Florida Insurance Report

Keeping You Informed About Florida
Volume XIII, Issue II

Citizens Emergency Assessment Ends by July 1

By: Travis Miller

The Office of Insurance Regulation has issued an order to insurers advising that the Citizens Property Insurance Corporation emergency assessment relating to a 2005 plan year deficit will end effective July 1, 2015. The OIR's order follows action by the Citizens Property Insurance Corporation Board of Governors relating to the defeasance of bonds issued in 2007 as a result of hurricane losses in 2005.

The emergency assessment initially was 1.4% and was authorized by an OIR order dated January 11, 2007.

Effective July 1, 2011, the assessment was reduced to 1.0%. Assessments such as these remain in effect as long as the bonds they support are outstanding. With the defeasance of the underlying bonds in this case, the assessment is no longer necessary. The OIR's order instructs all insurers collecting the assessment to terminate it by July 1.

Key Issues Remain Unsolved as Session Reaches Half -Way Mark

By: Travis Miller

Over the years, we've come to understand that most of the issues of interest to the insurance industry are resolved in the final days, and sometimes even the final hours, of each legislative session. This year appears to be no different as the bills about which we receive the most questions are still being heard in committees. The difficulty in writing about bills during the middle of a legislative session is that they are likely to change before the newsletter reaches our readers. Of course, we track some of the primary bills on the legislative page of our website at www.radeylaw.com, and our post-session wrap-up newsletter covers the final tally on bills that pass and those that don't.

One of the bills taking the most time in committee meetings relates to the Assignment of Benefits (AOB). The bills (HB 669 and SB 1064) would restrict the ability of third party vendors to take assignments of policyholders'

Continued at Top of Page 2

Inside this Issue

- Changes at OIR - Page 2
- Mold Assessment and Remediation Rules Draw Opposition - Page 4
- Radey Teams with Policy Athletic League to Create New Event - Page 4
- STOLI Statute at Issue in New Eleventh Circuit Case - Page 6
- Attempts to Subpoena Commissioner McCarty Quashed by 1st DCA - Page 7

Key Issues - Continued from Page 1

benefits under their policies, thereby gaining the policyholders' one-way right of attorneys' fees against the insurers in ensuing disputes. The issue is being hotly debated between groups representing the insurance industry and businesses on the one hand, and trial lawyers, water extraction companies and other remediation companies on the other.

Other bills pending in the session (SB 1006 and HB 1087) could lead to changes in the depopulation process at Citizens Property Insurance Corporation. Among the proposals being considered, Citizens' policyholders would receive at most two assumption notices in a 12-month period. Currently, a policyholder in Citizens might receive a request from an assuming insurer almost monthly, and the policyholder must opt out each time if he or she does not want to be assumed. Other ideas include restoring an assumed policyholder's eligibility for Citizens if the assuming insurer increases its rates by more than the 10% glide path amount that applies in Citizens, and possibly allowing policyholders to choose among multiple insurers interested in assuming them (currently Citizens uses an allocation process to assign policies among competing insurers).

Another bill (HB 273 and SB 202) would make a number of relatively smaller but desirable changes to the insurance code. For example, the bills would clarify that personal lines insurers may deliver policies electronically at the election of policyholders. The bills also would create certain exceptions to the requirement that a Notice of Change in Policy Terms must accompany the notice of renewal premium.

In the health insurance arena, HB 731 continues to move through the committee process. This bill would "modernize" Florida's health insurance regulations and contains recommendations of the Florida Health Insurance Advisory Board.

Although half of the legislative session has passed according to the calendar, most of the real action will occur over the final month. Stay tuned for our post-session wrap-up to see how the dust settles.

Changes at OIR

By: Karen Asher-Cohen

These days, you need a scorecard to keep track of everyone moving around at OIR at the senior management levels. Rich Koon has resigned as Deputy Commissioner for Property & Casualty Insurance and is going into the private sector. The Commissioner has promoted David Altmaier to that position, from his previous job as Director of P&C Financial Oversight. Also, Robert Ridenour was named as Director to replace David Altmaier.

