

FLORIDA INSURANCE REPORT

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Attorneys & Counselors at Law

"GET TO KNOW" INTERVIEWS THE INSURANCE COMMISSIONER



By: Karen
Asher-Cohen

COMMISSIONER KEVIN MCCARTY

is the Commissioner of the Florida Office of Insurance Regulation and the President-Elect of the National Association of Insurance Commissioners (NAIC). Recently I had the opportunity to sit down with the Commissioner and asked him the following questions.

The Governor has devoted a lot of attention to job creation. Does the OIR have a role in that and are you

pursuing any initiatives relating to attracting capital and job creation?

Yes, we worked very hard this session with many companies to expand business opportunities in Florida. I am very proud of the passage of House Bill 1087, the economic development bill. House Bill 1087 will provide opportunities for companies to move healthcare and health insurance business to Florida. It will allow companies to relocate high-paying, back-office jobs to Florida, particularly to Dade County, from Mexico and Boston. The provisions in this new

law will remove the legal impediments for back-office operations to be located in Florida, while the companies are in South and Central America. We worked in cooperation with Dade County and the Beacon Council to help make Miami the next insurance capital for Central and South America, just as it is now a banking capital. This bill will accomplish job-creating changes and will allow Florida to market to Central and South American companies to bring professional, back-office operational jobs to Florida residents.

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Insurance Train Bill Becomes Law

By: Travis Miller

In the last weeks of the 2011 legislative session, HB 1087 picked up a number of amendments that resulted in its becoming the insurance "train" bill for this year. Governor Scott has now signed this bill into law. Most of its provisions become effective July 1, 2011, although some provisions are effective immediately. For a summary of the train bill, please see our post-session edition of the *Florida Insurance Report*. Among the many varied provisions of the bill are the

following:

- Allowing workers' compensation benefits to be paid using a prepaid card.
- Providing an exemption from Florida's certificate of authority requirements for certain insurers domiciled outside of the United States and covering persons who are nonresidents of the United States.
- Limiting use of the same accountant or partner within a firm to five years, and not allowing that accountant or partner to be involved for five years.
- Setting forth periods of disqualification for individuals having felony records who are seeking insurance-related licenses.
- Specifying that notices of nonrenewal, cancellation or termination must be given to the "first-named insured."
- Creating an exemption to service warranty licensing requirements for companies selling warranties only to nonresidents.
- Providing a civil penalty in addition to criminal penalties for fraud under motor vehicle policies.

Get to Know...Continued

As you travel and meet with different parties like reinsurers and potential sources of capital, what message are you trying to convey about Florida?

I admit that Florida has some challenges in the marketplace. But Florida is still a good place to do business. We have a large population, with over 18 million people, and a lot to offer. The marketplace has taken reasonable steps to bring stability to our market and return companies to profitability. There is a lot to offer to companies in Florida.

Senate Bill 408 addressed some of the cost drivers in the property market. Are there areas that still need attention and may need to be addressed going forward?

Senate Bill 408 was a real triumph in the legislative process. Going into the session, there were significant challenges in the marketplace. Most companies were experiencing negative underwriting and very substantial problems in our system. I think Senate Bill 408 strikes a meaningful balance between insurance consumer protections while bringing stability to a fragile marketplace. Senate Bill 408 addressed the three worst problems in the market: sinkhole claims, replacement cost provisions, and public adjusters.

For example, here are three worst cases regarding sinkhole: 1) Sinkhole claims from 1999-2010 increased 1200%; 2) For every \$1 that Citizens collected in sinkhole premium, they paid out \$4 in sinkhole claims; and 3) there were \$2B in sinkhole claims in

the pipeline for the years 1999-2010. The Legislature saw that some fundamental changes were needed on sinkhole claims, so they decided to change three important factors: 1) The Legislature changed the definition of “sinkhole loss” and “structural damage” to address the issue of legitimate sinkhole claims paid and to ferret out the fraudulent claims; 2) The Law will make people take money from the policy to effectuate repairs. This will change the previous system where money just went into people’s pockets, with no requirement to make repairs, which created an incentive to make fraudulent claims; and 3) It changed the fundamental way in which sinkhole claims are investigated. Now there is an emphasis on technology and science to ensure legitimate claims are paid.

