

Orlando Sentinel

Who's taking a risk here?

By Bill Newton
Special to the Sentinel

July 13, 2003

Have you heard enough of the medical-malpractice issue? After three special sessions on the issue, most Floridians -- including legislators -- are really tired of talking about it.

Is there anything we don't already know about the "med-mal" crisis? I like my doctor and I like my lawyer. What are we going to do?

No matter how much we don't want to hear about it, consumers still have to be concerned about the outcome of the battle in Tallahassee over medical-malpractice insurance. It's a matter of losing some of our rights if one side wins or losing some of our access to health care if the other side is victorious. Or not, depending. If nothing happens, everything could be OK. Or not.

Having followed this battle for longer than an NFL season, most Floridians know that the real players are the insurance companies and the trial lawyers. The insurance companies have almost unlimited resources, which is handy, and the doctors are helping them in a temporary alliance.

Doctors, after all, have seen their incomes decline and their workloads increase because of insurance companies and normally hate them passionately. But they both hate the trial lawyers, and so does Gov. Jeb Bush.

The trial attorneys feel threatened by this alliance, and they are fighting for their lives. The insurance companies probably didn't quite anticipate the capacity, ferocity and determination of the lawyers. The lawyers believe they are fighting for their very way of life. And now they are fighting on ground they know very well -- the Legislature. They don't have the resources the insurance companies do, but they do love a fight.

So here we are. Impasse. Stalemate. Trench warfare. Daily casualties on both sides.

That isn't good for consumers, including doctors, who are dealing with a dysfunctional insurance market. Premiums are through the roof, and the coverage is less and less, if the insurer will pay at all. Many consumers have learned, the hard way, that they can only file a claim against their insurance in the most catastrophic circumstances, no matter what their deductible.

Insurance companies get premiums from consumers and, if possible, never give anything back. We're not in good hands and they're not good neighbors. They just want our money. Insurance is a business that takes advantage of consumers' (including doctors') need to avoid risk. The insurer's work is to spread risk and make a profit.

This is the basic agreement between the insurance industry and the consumer: Spread the consumers' risk, make a profit, but pay their claims. It's fair enough. Insurance companies are

required to carry out this bargain in good faith. Consumers are protected by government regulations that require insurance companies to actually cover risks and insurers to actually pay claims. In return, insurers get consumers' money to invest until they make a claim. They do make a little money from the excess of premiums over claims, but that is not the game. Investment is.

Here's the catch: The stock market returns an average of 10 percent over time. Bonds return somewhat less but with lower risk. The insurance company can usually do just fine. But what if the insurer isn't a good investor or the markets just don't perform? The insurer still wants a return for stockholders, owners, or executives so it still has to make money. How? Raise premiums.

So, no matter how the investments do, the insurance company can't lose money. Yes, that's right. The insurance industry is a business that can't lose money. This is not good for consumers since now they are taking their risk of their insurer's investments, which is the opposite of what's supposed to be happening, and they don't even get to help pick the stocks.

Here's another catch: Insurers are exempt from the Sherman Antitrust laws put in place to stop the robber barons of the last century. Why? Good question. But try getting that changed.

Anyway, insurers legally exchange information on their rates, risks, losses and strategic plans. Consumers and regulators don't have access to this information, so we're at a loss. Insurers take advantage of this by basing their rates on models projecting future claims. We call this the "black box." Numbers go in and rates come out, but we can't see inside. So, premium rates are based on information that they share but no one else can see.

As a consequence of these problems, the insurance market is dysfunctional. When investment returns are high, insurers compete for premiums by lowering prices, improving customer service, and offering better policies. When investment returns are low, insurers raise rates, reduce claims, and use their anti-trust exemption to fix prices. This is the insurance cycle.

Where we are now is called a hard market. Insurers are raising rates through the roof on all lines of insurance -- auto, homeowner's, health, worker's comp, and medical malpractice. When rates go through the roof, consumers scream and legislators listen. When the noise gets really loud, it's a crisis and legislators threaten to act.

But what to do?

Naturally, the insurance companies don't spend time telling legislators or the public about the insurance cycle. Instead, they focus on "runaway juries" and "lawsuit lotteries." If they succeed in making the debate about those issues, it could lead to limits on juries and lawsuits. That's a method of reducing risk through legislation. It would work, in the same way that legalizing crimes would reduce the crime rate. We'd still have the malpractice, but victims wouldn't be compensated. Floridians have heard the reasons for this several times.

To add insult to injury, if insurance companies aren't liable for claims, injured consumers pass along those losses to taxpayers because they can't pay their health-care costs and aren't productive taxpayers. Most affected are seniors and low-income people who wouldn't get much compensation for lost income.

