Florida Insurance Report

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RADEY
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Florida's Capital Law Firm for Regulated Industries
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Radey Welcomes Drew Parker

Radey is pleased to announce that Drew Parker is of counsel to the firm effective January 23. Drew most recently served as General Counsel to the Florida Department of Financial Services and CFO Jeff Atwater. As DFS' General Counsel, Drew supervised a team of 55 attorneys and 59 members of support staff.

Drew began his legal career in 2003 as Assistant General Counsel at DFS. He later spent four years in private practice, concentrating on administrative law and civil litigation. Drew then became General Counsel to the Florida Department of Children and Families, where he oversaw 38 attorneys working in 16 offices around the state. The opportunity then arose for Drew to serve as General Counsel to DFS and CFO Atwater.

"I enjoyed my time in public service, where I worked to make a difference," said Parker. "I have received a warm welcome from the Radey team, and I look forward to working with them to achieve positive outcomes for our clients."

Firm president Travis Miller said, "We are glad Drew decided to join our team. We strive to be the top law firm in the capital for regulated industries. Drew's experience leading the legal departments of two of Florida's largest agencies will enhance our ability to serve our clients."

Drew obtained his undergraduate and law degrees from Florida State University. He also holds a Master of Divinity with Biblical Languages degree from Southwestern Baptist Theological Seminary and a Master of Arts in Theology from the University of Notre Dame.

Drew will assist the firm in the areas of administrative and governmental law, government contracting and procurement, and civil and administrative litigation.

Inside This Issue

2016 Brought Its Share of Novel Issues

By: Travis Miller

As 2017 begins, we can look back and see the impact last year's events had on the Florida insurance market. In the property and casualty sector, we saw two hurricanes affect Florida after a decade without hurricanes. Fortunately, Hurricane Hermine remained a relatively small storm, and Hurricane Matthew stayed just offshore enough to avoid the type of damage we feared could occur. Still, the storms affected many families in our state, and some residents continue to rebuild. The hurricanes served as a reminder that our peninsula can experience a hurricane in any year, and even multiple hurricanes within a year.

The property and casualty sector also continues to see losses from the "assignment of benefits" issue and from water damage claims, particularly in certain areas of south Florida. The frequency and severity of these losses are enough to create upward pressure on rates, and ultimately for the private market to rethink its writings in some areas of the state. Citizens Property Insurance Corporation has pointed to substantial data showing that not only are rates higher than they otherwise would be, but the trend of reduced exposures in Citizens in recent years is beginning to reverse itself and its policy count will continue to grow.

This year also has been a tumultuous one for workers' compensation insurance. Beginning with reforms made in 2003, workers' compensation rates in Florida dropped sharply over the following decade. However, two Florida Supreme Court decisions this year found that restrictions on benefits and attorneys' fees went too far. Invalidating those portions of the reforms led to a proposed rate increase of more than 19% filed by NCCI. The filing ultimately was approved at approximately 14%. That decision has been challenged with claims that the rate development process did not conform to Florida's open government laws.

Finally, no year would be complete without uncertainties regarding the Affordable Care Act. Premiums continue to increase, and some private insurers have been rethinking their participation in the exchanges. Of course, the results of the presidential election and its impact on the ACA's future add to the uncertainty and speculation.

As 2016 winds down, several of these issues will continue to have high profiles in 2017. With the legislative session just around the corner, legislative committees already have started the process of evaluating some of these items.

DFS Names Chasity O'Steen As General Counsel

By: Travis Miller

Upon Drew Parker's return to private practice, the Florida Department of Financial Services has named Chasity O'Steen its General Counsel. Ms. O'Steen most recently served as Deputy General Counsel during Mr. Parker's tenure as General Counsel. She previously served as Deputy General Counsel at the Florida Department of Children and Families when Mr. Parker was General Counsel of DCF. Ms. O'Steen has substantial experience in administrative law, government procurements and contracting, agency rulemaking, and constitutional issues.

Surplus Lines Export Criteria Being Considered

By: David Yon

Nearly identical bills have been filed in the House and the Senate in an effort to reduce the hurdles to selling certain coverages in the surplus lines market. Section 626.916, Florida Statutes, currently provides that:

No insurance coverage shall be eligible for export unless it meets all of the following conditions:

(a) The full amount of insurance required must not be procurable, after a diligent effort has been made by the producing agent to do so, from among the insurers authorized to transact and actually writing that kind and class of insurance in this state, and the amount of insurance exported shall be only the excess over the amount so procurable from authorized insurers. Surplus lines agents must verify that a diligent effort has been made by requiring a properly documented statement of diligent effort from the retail or producing agent. However, to be in compliance with the diligent effort requirement, the surplus lines agent's reliance must be reasonable under the particular circumstances surrounding the export of that particular risk. Reasonableness shall be assessed by taking into account factors which include, but are not limited to, a regularly conducted program of verification of the information provided by the retail or producing agent. Declinations must be documented on a risk-by-risk basis. If it is not possible to obtain the full amount of insurance required by layering the risk, it is permissible to export the full amount.

