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2011 Legislative Session Closes with a Wide Range of Insurance Bills

By: Travis Miller

Just six months ago, the insurance industry and others began speculating how the new composition of Florida's government would affect the 2011 legislative session. Republican Rick Scott brought government-outsider, corporate CEO credentials to his gubernatorial campaign, prevailing in the primary against political veteran Bill McCollum and in the general election against CFO Alex Sink. Both chambers of the Legislature also saw Republicans capture 2/3 majorities.

Now with the 2011 session having ended last Friday, the results are in. In this edition of the *Florida Insurance Report*, we describe bills that passed in this session as well as some of the high profile proposals that did not pass. The theme for the session appears to have been incremental improvements--the Legislature attempted in several areas to address problems in Florida's insurance markets, but it resisted efforts to make sweeping changes. At various times, key legislators commented that they did not want to repeat the mistakes of prior years by enacting large shifts in regulatory philosophy one year, only to suffer adverse reactions and large shifts the other direction in subsequent years. Also, insurance issues have proven not to follow simple party-line divisions, with other factors such as coastal exposures and the impact of potential residual market assessments influencing legislators' views.

We hope you enjoy this 2011 session wrap-up. As always, we will be posting insurance-related news and blogs on our website at www.radeylaw.com/insurance. In addition, we will be tracking the bills that passed as they are presented to the Governor. These updates will be posted to the legislative updates section of our website.

Major Property Insurance Bill Strives for Wide-Ranging Reforms

By: Travis Miller

Senate Bill 408 became the major property insurance bill of the 2011 legislative session. This bill and its House counterpart (HB 803) reflected the Legislature's attempt to address the so-called cost drivers that have led to rate increases throughout the property insurance industry over the last couple of years even with no storms. Ultimately, the two chambers incorporated their agreements into SB 408 and passed the bill on Thursday evening before the session closed on Friday.

The final package did not fully address some of the reasons regulators and industry officials have cited as prompting rate increases. However, it does make meaningful changes in a number of key areas. The Florida Office of Insurance Regulation commented shortly after the bill passed, "The Office would like to commend the Florida Legislature for its passage of SB 408 relating to property and casualty insurance. By focusing on cost-drivers in the system that include overhauling the replacement cost methodology

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Inside this issue:

GET TO KNOW…

By: Karen Asher-Cohen

AL WILLIS – Al Willis is the new Acting Deputy Commissioner for Property & Casualty at the Florida Office of Insurance Regulation. Al has been at the (then) Department of Insurance and the OIR since 1987. A previous interview with Al appeared in the April, 2010, issue of our Florida Insurance Report. At that time, Al was the Director of Life & Health Financial Oversight. I thought it would be interesting to check back in with Al, now that he has assumed this new role. I asked Al the following questions.

You have been the "Acting" Deputy Commissioner for Property & Casualty for a little over a month now, after working on the Life & Health side for over 20 years. Have you found P&C and L&H to be more alike or more different than you expected?

There are a lot of similarities but ... P&C and L&H are totally different in so many ways. I expected there to be a lot of differences and nuances in P&C and this is exactly what I found.

What's been your steepest learning curve on the P&C side, if you've had one?

As I mentioned above, learning all the differences between L&H and P&C. It is almost like it is a different language in some respects.

Do you plan to make any changes to P&C on the organizational side of OIR?

Since I am in an "acting" capacity I don't have any specific plans for change in the organizational structure. If something comes up and I see a need, then certainly a recommendation would be made.

We are coming into hurricane season, and the OIR recently sent out a reinsurance data call. Have you identified any major areas of concern on the property side?

It is too early to tell. We are just getting data in for the first portion of the data call and it is being analyzed as we speak.

What do you see as the role of Citizens Property Insurance Corporation?

That is a question which will be answered by the Legislature.

Your title still includes "Acting" - do you intend to return to Life & Health at some point?

I do plan to return to Life & Health at some point, however since I work at the pleasure of the Commissioner, I will be working in whatever capacity he may want me to be in.

Commercial Insurance Rates

By: David Yon

In a session marked as much by what did not pass as what did pass, one of the most significant pieces of legislation that cleared all of the hurdles was the Commercial Insurance Rates, HB 99. Last year the first version of this passed the Legislature and was permitted to go into law by then Governor Crist. It identified a number of commercial types of insurance coverage and provided for greatly reduced regulatory review. The law permitted insurers to implement rates without OIR approval. This year's bill expands the lines and types of coverage and reduces even further the possible regulatory review and oversight.

