**HOUSE OF REPRESENTATIVES**
**COMMITTEE ON**
**INSURANCE**
**FINAL ANALYSIS**

**BILL #**: CS/SB 2532, 2nd ENG.

**RELATING TO**: Workers' compensation

**SPONSOR(S)**: Banking and Insurance and Senator Thomas

**TIED BILL(S)**:

**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE**:
(1) BANKING AND INSURANCE YEAS 7 NAYS 0
(2)
(3)
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(5)

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I. SUMMARY:

Funding for the Workers' Compensation Administration Trust Fund (WCATF) and the Special Disability Trust Fund (SDTF) 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" and "net premiums written" respectively.

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% on January 1, 2001;
- prohibit the Division from collecting past underpayment of WCATF assessments from certain carriers for assessments levied against those carrier prior to January 1, 2001;
- beginning July 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 SDTF 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;
- 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;
- allow an employer's subsidiaries and affiliates to apply to be self-insured under one umbrella application with the Division; and
- subject to legislative appropriation, authorize funding of up to $750,000 of the fixed expenses of the Workers' Compensation Joint Underwriting Association when the premiums fall below a certain level.

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.

**Securing Workers' Compensation Coverage**

Florida's workers' compensation act requires employers to secure workers' compensation coverage for their employees either by purchasing insurance or by meeting the requirements of self-insurance. Self-insurance can take two basic forms: group self-insurance funds and individual self-insurance. Self-insurance funds are associations of employers that pool their resources to pay workers' compensation claims. Individually self-insured employers are typically very large employers with substantial financial resources. The law requires employers choosing to be individually self-insured to seek approval from the Division. Employers seeking approval from the Division must file an application and post a security deposit.

**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]

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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.

Insurance companies receive a dollar-for-dollar credit against the insurance premium tax equal to the amount of their assessments paid into the WCATF.[5] The insurance premium tax, equal to 1.75% of each insurer's gross premiums, is collected by the Department of Revenue and goes primarily into the General Revenue Fund

**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.

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."[6] By statute, the SDTF assessment cannot exceed 4.52%.[7]

**Refund Requests**

The assessments for the WCATF and SDTF have been based on "net premiums" since 1975.[8] 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.[9]

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.

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[5] Section 624.509(6), F.S.

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

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

[8] 1975 Laws of Florida, ch. 75-209, ss. 24 and 25.

[9] 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.

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.[10] 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.

**Workers' Compensation Joint Underwriting Association**

The Florida Workers' Compensation Joint Underwriting Association (FWCJUA) is the residual market for workers' compensation insurance. The FWCJUA provides insurance coverage to those employers who cannot find coverage in the voluntary workers' compensation insurance market. Employers in the FWCJUA are typically higher risk employers -- i.e., very small employers and employers who have a high incidence of workplace injuries.

The FWCJUA provides workers' compensation insurance for employers in three distinct subplans -- subplans A, B, and C.

- Subplan A is designed to provide coverage for small employers -- those with less than $2,500 in premium. Policies issued under Subplan A are not assessable,[11] but they are subject to a flat surcharge of $475.

- Subplan B is designed to provide coverage to employers who are high risk by the nature of their business and who have a lower than average number of claims (i.e., an experience modification factor of less than 1.00). Policies issued under Subplan B are also not assessable, but they are subject to the $475 surcharge and an additional surcharge equal to 13% of the premium above $2,500.

- All other employers in the FWCJUA fall into subplan C and can be issued assessable policies, which can be funded by increased premiums upon renewal, direct assessments, or both. These policies are also subject to the $475 surcharge and an additional surcharge equal to 99% of the premium above $2,500.

The FWCJUA is an entirely self-funded program. It does not assess workers' compensation insurers for its losses (like, for example, the Florida Residential Property and Casualty Joint Underwriting Association does). All money to pay the FWCJUA's claims and expenses comes from premiums, surcharges, and assessments paid by policyholders.