(b) The premium rate at which the coverage is exported shall not be lower than that rate applicable, if any, in actual and current use by a majority of the authorized insurers for the same coverage on a similar risk.

(c) The policy or contract form under which the insurance is exported shall not be more favorable to the insured as to the coverage or rate than under similar contracts on file and in actual current use in this state by the majority of authorized insurers actually writing similar coverages on similar risks; except that a coverage may be exported under a unique form of policy designed for use with respect to a particular subject of insurance if a copy of such form is filed with the office by the surplus lines agent desiring to use the same and is subject to the disapproval of the office within 10 days of filing such form exclusive of Saturdays, Sundays, and legal holidays if it finds that the use of such special form is not reasonably necessary for the principal purposes of the coverage or that its use would be contrary to the purposes of this Surplus Lines Law with respect to the reasonable protection of authorized insurers from unwarranted competition by unauthorized insurers.

(d) Except as to extended coverage in connection with fire insurance policies and except as to windstorm insurance, the policy or contract under which the insurance is exported shall not provide for deductible amounts, in determining the existence or extent of the insurer's liability, other than those available under similar policies or contracts in actual and current use by one or more authorized insurers.

The proposed legislation in SB 208 and HB 191 would make paragraphs (a) – (d) above inapplicable to commercial lines residential coverage as defined in s. 627.4025. There is already an exemption in place for classes of insurance subject to s. 627.062(3)(d)1. That statute provides:

(d)1. The following categories or kinds of insurance and types of commercial lines risks are not subject to paragraph (2)(a) or paragraph (2)(f):

a. Excess or umbrella.

b. Surety and fidelity.

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New Year Brings Lower Coverage Limits in Citizens

By: Travis Miller

The maximum personal residential coverage limits available from Citizens Property Insurance Corporation decreased as of January 1, 2017, in accordance with a law passed in 2013 providing for a gradual step-down in the limits. Effective January 1, the following risks are no longer eligible as new business or renewals:

- A structure that has a dwelling replacement cost (Coverage A) of $700,000 or more;
- A single condominium unit with a combined dwelling and contents replacement cost (Coverage A and C) of $700,000 or more; or
- A tenant contents policy with a Coverage C limit of $700,000 or more.

The Florida Office of Insurance Regulation previously determined there is not a reasonable degree of competition in Miami-Dade and Monroe counties. Therefore, these counties are exempt from the decreased coverage limits, and maximum limits of $1 million continue to apply in these counties.

Surplus Lines - continued from Page 3

(c) Boiler and machinery and leakage and fire extinguishing equipment.

(d) Errors and omissions.

(e) Directors and officers, employment practices, fiduciary liability, and management liability.

(f) Intellectual property and patent infringement liability.

(g) Advertising injury and Internet liability insurance.

(h) Property risks rated under a highly protected risks rating plan.

(i) General liability.

(j) Nonresidential property, except for collateral protection insurance as defined in s. 624.6085.

(k) Nonresidential multiperil.

(l) Excess property.

(m) Burglary and theft.

(n) Travel insurance, if issued as a master group policy with a situs in another state where each certificateholder pays less than $30 in premium for each covered trip and where the insurer has written less than $1 million in annual written premiums in the travel insurance product in this state during the most recent calendar year.

(o) Medical malpractice for a facility that is not a hospital licensed under chapter 395, a nursing home licensed under part II of chapter 400, or an assisted living facility licensed under part I of chapter 429.

(p) Medical malpractice for a health care practitioner who is not a dentist licensed under chapter 466, a physician licensed under chapter 458, an osteopathic physician licensed under chapter 459, a chiropractic physician licensed under chapter 460, a podiatric physician licensed under chapter 461, a pharmacist licensed under chapter 465, or a pharmacy technician registered under chapter 465.

(q) Any other commercial lines categories or kinds of insurance or types of commercial lines risks that the office determines should not be subject to paragraph (2)(a) or paragraph (2)(f) because of the existence of a competitive market for such insurance or similarity of such insurance to other categories or kinds of insurance not subject to paragraph (2)(a) or paragraph (2)(f), or to improve the general operational efficiency of the office.

The bill was filed in the Senate by Republican Kathleen Passidomo and in the House by Republication Halsey Beshears. The Senate version has been referred to the following committees: Banking and Insurance; Commerce and Tourism; and, finally, Rules. The House version has not been referred to any committees.