The bill exempts five new types of commercial insurance from the rate filing and approval process. Effective October 1, 2011, insurance companies writing these types of commercial insurance will not have to obtain approval from OIR to use rates for these coverages. The new exempt types of commercial insurance are:

- Fiduciary Liability
- General Liability
- Nonresidential Property, but not Collateral Protection Insurance
- Nonresidential Multi-peril
- Excess Property
- Burglary and Theft

Under existing law, the following types of insurance are included in this exemption:

- Excess or Umbrella Insurance
- Surety and Fidelity Insurance

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Commercial Insurance - *Continued from Page 1*

- Boiler and Machinery Insurance and Leakage and Fire Extinguishing Equipment Insurance
- Fleet Commercial Motor Vehicle Insurance for a fleet of 20 or more self-propelled vehicles
- Errors and Omissions Insurance (E & O)
- Directors' and Officers', Employment Practices, and Management Liability Insurance
- Intellectual Property and Patent Infringement Insurance
- Advertising Injury and Internet Liability Insurance
- Property risks rated under a highly protected risks rating plan

It should be noted that OIR takes the position the exemption does not apply if these coverages are written as an endorsement to a type of coverage that is subject to rate review.

The bill also expands the current rate filing and approval exemption process for commercial motor vehicle insurance. In the future all commercial motor vehicle insurance is exempt from the rate filing and approval process, rather than only commercial motor vehicle insurance covering a fleet of 20 or more vehicles.

Insurers must still notify OIR of the rate to be charged within 30 days. However, the bill deletes some of the information required in the notice and the type of data required to be retained by the insurer to support the rate. Additionally, the bill deletes current law allowing the OIR to obtain information about an exempt commercial insurance rate at the insurer's expense, but it still requires the insurer to incur the cost of any "examination" by the OIR of the rate charged.

Legislature Authorizes Health Insurers to Offer Wellness Incentives

By: Travis Miller and David Yon

The Legislature passed HB 445 creating an exception to unfair insurance trade practices statutes allowing health insurers and HMOs to offer rewards or incentives for wellness or health improvements. The incentives may take the form of merchandise, gift cards, debit cards, premium discounts, contributions to HSAs or similar items.

The bill also clarifies that health insurers and HMOs may advertise these programs without violating state insurance advertising restrictions. Availability of the programs must be disclosed in the applicable policies or certificates. In addition, nonparticipants may be eligible to receive the incentives if they provide verification, such as from their physician, that they have a health condition that makes participation unreasonably difficult.

The bill should be evaluated in light of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) that generally prohibits group health plans from charging similarly situated individuals different premiums or requiring other additional payments on the basis of a health factor. The bill summary notes there is a HIPAA exception for plans that offer rewards or incentives for member participation in health or wellness programs. If the receipt of a reward or incentive is not conditioned on the individual satisfying a standard related to a health factor, or if no reward or incentive is offered for participation, then the health or wellness program satisfies the nondiscrimination provisions of HIPAA. However, if the group health plan offers a reward or incentive for member participation in a health or wellness program that is based on the individual satisfying a health factor standard, then the program must meet the following five requirements:

- The total reward or incentive is limited, generally to no more than 20% of the cost of coverage under the plan to the individual or family.
- The program must be reasonably designed to promote health and prevent disease.
- The program must give individuals eligible to participate the opportunity to qualify for the reward at least once per year.
- The reward or incentive must be available to all individuals similarly situated and must allow a reasonable alternative standard for obtaining the reward to any individual for whom it is unreasonably difficult due to a medical condition, or medically inadvisable, to satisfy the standard.
- The plan must disclose in all materials describing the terms of the program the availability of a reasonable alternative standard.

If the plan's program does not base any reward on outcome, it is allowed under the HIPAA nondiscrimination provisions without complying with these requirements.

Property Bill - *Cont. from Page 1*

and addressing the increase in sinkhole claims - this bill will pay long-term dividends for Florida by contributing to the stabilization of the property insurance marketplace, and in attracting new capital investment to our state. The Office especially would like to thank Senator Garrett Richter and Representative John Wood for their efforts in bringing this legislation to fruition." Reforms made by the bill include the following:

Sinkholes

No issue received as much attention leading up to and during the 2011 session as the current sinkhole insurance crisis. Insurers have paid more than $1 billion in sinkhole claims so far, much of it on homes that are not being repaired, and estimates for future payments range from the hundreds of millions to over another $1 billion. The Legislature sought to balance having sinkhole coverage available for legitimate sinkhole claims with deterring the more troublesome claims wherein policyholders don't repair their homes while municipalities are faced with declining home values.

