Florida Insurance Report

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What's In Store for the 2011 Legislative Session?

By: David Yon

The 2011 legislature began with opening session on March 8, 2011 in Tallahassee and the challenges are daunting. Like most other states, Florida faces a large deficit ($3.4 billion) that must be addressed before the close of session. With new taxes seemingly not on the table, that means spending cuts to much of the state's programs. Senate President Mike Haridopolos emphasized "Reform and Restraint" as his watchwords – with Medicaid, education, and government pensions being the top areas for attention. Dean Cannon, Speaker of the House, laid out a similar agenda, but also stated he wanted to see the Florida Supreme Court expanded from 7 judges to 9 and divided into criminal and civil divisions.

The 2011 session also appears to offer more opportunities for insurance reform, with a strong emphasis on property and casualty legislation, than any session in recent memory. This issue of the Florida Insurance Report identifies many of the most important bills. You will find sections devoted to property, health, and auto.

Property and Casualty Insurance

Ominbus Property Bill (CS/SB 408 and HB 803)

The Senate Banking and Insurance Committee has already passed **CS/SB 408** by a vote of 7-3 after vigorous debate and spirited public testimony. The next stop (March 11, 2011) is the Budget Subcommittee on General Appropriations. The companion bill in the House (HB 803) has been referred to the Insurance and Banking Subcommittee. SB 408 began with last year's major property bill, SB 2044, which passed, but was vetoed by the Governor. The 2011 version includes items intended to encourage insurers to write that were removed last year in the hope of avoiding a veto.

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Commissioner McCarty's Top 5 Issues

By: Travis Miller

In recent presentations, Commissioner McCarty has identified the top issues affecting the property and casualty insurance market in 2011. The Commissioner's Top 5 issues include the following:

1. Attracting Capital-- Commissioner McCarty points out that as Florida's economy recovers, the demand for insurance products will increase. This will necessitate additional deployment of capital to Florida. This translates to a need to develop new ways to invite additional capital to Florida.

2. Changing Makeup of the Market-- McCarty notes that the contraction of large national insurers affects Florida and other states. This leads to increased reliance on domestic insurers to fill the gap, in turn placing increased emphasis

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LOOK

Inside this issue:

People on the Move

By: Karen Asher-Cohen

We are now in that post-election, legislative session, time of the year, when new agency positions are created, old ones get filled, and people are just generally moved around. The following run-down may help you keep score on the Office of Insurance Regulation (OIR) and the Department of Financial Services (DFS):

- **Belinda Miller**, who has most recently served as the Deputy Commissioner for Property & Casualty at the OIR, is now the Acting General Counsel. As you may recall, Steve Parton recently retired from that position.

- **Robin Westcott** was appointed by Chief Financial Officer Jeff Atwater as the Executive Director of the newly formed Medicaid and Public Assistance Fraud Strike Force. The Strike Force was created during the 2010 legislative session. CFO Atwater serves as Chair and Attorney General Pam Bondi serves as Vice Chair of the 11-member Strike Force. "Robin has a proven track record of providing exceptional leadership and vision to new initiatives," said CFO Jeff Atwater. "The first meeting of the Strike Force set the groundwork for creating a streamlined, fraud-resistant Medicaid and public assistance system that ensures a high quality of care and service at the lowest price for taxpayers, and Robin will play an integral role in reaching that goal." Immediately prior to this new challenge, Robin was the Acting Deputy Commissioner for Property & Casualty at the OIR, having previously served as the Director of the Property & Casualty Financial Oversight Bureau.

- **Jim Pafford** is now the Director of Market Conduct Investigations at the OIR. Jim will fill the vacancy left by Jim Bennett's resignation from the OIR last fall. In response to Jim's new appointment at the OIR, Belinda Miller commented: "I have known Jim Pafford since our Receivership days and I know he will do a great job as the new Director of Market Conduct Investigations." Jim most recently worked in the Property & Casualty Financial Oversight Section, and for many years before that, in the Division of Rehabilitation and Liquidation at DFS.

- **Tom Kirwin** is now the Deputy CFO over the three law enforcement areas at DFS: the Division of Insurance Fraud, the Bureau of Fire and Arson Investigations, and the Office of Fiscal Integrity. Tom most recently was an Assistant United States Attorney for the Northern District of Florida, and before that, an Assistant State Attorney. "Tom's long service as a prosecutor in military, state and federal courts makes him uniquely qualified to marshal a team of dedicated law enforcement officers and more aggressively prepare and present trial-ready cases for prosecution," said CFO Atwater. "I am honored that he agreed to join in the fight against fraud that is costing Florida families millions of dollars each year."

