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HOUSE OF REPRESENTATIVES
COMMITTEE ON
INSURANCE
ANALYSIS

BILL #: HB 2441 (PCB IN 00-04)

RELATING TO: Workers' Compensation

SPONSOR(S): Committee on Insurance, Representative Bainter and others.

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) INSURANCE YEAS 9 NAYS 0
(2)
(3)
(4)
(5)

I. SUMMARY:

Funding for the Workers' Compensation Administration Trust Fund (WCATF) is generated through annual assessments on individually self-insured employers, self-insurance funds, and insurers (on behalf of their insured employers) based on "net premiums collected." Similarly, funding for the Special Disability Trust Fund (SDTF) comes from assessments on individually self-insured employers, self-insurance funds, and insurers (on behalf of their insured employers) based on "net premiums written."

A controversy has recently arisen involving 15 insurers and self-insurance funds. They contend that the terms "net premiums collected" and "net premiums written" do not include premiums transferred (i.e., ceded) to reinsurers. These companies have requested approximately $73 million in refunds from the Division of Workers' Compensation (Division) for alleged past overpayments of assessments. Two of these companies, Riscorp Insurance Co. and Florida Hospitality Mutual Insurance Co., have filed lawsuits in court regarding the refunds.

The bill would provide that it is the Legislature's intent to clarify that the terms "net premiums collected" and "net premiums written" have meant and continue to mean premiums arising from workers' compensation policies without deduction of ceded reinsurance premiums. The bill would also:

- reduce the statutory cap on the WCATF assessment rate from 4% to 2.75%
- prohibit the Division from collecting past underpayment of WCATF assessments from a carrier for assessments levied against that carrier prior to July 1, 2000;
- beginning January 1, 2001, include the full premium amount of large deductible policies in the premium base for the WCATF;
- provide that, for insurers that excluded ceded premiums before January 1, 2000, no assessments on ceded premiums shall be paid until the Division advises insurers of the impact that the inclusion of ceded premiums would have on their assessment;
- beginning January 1, 2001, change the workers' compensation assessment determination from a fiscal year basis to a calendar year basis; and
- assemble a legislative task force to study the administration and funding of the workers' compensation system and authorize the Governor's office to contract for a budgetary and operational analysis of the Division.

The bill could have a fiscal impact on the WCATF and SDTF. See Fiscal Comments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [] No [] N/A [x]
2. Lower Taxes Yes [] No [] N/A [x]
3. Individual Freedom Yes [] No [] N/A [x]
4. Personal Responsibility Yes [] No [] N/A [x]
5. Family Empowerment Yes [] No [] N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Basis for Workers' Compensation

Workers' compensation statutes represent a basic compromise between labor and management. Under this compromise, employees injured on the job receive medical care and a portion of their lost wages (called indemnity or disability benefits) regardless of who was at fault for their injury. In exchange for these no-fault benefits, employees give up the right to sue their employers in tort and, as a result, give up the right to be compensated for pain and suffering associated with the workplace injury.

Administration of Workers' Compensation

The Department of Labor and Employment Security, Division of Workers' Compensation (Division) is the primary agency responsible for the administration of Florida's workers' compensation system. Its functions include:

- ♦ enforcing employer compliance with workers' compensation coverage requirements;
- ♦ overseeing reemployment of injured employees;
- ♦ monitoring and auditing the delivery of benefits;
- ♦ paying permanent total disability supplemental benefits in pre-1984 cases;
- ♦ operating the Employee Assistance Office; and
- ♦ administering the Special Disability Trust Fund.

The Office of the Judges of Compensation Claims, also within the Department of Labor and Employment Security, oversees 31 judges of compensation claims located throughout the state. These judges of compensation claims preside over the workers' compensation dispute resolution process.

Other agencies, such as the Agency for Health Care Administration and the Department of Insurance, also have responsibilities relating to workers' compensation.

The Agency for Health Care Administration (AHCA) is responsible for regulation of workers' compensation managed care arrangements. Since January 1, 1997, all workers' compensation medical benefits have been required to be provided through workers' compensation managed care arrangements.

The Department of Insurance investigates (and refers for prosecution) criminal insurance fraud, including workers' compensation fraud.