In adopting SB 408, the Legislature included a strong statement of legislative intent expressing its dissatisfaction with the results of prior reforms made in 2005. The Legislature specifies that it is clarifying many of its prior efforts, and it makes additional changes to address the state's sinkhole insurance problem. Among the significant clarifications and changes:

- The Legislature continues existing law requiring property insurers to offer both catastrophic ground cover collapse coverage and sinkhole coverage. Insurers sought to have the sinkhole coverage become an optional offer and sought to exclude commercial property insurers from the mandate, but neither of these proposals were adopted. The Legislature did, however, specify that insurers may limit coverage to the principal building defined in the policy.
- The definition of structural damage is updated to include what the Legislature hopes to be clearer standards for identified bona fide sinkhole losses. The Legislature hopes to exclude cosmetic settlement-type cracking from the coverage requirements while retaining coverage for policyholders who suffer significant damage.
- The bill prohibits claims filed more than two years after the policyholder knew or reasonably should have known of a sinkhole loss.
- The requirement for insurers to report their losses to a centralized sinkhole database has been eliminated.
- The sinkhole investigation process is updated and clarified. Insurers will be able to investigate claims to determine whether structural damage exists. Only if structural damage exists and sinkhole activity is the cause, or the cause cannot be identified, will the more expensive testing process commence. The policyholder is responsible for up to $2500, but the insurer must reimburse this amount to the policyholder if the testing indicates a sinkhole exists.
- If a policyholder suffers a catastrophic ground cover collapse or sinkhole loss, the policyholder must repair the home in accordance with the engineering recommendations. There is an exception for losses that cannot be repaired within the policy limits, but the intent of this provision is to limit inflated claims in which cash settlements are the primary motivation and to protect municipalities and subsequent purchasers by ensuring that damaged homes are repaired whenever possible.
- The bill prohibits policyholders from receiving rebates from any person performing repairs, which is intended to ensure the work is actually done in accordance with the recommendations and to prevent the inflation of insurance claims.
- Policyholders will be responsible for publicly filing any sinkhole reports they obtain on their property. In addition, when repairs are completed, the professional engineer overseeing the work will file a certificate with the county clerk of court.
- Neutral evaluation procedures are updated, with new conflict of interest provisions added, the failure to hold the conference within 90 days not invalidating the process, and provisions added to ensure the parties are able to admit the full results of the neutral evaluation in any subsequent litigation.

The Legislature also changed the definition of a covered claim for purposes of Florida Insurance Guaranty Association (FIGA) coverage. The newly revised definition specifies that a covered claim does not include any amount payable for a sinkhole loss other than for testing and for actual repair of the loss. FIGA will not pay attorneys' fees or public adjusters' fees in connection with sinkhole losses or pay policyholders.

Insurers with existing sinkhole claims disputes should review SB 408 to determine how the legislative clarifications and changes might help mitigate current concerns. Meanwhile, all property insurers should review the bill in light of their current policy forms and claims procedures to best ensure their future exposure to sinkhole claims is limited to legitimate sinkhole losses of the type intended by the Legislature.

Rate Filings

Changes to Florida's rating law received considerable attention, and even some criticism in the media for being too beneficial for insurers. However, in each case, other than commercial rates, the Office retains approval authority so concerns with the legislative changes seem to be overstated. The changes include:

- The "use and file" rate filing process is suspended until May 1, 2012.
- The Office is prohibited in the rate-making process from interfering with an insurer's right to acquire policyholders such as in the calculation of agent commissions.
- The expedited rate filing process for reinsurance costs is updated. The process allows an insurer to make a streamlined filing to adjust its rates for the cost of reinsurance, financing products used as replacements for insurance, and the rapid cash build-up factor. A prohibition against loading the costs for expenses and profits has been eliminated. In addition, insurers are no longer prohibited from making an expedited filing for six months before or after another rate filing. However, the insurer may make only one expedited filing in any 12-month period.
- Rate filings still must be certified initially by the Chief Executive Officer or Chief Financial Officer and the Chief Actuary. However, for efficiency in the ongoing review process, subsequent responses to OIR inquiries can be certified by the actuary responsible for the filing with no further officer certifications required.