- **Greg Thomas** is the new Director of the Division of Agent & Agency Services at DFS. Greg previously served as the Assistant Division Director in the Consumer Services Division at DFS.

Federal Healthcare Ruling Leaves Implementation in Florida Uncertain

By: Travis Miller

U.S. District Court Judge Roger Vinson has issued a response to the Department of Justice's most recent motion in the federal healthcare lawsuit. Judge Vinson previously ruled that the federal healthcare law is unconstitutional, but the Department of Justice filed a motion seeking to ensure implementation will continue while it appeals. Vinson criticized the Department of Justice for waiting two weeks to file the motion but ultimately granted a stay as long as the Department of Justice filed its appeal within seven days and requested expedited review. The Department of Justice subsequently filed its appeal.

Despite Judge Vinson's ruling on the motion, the Florida Office of Insurance Regulation does not have immediate plans to implement the federal health care law. In an e-mail to the *Florida Tribune*, OIR Communications Director Jack McDermott said "irrespective of the decision" to stay the Jan. 31 ruling that the health care law is unconstitutional "the office does not currently have authority within the insurance code" to implement the reforms that have taken effect to date, including medical loss ratio requirements. McDermott notes that neither the Governor nor the legislature have expressed an intent to pass enabling legislation that the OIR believes would be necessary for it to implement the Affordable Care Act.

Florida officials were contemplating a request for a waiver of the healthcare law's medical loss ratio requirement but did not proceed with the request in light of Judge Vinson's initial ruling that the law is unconstitutional. The OIR recently indicated it is still in the process of deciding how to proceed on that issue in light of the evolving legal treatment of the federal law.

McCarty's Top 5 - *Cont. from Page 1*

on the regulator's solvency regulation. This also results in reliance on international reinsurance markets, or the state must develop access to alternative methods of risk-sharing such as may be available through financial markets.

3. Role of the Residual Market-- The role of Citizens Property Insurance Corporation is a source of renewed debate. At over 1.2 million policies, Citizens is the largest property insurer in Florida. Due to rate freezes implemented by prior legislatures, Citizens' policies are priced below the private market, which is leading to market distortions.

4. Identifying the Source of Costs-- Commissioner McCarty continues to see a need to address factors such as 1) the current replacement cost methodology; 2) a reported increase in fraud; 3) premium reductions from mitigation discounts; and 4) an increase in reported sinkhole claims. Due in large part to these factors, insurers have been filing for rate increases over the last year and are expected to continue filing for increases until these sources of losses are addressed.

5. Sinkholes-- The biggest issue of 2011 might be how the state deals with its sinkhole insurance problem. McCarty notes that although sinkholes are one of many cost-drivers, they are important enough to merit their own item in his Top 5 list. With nearly $2 billion in damage over the past five years, McCarty refers to sinkholes as a "silent catastrophe." He notes that given sinkholes are unpredictable geological events, we must ask whether they are really an insurable risk. If they are not, this could lead to a multitude of other challenges as both banks and consumers need to have some protections from this risk.

OIR Issues Informational Memorandum to Life and Health Insurers

By: Karen Asher-Cohen

The OIR has issued the first new informational memorandum of 2011, #OIR-11-01M, to all life and health insurers and HMO's. The purpose of the memorandum is to remind insurers of the requirements of section 627.6487, Florida Statutes, and Rule 69O-154.112, Florida Administrative Code, to guarantee the availability of individual health insurance coverage to eligible individuals without pre-existing conditions. The memorandum outlines the criteria for eligibility:

- Has 18 or more months of creditable coverage as defined in Section 627.6561(5) and (6), Florida Statutes;
- Whose most recent coverage was under a group health plan, governmental plan, or church plan or health insurance coverage offered in connection with any such plan; and
- Whose most recent coverage was under an individual plan, which coverage is terminated by the insurer or HMO due to insolvency or discontinuing the offering of all individual coverage in the State of Florida.

OIR Issues 2011 Freedom to Travel Report to Legislature

By: Karen Asher-Cohen

The OIR has issued its "2011 Report on Life Insurance Limitations Based on Foreign Travel Experiences" to the Florida Legislature. Pursuant to section 626.9541(1)(dd)6., Florida Statutes, the OIR is required to report annually to the Legislature on the implementation of this unfair trade practice, as established in 2006. The law limits the ability of insurers to deny applications for or increase premiums on life insurance based solely on an individual's past or future plans for lawful travel. However, coverage denials for travel to Afghanistan or Iran are permissible under a variance granted by the OIR. Commissioner McCarty remarked about the Report: "The report documents the insurance industry's compliance with this important law that preserves Floridians' rights to travel outside the United States."