The Workers' Compensation Administration Trust Fund

The sole source of funding for the administration of the workers' compensation system is the Workers' Compensation Administration Trust Fund (WCATF). Money for the trust fund is raised through annual assessments on self-insured employers and insurers (on behalf of insured employers).[1] The assessment is based on the expenses of administration of the workers' compensation system for the preceding fiscal year and is announced by the Division as soon as practicable after July 1 of each year.[2] In 1999, the Division announced the assessment rate on November 15.

Self-insured employers pay the assessments directly, while insured employers pay the assessments as a component of the insurance premiums they pay to their insurer.

The WCATF assessment is levied based on the "net premiums collected" by insurers and self-insurance funds or, in the case of individually self-insured employers, the premium they would have paid for workers' compensation coverage.[3] The total workers' compensation premiums reported to the Division for assessment purposes have declined in recent years. As a result, the assessment rate has increased each of the last three fiscal years:

FY 1998	2.40%
FY 1999	2.75%
FY 2000	3.48%

By statute, the WCATF assessment rate cannot exceed 4%.[4]

Special Disability Trust Fund

The Special Disability Trust Fund (SDTF), also called the "second injury" fund, was created in 1955 as an incentive for employers to hire employees with pre-existing physical impairments. If an employee with a pre-existing injury was injured on the job, employers could make a claim to the SDTF to have a portion of the workers' compensation claim reimbursed by the SDTF.

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[1] Workers' compensation insurance rates are annually filed with, and approved by, the Department of Insurance. Rates are filed by the National Council on Compensation Insurance (NCCI) on behalf of all insurers and self-insurance funds in Florida. Although there is no statutory or rule requirement, the NCCI usually makes its rate filing in August (e.g., in 1999, the NCCI made its filing on August 9). One of the components of the rates filed by the NCCI, and ultimately charged to employers, is a charge for the WCATF and SDTF assessments.

[2] Section 440.51(1)(a), F.S.

[3] Section 440.51(1)(b), F.S.

[4] Id.

The funding for the SDTF also comes from assessments on insurers, self-insurance funds, and individually self-insured employers. The SDTF assessment is levied based on "net premiums written."[5] By statute, the SDTF assessment cannot exceed 4.52%.[6]

Refund Requests

The assessments for the WCATF and SDTF have been based on "net premiums" since 1975.[7] A controversy has recently arisen regarding the interpretation of the assessment base. Since 1998, 15 companies have applied for refunds from the Division of Workers' Compensation arguing that the terms "net premiums collected" and "net premiums written" do not include ceded premiums. These companies allege that they overpaid their assessments to the WCATF and the SDTF in recent years.

Two of these companies, Riscorp Insurance Company and Florida Hospitality Mutual Insurance Company, have filed lawsuits in circuit court against the Department of Labor and Employment Security requesting the court to declare them to be entitled to refunds.[8]

According to the Division of Workers' Compensation, the requested refunds in all currently pending requests totals approximately $73 million.

Large Deductible Policies

A large deductible policy is an insurance policy with a minimum deductible of $100,000 per claim. According to the National Council on Compensation Insurance, in 1999, 3,641 employers had large deductible policies for workers' compensation. According to the Division, since FY 1996/97, 182 self-insured employers (large employers with the financial ability to pay its own claims) have withdrawn their self-insured status, most for the purpose of buying a large deductible policy.

When a self-insured employer switches to a large deductible policy the assessment for the previously self-insured employer is eliminated. Instead, the assessment is paid by the employer's new insurer based on the premium paid for the policy, which can be as much as 80% less than the premium imputed to self-insured employer. Similarly, when an insured employer purchases a large-deductible policy, the amount of premium paid by that employer, and consequently the premium reported by the insurer for assessment purposes, is reduced substantially. According to a report commissioned by the Division, the purchase of large deductible policies by self-insured employers is responsible for a loss of approximately $800 million in premium base.[9] This same report estimated that the WCATF assessment rate for FY 1999/00 would have been 0.62 percentage points lower -- e.g., 2.13% instead of 2.75% -- had employers not used large deductible policies.

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[5] Section 440.49(9)(b)3., F.S.

[6] Section 440.49(9)(c), F.S.

[7] 1975 Laws of Florida, ch. 75-209, ss. 24 and 25.

[8] Zenith Insurance Company purchased Riscorp Insurance Company in 1997 after Riscorp Insurance Company was ordered by the state to find a buyer for its business.