Public Adjusters

SB 408 contains several reforms designed to regulate the business of public adjusters, including the following:

- Compensation for reopened or supplemental claims will be limited to 20% of the reopened or supplemental payment.
- Current law limits post-emergency consideration to 10% for a one-year period. SB 408 provides for a 20% limit thereafter, and a 20% limit for claims that do not arise from declared emergencies.
- The bill attempts to limit misleading advertising by public adjusters, including advertisements that suggest policyholders face no risk from filing claims, offer inducements for filing claims, or imply the public adjusters are governmental agencies. Public adjuster advertisements also must include a mandated disclosure specifying that the advertisements are solicitations for business.
- Provisions of the bill ensure that company representatives have access to damaged property with at least 48 hours notice. On the other hand, when an insured is represented by a public adjuster, insurers are prohibited from excluding public adjusters from any in-person meetings.
- Contractors are allowed to discuss their bids without running afoul of adjuster licensing requirements as long as the contractor is only doing so for the usual and customary fees for the work to be performed.

Citizens Property Insurance Corporation

As discussed elsewhere in this Report, the Legislature did not pass comprehensive rating and eligibility reforms for Citizens. However, the main property bill contained these provisions:

- Citizens will limit payments to public adjusters to 10% of any additional amount ultimately paid over the amount initially offered.
- The high risk account will be known as the coastal account.
- The policyholder surcharge will be payable upon cancellation or termination of the Citizens policy, or upon issuance of a new policy by Citizens within 12 months. Citizens will be required to include a disclosure on its policies informing policyholders of the possibility of their liability for assessments.
- Citizens is prohibited from levying its regular assessments until it has levied the policyholder surcharges.
- Citizens is required to study the feasibility of outsourcing some of its functions and provide a report next year.
- Policies issued on or after January 1, 2012, containing sinkhole coverage will not include any coverage for appurtenant structures, driveways, sidewalks, decks or patios.
- Board member conflict of interest provisions are updated.
- Sinkhole coverage is exempted from the 10% cap on Citizens' rate increases.
- The requirement to calculate and report PMLs and to reduce the boundaries of the coastal account over time has been eliminated.

Actual Cash Value and Replacement Cost Coverage

Although the Legislature's prior decision to require replacement cost payments without holdbacks has increased claims costs and incentivized inflated claims, attempts to fix this problem proved to be controversial. After considerable discussion, the Legislature eventually made the following changes:

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Property Bill - *Continued*

- For dwelling coverage, the insurer must initially pay at least ACV, less the deductible. The insurer then will pay any remaining amounts as work is performed. However, if the dwelling is a total loss, the insurer must pay the full replacement cost without holdback.
- For personal property, the insurer must continue to offer a product for which it is obligated to pay the full replacement cost without holdback, whether or not the insured repairs or replaces the property. The insurer also may offer, if it chooses, a policy under which it pays the actual cash value of the damaged property until replacements are made. The insurer must offer a reasonable credit or discount for this product as compared to the full replacement cost version.

General Provisions

The Legislature included a series of additional changes in SB 408, such as:

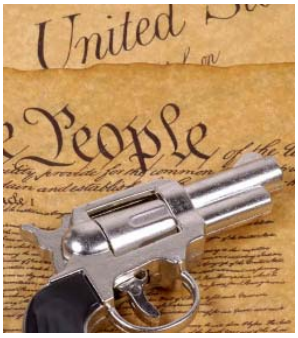
- Losses for purposes of FHCF reimbursements will include amounts paid on behalf of or inuring to the benefit of policyholders (attorneys' fees and public adjusters' fees) but will exclude other amounts such as those proximately caused by a non-covered peril, voluntary expansions of coverage by insurers, loss assessments, and allocated or unallocated loss adjustment expenses.
- The cancellation and nonrenewal notice period for policyholders who have been with a company for five or more years has been reduced from 180 days to 120 days.
- Upon the OIR's approval of a cancellation and nonrenewal plan, an insurer may cancel and nonrenew policies on 45 days notice if necessary to protect policyholders or the public. Approval may be conditioned on entering into a consent order for supervision or receivership.
- For policies providing both home and auto coverage, a single 90-day nonrenewal notice may be used.
- The bill authorizes a "notice of change in policy terms" as a substitute for current law, which requires insurers to nonrenew existing policies even when they intend to issue replacement policies with different coverage.
- Participants in the Insurance Capital Build-Up Incentive Program may renegotiate their surplus notes to reduce the writings ratio requirements as long as they agree to accelerate repayment.
- The minimum surplus requirement for new residential property insurers is increased to $15 million. Existing insurers will need to reach this level over a 10-year phase-in period.
- The statute of limitations for breaches of property insurance contracts will run five years from the date of loss.
- Hurricane claims (including supplemental or reopened claims) on property insurance policies must be filed within three years of the hurricane's landfall.
- The requirement for OIR to develop uniform rating territories for residential property insurance is eliminated.
- Provisions relating to the 2003 presumed factor for medical malpractice insurance have been deleted.
- A requirement to tie mitigation discounts to the uniform home grading system has been eliminated.
- Fees charged to private insurers for access to the public model must reflect the reasonable costs of its operation and maintenance.