On the L&H side, Jack McDermott has resigned as Director of Life & Health Insurance Rate and Product Review. He too is taking a job in the private sector. Commissioner McCarty has named Eric Johnson to take Jack's place. Currently, Eric is the chief actuary in that bureau.

And over in Legal, Belinda Miller, the current General Counsel, is moving to the first floor to become Kevin's Chief of Staff. Regarding the move, Belinda said: "I'm happy to continue to work with such a great team in a slightly different capacity." The current chief of staff, Rebecca Matthews, is leaving OIR to become the executive director of Florida Healthy Kids Corporation. Anoush Brangaccio, the current chief of the litigation section, has been named to replace Belinda as General Counsel.

Whew. Got all that?

Florida First DCA Confirms Insured Must First Exhaust Administrative Remedies when Challenging an Insurer's Premium Discounts

By: Karen Asher-Cohen and Laura Dennis

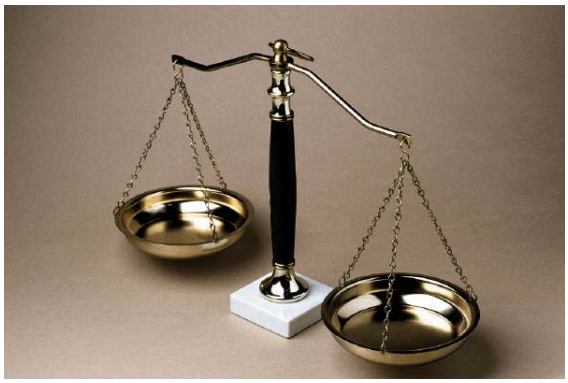
On March 10, 2015, the Florida First District Court of Appeal issued an opinion in *Asseff v. Citizens Property Insurance,* No. 1D14-1822 (Fla. 1st DCA Mar. 10, 2015), holding that an insured must first exhaust the administrative remedies available under section 627.371, Florida Statutes, before bringing a claim in circuit court that the insured was wrongfully denied a premium discount or credit.

This case stems from a declaratory class action brought by insureds against their insurer, Citizens Property Insurance ("Citizens"). The insureds alleged that they submitted uniform mitigation verification inspection forms to Citizens, and that the mitigation forms provided that they were valid up to five years. The insureds alleged, however, that Citizens began to re-inspect the insureds' property without cause, which led to a widespread removal of loss mitigation benefits in the form of premium discounts and credits. Thus, the insureds sought a declaration that the mitigation form and its terms were incorporated into Citizens' insurance policies and that the trial court provided the appropriate forum for issuing declaratory relief.

Citizens moved to dismiss the insureds' complaint on the basis that they failed to exhaust their administrative remedies under section 627.371, Florida Statutes. Section 627.371 provides that any person aggrieved by a rate charged may request review by the insurer of the manner in which the rate has been applied. However, the insureds claimed that they were not challenging Citizens' rates or the discount calculation. Relying on the Florida Fourth District Court of Appeal case of *Serchay v. State Farm Fla. Ins. Co.,* 25 So. 3d 652 (Fla. 4th DCA 2010), the trial court held that the actual injury the insureds complained of was the reduction of wind mitigation credits and the corresponding increase in premium. Specifically, the court in *Serchay* held that a request for a premium adjustment necessarily must arise from a challenge to the rate charged and, therefore, that rates charged and premium discounts are inextricably linked. Thus, the trial court found that the insureds failed to exhaust their administrative remedies and dismissed the complaint. The insureds appealed.

The Florida First District Court of Appeal affirmed the trial court's dismissal. Particularly, the appellate court found that the trial court's reliance on *Serchay* was not misplaced. The appellate court further confirmed that an insured who claims to have been "wrongly deprived of a premium discount is essentially claiming to have been aggrieved by the rate charged by the insurer." Ultimately, the court held that because the insureds alleged a loss of premium discounts and credits, they have been "aggrieved by any rate charged" pursuant to section 627.371, Florida Statutes, and must first exhaust the administrative remedies available to them thereunder before bringing suit in circuit court.