As I said, the Law also addressed some other major problems. It will combat the prolific use of unscrupulous public adjusters. I do not mean to demonize public adjusters. However, the system as it existed had created perverse incentives for fraud. The Legislature has now put meaningful limits on solicitation and claims practices, and on compensation schemes that encouraged abuse.

Also, the Law addressed the problems with the existing replacement cost provisions, which were the result of HB1A. Often, the best intentions have unintended consequences. That was the case here. The new law will help consumers get paid for their claims. Again, the Legislature struck a real balance between consumer protections and reasonable measures for

companies. Now, the law provides for replacement cost on structures, but consumers will be paid as repairs are made. On the contents coverage, consumers will have the choice of actual cash value or replacement cost coverage.



Commissioner Kevin McCarty

Senate Bill 408 is a 100+ page bill, but I think that those are the most important features. This law has gone a long way towards fighting fraud and the major cost drivers on rising insurance rates.

Is there an emphasis on new capital, or more of a focus on improving the market for people who are here and addressing cost drivers?

I think there are two points here. It is important for us to maximize the deployment of capital currently in Florida. Unfortunately, with Citizens’ rate structure, companies cannot fully maximize their capital here. As a corollary, capital is reluctant to come to Florida without a reasonable assurance of a fair rate of return. Given the cost drivers in the system and CPIC’s loss structure, a lot of capital is sitting on the sidelines, waiting to see what happens.

We are coming into hurricane season, and the OIR recently sent out a reinsurance data call.

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Get to Know...Continued

Have you identified any major areas of concern on the property side?

Obviously, we have had a series of events that occurred globally, such as New Zealand and Japan, that have certainly had an impact on the costs and availability of global reinsurance. The reports that we are hearing from the marketplace is that there should be sufficient capacity and availability for all companies. Of course, there will be winners and losers in this balance, as always. One important wrinkle this year is the release of the new RMS model. It will not affect the overall PML of Florida, but it will cause wide variations in Florida. It will increase the PML of some companies from 60% to 80%, and may have no effect on other companies. That is one factor that will affect prices. We expect that there will be a 10 - 15% increase in costs for reinsurance overall, but of course that will be very portfolio-specific.

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

Citizens has had very different roles at different points in its history. It has changed from being a market of last resort to a market for alternative coverage, to a market that had to respond to the volatility of the marketplace after the 2004 and 2005 storm seasons. Most policy makers would like to see the return of Citizens to a market of last resort. But this will take an accelerated glide path to more accurately reflect Citizens' loss ratios. This will

definitely be part of the public policy debate next year and an issue that will not go away.

You've had success with prior reforms in workers' comp and med mal. How are those markets performing?

I am particularly concerned about the workers' compensation market. I want us to take the opportunity this summer to do a survey of companies to gauge where we are, and survey the landscape. I have received anecdotal information and actual data from a rating organization that there are emerging issues in workers' compensation. We have seen a slight uptick in rates after experiencing more than a 60% reduction in rates. It is important to monitor evolving issues before they result in a crisis in the marketplace.

In the medical malpractice market, we are also beginning to see an uptick in rates. We are seeing some fairly significant mergers and acquisitions and are continuing to see new entrants in this market in Florida. The most interesting new component is the risk retention groups, and what that will mean to the admitted market. They are certainly filling a gap in the market, but a reduction in the capital and surplus does not guarantee a solvent company. We need to be vigilant with other Commissioners in other states where these groups are situated, to ensure that solvency is properly monitored, and Florida consumers are adequately protected.

What are your thoughts on the PIP debate and its future?

There is no question that PIP is in crisis. There have been substantial rate increases and Florida has one of the worst loss ratios in the country. For years, Florida had a competitive market for auto insurance. But the stress and strain of what we believe to be rampant fraud in the system has taken its toll. We have to figure out how to effectively collect the data to assist the policy makers to solve this problem. The mining of data is a big challenge. We need to harness technology and sufficient tools to help get the data to enable the policy makers to address these public policy issues.

Looking inward, what are your plans for the P&C Solvency Bureau and who is going to fill the void?

Finding new people is a major challenge, but we have a strong management team; one of the best in the country in terms of subject matter expertise and experience. The recent departure of Steve Szygula was a huge loss. Steve is an accomplished professional who is respected around the country. We are conducting a national search to augment this important part of our solvency team, someone who has that much experience in solvency regulation. Of course, we are very lucky to have Al Willis as Deputy. Al is a statutory accountant and has participated in most of the major solvency committees through the years. He is an appropriate and extremely qualified stand-in during this transition period.