<u>Premiums Written by the FWCJUA</u>

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

[11] An assessable FWCJUA policy is one in which the policyholder may be required to contribute on a pro-rata basis the money needed to meet any assessment levied by the FWCJUA.

The total premium written by the FWCJUA has declined every year since its inception in 1993. Premiums written by year are as follows:

| CALENDAR YEAR | GROSS WRITTEN PREMIUMS |
|---|---|
| 1993 | $328,159,749 |
| 1994 | $73,305,743 |
| 1995 | $69,102,344 |
| 1996 | $27,748,666 |
| 1997 | $13,862,990 |
| 1998 | $14,182,389[12] |
| 1999 | $6,431,378 |

Premium Breakdown

Out of every premium dollar[13] written by the FWCJUA, a portion goes to paying each of the following: claims (or losses); loss adjustment expenses; variable expenses; and fixed expenses. For 1995, 1997, and 1999, the breakdown was as follows:[14]

| | 1995 | 1997 | 1999 |
|---|---|---|---|
| *Claims* | 37.8% | 58.5% | 62.5% |
| *Loss Adjustment Expenses* - adjusters salaries, attorney's expenses | 7.4% | 8.7% | 3.3% |
| *Variable Expenses* - reinsurance costs, producer's commissions, service provider fees, collection expenses, taxes and assessments, and bad debt write-off | 29.7% | 53.9% | 105% |
| *Fixed Expenses* - rent, utilities, printing costs, postage, personnel, and office equipment | 2.2% | 7.4% | 19.8% |

The fixed expenses of the FWCJUA were $1.17 million in 1998 and $1.23 million in 1999. The largest component of the FWCJUA's fixed expenses was personnel -- i.e., employees' salaries, benefits, incentives, and payroll taxes -- which totalled $634,886 in 1998 and $693,505 in 1999.[15]

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[12] According to the FWCJUA, the premium figure for 1998 includes an additional $5.8 million in premiums that it discovered should have been paid by employers in previous years, but were not due to fraud.

[13] For purposes of this breakdown, premium dollars also include the dollars collected from employers in the form of surcharges and assessments.

[14] If the premium breakdown total is less than 100%, then the FWCJUA will have a surplus. If the premium breakdown total is greater than 100%, then the FWCJUA will have a deficit (which it must eliminate within a reasonable amount of time through increased premiums in subsequent years or through assessments).

[15] Specific information on the FWCJUA's loss adjustment expenses and variable expenses is not included in the Present Situation because the changes proposed in this bill do not relate to these expenses.

**Retaliatory Tax**

Florida's retaliatory tax statute authorizes Florida to impose a tax against foreign-domiciled insurers (i.e., insurers from other states) in the amount by which their state of domicile would tax Florida insurers in excess of Florida's comparable tax.[16] To calculate the retaliatory tax, the Department of Revenue compares the taxes a Florida insurer would pay in another state to the comparable taxes a foreign insurer would pay in Florida. If the taxes are higher in the other state, Florida imposes a retaliatory tax on insurers from the other state in an amount equal to the difference. The purpose of the retaliatory tax is to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes.[17]

The retaliatory tax computation does not take into account "special purpose obligations or assessments imposed in connection with particular kinds of insurance other than property insurance."[18] The WCATF assessment is considered a special purpose obligation or assessment and, therefore, is not included in the retaliatory tax calculation.[19] But, since 1997, the Department of Revenue has, by rule, permitted WCATF deductions taken against Florida's insurance premium tax to be "added back" to the insurer's premium taxes for purposes of computing the retaliatory tax.[20] As a result, an insurer's retaliatory tax is computed as if the insurer paid the Florida premium tax without deduction for WCATF assessments. This has the effect of decreasing an insurer's retaliatory tax liability because it increases the amount of taxes shown to be paid in Florida.

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.