The authors were also recently successful in having a class action complaint dismissed against an insurer, on the same defense of failure to exhaust administrative remedies.



Mold Assessment and Remediation Rules Draw Opposition

By: Travis Miller

The Department of Business and Professional Regulation recently held a rule hearing relating to two rules– 61-31.701 "Minimum Standards of Practice for Mold Assessors" and 61-31.702 "Minimum Standards of Practice for Mold Remediators." Several representatives of the insurance industry participated in the hearing, as did representatives of the mold assessment industry, mold remediators, home builders and others. Although these interested parties bring different perspectives to the rules, the most common theme through the hearing is that many affected parties believe the standards are not authorized by the underlying statutes and the rules should be withdrawn and reworked.

For its part, the insurance industry offered both specific comments directed to proposed rule provisions and more general objections to the approach reflected in the rules. One question we frequently receive in the insurance industry is why property insurance rates have tended to be flat or sometimes even go up when Florida has not experienced hurricanes in many years and reinsurance costs have gone down. The answer sometimes can be attributed to insurers' experiences with other perils, such as water damage. Insurance industry representatives pointed out that DBPR's proposed rules will only increase the cost of water damage claims as they mandate mold procedures that might not be necessary in particular cases. In addition, many policies contain limitations on mold coverage, meaning that the more extensive assessment and remediation standards imposed by the rules are likely to cause policyholders' direct out-of-pocket costs to increase.

The Department of Business and Professional Regulation will evaluate the comments received at the hearing in addition to those many parties have provided in writing.

Radey Teams with Police Athletic League to Create New Event

Radey has joined forces with the Tallahassee Police Athletic League and Gulf Winds Track Club to create a new 5K and 1-mile road race in Tallahassee serving as the launching point for a new youth running program. Firm shareholder David Yon directs the Tallahassee Turkey Trot each year, which is by far Tallahassee's largest running event. David also directs another race in the summer and volunteers at many more. Already having such a full plate, David wasn't necessarily looking to take on another race. However, when he heard about the Police Athletic League's goal, David saw an immediate connection with Gulf Winds Track Club's goal of establishing a youth running program on Tallahassee's south side. David approached the firm about participating, and the next thing we knew, plans for the Tallahassee Police Athletic League "T-PAL" 5K and 1 mile were underway.

The immediate appeal of creating this event comes from its blend of two important topics confronting many communities today. First, the local Police Athletic Leagues and events like the T-PAL 5K create opportunities for positive interactions between law enforcement and the communities. Strained relationships between law enforcement and communities are prevalent in today's headlines, so creating outlets for positive interaction becomes increasingly important. At the same time, running and athletic activities such as those fostered by Gulf Winds Track Club and the Police Athletic League create opportunities to connect with youth in our community.

The events will be held May 30 at Tallahassee's Jack McLean Park.

House and Senate Proposals Address Assignment of Benefits

By: Travis Miller

Similar proposals under consideration in the House and Senate would restrict the so-called assignments of benefits (AOB) under policies. The bills are designed to address a growing concern with assignments increasing the cost of non-catastrophe claims, which ultimately creates upward pressure on rates for all policyholders. The issue arises when a policyholder retains a vendor such as a water extraction company or roofing company to perform services and the vendor's contract provides for an assignment of the policyholder's rights against the insurer. If this assignment includes the policyholder's one-way right of attorneys' fees against the insurer, the insurer finds itself in a difficult position to defend against a claim it believes is inflated. The insurer finds itself opposed to a party with which it never contracted but that has the leverage of the policyholder's one-way attorneys' fee right against it.

The House and Senate proposals would specify that an insurer may prohibit post-loss assignments of benefits or policy rights except in three limited situations:

- A person providing services or materials to mitigate or repair damage directly arising from a covered loss could take an assignment of up to $3000, with the scope of the assignment limited solely to being designated as a co-payee for the payment of the reasonable value of the services. The right to enforce payment obligations under the policy would remain with the policyholder.
- A public adjuster could take an assignment only for the amount of compensation due to the PA. The assignment could not include any other benefits under the policy and would not alter any obligation of the insurer to issue a payment jointly to a policyholder and mortgage holder.
- An attorney representing the policyholder could take an assignment and receive funds, subject to disbursement for repairs at the direction of the policyholder.