This is Part I of Karen's interview with the Commissioner. Please see next month's Insurance Report for Part II.

Workers' Compensation Reciprocity Law Takes Effect July 1

By: Travis Miller

The Florida legislature passed HB 723 during the 2011 legislative session relating to reciprocity of workers' compensation claims. Governor Rick Scott has signed the bill into law, and the new law takes effect July 1, 2011. By its terms, the law applies to any claim made on or after July 1, 2011, regardless of the date of the accident.

The new law provides that if an employee in Florida leaves

this state incidental to his or her employment and receives an accidental injury in connection with the employment, the employee is entitled to the benefits of Florida's workers' compensation law. Conversely, the new law exempts from Florida workers' compensation laws the employee and employer of another state if an employee from another state is temporarily in Florida doing work for the employer.

The law seeks to address situations such as professional athletics wherein persons predominantly employed in one state become injured in another state and seek to avoid application of the home state's workers' compensation laws.



Hurricane Season Arrives

By: Travis Miller

The 2011 Atlantic Hurricane season is officially underway, and with it comes the annual concerns for Florida and

other coastal states. In the insurance industry, we tend to focus on the economic effects of hurricanes--the design of insurers' reinsurance programs, the impact on Citizens Property Insurance Corporation and its reliance on assessments, and the ability of the Florida Hurricane Catastrophe Fund to reimburse insurers with its cash-on-hand and bonding ability. However, these considerations pale in comparison to concerns over human safety and the potential impacts on our coastal communities.

As this year's hurricane season gets underway, we encourage Floridians and other coastal residents to prepare for the possibility of hurricane strikes this year. Florida largely has been spared from hurricane activity over the last few years, which unfortunately can lead to fading memories of the devastation caused by the series of storms in 2004 and 2005. And just because Florida hasn't experienced hurricanes for a few years, the storms have been there... last season saw its share of hurricanes, they just diverted away from us. Dr. Gray from Colorado State University has become known for his hurricane forecasts, and this year promises to be a busy one. In a recent forecast, Dr. Gray suggested this season will include 16 named storms, with 9 of those

becoming hurricanes and five of those being major hurricanes. Of course, these forecasts cannot answer the critical question of where these storms will strike. Nonetheless, Dr. Gray's research shows that hurricanes are more likely to affect Florida than other coastal states.

Insurance-related issues arising from protecting against and responding to hurricanes are important. As we enter another hurricane season, we can set those issues aside and focus on hurricane preparedness and taking the steps necessary to protect our families and communities from the storms we know sooner or later will come again.

Hurricane Names - 2011

Arlene, Bret, Cindy,
Don, Emily, Franklin,
Gert, Harvey, Irene,
Jose, Katia, Lee,
Mari, Nate, Ophelia,
Philippe, Rina, Sean,
Tammy, Vince, and Whitney



11th Circuit Reviews Florida Medical Malpractice Cap

By: Travis Miller

The United States Court of Appeals for the 11th Circuit has determined that Florida's cap on noneconomic medical malpractice damages (Section 766.118, Florida Statutes) passes constitutional muster under the Equal Protection Clause and Takings Clause of the U.S. Constitution as well as the Takings Clause of the Florida Constitution. However, the 11th Circuit has certified several other questions to the Florida Supreme Court for further consideration under state law.

The 11th Circuit in *Estate of Michelle Evette McCall vs. United States of America* addressed whether Florida's cap on noneconomic damages violates the United States or Florida Constitution. The court analyzed the plaintiffs' Equal Protection argument under a rational basis standard because the statutory caps do not raise questions of suspect

classifications under federal law. Under this standard, the court found that the statutory cap does not present Equal Protection concerns. Likewise, the court found that the legislation did not deprive the plaintiffs of vested property rights and therefore did not give rise to Takings Clause concerns. The court found sufficient state law authority to reach its conclusion on the takings issue. However, the court certified other significant questions to the Florida Supreme Court. These questions are:

- Does Florida's statutory cap on noneconomic damages violate the Equal Protection Clause under Article I, Section 2 of the Florida Constitution?
- Does Florida's statutory cap on noneconomic damages deny access to courts under Article I, Section 21 of the Florida Constitution?
- Does Florida's statutory cap on noneconomic damages deprive plaintiffs of their right to trial by jury under Article I, Section 22 of the Florida Constitution?
- Does Florida's statutory cap on noneconomic damages violate the separation of powers guaranteed by Article II, Section 3 and Article V, Section 1?