OIR Agrees with Long Term Care Insurers on 10-Year Rate Guarantees

By: Travis Miller

The Florida Office of Insurance Regulation reached agreements with Metropolitan Life Insurance Company ("MetLife") and two subsidiaries of the Unum Group, Unum Life Insurance Company of America and Provident Life and Accident Insurance Company ("Unum"), on their recent rate filings. Under the agreements, MetLife and Unum are providing policyholders guaranteed certainty about the cost of their long-term care insurance for the next 10 years. Rate changes approved by the Office will be phased-in by the insurance companies incrementally over an initial three-year period. During the following seven-year period, rates will be guaranteed, with no additional rate changes for affected policyholders. Policyholders also will be given a range of benefit options to choose from so they may potentially mitigate their rate increases. These options will include allowing a policyholder to accept a reduction or removal of the inflation factor, a reduction in the daily benefit provided for in the policy, or an increased elimination period. It also includes a non-forfeiture provision that allows policyholders who do not wish to make future premium payments to accept a paid-up policy with maximum benefits equal to the premiums they have already paid in the policy.

"The Office will continue to encourage other long term care insurers to approach rate needs in a similar fashion for the benefit of their policyholders, many of whom are on fixed incomes. This plan effectively balances the company's need for rate increases against the impact that those increases have on policyholders who have invested in these products over a period of many years," said Florida Insurance Commissioner David Altmaier.

Legislation Seeks New Requirements for TNCs

By: David Yon

In the never ending battle for ride sharing business, bills have been filed in both the House (HB 0221) and the Senate (SB 340) to provide for certain insurance and other regulatory requirements. A "Transportation Network Company or "TNC" means an entity operating in this state pursuant to this section using a digital network to connect a rider to a TNC driver, who provides prearranged rides. A TNC is not deemed to own, control, operate, direct, or manage the TNC vehicles or TNC drivers that connect to its digital network, except where agreed to by written contract, and is not a taxicab association or for-hire vehicle owner. A digital network as used in this means any online-enabled technology application service, website, or system offered or used by a transportation network company which enables the prearrangement of rides with transportation network company drivers.

Among other things, TNC Drivers must maintain primary automobile insurance that provides levels of coverage depending on services being provided and the company must make certain disclosures.

Decisions

By: Karen Asher-Cohen and Jordann Allen*

The Eleventh Circuit Court of Appeal in *Direct Gen. Ins. Co., v. Houston Cas. Co.*, No. 15-14887, 2016 WL 5437062 (11th Cir. Sept., 29, 2016), recently upheld a decision from the Southern District of Florida, that in determining whether claims are considered to be related claims, implication of different legal theories will not distinguish otherwise related claims, if a distinction based on legal theory is not provided in the policy. This decision leaves Direct General Insurance Company with over 70,000 claims found to not fall within the policy period asserted, and are therefore without coverage. Direct argued that the 70,000 claims were related to the Advantage Open MRI class action (the "Advantage Action") that was filed against Direct in 2008, and the MRI Associates of St. Pete class action (the "St. Pete Action") filed in 2012, such that the 70,000 claims should be found to fall within the 2009-2009 policy period.

When the Florida Personal Injury Protection statute, section 627.736, Florida Statutes, was reenacted in 2008, the statute allowed for insurers to have the option to calculate benefits for medical providers based on an alternative fee schedule method (the "Fee Schedule Method"). The Advantage Action alleged that Direct had unlawfully employed the fee schedule method, while the St. Pete action alleged that because the Fee Schedule Method was used, instead of the alternative, reasonable expenses method, the MRI providers were underpaid. Regardless of the fact that the St. Pete Action was brought over four years after the Advantage Action, Houston Casualty Company and National Specialty Insurance Company (the "Excess Carriers") found the St. Pete Action to fall within the 2008-2009 policy period, based on a reservation of rights, and acceptance that the two class action suits were related claims, which would classify the two as a single claim for purposes of determining whether the St. Pete Action would fall within the policy period.

Direct additionally sought coverage under the 2008-2009 policy period for the additional 70,000 claims, mentioned above, in January, 2014. Direct asserted that the claims were related to the Advantage Action and the St. Pete Action and should, therefore, fall within the 2008-2009 policy period. However, during the time in which discovery was conducted, Direct produced 34 demands for personal injury protection ("Pre-Policy Demands") that were received prior to the start of the 2008-2009 policy period. The District Court took the Pre-Policy Demands into consideration when determining whether the 70,000 claims fell within the policy period. Direct distinguished the Pre-Policy Demands by stating that the 34 Pre-policy Demands were not based upon a wrongful act, regarding the method that Direct employed to calculate benefits.

