

FLORIDA INSURANCE REPORT

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PIP Working Group Finalizes its Review of Florida's No-Fault Auto Insurance Laws

By: Bert Combs

After a series of meetings, a working group chaired by Florida's Insurance Consumer Advocate has finalized its review of Florida's "no-fault" auto insurance laws. The working group hoped to identify both the problems with the current system and solutions to these problems. However, the group ultimately failed to generate consensus among its members or produce any recommendations to help with the escalating costs of auto insurance. Significant problems with the current system were identified and thoroughly discussed. The Consumer Advocate presented the results of the working group's efforts at the most recent meeting of the Florida Cabinet, and a Final Report is expected to be issued soon.

The working group included law enforcement, consumer advocates, members of the insurance industry, medical providers, attorneys, and other professionals who have knowledge of the benefits and challenges of the no-fault system. Participants included:

- Robin Westcott, Insurance Consumer Advocate (Chair)
- Marc Slager, Deputy Chief of Staff, Director of Cabinet affairs, Executive Office of Gov. Rick Scott
- James Knudson, Esq., Senior Attorney, Florida Senate Banking and Insurance Committee
- Detective Ron Cooper, Hillsborough County Sheriff's Office

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Governor Accelerates Discussion of Citizens Proposals

By: Travis Miller

Over the course of many years, there has been no shortage of discussion in Tallahassee about the status and role of Citizens Property Insurance Corporation (and its predecessors). Raise its rates or cap them? Promote depopulation or getting rid of it, or use it as a safety valve for affordable coverage?

After several years of capped rate increases and the state using Citizens to maintain affordable coverage in the market, Citizens is growing at an alarming rate. Governor Rick Scott has seen enough, and now wants Citizens to recommend ways to improve its status. Scott has even suggested that Citizens should consider whether it can sell itself to a private company. The Governor wants prompt action on these requests too, asking Citizens to address these topics at the December 6 Cabinet meeting.

"I expect them to come back with ideas of things they can do without the Legislature, things that we have to go to the Legislature with," Scott said. "We shouldn't be sitting here just hoping every hurricane season that we're not going to have a hurricane. Someday we're going to have a hurricane."

Scott added that he doesn't believe most Floridians are aware they'll be assessed on a wide range of policies, including auto policies, if Citizens runs short of money. "I don't think that they have any idea that they are taking that risk of having an assessment," Scott said. "All consumers should know that."



GET TO KNOW ...

By Karen Asher-Cohen

MICHELLE ROBLETO – Michelle is the new Deputy Commissioner for Life & Health at the Florida Office of Insurance Regulation. Michelle grew up as an “army brat,” living in many places, including Frankfurt, Germany. She graduated from Louisiana Tech with a degree in sociology and business, and received her Master’s of Public Administration from Texas A&M. She and her husband, Rich Robleto, moved to Tallahassee in 1999, for Rich to take a job at the (then) Department of Insurance. Michelle worked at the (previous) FRPCJUA. Then, Kevin McCarty asked her to run the Florida Comprehensive Health Association (FCHA), which she did from 2001 to 2007. Michelle then became Director of the Division of State Group Insurance at the Department of Management Services; a position she held until now.

Recently, I asked Michelle the following questions.

What’s your background in health care and insurance? Is this a very different role for you?

I have been involved in health care financing and/or insurance issues for my entire career, beginning as a Presidential Management Intern with the Federal Health Care Financing Administration (now CMS). I bring the perspective of working in a variety of insurance roles, from federal entitlement programs, to working for an insurance company doing business in a competitive and changing market, to that of a large employer purchasing coverage. This is my first experience in the state regulatory environment, and I’m excited about the opportunity. I appreciate the confidence the Commissioner has shown in asking me to be part of his team.

What do you see as your mission as the new Life & Health Deputy Commissioner?