Reining in the insurance companies isn't that complicated but it is difficult. They are a powerful,

wealthy interest group whose industry is essential yet hard to explain. They're tough, established players who just showed everyone they can bring the pain.

The solutions, in our view, include ending the anti-trust exemption, rolling back rates, establishing an independent consumer advocate, opening the "black box" of ratemaking, prior rate review, and rigorous rate regulation. Our state Senate looked at many of these measures; some passed both the Insurance Committee and the Health Care Committee. Maybe next year we'll get farther.

But what about the lawyers? Aren't they just as greedy as insurance companies? Don't they exploit the injured and lead innocent juries astray? Well, lawyers are people just like the rest of us, and they have their faults and their virtues. Some are greedy, and some are unethical. But like everyone else, most attorneys are good people who work hard.

There are large verdicts, but not many. Elected judges reduce the judgments on appeal. And those jury decisions are made by people like you. Caps would take the power out of your hands and give it to legislators on the advice of your insurance company. Does that sound like a good idea?

What about the doctors? The misery they endure, the sacrifice, the long hours and the dropping reimbursements. And on top of everything else, stalked by lawyers! Doctors and hospitals are shouldering the burden of indigent care and a foundering health-care system made worse by consumers that demand the impossible. Write another prescription! And those insurance companies and their paperwork and forms and denials and contracts and paperwork. Its enough to make a doc want to leave their practice.

Sadly, the war prize, the \$250,000 cap, over which so much blood runs in the streets of Tallahassee, won't make insurance rates go down. It will decrease the number of times some doctors are sued, and that suits them just fine. Never mind that the malpractice will still be there.

Why not work to reduce the malpractice? Increasing the number of nurses will do more to improve patient care than almost anything. And let's work on our health care system so we handle indigent care.

In a plot twist that amused cynical legislative observers and confounded those attempting to understand this debate, the insurance companies announced they didn't really want caps, although they wouldn't mind caps. Turns out, what they really, really want is "bad-faith" reform. Give us that and we'll mop up the blood and lower our rates, they say.

Remember the basic bargain represented by insurance, that we pay, and then they pay? In good faith? That's what bad-faith "reform" is all about. If the insurance company should have settled your case and you end up getting cleaned out, that's bad faith, and you can sue them. "Reform" means they're off the hook. Of course, they should lower rates if they get that. But I'm afraid they'll be dreaming that dream for awhile, because the docs are too smart for that. Some docs actually have made some money and have some assets they could lose if their insurance company walks. So, they will say, no deal.

Now we have a kind of gridlock between the parties. The insurance companies want bad faith, but the docs don't. Bush wants caps, but everyone else left that idea behind months ago. The

lawyers are dug in, they're mad, they taste blood, they might have a nuclear-weapons program. Consumers are getting slammed by higher insurance rates across the board. There's an election coming.

Unfortunately, while the policy issues are interesting, politicians want re-election more than anything. Everybody wants to look good. Only one player in Tallahassee won't be running for a state office next time out. One player has so much political capital he can lose a little and still be fine. Hint: His brother is president and he can't run for governor again.

The senators, representatives, lawyers and insurance companies are all going to be in Tallahassee for a long time to come. But Bush won't be around town much longer.

So there is a way out, sort of. Bush is backing down a little while continuing to bludgeon the Senate. The senators surely feel the pressure, but many do not fear Bush as much as he wants them to. Senators appear to believe that there is a higher power than Bush. They don't think their constituents require obedience to Bush as a prerequisite to re-election. The senators believe that character, integrity and principle are more important than party loyalty. Bravo!

Some kind of compromise is probably coming and is already here, but it will only deal with medical malpractice and will leave consumers to deal with skyrocketing insurance rates.

The docs, insurers and lawyers will all retreat wounded but alive to fight again another day. Consumers once again may need to take matters into their own hands. A citizen initiative for a rate rollback has been filed. It is possible the angry citizens would find a way to get it passed. They have passed other such measures recently. However, rates will come down even if nothing is done because of the insurance cycle and that may ease the crisis.

There are always casualties in war, and this one is no exception. Everyone is damaged and little was accomplished. There could be unintended consequences. More people in Florida know more about insurance than at any time in the last 25 years. We've seen things like the anti-trust exemption written about and talked about more than anyone can recall. Knowledge like that is dangerous -- to insurance companies.

Wouldn't that be ironic? Insurance companies start a war for what they want most and end up losing that which they hold most dear.

Bill Newton is the executive director of the Florida Consumer Action Network. He wrote this for the Sentinel.

Copyright © 2003, [Orlando Sentinel](#)