**Workers' Compensation Administration Trust Fund (WCATF)**

*Reduction of Statutory Cap on WCATF Assessment Rate*

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[16] Section 624.5091, F.S.

[17] See Gallagher v. Motors Ins. Co., 605 So.2d 62, 71 (Fla.1992), cert. dismissed, 506 U.S. 1074, 113 S.Ct. 1036, 122 L.Ed.2d 179 (1993).

[18] Section 624.5091(3), F.S.

[19] Rule 12B-8.016(3)(b)1.a., F.A.C.; Department of Revenue v. Zurich Insurance Company, 667 So.2d 365 (Fla. 1st DCA 1995) ("Under the plain language of the statute, [the WCATF assessment] is a special purpose obligation or assessment.").

[20] Rule 12B-8.016(4), F.A.C.

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%, beginning January 1, 2001 (in the interim period of July 1, 2000, and December 31, 2000, the assessment cap would be 4%). As a result, the current WCATF assessment rate of 3.48% would have to be reduced at least to 2.75% on January 1, 2001, to comply with the new cap.

*Large Deductible Policies*

Beginning July 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 $400 million in calendar year 2001.

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.

*Collection of Past WCATF Underpayments Relating to Ceded Premiums*

For carriers that excluded ceded reinsurance premiums from their WCATF assessments prior to January 1, 2000, the Division would be prohibited from collecting any past underpayments of WCATF assessments related to ceded reinsurance premiums prior to January 1, 2001. See "Other Comments," section V., C. of the analysis.

The Division would be authorized to allow a carrier to remit underpayments of assessments for assessments levied after January 1, 2001.

*Effect of WCATF Assessment Payments on Retaliatory Tax Liability*

Insurers claiming a deduction against their insurance premium tax for WCATF assessments paid would not be required to pay any additional retaliatory tax levied pursuant to s. 627.5091, F.S. In effect, the Department of Revenue rule, permitting insurers to add the amount of WCATF deductions back to their insurance premium tax for purposes of computing the retaliatory tax, would be codified.

*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.

*Funding the Fixed Expenses of the Workers' Compensation Joint Underwriting Association*

Instead of being funded entirely by the employers covered by the FWCJUA, up to $750,000 of the fixed expenses of the FWCJUA would be spread among all employers in Florida if the FWCJUA's gross written premiums drop below $30 million, subject to appropriation by the Legislature. The FWCJUA's gross written premiums for 1999 was $6.4 million.

By July 1st of each year, the FWCJUA would notify the Division of Workers' Compensation of its gross written premiums for the previous calendar year. If the premiums are below $30 million (and if the Legislature appropriates the money), the Division could charge up to $750,000 of the FWCJUA's fixed expenses against the WCATF.

The FWCJUA would also be allowed to eliminate deficits through the use of policyholder surplus attributable to any year.

**Special Disability Trust Fund (SDTF)**

*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 SDTF 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 on or before January 1, 2000, 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.

**Authorization for Employer to Self-Insure on Behalf of Subsidiaries and Affiliates**

Employers would be permitted to seek authorization from the Division to self-insure, not only individually, but on behalf of its subsidiaries and affiliated companies with employees in Florida.

**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:

| Recurring | FY 2000-01 | FY 2001-02 | FY 2000-03 |
|---|---|---|---|
| Casualty Insurance Risk Management Trust Fund - *assessments paid by Division of Risk Mgt.* | 0 | ($2.2 million) | ($2.2 million) |

| Nonrecurring | FY 2000-01 |
|---|---|
| WCATF - *Task Force on W.C. Administration* | ($250,000) |

The bill could have an additional 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:

To the extent a local government has a large deductible policy for workers' compensation, the local government could experience higher WCATF assessment costs on July 1, 2001, when the bill would require the full premium value of large deductible policies to be included in the WCATF assessment. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

**Workers' Compensation Administration Trust Fund (WCATF)**

*Reduction of Statutory Cap on WCATF Assessment*

The bill reduces the statutory cap on the WCATF assessment rate from 4% to 2.75% on January 1, 2001. As a result, self-insured employers (through decreased assessments) and the vast majority of insured employers (through decreased rates charged by their insurers) would experience lower costs.