The mission is pretty clear. We want to meet the needs of Floridians by providing a framework that encourages a marketplace of companies that are licensed, financially sound, and compliant with consumer protections.

What are the challenges in Florida for health regulation?

This is a critical time for state governance. As we watch the upcoming challenges to federal reform unfold, and monitor the changing insurance landscape, our job is to be prepared with guidance and direction for the Florida marketplace.

What are your goals for your first 100 days?

My goals for the first one hundred days are to continue the Office’s work on the MLR waiver, to support the Commissioner and our legislative leaders in what is going to be another difficult budget year, to have the Office poised for whatever decision comes from the Supreme Court, and to continue the great work of the Office. I have been very impressed with the professionalism and processes in place within the Product Review and Financial Oversight divisions.

Do you anticipate making any administrative changes?

It’s really too early to tell.

How do you get away from it all?

I love to bake. Once I’m off crutches, I’ll get back to running.

What’s it like to be ½ of the first husband and wife team to hold the same office at OIR? [Editor’s note: Michelle’s husband, Rich Robleto, was also the Life & Health Deputy Commissioner at OIR and occupied the very same physical office.]

It’s a little strange, isn’t it? It’s really nice to have someone at home that speaks the same language.

OIR Approves 8.9% Workers' Compensation Rate Increase for NCCI

By Karen Asher-Cohen

On October 31, 2011, Commissioner McCarty issued an Order approving an 8.9% workers' compensation rate increase for the National Council on Compensation Insurance (NCCI), to become effective January 1, 2012. This Order was in response to the modified filing which NCCI made on October 26, 2011, which included the changes referenced in the Office's first Order, issued October 24th. NCCI had submitted its original rate

filing on August 18, 2011. The OIR then held a public hearing on the filing on October 11, 2011, and issued an Order on October 24, 2011, denying the first filing.

Commissioner McCarty remarked: "The rate increase that has been justified would still give Florida the lowest workers' compensation insurance rates among the large states, the lowest workers' compensation insurance rates in the southeast, and most importantly -- a 58.6% cumulative decrease from the highs prior to the legislative forms in 2003."

Commissioner McCarty Receives Nod from Governor, CFO

By: Travis Miller

The last couple of weeks have been good ones for Florida Insurance Commissioner Kevin McCarty. Although it has been known for some time that Commissioner McCarty is in line to be the next NAIC President, this became official at the recent NAIC meetings in Washington, D.C. Please see our article elsewhere in this newsletter for additional information about that appointment.

Shortly before the NAIC meetings, the Commissioner got a boost from Governor Rick Scott and CFO Jeff Atwater. As most readers know, the process of selecting an Insurance Commissioner (and Banking Commissioner, for that matter) is a complicated one in Florida. It takes a majority vote of the Governor and Cabinet, with the Governor and Chief Financial Officer required to be on the same side. Once a Commissioner is appointed, the process becomes a little less clear. The position continues indefinitely, subject to a possible vote of the Governor and Cabinet to terminate the appointment.

This causes some uncertainty, particularly when the elected officials comprising the Governor and Cabinet change. This leads to inevitable questions and speculation -- Will the new elected officials want to retain the current appointees or go in a different direction? Will they even be able to agree, as a group, on a change? Will they make an affirmative statement on the appointees' positions, or will they be left in limbo?

Although clearly things can change at any time in government, Governor Rick Scott showed support to Commissioner McCarty by recently saying he is satisfied with the job the Commissioner is doing. CFO Jeff Atwater then followed by saying he has worked with Commissioner McCarty for a number of years and is comfortable with the direction he is taking the Office of Insurance Regulation.

These comments come at an opportune time for Commissioner McCarty, as he is on the eve of ascending to the NAIC presidency. In addition, this support can only help the OIR's chances of attracting and retaining senior regulators, which already has enough challenges in a tough budget environment.