[9] Insurance Services Office, Inc., February 15, 2000, Report on the Impact of Large Deductible Policies on Assessment Revenue, Exhibit 5, Column (8).

C. EFFECT OF PROPOSED CHANGES:

Statement of Intent Relating to "Net Premiums Written" and "Net Premiums Collected"

A statement of legislative intent would be provided stating that it is the intent of the Legislature to clarify that the terms "net premiums collected" and "net premiums written" have meant and continue to mean premiums arising from workers' compensation policies issued by an insurer in this state as the primary insurance carrier without deduction for ceded reinsurance premiums transferred to an insurance company for reinsurance purchased or any premium expense attributable to purchasing reinsurance.

Reduction of Statutory Cap on WCATF Assessment Rate

Due to the expansion of the premium base resulting from other provisions of the bill, the statutory cap on the WCATF assessment rate would be reduced from 4% to 2.75%. As a result, the current WCATF assessment rate of 3.48% would have to be reduced at least to 2.75% to comply with the new cap.

Collection of Past WCATF Underpayments

The Division would be prohibited from collecting past underpayment of WCATF assessments from a carrier for assessments levied against that carrier prior to July 1, 2000. But, the Division would be authorized to collect past underpayments of WCATF assessments from a carrier for assessments levied against that carrier after July 1, 2000.

Payment of Assessments on Ceded Premiums for the SDTF

Insurers that excluded ceded reinsurance premiums from their assessments prior to January 1, 2000, would not be required to pay assessments on ceded reinsurance premiums until such time as the Division advises those insurers of the impact that the inclusion of ceded premiums would have on their assessment. Further, the Division would be prohibited from recovering past underpayment of SDTF assessments levied against any carrier that excluded ceded premiums from their assessments prior to the point that the Division advises of the appropriate assessment that should have been paid.

See "Other Comments," section V., C. of the analysis.

Large Deductible Policies

Beginning January 1, 2001, the full premium amount of large deductible policies would be included in the premium base for the WCATF. This could increase the premiums reported by insurers for the WCATF assessment by as much as $800 million.

However, the full premium value of large deductible policies would not be included in the premium base for the SDTF. Thus, insurers would not report any additional premiums for purposes of the SDTF assessment.

Timing of Assessment Calculation

Beginning January 1, 2001, the workers' compensation assessment determination would be changed from a fiscal year basis to a calendar year basis. Also, the Division would be required to announce the assessment rate by June 30 of each year, in time for it to be included in the workers' compensation rate filing approved by the Department of Insurance.

Task Force on Workers' Compensation Administration

A legislative task force would be assembled to study the administration and funding of the workers' compensation system and authorize the Governor's office to contract for a budgetary and operational analysis of the Division of Workers' Compensation. The task force would submit recommendations to the Legislature by January 15, 2001.

D. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill could have an indeterminate fiscal impact on the revenues of the WCATF and the SDTF. See Fiscal Comments.

2. Expenditures:

The bill could have an indeterminate fiscal impact on the expenditures of the WCATF and the SDTF. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill would require the full premium value of large deductible policies, prior to the application of deductible discounts or credits, to be reported to the Division for the WCATF assessment. Therefore, insurers writing large deductible policies would report additional premiums (and accordingly pay higher assessments) to the Division for the WCATF assessment. However, since assessment payments are passed through to the employer in the workers' compensation insurance premiums, insurers would not themselves experience increased expenses.

Also, the bill permits insurers that excluded ceded premiums prior to January 1, 2000, to avoid payment of SDTF assessments on ceded premiums until the Division advises each carrier of the impact of including ceded premiums in the assessment. Presumably, insurers that did not exclude ceded premiums prior to January 1, 2000, would be required to pay

SDTF assessments on ceded premiums. Therefore, the impact of this bill on insurers may depend on whether the insurer excluded ceded premiums from its assessments prior to January 1, 2000. See "Constitutional Issues," section V., A, of the analysis.