OIR's Final Order Increases Recommended Penalty for Freedom to Travel Violations

By: Bert Combs

In 2009, the Office of Insurance Regulation (OIR) issued a 35-count Order against Liberty National Life Insurance Company (LNL) for violations of Florida's unfair insurance trade practice statutes and the Freedom to Travel Act. LNL disputed the factual allegations and the legal conclusions in the order and requested a formal administrative hearing. The case went to the Division of Administrative Hearings where an Administrative Law Judge (ALJ) recommended that all but four of the counts should be dismissed. The four remaining counts alleged violations of Florida's Freedom to Travel Act. Each of the four counts involved situations where LNL issued insurance policies that limited the amount, extent, or kind of life insurance coverage available to the applicants solely because of past or future travel plans. These underwriting decisions were clear violations of the Freedom to Travel Act. The ALJ found that evidence showed all of these violations were minor and were not willful. Because the violations were minor and non-willful, the ALJ recommended an administrative fine of $1,000 per violation for a total of $4,000.

Last month, OIR issued a Final Order stating that the violations of the Freedom to Travel Act should not be considered minor nor should the violations be down-played. Rather, these violations were clear situations where LNL failed to comply with Florida law. Because OIR still found the violations to be non-willful, it imposed the maximum $5,000 fine per violation. However, the OIR also noted that violations of the Freedom to Travel Act require fines to be tripled. Accordingly, OIR imposed an administrative fine of $15,000 per violation for a total of $60,000.

Appellate Update

By: Tom Crabb

Ban On All Public Adjuster Solicitations Within 48 Hours After A Storm Declared Unconstitutional

Frederick W. Kortum, Jr. v. Alex Sink, Case No. 1D10-2459, --- So. 3d --- (Fla. 1st DCA 2010).

On December 29, 2010, the First District Court of Appeal struck down the law prohibiting public adjusters from soliciting insureds or claimants within 48 hours after a storm. In 2007, the Legislature amended the Insurance Code (s. 626.854(6)) to provide that a public adjuster may not "initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim..." Kortum, a public adjuster, claimed that the law violated his right of free speech. Kortum argued that the first 48 hours after a storm are "critical" because the insured may make decisions that diminish recovery under the policy by failing to preserve evidence or find damaged property and by overspending on restoration efforts. The trial court concluded that the language of the statute was ambiguous as to whether it prohibited all solicitation for the first 48 hours (as Kortum contended) or only face-to-face or telephonic solicitation (as the Department of Financial Services contended). As a result of this lack of clarity, the trial court concluded the Department's interpretation of the Code should be followed. By reading the statute as permitting some types of solicitation during those first 48 hours, the trial court was able to conclude that the statute accomplished the legislative purpose of providing a citizen with some "breathing room" before making any decisions and was thus permissible. The First District disagreed. It first held that the statute clearly prohibited all solicitation during the first 48 hours. The Court then held that the complete ban for 48 was more extensive than necessary to serve the asserted purpose of protecting citizens from overreaching by public adjusters: "The Department has not demonstrated that prohibiting property owners from receiving any information from public adjusters for a period of 48 hours is justified by the possibility that some public adjuster may unduly pressure traumatized victims or otherwise engage in unethical or unprofessional behavior." The law therefore impermissibly infringed on the free speech rights of public adjusters and was thus unconstitutional.

Auto Policy Provision Requiring Insured To Sue The Owner Of Uninsured Vehicle Held Void As Against Public Policy

Saris v. State Farm Mutual Automobile Insurance Company, Case No. 4D09-886 (Fla. 4th DCA 2010).

An uninsured motorist coverage policy provision required the insured to sue the owner or driver of the uninsured vehicle. The only exception to this condition was if the owner or driver of the uninsured vehicle was either unknown or had been released from liability. In a recent case, an insured subject to this provision did not sue the owner or driver of the uninsured vehicle because the statute of limitations against such person had expired. Therefore the insured did not comply with the clause. During the ensuing coverage dispute, the insurer argued to the trial court that there was no uninsured motorist coverage because of the insured's failure to sue the owner or driver of the uninsured vehicle. The trial court agreed and entered judgment for the insurer. In a December 1, 2010 decision, the Fourth District Court of Appeal reversed the trial court and held that the policy provision requiring the insured to sue the owner or driver of the uninsured vehicle in order to collect uninsured motorist coverage was void for being contrary to public policy. The Fourth District concluded that the policy provision was contrary to the public policy behind the uninsured motorist statute (627.727(1)) because the statute imposes no such burden on the insured to file suit. The purpose of such coverage, the court held, is to protect the injured motorist rather than benefit the insurer or the uninsured motorist. "UM coverage contemplates neither no less nor no more than a simple contractual action against the insurer."