Commissioner Kevin McCarty

- Howard Goldblatt, Coalition Against Insurance Fraud
- Brad Ashwell, Director, Florida Public Interest Research Group
- Ralph Glatfelter, Florida Hospital Association
- Dr. Richard Thacker, DO, Florida Osteopathic Medical Association
- Paul Watson Lambert, Esq., Florida Chiropractic Association, Inc.
- Jeffery M. Scott, Florida Medical Association
- Steven D. Smith, Blue Cross/Blue Shield of Florida
- S. Grier Wells, Esq., Board of Governors, Florida Bar
- Todd Copeland, Esq., Florida Justice Association
- René Hernández, Esq., Florida Insurance Council, Inc.
- Lynne McChristian, Insurance Information Institute
- Alex M. Hageli, Esq., Property Casualty Insurers Association of America
- Allen McGlynn, Esq., State Farm Mutual Automobile Insurance Company
- Robert Simmons, Esq., Allstate
- Michael J. Neimand, Esq., United Automobile Insurance Company
- Major Simon Blank, Department of Financial Services, Division of Insurance Fraud
- R. Terry Butler, Esq., Senior Attorney, Department of Financial Services
- Monte Stevens, Director, Governmental Affairs, Office of Insurance Regulation

Florida's Insurance Consumer Advocate recognized that each member of the working group has their own pecuniary interests and point of view, and she acknowledged that her particular interest involved doing what is best for the consumer. However, she said she hoped that doing what is best for the consumer may actually benefit all stakeholders.

The topics analyzed by the working group included:

- The benefits (and disadvantages) of Florida's no-fault system;
- The different types of fraud and abuse;
- Healthcare clinic licensure;
- Billing and payment processes;

- Alternative dispute mechanisms;
- Independent medical examinations (IMEs);
- Emergency room services;
- Uninsured drivers; and
- Fee schedules

Throughout the working group's meetings, insurers claimed there is rampant fraud and overutilization in the current system. Consumer advocates and medical professionals claim that PIP benefits are often the only insurance available to accident victims and the only insurance available to promptly pay for emergency room care and other medical services. Attorneys claim that insurers are too quick to deny benefits and underpay providers. The focus of much of the criticism about the current system related to certain healthcare clinics (e.g., massage therapy clinics) that are exempt from licensure requirements. However, representatives of the medical profession argued that such clinics, at least when owned by licensed medical providers, should continue to be exempt.

Ultimately, the working group members were unable to agree on a set of recommendations given their varying interests and points of view. The Consumer Advocate has asked insurers to provide her with PIP claims data, including how attorney fees affect the rising cost of auto insurance. After consideration of all of the information received during the meetings and additional data from insurers, the working group is expected to issue its Final Report. That report will no doubt assist the Florida Legislature in analyzing what will be several legislative bills that seek to either reform or repeal Florida's current no-fault auto insurance system.



Sneak Peek at the 2012 Legislative Session

By: Bert Combs

The 2012 Florida Legislative Session will begin on January 10 and last for 60 days. This year's session is earlier than usual due to Legislative and Congressional Reapportionment that occurs every 10 years to redraw district lines.

Reapportionment will be a primary focus of legislators, but several major insurance bills have already been filed in both the House and Senate. The bills impact Florida's laws relating to many different lines of business. The proposed legislation affects motor vehicle insurance, property insurance, bad faith litigation, and workers' compensation insurance. A health insurance bill relating to autism has also been filed, along with other bills affecting captive insurers, alien insurers, and title insurance.

Motor Vehicle Insurance

Three bills address problems associated with Florida's "no-fault" or "personal injury protection" (PIP) insurance laws. The bills specifically address auto insurance fraud, and other bills may be filed that seek to further reform or even repeal the PIP law altogether. HB 119, SB 254, and HB 523 contain some similar provisions. Among the changes, the bills seek to revise requirements relating to vehicle crash reports, the licensure of health care clinics, direct revenues to the operation of the Automobile Insurance Fraud Strike Force, and authorize the Division of Insurance Fraud to establish direct-support organization for purposes of prosecuting, investigating, and preventing motor vehicle insurance fraud. The proposed legislation also revises provisions relating to claim payments, provides that the time for paying or denying a claim is tolled during an investigation of suspected fraudulent acts, specifies when benefits are not payable, and revises reimbursement limitations.

