and is obviously intended as a nuclear weapon to frighten insurance companies into a more submissive stance. The insurance companies, however, have shown no signs of backing down. The state's largest medical-liability insurer, First Professionals Insurance Company, has offered to testify under oath and release records voluntarily, without the need for a subpoena. The substance of the carrier's testimony, however, will not change. A meaningful cap on non-economic damages and bad faith reforms are necessary to alleviate the medical malpractice crisis in this state.

Special Session B came to an ignominious end Wednesday evening, after the newly formed Senate Select Committee on Medical Malpractice Reform met in a marathon session, comparing SB 2B with the House package, HB 63B, and the language proposed by the governor.

Wednesday's meeting revealed a lack of consensus among the individual members, explained in part by their lack of familiarity with the issue at hand. Medical-malpractice insurance is one of the more complex issues that lawmakers have to address, and senators are at a distinct disadvantage because, compared to their counterparts in the House, they have spent a fraction of the time investigating the problem and possible solutions. The meeting was helpful if only because it revealed the contradictory and duplicative provisions of the Senate bill

Please go to <http://www.aif.com/taxmedia.htm> for video clip by Art Simon, AIF's senior vice president, governmental affairs.

At the conclusion of the meeting, the Capitol was left vacant of House members who never returned and senators who quickly departed.

Despite the rancor and outward lack of progress during the second week of Special Session B, Capitol insiders are now detecting some movement on the issue. Quiet negotiations are ongoing among staff members of the House, Senate, and governor's office. It is widely believed that key members of the upper chamber's negotiating team include Senators Tom Lee (R-Brandon) and Rod Smith (D-Gainesville), who are joined in the consensus-building effort by Representatives Dudley Goodlette (R-Naples) and Allan Bense (R-Panama City). Certainly, other legislative leaders are engaged as well, most notably the House Speaker Johnnie Byrd (R-Plant City) and Senate President Jim King (R-Jacksonville).

No doubt negotiators are starting at the bottom of the controversy pyramid and working their way up to the more contentious issues. Of course, as is always the case, nothing is truly agreed upon until everything is agreed upon, but at least they are trying.

On Friday afternoon, the governor issued the proclamation calling the Legislature into special session from July 9 through 16. He also released letters to Senator King and Representative Byrd setting forth the schedule for a five other special sessions, as follows:

Special Session D: July 22 - July 28, 2003  
Special Session E: August 5 - August 13, 2003  
Special Session F: August 20 - August 28, 2003  
Special Session G: September 3 - September 10, 2003  
Special Session H: September 18 - September 26, 2003

You may view both letters at <http://www.aif.com/infocenter.htm>

The governor's letter to Senator King took a friendlier tone than some expected, but it outlines in clear detail what Gov. Bush perceives as the defects in SB 2B. The governor then hits hard at the plaintiff: "[W]e need to focus on sound public policy rather than allowing a small but powerful group of wealthy trial lawyers to protect their huge incomes at the expense of women who need women's health care services, children who need specialized health care services, and our rural poor, who have nowhere else to turn when their doctor leaves."

It remains to be seen whether the letter will bring about any significant movement on the most difficult issues, which so far has been lacking. The cap on non-economic damages remains a major sticking point. Although Gov. Bush has indicated a willingness to be somewhat flexible on the cap issue, officially he stands tall in support of the House position, that being a hard cap of \$250,000. Conversely, the Senate is looking for a \$500,000 cap that can be pierced, allowing up to \$6 million in non-economic damages.

Texas recently enacted what is sometimes called a floating cap. Governor Bush is quoted in some newspaper articles as looking at the Texas plan as a possible basis for compromise. Under the new Texas law, an injured patient can receive no more than \$250,000 from all of the medical providers in a lawsuit, plus another \$250,000 from a health-care facility. If there is more than one facility involved in the claim, the patient could receive another \$250,000. No matter how many claimants or defendants, the cap starts at \$250,000 and can only "float" up to \$750,000, depending upon the makeup of the class of defendants. Under Florida law, however, a floating cap would probably have to apply to each claimant.

A non-economic damages cap remains the most significant change that can occur. If premiums are to decrease, or even stop growing at such astronomical rates, insurance company actuaries need greater predictability over what future losses will be. A cap on non-economic damages lessens the risk of a devastating and unpredictable award by a runaway jury, allowing the companies to use more conservative calculations of future losses. The cap is necessary to offer that predictability, yet it must be low enough to actually bring about the benefit of lower rates.

A \$250,000 cap is both actuarially predictable and beneficial. Whether it is politically feasible remains to be seen. Which brings us to a final point. The political overtones of this entire debate cannot be overlooked. The Republican Party controls Florida's Legislature and its governor's mansion, which houses the brother of the party's leader, President George W. Bush, who himself has recommended a nationwide \$250,000 cap on non-economic damages. The prospects of the president's agenda are dimmed by Florida's GOP senators who, as the governor so memorably announced, have wandered off the reservation.

The president will soon be visiting our state. Will he use this opportunity to speak out in support of the governor's medical liability reform plan? Will he talk with Senator King? Will he have any message for the hesitant handful of Republican senators who are holding up passage of the governor's bill? Only time will tell.

When lawmakers arrive back in Tallahassee on July 9 for a rare summer session, they will find the climate here is hot and muggy. But they better get used to it, because they may be around for a while.

It could be that we will all wake up one morning in the near future and read that the impasse on medical-liability insurance reform has been breached. Then again, Special Session C may simply go down in history as yet another arduous step in a long, painstaking climb to the passage of legislation. It all depends on what happens behind the scenes over the next week-and-a-half.

- 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.