The essence of the appeal centered upon whether the Pre-Policy Demands and the Advantage Action, St. Pete Action, and the 70,000 additional claims were Related Claims, pursuant to the definition provided in the Related Claims provision, that the claims be "based on or directly or indirectly arising out of or resulting from the same or related...series of facts, circumstances, situations, transactions, or events." As Direct is a Tennessee insurance company, the court stated that Tennessee law applied, and that "[u]nder Tennessee law...insurance policy is a question of law." *Guiliano v. Cleo, Inc.*, 995 S.W. 2d 88, 95 (Tenn. 1999). The argument put forth by the Excess Carriers was that the Pre-Policy Demands were related claims, and, therefore, all the claims would not fall within the policy period. Direct's argument was such that the Pre-Policy Demands should not be considered related claims, based on the differences in the underlying legal theories implicated in the different claims.

The Eleventh Circuit upheld the district court's grant of summary judgment to the Excess Carriers, in finding that the Pre-Policy Demands were considered related claims, thereby identifying that all claims for which Direct sought coverage fell outside of the policy period. The court restated the reasoning of the District Court in opining that the policy did not include in the definition of Related Claims a distinction based on the legal theories presented.

** Ms. Allen is a Law Clerk and not a member of the Florida Bar.*

OIR Issues 2016 Annual Workers' Compensation Report

By: David Yon

Each year, OIR is required to submit an annual report to the President of the Senate and the Speaker of the House of Representatives before January 15 of each year. The report must contain an analysis of the availability and affordability of workers' compensation coverage and whether the current market structure, conduct, and performance are conducive to competition, based upon economic analysis and tests.

As mandated, the analysis presented in the January, 2017 report finds the following:

1. Based on a comparative analysis across a variety of economic measures, the workers' compensation market in Florida is competitive.

    a. The workers' compensation market in Florida is served by a large number of independent insurers and none of the insurers have sufficient market share to exercise any meaningful control over the price of workers' compensation insurance.

    b. The Herfindahl-Hirschman Index (HHI) - a measure of market concentration - indicates the market is not overly concentrated.

    c. Based on the record of new entrants and voluntary withdrawals with no market disruptions, there are no significant barriers for the entry and exit of insurers into the Florida workers' compensation market which signals that the Florida workers' compensation market is well capitalized and competitive. Additionally, there were no new insolvencies in 2015 that impacted the Florida Workers' Compensation Insurance Guaranty Association.

2. Of the six most populous states, Florida is one of only two where a private market insurer is the largest insurer rather than a state-created residual market entity. This degree of private activity indicates coverage should be generally available in the voluntary market. The residual market is small, suggesting the voluntary market is absorbing the vast majority of demand.

3. Reforms to Section 440.34, Florida Statutes, which affected attorney's fee provisions, were a significant factor in the decline of workers' compensation insurance rates and continue to impact the industry. It is also the case, however, that most of the improvements resulting from these legislative changes may have been realized as there were four rate increases from 2010 to 2014 after seven years of decreases following the 2003 reforms. Although the dramatic decreases in rates during the seven years from 2003 to 2010 were directly attributable to action taken by the Florida Legislature in 2003, the reforms have subsequently been challenged in the courts. Notably on April 28, 2016, the Florida Supreme Court found the statutory mandatory attorney fee schedule in Section 440.34, Florida Statutes, unconstitutional as a violation of due process under both the Florida and United States Constitutions. This ruling and other court rulings have the potential to significantly impact the workers' compensation system in Florida. Some of the cost impact of the rulings has already been reflected in the December 1, 2016, rate increase which caused a dramatic shift in the comparison of pure loss costs for the 10 largest workers' compensation class codes for Florida compared to the other states.

4. Medical cost drivers, particularly in the areas of drugs, hospital inpatient, and ambulatory surgical centers (ASC) are noticeably higher in Florida than the countrywide average. Legislative reform affecting the reimbursement of these services could produce substantial savings for Florida employers.

5. Affordability within the Florida Workers' Compensation Joint Underwriting Association, Inc. (FWCJUA), which is the residual market, has been an ongoing issue. Senate Bill 50- A enacted in 2003 and House Bill 1251 enacted in 2004 addressed affordability in the voluntary and residual market, respectively, and both markets have remained stable. It is worth noting, however, that over the last several years both policy count and premium within the FWCJUA increased significantly, though it still remains a very small portion of the overall workers' compensation market.

6. The Office is in compliance with the requirements of Section 627.096, Florida Statutes, (relating to the Office's obligation to maintain a rating bureau for the purpose of studying workers' compensation data).

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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.

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