Legislature Limits Consideration of Gun Ownership in Underwriting and Rating

By: Travis Miller

One of the 2011 session's most hotly debated bills had an incidental impact on the insurance industry. In HB 155, the Legislature prohibits health care practitioners from making unnecessary inquiries into patients' gun ownership and prevents them from including firearm-related information in patients' files when that information is not necessary.

Regarding the insurance industry, the bill prevents any insurer offering policies governed by Chapter 627 from denying coverage, increasing premiums, or otherwise discriminating against any insured or applicant on the basis of that person's lawful ownership, possession, or storage of firearms or ammunition. Chapter 627 broadly governs admitted market property and casualty, and life and health insurance, so the legislation has broad effect. The bill specifically allows insurers to consider the fair market value of firearms and ammunition in connection with setting premiums under scheduled personal property endorsements.



Surplus Lines

By: David Yon

Congress enacted the Non-admitted and Reinsurance Reform Act of 2010 (NRRA) that substantially revamps state regulation of surplus lines. NRRA limits the ability of a state to levy and collect surplus lines fees and taxes unless the state is the "home state" of the insured risk. States may, however, enter into compacts or agreements for a home state to collect and reallocate the taxes. The new law:

- Requires surplus lines agents to confirm by affidavit on or before the 45th day following each calendar quarter that they have properly reported all surplus lines insurance transactions. Previously this was done at "the end of the month" following the calendar quarter.
- Requires, for multi-state risks located partially in Florida and where Florida is the home state as defined in NRRA, the tax payable is to be computed on the gross premium not to exceed the tax rate where the risk or exposure is located. Currently the tax is based on the premium allocated to Florida.
- Requires, for multi-state risks located partially in Florida and where Florida is the home state as defined in NRRA, that the service fee collected by the agent (to be paid to the surplus lines office) be collected based on gross premium instead of for premium allocated to Florida. Currently the fee is based only on premium allocated to Florida.
- Creates section 626.9362, Florida Statutes, which authorizes the Department of Financial Services and the Office of Insurance Regulation to enter into a cooperative reciprocal agreement with another state or group of states to collect and allocate taxes pursuant to NRRA. The law provides the agreement may include provisions:
  - Creating a clearinghouse, including a service fee (not to exceed .3% of gross premium);
  - Specifying reporting requirements;
  - Determining method of collection and forwarding taxes between states; and
  - Providing for audits and information exchanges.
- Grants OIR and DFS rulemaking authority to implement and administer cooperative agreements.
- Gives the Legislature the right to direct the state to remove itself from any cooperative agreement the Legislature determines "not in the best interest of the state."
- Requires DFS to provide a report to the Legislature regarding details of any agreement.
- Makes similar tax allocation provisions for taxes and service fees for independently procured coverages.
- Takes effect "upon becoming law," i.e., when the Governor signs it or lets it go into law without signature.

Petitioners Ask Supreme Court to Look at Fee Limit

By: David Yon

The limitation on attorney fees in subsections 440.34(1) and (3), Florida Statutes, that employers must pay for workers' compensation cases was upheld by the First District Court of Appeal in an order dated March 23, 2011. The law bases attorneys' fees on the amount of benefits that are awarded to an injured worker. Fees are 20 percent of the first $5,000 in benefits; 15 percent of the next $5,000 in benefits; and either 10 percent or 5 percent of additional benefits, depending on the length of time involved. Lawyers on behalf of the appellant in that case, Jennifer Kauffman, have asked the Florida Supreme Court to take jurisdiction of the case. Counsel asserts that the statutory guideline fee in the case was $684.41 which purportedly equated to an hourly legal fee of $6.84 per hour. As a result counsel argues that the "mandated, inflexible statutory cap on the amount of attorneys' fees...violates at least four provisions of the Florida Constitution." Since the Petitioner is seeking the discretionary jurisdiction of the Court, it is very possible the court will decline to accept the case.