What's In Store? - *Cont. from Page 1*

A major emphasis in this year's bill is revising the process for insuring sinkhole losses and paying claims. The bill would continue to require residential insurers to provide catastrophic ground cover collapse insurance, but the decision whether to offer any additional sinkhole coverage would be optional for the insurer. Catastrophic ground cover insurance is defined as damage caused by the abrupt collapse of the ground leaving a visible depression and structural damage to the house sufficient to cause the house to be condemned. The bill attempts to more clearly define sinkhole coverage and limit disputes (revising the neutral evaluation process and the presumptions) regarding what is a covered loss in an effort to bring some of the cost drivers under control. The bill also requires a policyholder to provide notice to the insurer of a new, supplemental, or reopened claim for sinkhole loss within 2 years after the policyholder knew or should have known about the sinkhole loss.

Some of the other proposed changes in the property bill would: increase the minimum surplus requirements for property insurers; impose limits on public adjuster conduct, compensation and advertising; provide a three-year limit for reporting hurricane claims; modify the rating law; modify the law clarifying that Citizens policyholders must pay assessment surcharges when a policy is cancelled and making it easier for a private company to assume Citizens' policies; allow insurers to change coverages on renewal by providing a notice of change instead of cancellation; permit insurers to hold back payments for amounts due for property damage under a replacement cost policy above actual cash value until insured produces a contract for repair or replacement; permit insurers to limit initial payment for loss to personal property to the greater of actual cash value or 50 percent of the replacement cost value until the insured produces a receipt for the actual replacement cost; and require payment or denial of initial, reopened or supplemental property claims within 90 days of receiving notice of the claim and within 15 days after there are no longer factors beyond the control of the insurer that reasonably prevent payment. The Banking and Insurance Committee meeting resulted in an amendment that removed the statutory requirement that the boundaries for the high risk territory be moved if the PML for Citizens exceeds specified levels.

Commercial Deregulation (CS/SB 178 and CS/HB 99)

The commercial deregulation bills (rate filings are made for informational purposes only) were approved as committee substitutes in both the Senate Banking and Insurance Committee and the House Insurance and Banking Subcommittee (CS/SB 178 and CS/HB 99). The House bill was approved unanimously by the Government Operations Appropriations Committee.

These bills expand on last year's amendments to section 627.062, Florida Statutes, which substantially reduced the rate review of certain designated commercial categories or lines of business. Insurers were required only to notify the OIR by an informational filing within 30 days of making a rate change for any of these types of business. No approval was necessary to implement the rates, although OIR was able to review the rate after the fact. These bills expand the exempted types of coverages to include general liability, nonresidential property, nonresidential multi-peril, and excess property, and clarify the information that must be provided in any filing made under the reduced requirements. The bills also revise the reporting and recordkeeping requirements for exempt insurers and rating organizations for the rate changes and it deletes a provision that permits the OIR to require insurers to provide information regarding rates at the insurer's expense.

Fair Claims Practices Act

Senator John Thrasher has filed SB 1592 which is designed to clarify the rules regarding bad faith judgments. The bill revises the grounds for bringing an action based on the insurer's failure to accept an offer to settle within policy limits. It provides an insurer with an affirmative defense if a third-party claimant or the insured fails to cooperate with the insurer. Insurers would not be liable for bad-faith failure to settle until they had been presented with a legitimate written offer to settle and allowed an appropriate time designated in the statutes to consider it. The bill revises and limits the damages that are recoverable from an uninsured motorist carrier in a civil action, etc. There is an identical bill in the House, HB 1187.

Citizens Property Insurance Corporation

Major changes are being proposed to reduce the risk exposure of Citizens Property Insurance Corporation and to reduce its impact on the private property insurance market.

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What's In Store? - Cont.

Senate Bill 1714 seeks to tighten eligibility requirements. The bill requires that any risk offered a policy from an admitted insurer at an approved rate is not eligible for coverage from Citizens after January 1, 2015. An existing requirement that the premium for the private policy must be within 15% of the Citizens' premium for a risk to be ineligible for Citizens is deleted and replaced by a provision that makes ineligible any risk receiving a private market quote no more than 25% greater than Citizen's premium.