Governor Scott Signs Bill Reducing Commercial Rate Regulation

By: Travis Miller

Governor Rick Scott has signed HB 99 into law, reducing Florida's regulation of commercial insurance rates. In 2010, the legislature amended section 627.062 to provide that limited types of commercial insurance rates are not subject to prior regulatory approval. Instead, insurers writing the listed types of products can implement rate changes subject to a notice requirement and to the Office of Insurance Regulation's ability to follow up regarding the actuarial support. The legislature also made a corresponding change to the commercial auto insurance ratemaking requirements at section 627.0651.

This year, the legislature expanded the list of commercial insurance products that are exempt from prior rate approval. These products include general liability, non-residential property (except collateral protection), non-residential multi-peril, excess property, and burglary and

theft. In the auto ratemaking statute, the legislature eliminated a requirement that limited the prior law's exemption to fleets of 20 or more vehicles.

An insurer implementing rate changes in the exempted lines must notify the Office of Insurance Regulation within 30 days of the effective date of the change. The insurer also must maintain the underlying actuarial support for two years from the effective date, and the OIR may choose to examine the rates to confirm that the rates are not excessive, inadequate, or unfairly discriminatory.

The new law is effective October 1, 2011.



OIR Discusses Implementation of New Property Bill

By: David Yon

Recently, the Office of Insurance Regulation conducted a public meeting regarding the implementation of the new property bill, SB 408 or Chapter 2011-39, Laws of Florida. OIR participants included Richard Koon, Director of Property and Casualty Product Review, Belinda Miller, Acting General Counsel for Legal Services, Bob Lee, Actuary, and Ken Ritzenthaler, Actuary. A list of discussion items was distributed at the meeting. Each item identified a topic in the bill, the line numbers in the bill where the relevant statutory language is located, and the effective date for the statutory language.

Richard Koon began the discussion by stating there were numerous statutory requirements that must be incorporated into policies as soon as possible. He stated that policy changes that adopted language from the statute or from other forms that receive approval would be approved quickly. Changes deviating from the statute or relying on “more creative ideas” are likely to take more time for review. He stated that in general, incorporating the statute by reference would not be acceptable.

Other than noting the effective date of each statutory provision, OIR did not provide significant guidance as to when a statutory provision could be enforced without including language in a policy.

The discussion proceeded based on the handout provided by OIR.

Time Limit on Windstorm and Hurricane Claim (Section 10 of bill - Lines 772-787)

Requires hurricane claims, including supplemental or reopened claims, to be filed within three years of date of loss. OIR suggested this provision would be applicable to losses occurring after the effective date of the law even if the changes were not included in a policy. OIR wants to see both the three-year limit and the reference to supplemental and reopened claims in the policy.

Replacement Cost on Property (Homeowners) (Section 19 - Lines 2896-2913)

The policy must provide an option for insureds to obtain replacement cost coverage with no holdback for contents coverage. Companies also must add language regarding any holdback rights they want to exercise for the dwelling coverage.

Timing of Claim Payment (Residential Property) (Section 20 - Lines 2961-2982)

This section requires insurers to pay or deny “initial, reopened, or supplemental property claims” within 90 days. The bill simply adds “initial, reopened, or supplemental” claims to the statute. OIR stated insurers must notify policyholders of the 90-day requirement in the policy and include these terms.

Changes to Existing CGCC and Sinkhole Related Definitions (Property) and New Sinkhole Related Definitions

(Property) (Section 22 - Lines 3047-3135)

OIR strongly recommended including the new statutory definition for “structural damage,” which is quite lengthy in the policy. Mr. Koon also noted there would likely be issues related to the use of the terms “covered” building and “principal” building. The statute uses these terms without defining them. For example the insurer may restrict catastrophic ground cover collapse and sinkhole coverage to the “principal building,” but sinkhole loss means structural damage to the “covered building.” Policy language must clearly specify how these terms are being used in the policy.