*Large Deductible Policies*
After July 1, 2001, insurers will be required to report to the Divison the full premium value of large deductible policies, prior to the application of deductible discounts or credits, 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 after July 1, 2001. However, since assessment payments are passed through to the employer in the workers' compensation insurance premiums, employers rather than insurers could experience increased expenses.

*Workers' Compensation Joint Underwriting Association (WCJUA)*

The bill also provides for the payment of up to $750,000 of the WCJUA's expenses from the WCATF if the WCJUA's premiums fall below a certain level (and if appropriated by the Legislature). As the premium written and the number of policyholders insured by the WCJUA decreases, the proportionate share of the fixed expenses paid by WCJUA policyholders increases. It is possible that the premium level and number of policyholders could drop to a point where it is impossible, from a practical standpoint, to collect the necessary expenses to operate the WCJUA from the existing policyholders. Therefore, this bill's outside source of funding for fixed expenses could ensure that the WCJUA can continue to operate even when the premium level is low.

**Special Disability Trust Fund (SDTF)**

The bill does not require insurers that excluded ceded premiums prior to January 1, 2000, to pay SDTF assessments on ceded premiums until the Division advises each carrier of the impact of including ceded premiums in the assessment. Insurers that did not exclude ceded premiums prior to January 1, 2000, would be required to continue to pay SDTF assessments on ceded premiums. Therefore, the fiscal impact of this bill on insurers will vary depending 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:

**WCATF Assessment Rate Reduction and Base Expansion**

The bill reduces the statutory cap on the WCATF assessment rate from 4% to 2.75% on January 1, 2001. Since the current WCATF assessment rate is 3.48%, the bill will result in a reduction in the WCATF assessment rate of at least 0.73 percentage points. The bill also expands the assessment base beginning July 1, 2001, to include the full premium value of large deductible policies. According to a report commissioned by the Division, the inclusion of large deductible policies could result in an annual increase of approximately $800 million in premium base.

According to the Division of Risk Management, which provides workers' compensation coverage for state employees through a large deductible policy, the inclusion of the full premium value of large deductible policies will result in a recurring negative fiscal impact on the Casualty Insurance Risk Management Trust Fund of approximately $2.2 million beginning July 1, 2001. The Division estimated the fiscal impact based on the assumptions that the WCATF assessment rate would be 2.75% and that their net premiums would be $81.3 million (their premiums from FY 1996-97, the most recent year they were self-insured).

**Change from Fiscal to Calendar Year Assessment**

The bill changes the WCATF assessment from a fiscal year calculation to a calendar year calculation, with a reduction in the statutory cap to 2.75% as of January 1, 2001. The Division will be required to reduce the WCATF assessment rate as of January 1, 2001, even though the increased premium base due to the inclusion of large deductible policies will not take effect until July 1, 2001 -- halfway through the Division's first calendar year assessment. If the increase in the amount of net premiums collected in the second half of CY 2001 is not large enough to generate the same revenue at the reduced assessment rate, the Division could experience a shortfall in revenue. Assuming the WCATF assessment rate for CY 2001 is 2.75%, any shortfall in revenue would require the Division to cut expenses.

**Clarification of "Net Premiums"**

Since the bill proposes to clarify existing law relating to "net premiums collected" and "net premiums written" and not change existing law, the provisions of the bill relating to "net premiums" 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. Also, the bill prohibits the Division from collecting past underpayments of WCATF assessments from certain carriers who deduct ceded premiums prior to January 1, 2001. Therefore, some insurers would be permitted to avoid SDTF and WCATF assessments on their ceded premiums until January 1, 2001, (for WCATF assessments) or until the Division notifies them (for SDTF assessments). Whether insurers would be required to repay 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.[21]

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).