Legislature Creates Greater Role for Itself in Rulemaking Process

By: David Yon

The passage of HB 993 is another significant step in changing the rulemaking process and creating a greater role for legislative oversight of the process. The new law will require significant review by agencies of all outstanding rules. The law follows up on legislation passed last year (HB 1565) that required legislative ratification of rules that have certain economic effects. A rule projected to have a specific economic impact exceeding $1 million in the aggregate over 5 years must be ratified by the Legislature before taking effect. Among other things, the changes last year created timing issues that made compliance during the rulemaking or repeal process difficult to meet. This bill attempts to correct those matters.

The bill contains the following provisions:

- Requires agencies to include in each notice of rulemaking whether the proposed rule will require legislative ratification.
- Expressly includes legislative ratification in the description of factors controlling when an adopted rule takes effect.
- Resolves a timing conflict created by Chapter 2010-279, Laws of Florida, by restoring certain time deadlines to the pre-2010 provisions.
- Exempts emergency rulemaking from the statutory requirements to prepare a statement of estimated regulatory costs.
- Provides a summary process of repealing rules determined to be invalid for failing to be submitted for legislative ratification.
- Excludes from the ratification requirement emergency rules, and rules adopting federal standards, the triennial update of the Florida Building Code, or the triennial update of the Florida Fire Prevention Code.

In addition the summary of the bill states that the law adds the following sections to the Florida Administrative Procedures Act:

- Subsection 120.74(3), requiring agencies annually to prepare a regulatory plan of projected rulemaking, excluding emergency rulemaking, and to report these plans to the Legislature. Subsection 120.74(4) is also added to adjust certain reporting requirements to coordinate with the reports required under new s. 120.745.
- Section 120.745, requiring all agencies to conduct a comprehensive review of their rules, identifying those rules in effect on or before November 16, 2010 (the day before the ratification requirement went into effect) which have economic impact of over $1 million as stated in s. 120.541(2)(a), F.S. Agencies must complete modified economic reviews of all such rules over a two-year period, and provide annual reports to the Legislature. Agencies must also identify and justify rules requiring data submissions from third parties. This provision will expire on July 1, 2014.
- Section 120.7455, establishing the format for a Legislative project to gather information on burdensome administrative rules and providing use immunity and protections from agency retaliation to those parties who participate in the survey.

Workers' Compensation Extraterritorial Reciprocity

By: Tom Crabb

This bill (HB 723), which passed both houses unanimously, provides for extraterritorial reciprocity under the Florida Workers' Compensation Law. Essentially this means that a Florida worker injured while temporarily working in another state is limited to his or her recovery under Florida law, and a worker from another state injured while temporarily working in Florida is limited to his or her recovery under that state's law, if certain conditions are met. Under the bill, an employee is "temporarily working" in the other state for up to 10 consecutive days or 25 days in a year. Florida employees temporarily working in another state receive Florida workers' compensation benefits.

Out of state employees injured while temporarily working in Florida are exempted from Florida's workers' compensation law, allowing for a recovery under the home state's laws only, if: 1) the employer has furnished coverage under the home state's laws that covers the employee's temporary work in Florida; 2) the extraterritorial provisions of Florida's workers' compensation law is recognized in the employer's home state; and 3) Florida employees and employers are exempted from the workers' compensation law of the employer's home state for injuries that occur while Florida employees are temporarily working in the employer's home state.

Insurance "Train" Bill Affecting Multiple Lines of Business Gets Legislative Approval

By: Bert Combs

House Bill 1087, which started out on March 1 as a bill designed to address which insureds must get policyholder notices under the Florida Insurance Code, became the insurance "train" bill and moved through the legislative process collecting pieces of legislation that had been knocked off the tracks in other legislative committee hearings. The 37-page bill includes a number of provisions affecting multiple lines of business.

The "first named insured provisions" which make up almost ten pages of the bill revise the various policyholder notice requirements in the Insurance Code so that these provisions refer to the "first named insured" as opposed to the "named insured." The changes are intended to address problems and ambiguities when there is more than one named insured on a policy. References to "additional insureds" or "additional named insureds" in policies and language used in policy forms developed by the Insurance Services Office also created uncertainty. This language is intended to address all of those situations to clarify and limit the number of persons who have to receive notices.