- Effective January 1, 2012, personal lines residential structures valued at $1,000,000 or a single condominium, with a combined dwelling and content value of $1,000,000 would be ineligible for coverage.
- Effective January 1, 2014, personal lines residential structures valued at $750,000 or a single condominium, with a combined dwelling and content value of $750,000 would be ineligible for coverage.
- Effective January 1, 2016, personal lines residential structures valued at $500,000 or a single condominium, with a combined dwelling and content value of $500,000 would be ineligible for coverage.

Additionally, the bill requires policies issued by the corporation to include a provision that prohibits policyholders from engaging the services of a public adjuster; prohibits the corporation from levying certain assessments with respect to a year's deficit until the corporation has first levied a specified surcharge; and requires owners of properties in Special Flood Hazard Areas to maintain a separate flood insurance policy after a certain date. The law will also require agents to secure acknowledgements from insureds that they are subject to potential surcharges and assessment liabilities.

An identical bill has been filed in the House (HB 1243) by Representative Boyd. The omnibus property bills (SB 408 and HB 803) also amend provisions of the Florida Insurance Code that affect Citizens.

SB 1330 Flex Rating

Senator Hays has filed SB 1330 which authorizes an insurer, beginning January 2, 2012, to use a rate for residential property insurance that differs from its otherwise filed rate after a specified date under certain circumstances. An insurer must still file the rates for review and must comply with specific and cumbersome criteria listed in the statute. The rates must not represent more than a 15 percent statewide average rate increase over the most recently filed and approved rate. An identical House version (HB 885) has been filed by Representative Wood.

Anti-Fraud Legislation and Legal Fixes Seek to Reform Florida's Auto Insurance Laws

By: Bert Combs

After a series of legislative workshops and other meetings, a total of four bills have been filed in the House and Senate to bring legal reform and anti-fraud measures to Florida's auto insurance market. Florida ranks first in number of staged accidents, and fraud among health clients and even attorneys representing accident victims costs every Florida auto driver, by some estimates, an extra $100 in additional premium or tax on their insurance bills.

Separate bills (SB 1694 and HB 967) have been filed to address the legal reforms, or legal fixes. Two other bills (SB 1930 and HB 1411) contain the anti-fraud measures. The bills are similar, but none of the bills are identical. The legal fixes are focused on limiting attorney fees under Florida's no-fault law and eliminating the Lodestar multiplier or contingency risk multiplier that results in disproportionate attorney fee awards in some cases. Other legal fixes relate to the fee schedules to be used by insurers, requirements related to independent medical exams (IMEs) of injured parties, and provisions for arbitration.

The anti-fraud bills focus on crash report procedures, clinic licensure requirements, and the establishment of an organization in connection with the Division of Insurance Fraud for purposes of prosecuting, investigating, and preventing auto insurance fraud. Other anti-fraud measures revise auto claim procedures to clarify how and when a claim is payable and obligate accident victims and clinics to provide certain information to insurers.

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Tracking Life and Health Legislation

By: Tom Crabb

While property and casualty may again dominate this legislative session, there are a number of bills affecting life and health insurance issues that we will be monitoring. These current bills and some of the issues they address include:

HB5 -- requires individual accident or health insurance policies, group, blanket, or franchise accident or health insurance policies, & health maintenance contracts to provide specified coverage for orthoses, prostheses, orthotics, & prosthetics benefits.

HB119 -- amends the Drug-Free Workplace Act, amends various provisions relating to nursing homes, licensed facility peer review, child protection cases, licensed facility beds, respite patients, home health agencies, hospices, home medical equipment providers, intermediate care facilities for the developmentally disabled, health care clinics, portable equipment providers, the Medicaid prescribed-drug spending-control program, and assisted living facilities.

HB367 (similar SB546) -- contracts between a health insurer and a dentist for the provision of services to patients may not contain any provision that requires the dentist to provide services to the insured under such contract at a fee set by the health insurer unless such services are covered services under the applicable contract.

HB527 (similar SB750) -- a health benefit plan that provides pharmacy services must authorize a licensed pharmacist or pharmacy that agrees to the plan's terms, conditions, reimbursement rates, and standards of quality, to serve as a participating pharmacy services provider for any of the plan's participants.

HB1101 (similar SB1600) -- an employee of any Florida corporation employing fewer than 25 employees is eligible to participate in the state group health insurance plan if the corporation reimburses the state for 100% of the premium and complies with other conditions; all Florida residents may participate in the state group health insurance plan if they reimburse the state for 100% of the premium.

Please contact us for updated information about these or any other life and health bills.