**Payment of Fixed Expenses of the WCJUA**

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

Subject to appropriation by the Legislature, the bill authorizes up to $750,000 of the WCJUA's fixed expenses to be paid from the WCATF if the WCJUA's premium level in any given year are below $30 million. The amount of fixed expenses that would actually be paid from the WCATF is indeterminate for the following reasons. First, it is not certain that the WCJUA's premium level will be below $30 million. Thus, it is not certain that any of the FWCJUA's fixed expenses would be paid from the WCATF. Second, it is not known exactly what the FWCJUA's fixed expenses will be in the future.

Assuming, however, that the premium level is below $30 million, the bill could result in an increase of up to $750,000 in the expenses paid from the WCATF. Based on the formula used to derive the current assessment rate, an increase of $750,000 in expenses would result in an increase in the assessment rate of approximately 0.025 percentage points. In other words, the current assessment rate of 3.48% would increase to 3.505%.[22]

**Retaliatory Tax Provision**

Because the provision in the bill relating to the retaliatory tax is a codification of a Department of Revenue rule which has been in effect since 1997, this provision would not have any fiscal impact.

## IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

### 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.

### 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

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[22] According to the Division of Workers' Compensation's rate order of November 15, 1999, the current assessment rate of 3.48% was derived by dividing $96,638,358 (expenses) by $2.778 billion (premium base). By increasing the expenses $750,000, the calculation changes as follows: $97,388,358 (expenses) divided by $2.778 (premium base) equals an assessment rate of 3.505%.

are raised because the bill may affect vested rights, create new obligations, or impose new penalties.[23]

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.[24]

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 SDTF 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. The bill also provides that for carriers that excluded ceded premiums from their WCATF assessments prior to January 1, 2000, the Division shall not recover any past underpayments of assessments relating to ceded premiums prior to January 1, 2001. Presumably, carriers that did not exclude ceded premiums from their assessments prior to January 1, 2000, would be required to continue to pay assessments on ceded premiums for the SDTF and could be required to pay past underpayments of WCATF assessments relating to 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 and the recovery of past underpayments of WCATF assessments.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

**Recovery of Past Underpayment of WCATF and SDTF Assessments**

The bill prohibits the Division from recovering from certain carriers past underpayments of WCATF assessments related to ceded premiums prior to January 1, 2001. Similarly, the bill prohibits the Division from recovering any past underpayments of SDTF assessments levied against certain carriers that excluded ceded premiums from their assessment prior to the point that the division notifies each carrier of the appropriate assessment.

These provisions could be interpreted two ways. One interpretation is that carriers will be liable for underpayments of WCATF assessments occurring prior to January 1, 2001, and

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

[24] 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.").

underpayments of SDTF assessments occurring prior to the Division's notification, but the Division must wait until after January 1, 2001, (for WCATF) and after notification (for SDTF) before actually collecting past underpayments. Another interpretation is that carriers will not be liable for underpayments of WCATF assessments occurring prior to January 1, 2001, or underpayments of SDTF assessments occurring prior to the Division's notification.

**Payment of Fixed Expenses of WCJUA**

The provisions of this bill which provide for the payment of up to $750,000 of the WCJUA's fixed expenses are similar to the provisions of HB 1187 filed in the 2000 session by Representative Goode. The provisions contained in this bill differ from HB 1187 in that this bill:

- provides for the payment of up to $750,000 of the WCJUA's fixed expenses, instead of $1.5 million, and

- conditions the payment of the WCJUA's fixed expenses from the WCATF on the Legislature appropriating the funding.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

| Prepared by: | Staff Director: |
|---|---|
| Robert E. Wolfe, Jr. | Stephen Hogge |

**FINAL ANALYSIS PREPARED BY THE COMMITTEE ON INSURANCE**:

| Prepared by: | Staff Director: |
|---|---|
| Robert E. Wolfe, Jr. | Stephen Hogge |