HB 1087 also:

- Allows workers' compensation benefits to be paid on a prepaid card if authorized by the employee.
- Exempts from certificate of authority requirements an insurer domiciled outside of the United States and covering only persons who are nonresidents of the United States.
- Reduces the 7-year limitation on using the same accountant for the required audited financial report to a period of five years and increases the 2-year waiting period to a period of five years.
- Bars persons who commit certain crimes from applying for licensure under the Florida Insurance Code and further revises waiting periods for licensure for other crimes.
- Allows applicants for a public adjuster apprenticeship license to have two additional adjuster designations, Certified Adjuster and Certified Claims Adjuster, in order to qualify for a license as a public adjuster apprentice.
- For workers' compensation insurance, provides that when a cancellation request is made by the insured in writing, a notice of cancellation is not required to be delivered to the insured. Instead, the effective date of cancellation is either the date requested by the insured or otherwise the date of the written request if no date is specified.
- Provides that requests for insurance-related information from self-insured corporations must be sent by certified mail to the registered agent of the disclosing entity.
- Exempts a service warranty entity from licensure requirements if the service warranties it offers are only offered, marketed, or sold to nonresidents of this state.
- Revises the dates applicable to calculations of annual assessments by the Special Disability Trust Fund.
- Requires funds collected by a managing general agent (MGA) to be held in a bank insured by the Federal Deposit Insurance Corporation, rather than simply a bank that is a member of the Federal Reserve System.
- Limits the requirement for workers' compensation premium audits so that premium audits are not required, other than for an audit required by the insurance policy or an order of OIR, or at least once each policy period, if requested by the insured.
- Makes risks that are "individually rated" or A-rated by an insurer eligible for export under the Surplus Lines Law if certain conditions are met.
- Increases civil penalties for insurance fraud committed for the purpose of receiving proceeds from a motor vehicle insurance contract.

Legislature Passes Some (but No Major) Fraud and Tort Reform Measures

By: Bert Combs

In a year where the hopes of passing major anti-fraud and tort reform measures were high, the Florida Legislature failed to pass major reforms. Several provisions to address auto insurance fraud did however pass, and the Legislature passed a products liability bill reversing a Florida Supreme Court decision that limited evidence that could be heard in those types of cases.

Two comprehensive bills addressing Florida's personal injury protection (PIP) system failed. One PIP bill addressed fraud and another focused on legal reforms that would cap attorney fees in PIP cases and eliminate the use of a contingency risk multiplier. After being watered down to get enough consensus to pass, the remaining fraud and legal fixes were voted down by the House Health and Human Services Committee with a 9-8 vote. A last ditch effort to insert the legal fixes into a conforming bill for the state budget was not successful.

Legislation to reform "bad faith" litigation also failed. The Senate's bad faith legislation passed out of the Judiciary Committee on a 4-3 vote. However, concessions after that very close vote were not enough to pass any "bad faith" reform. The House's bad faith bill died when, after two hours of debate, the bill's sponsor did not even bring his bad faith legislation up for a vote. It was clear that he did not have the votes to pass the bill.

Some important anti-fraud measures did however pass. Increased civil penalties for auto insurance fraud were included in House Bill 1087, which became the insurance "train" bill. Senate Bill 2132 creates a new Insurance Fraud Direct Support Organization. This new fraud organization will be controlled primarily by CFO Atwater, can accept donations, and is directed to prevent auto insurance fraud. In the final hours of session, legislation was also approved requiring the "short form" accident report to include the names of all drivers and passengers and proof of insurance. The language that passed was not the desired expansion of the "long form" reporting requirements. However, the additional information will become part of the "short form" crash report that law enforcement officers have discretion to use in reporting crashes.

Finally, tort reform related to products liability litigation also passed. Senate Bill 142 overturns a 2001 Florida Supreme Court decision against an automobile manufacturer that said evidence of the primary cause of a crash, such as driver error or drunkenness, could not be introduced in a products liability case.

Insurer Insolvency and Guaranty Associations

By: Tom Crabb

House Bill 1007 passed both houses unanimously and addresses many issues surrounding insurer insolvency, the receivership process, and guaranty payments. Provisions in the bill:

- Allow the State Board of Administration to renegotiate the minimum writing ratios in notes issued to insurers under the Insurance Capital Build-Up Incentive Program if the insurer accelerates the payment period of the note;
- Increase the surplus requirement on a reinsurer for whom the Commissioner of Insurance may allow credit for reinsurance to be taken by the ceding insurer from $100 million to $250 million and requires rating by an agency having experience rating insurers doing business in Florida;
- Make significant changes relating to the rehabilitation of a title insurer, including assessing title insurers for the unpaid claims and expenses of title insurers in rehabilitation (up to 3% of the insurer's prior year surplus) and recoupment of the assessment; that instate policies are to remain in force unless the assessments would be insufficient to pay the claims; that officers, directors, and shareholders of the title insurer may not hold that same role with another insurer in the future absent a showing they were not personally responsible for the receivership;
- Provide for the recoupment of the above assessment by a per transaction (i.e., per title policy) surcharge of up to $25 for each impaired title insurer;
- Allow DFS to be named an ancillary receiver over foreign insurers for the purpose of obtaining records from those insurers to adjudicate the claims of Florida policyholders;
- Indemnify DFS employees for any liability for their actions when claims of an insurer in receivership are paid to the detriment of a claim owed by the insurer to the federal government;
- Exclude from the definition of FIGA covered claims those that have been denied by another state's guaranty fund because of statutory exclusions in that state; and
- Terminate the membership of any FIGA board member who represents an insurer that is placed into receivership.