The House version of the bill also contains a provision specifying that an insurance interest in the property does not survive assignment.

Debate about the bills has consumed major portions of recent committee meetings where they've been heard. Consideration of these bills likely will remain a focal point of the session as we enter its final weeks.

Paper or E-mail?

Do you still enjoy reading a book by turning the page or have you embraced the electronic age of readers? We offer the Florida Insurance Report in both formats. If you would like to receive your issue electronically just send an e-mail to Kendria Ellis at kellis@radeylaw.com and you will receive your next issue in your inbox. If not, continue to flip the pages on your paper version.

STOLI Statute at Issue in New Eleventh Circuit Case

By: Karen Asher-Cohen

The Eleventh Circuit Court of Appeals has asked the Florida Supreme Court to determine which of two Florida statutes controls in two cases involving alleged stranger-originated life insurance ("STOLI") policies: section 627.404, which requires a person who buys a life insurance policy to have an insurable interest in the life of the insured at the inception of the policy; or section 627.455, which requires all insurance policies to include a clause that the policy is incontestable after it has been in force for two years.

The Eleventh Circuit certified the following two questions to the Supreme Court:

> Can a party challenge an insurance policy as being void ab initio for lack of the insurable interest required by Fla. Stat. s. 627.404 if that challenge is made after expiration of the two-year contestability period mandated by Fla. Stat. s. 627.455?
>
> Assuming that a party can do so, does Fla. Stat. s. 627.404 require that an individual with the required insurable interest also procure the insurance policy in good faith?

The two district courts in the underlying cases reached different conclusions on the same question, thus prompting this consolidated appeal and the certified questions.

The two cases involve three STOLI policies. Wells Fargo, N.A. is the present owner of a STOLI policy on the life of Mrs. Berger, issued by Pruco Life Insurance Company. In the second case, Pruco is appealing a different district court's order on two STOLI policies on the life of Mrs. Guild, currently owned by U.S. Bank, N.A.

Pruco is seeking to invalidate the policies, four and seven years after their issuance, based on the alleged absence of an insurable interest at the time of the policies' issuance. However, the current owners of the policies argued that Pruco's tardiness should defeat its efforts. The "Berger court" ruled for Pruco, holding that "the STOLI policy at issue was void ab initio because it violated s. 627.404, the insured-interest statute. A contract that is void ab initio is a contract that never existed." Therefore, the two-year incontestability provision never took effect because that provision only applies to an "in force" policy and was thus not a bar to Pruco's claim to invalidate the insurance policies.

However, the "Guild court" found that Pruco's late insurable-interest claim was barred by that same incontestability provision, comparing s. 627.455 to a statute of limitations that applies regardless of the basis of any challenge to the underlying policy.

Attempts to Subpoena Commissioner McCarty Quashed by 1st DCA

By: Karen Asher-Cohen

The 1st DCA granted OIR's petition for a writ of certiorari challenging a circuit court discovery order compelling Commissioner McCarty, the agency head of the OIR, to appear for a deposition in a receivership action. The underlying cause of action was filed by DFS as Receiver for Southern Family Insurance Company, Atlantic Preferred Insurance Company, and Florida Preferred Property Insurance Company, against Deloitte & Touche, LLP, alleging that Deloitte had negligently prepared inaccurate financial statements for the above-named companies that were filed with OIR in 2005, and had Deloitte prepared accurate financial statements, OIR would have recommended that DFS put the companies into receivership in 2005, rather than a year later, in 2006. Further, DFS alleged that the one-year delay harmed the companies and consumers.