D. FISCAL COMMENTS:

Since the bill proposes to clarify existing law relating to "net premiums collected" and "net premiums written" and not change existing law, the bill should have no fiscal impact on the WCATF and SDTF. However, the bill permits insurers that excluded ceded premiums from their SDTF assessments prior to January 1, 2000, to not pay SDTF assessments on ceded premiums until the Division notifies insurers of the impact of including ceded premiums on their assessments. Therefore, some insurers would be permitted to avoid SDTF assessments on their ceded premiums until the Division notifies them. Whether these insurers would be required to repay these underpayments of SDTF assessments after the Division notifies insurers is unclear. See "Other Comments," s. V.,C. of the analysis.

If, despite this bill, the court determines that "net premiums collected" and "net premiums written" do not include premiums ceded to reinsurers, the Division of Workers' Compensation could be responsible for refunding $73 million to the companies currently requesting refunds. The Division of Workers' Compensation could also be responsible for refunding money to all other companies who paid assessments on ceded premiums, but have not yet requested refunds. According to a study conducted by Insurance Services Office, Inc., for the Division of Workers' Compensation, refunds to all other companies could total as much as $400 million. To pay refunds, the expenditures from the WCATF and SDTF would increase dramatically, necessitating increases in the assessment rates and/or significant expense reductions for the WCATF and further delay in the reimbursement of claims in the SDTF.[10]

In addition, there could also be a negative recurring fiscal impact on the WCATF and SDTF in that insurers and self-insurance funds, that were not already deducting ceded premiums, would deduct ceded premiums before reporting to the Division of Workers' Compensation. The result would be a reduced premium base upon which assessments could be levied. If the statutory assessment caps on the WCATF and SDTF assessments are not raised, WCATF and SDTF revenues would drop. Also, some insurers and self-insurance funds could evade paying future assessments altogether by simply ceding all of it premiums to a reinsurer (which in many cases may be an affiliated insurer).

IV. <u>CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION</u>:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

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[10] It is also possible that the Legislature could choose to pay refunds through another source, such as a General Revenue.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that municipalities and counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Clarifying Language

When a bill changes existing law, it is presumed to apply prospectively, unless the Legislature expresses intent that the bill be applied retroactively. Where the Legislature expresses an intent that a bill be applied retroactively, constitutional issues of due process are raised because the bill may affect vested rights, create new obligations, or impose new penalties.[11]

When a bill does not change existing law, but merely clarifies the Legislature's original intention of the existing law, there is no change to apply retroactively and, accordingly, there are no due process concerns.[12]

This bill establishes a statement providing clarification of the Legislature's intent with respect to terms currently used in Chapter 440, F.S. The bill contains no express statement that the bill would apply retroactively, presumably because the Legislature does not intend to change existing law, but merely to clarify its original intent.

Equal Protection

The bill provides that, for carriers that have excluded ceded premiums from their SDTF assessments prior to January 1, 2000, no assessments on ceded premiums shall be paid by those carriers until the Division advises each carrier of the impact that including ceded premiums would have on their assessments. Presumably, carriers that did not exclude ceded premiums from their assessments prior to January 1, 2000, would be required to pay assessments on ceded premiums. This could raise equal protection concerns because similarly situated carriers (each ceding premiums to reinsurers) would be treated differently for purposes of the SDTF assessment.

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[11] See Metropolitan Dade County v. Chase Federal Housing Corporation, 24 Fla. L. Weekly S267 (Fla. 1999).

[12] See e.g., Asphalt Pavers, Inc., v. Department of Revenue, 584 So.2d 55, (Fla. 1st DCA 1991); State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529, 531 (Fla. 1973) ("The language of the amendment . . . was intended to make statute correspond to what had previously been supposed or assumed to be the law"); Williams v. Hartford Accident and Indemnity Company, 382 So.2d 1216, 1220 ("[T]he timing and circumstances of an enactment may indicate it was formal only and served as a legislative clarification or interpretation of existing law, and thus such an enactment may even suggest that the same rights existed before it.").

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The bill prohibits the Division from recovering any past underpayments of SDTF assessments levied against any carrier that excluded ceded premiums from their assessment prior to the point that the division notifies each carrier of the appropriate assessment. This provision could be interpreted two ways. One interpretation is that carriers will be liable for underpayments of SDTF assessments occurring prior to the Division's notification, but the Division must wait until after notifying carriers of the appropriate assessment before it can actually collect the underpayments. Another interpretation is that carriers will not be liable for underpayments of SDTF assessments occurring prior to the Division's notification.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

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