Medical Malpractice Update

By: Karen Asher-Cohen

Late in the session, the Legislature passed HB 479, the medical malpractice insurance package, which was heavily supported by the Florida Medical Association. While a number of significant provisions were deleted from the final bill, including ex parte communications between defense attorneys and the claimant's treating physician, this legislation includes many changes to current law, affecting medical malpractice insurance contracts, physician and dentist licensing, medical malpractice claims, discovery, and litigation, and liability issues. Included in the significant changes are the following:

- Under section 627.4147, a medical malpractice insurance contract is no longer required to contain a provision authorizing the insurer to settle a malpractice claim within policy limits over the insured's veto. The bill requires that policies now "clearly" state whether the insured has the exclusive right to veto settlements within policy limits.

- Physicians and dentists licensed outside of Florida must now obtain an expert witness certificate from the Department of Health before providing expert testimony in Florida.

- The bill provides additional immunity from liability for volunteer team physicians. The Legislature apparently took notice of a recent case in the 4th DCA, *Weiss v. Pratt*, 53 So.3d 395 (Fla. 4th DCA 2011), and referenced that case in the original Staff Analysis.

- Requires a presuit notice for a medical malpractice claim to be accompanied by an authorization form for release of protected health information. The authorization form is provided in the statute as well. In the absence of the new authorization form, the presuit notice is void.

- Documentation or testimony of an insurer's reimbursement decisions or policies regarding the care provided to a plaintiff are not admissible as evidence in a medical malpractice action.

- Also excludes from admissibility as evidence in a medical malpractice action the health care provider's failure to comply with or breach of any federal requirement.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Rules for Workers' Comp Self-Insurers Get Major Rewrite

By: David Yon

State Farm Announcement Promises to Add Intensity to Legislative Session

By: Travis Miller

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It Didn't Pass…

By: David Yon

Among the more important items not to pass this year was meaningful change to Citizens Property Insurance Corporation. SB 1714 and HB 1243 both proposed some major changes including significant increases in the percentages for rate increases. These bills would have moved the limit up to 20% per territory and 25% per policy. At one point in time homes valued at more than $1,000,000 would have become ineligible for coverage. Applicants receiving offers of coverage from an authorized insurer with a premium level within 25% of that offered by Citizens would have been ineligible for Citizens. Citizens would have stopped writing new commercial nonresidential insurance policies and new construction located seaward of the coastal construction control line.

There were a few changes that made their way into the final version of the property bill. These included some new limits on public adjuster fees, a change in the name of the "high risk account" to the "coastal account," an expansion of assessment surcharges for Citizens' policyholder and ex-policyholders, creation of a provision for a third party consultant to study outsourcing, modifications in the type of sinkhole coverage Citizens provides and the elimination of the requirement to provide a PML report to the Legislature and potentially reduce the high risk territory.

Other bills that did not navigate the legislative process include the array of tort reform proposals reported on page 10. A few others include:

- Credit Scoring Ban (SB 938) - Would have prohibited insurers from using credit scores and reports in making rating determinations.
- Captive Insurance (HB 1235, SB 1836) - Would have expanded the kinds of insurance a captive insurer could seek licensure for; limit risks that certain captive insurers may insure; and specify requirements and conditions relating to a captive insurer's authority to conduct business.
- Hurricane Loss Mitigation Program (HB 535/SB 510) - Extends repeal date for Hurricane Loss Mitigation Program; deletes obsolete provision relating to use of funds for programs to retrofit certain existing facilities.
- Consumer Choice Policies (HB 885, SB 1330) - This bill would have created flex rating for certain lines of insurance.
- Property Insurance Appraisal Umpires & Property Insurance Appraisers (HB 947/SB 1750) - Would have provided license application, issuance, biennial renewal, or continuation fees for property insurance appraisal umpires and property insurance appraisers.