Time Limit on Sinkhole Claim (Section 22 - Lines 3177-3182)

This provision bars a sinkhole claim not reported within two years of the date the policyholder knew or reasonably should have known about the sinkhole loss. Again, OIR did not say the statute could not be enforced before the language is included in a policy, but it is requiring that the language be in the policy. As a practical matter, this limit will be difficult to enforce anyway as the two years starts when the policyholder knew or should have known there was a “sinkhole loss,” not just knew there was damage.

Policyholder Demand for Sinkhole Testing (Section 25 - Lines 3239-3248)

The statute limits the time during which a policyholder can demand testing to 60 days after an insurer denies

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Implementation of SB 408 - Cont.

coverage. It also describes when the policyholder must pay for a portion of the cost. Again, OIR believes to enforce these limitations, language must be added to the policy to address both of these items.

Time Limit to Enter Sinkhole Contract (Section 25 - Lines 3274-3281)

OIR says that new policies must include language notifying policyholders they must enter into a contract for the performance of building stabilization and foundation repairs within 90 days after an insurer confirms coverage unless the parties pursue the neutral evaluation process.

Time Limit to Complete Sinkhole Repair (Section 25 - Lines 3295-3298)

OIR wants language added to policies notifying the policyholders they must complete stabilization within 12 months of entering into the contract unless one of the exceptions applies. OIR will permit, but not require, language limiting payments to the

amount necessary to begin and perform repairs and make the payment to the person making the repair.

Rebate Related to Repair (Section 25 - Lines 3311-3318)

OIR wants language in the contract notifying insureds they may not accept rebates and that, if they do, their coverage is void.

Policyholder Must File Sinkhole Report (Section 26 - Lines 3417-3422)

New policies must include language notifying insureds they must file before receiving payment for a sinkhole loss any report that was prepared at the insured's request or on their behalf.

OIR made the point that the Notice of Change provided for in the new section 627.43141, Florida Statutes, was not part of the contract and could not on its own change coverage. The Notice was intended only to allow insurers to tell policyholders about changes otherwise contained in a new policy instead of having to non-renew them. OIR also warned companies about using the Notice of Change option to remove sinkhole coverage from

a policy, stating it believed the better practice was to non-renew an existing policy and issue a new policy. Finally, Mr. Koon said the form of the Notice of Change should be filed with OIR for approval.

OIR was asked if it would consider issuing a presumed factor for rates for sinkhole coverage. OIR responded its sinkhole data was not really rate-making and it did not believe it had statutory authority to issue a presumed factor.

There was considerable discussion about the revised expedited rate filing process for recouping reinsurance costs. OIR has revised its I-File system to accommodate such filings. Companies may now recoup for all reinsurance costs, subject to a 15% cap. Mr. Koon stated the revisions to the rate filing certification process should speed up its review of filings and enable it to ask for additional information without disapproving a filing.

Many of these issues likely will evolve over time. As always, we will keep you advised.

First Appellate Court Upholds Health Care Act

By: David Yon

A panel from the 6th Circuit Court of Appeals became the first appellate court to rule on the constitutionality of the Patient Protection and Affordable Care Act. The decision, written in part by Judge Jeffrey Sutton, an appointee of George W. Bush, found the law met the classic constitutional tests imposed by the Supreme Court under the Commerce Clause. The size and scope of the health care industry and, according to Judge Boyce F. Martin, Jr., the fact that "virtually everyone requires health care services at some unpredictable point, . . . regardless of ability to pay," justified the mandate. For the entire holding, see *Thomas More Law Center v. Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. June 29, 2011).

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RTYC Insurance Practice Named to Chambers' Top Tier

By: Travis Miller

The insurance practice at Radey Thomas Yon & Clark, P.A. has again been named a Top Tier Practice by Chambers USA. Chambers again cited the work of David Yon, Harry Thomas, and Travis Miller as key components of the firm's strong presence in insurance law.

Chambers mentions that RTYC "has a reputation for being able to produce work on regulatory matters of the very highest standard." David Yon is called "one of the best in the business," and Harry Thomas is identified as an "excellent litigator." Travis Miller is noted for his work in representing insurers before the Florida Office of Insurance Regulation.

The firm appreciates the confidence our clients and friends have placed in us, and we look forward to continuing to provide the type of counsel that has allowed our insurance practice to earn recognitions such as that in Chambers USA.



First Tier Rankings

Administrative/Regulatory Law

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