Continued at top of next page

Subpoena - Continued

In 2013 and 2014, Deloitte tried several times to subpoena Commissioner McCarty for deposition and DFS attempted to add his name to their witness list. OIR was successful in quashing those attempts. However, DFS later filed a motion in limine to prevent Deloitte from mentioning during trial that McCarty would not be testifying. The circuit court ruled that DFS could amend its witness list to add McCarty's name and Deloitte could depose him.

The appellate court held that it is "well-established in Florida that 'the agency head should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources.'" This doctrine is often referred to as the "apex" doctrine. The Court found that in this case, "the information they seek from the Insurance Commissioner is neither necessary to DFS's cause of action nor unavailable from other sources."

Additionally, the Court also held that "compelling the questioning of agency heads regarding what discretionary decisions they might have made while carrying out their statutory duties if they had been provided certain information raises serious separation of powers issues." In other words, an agency head cannot be compelled to opine about a possible agency action based on hypothetical facts. "Such intrusion into the executive branch must be weighed against the ability of other persons to provide opinions concerning meeting the more likely than not standard."

Insurers Need Only Provide Simple Notice that they will Limit Reimbursements for Medical Services Through the Use of Fee Schedules

By: Laura Dennis

The First District Court of Appeal in *Allstate Fire and Casualty Insurance v. Stand-Up MRI of Tallahassee, P.A.,* No. 1D14-1213 (Fla. 1st DCA Mar. 18, 2015), recently addressed whether the notice used in Allstate's insurance policies relating to the reimbursement of Personal Injury Protection (PIP) benefits complied with the Florida Supreme Court's decision in *Geico Gen. Ins. Co. v. Virtual Imaging Servs. Inc.,* 141 So. 3d 147 (Fla. 2013) (*Virtual Imaging*). Florida law requires that automobile insurers provide PIP coverage for eighty percent of all reasonable expenses for medically necessary services. Additionally, the Florida Motor Vehicle No-Fault Law permits reimbursement for medical services to be limited through the use of fee schedules identified in section 627.736(5)(a)2, Florida Statutes. However, the Florida Supreme Court in *Virtual Imaging* recently held that insurers must first give sufficient notice to insureds within the policy if they are to limit reimbursements through the use of fee schedules.

Stand-Up MRI, as the assignee of several insureds, claimed that Allstate failed to provide adequate notice in its policies to inform insureds that it uses Medicare fee schedules to limit benefit reimbursements. The county court agreed with Stand-Up MRI and certified a question of great public importance to the First District Court of Appeal. The appellate court, however, reversed the county court's decision, finding that the plain statement in Allstate's policies was not ambiguous, but was instead consistent with *Virtual Imaging's* simple notice requirement. Specifically, the First District Court of Appeal determined the notice was legally sufficient because it provided that reimbursements shall be subject to the limitations in section 627.736, Florida Statutes, including all fee schedules, and because section 627.736 refers to Medicare fee schedule-based limitations. The appellate court concluded that the Court in *Virtual Imaging* required "no other magic words" from Allstate's policy. Therefore, the policies provided adequate notice to the insureds.

Experience.Service.Success.

The Radey Law Firm believes that service to clients must be efficient and dedicated. Our location in Tallahassee, Florida, provides us the opportunity to be at the heart of the regulatory, legislative, and judicial arenas. The Florida Insurance Report is provided to our clients and friends in a condensed summary format and should not be relied upon as a complete report nor be considered legal advice or opinion.

Our Insurance Team

Karen Asher-Cohen
Shareholder
karen@radeylaw.com

Donna Blanton
Shareholder
dblanton@radeylaw.com

Bert Combs
Shareholder
bcombs@radeylaw.com

Tom Crabb
Shareholder
tcrabb@radeylaw.com

Laura Dennis
Associate
ldennis@radeylaw.com

Travis Miller
Shareholder
tmiller@radeylaw.com

Harry Thomas
Of Counsel
hthomas@radeylaw.com

David Yon
Shareholder
david@radeylaw.com

Florida's Capital Law Firm for Regulated Industries

301 South Bronough Street, Suite 200, Tallahassee, FL 32301
850-425-6654/850-425-6694 (Fax)
www.radeylaw.com