Property Insurance

Bills have been filed in both the House and Senate to address the depopulation of Citizens Property Insurance Corporation. HB 245 and SB 578 revise Citizens' depopulation procedures, and both bills provide that eligible surplus lines insurers may participate in depopulation, take-out, or keep-out programs. SB 4059 repeals the requirement that the Financial Services Commission provide an annual report to the Legislature relating to net probable maximum losses, financing options, and potential assessments of both the Cat Fund and Citizens.

SB 728 amends the requirement for an insurer to provide insureds with a checklist of policy contents, revises provisions relating to the disclosure of certain policy information to claimants, and revises provisions relating to deductibles. SB 846 broadly redefines the term "claim-related document" and, among other things,

allows a claimant to request and obtain all claim-related documents from an insurer.

Bad Faith Reform

After failing to pass bad faith reform last session, a simplified bill has been filed that would require claimants to provide notice to an insurer prior to filing suit for bad faith damages. HB 427 expands upon Florida's existing "civil remedy" notice requirements for statutory violations. The bill would require that, before bringing a common-law bad faith action against an insurer, a party must first provide to the Office of Insurance Regulation and the insurer prior written notification. The notice must specify the common-law duty violated by the insurer, and the notice must specify the amount of money that the insurer has failed to pay. Most importantly, the bill specifies that no cause of action may be filed if, within 60 days of the notice, the circumstances giving rise to a statutory or common-law based violation are corrected.

Workers' Compensation

A total of five bills affecting workers' compensation insurance have been filed in the House. Three bills are pending in the Senate. HB 307 and SB 676 revise Florida's certificate of exemption process. HB 4019 and SB 140 repeal a workers' compensation reporting requirement that requires the Department of Financial Services to report on the administration of Florida's workers' compensation law to the Governor and House and Senate leaders. HB 4087 repeals a requirement for the Financial Services Commission to contract for an actuarial peer review of licensed rating organizations. HB 511 and SB 668 revise requirements for determining the amount of reimbursement for repackaged or relabeled prescription medication. Finally, HB 4085 repeals the requirement for the Office of Insurance Regulation to have a Workers' Compensation Administrator and deletes obsolete requirements relating to the Florida Workers' Compensation Joint Underwriting Association.

Other Bills

HB 162 is a health insurance bill that addresses autism. It requires that a physician refer a minor to an appropriate specialist for screening for autism spectrum disorder under certain circumstances and requires that certain insurers and health maintenance organizations provide direct patient access to an appropriate specialist. The remaining bills address captive and alien insurers and title insurance. HB 379 and SB 610 are identical and expand the kinds of insurance for which a captive insurer may seek licensure. HB 409 revises the certificate of authority exemptions for alien insurers with respect to nonresident policy owners. Lastly, SB 826 creates a new statute that gives title insurers the right to cure any claim it receives. However, after 90 days without a cure, the insurer must tender payment of full policy limits or cover all costs until the cure is finalized.

Florida Insurance Commissioner to be Next NAIC President

By: Karen Asher-Cohen

At the National Association of Insurance Commissioners (NAIC) Fall meeting in Washington, D.C., the outgoing NAIC President, Susan Voss (Iowa Commissioner) announced that Florida Commissioner Kevin McCarty will become the NAIC President, effective January 1, 2012. Commissioner McCarty will continue to serve as President-Elect of the NAIC through 2011.

"It is an honor and privilege to be elevated by my colleagues and to this leadership role," remarked Commissioner McCarty, "Over the next year we must confront several important challenges.

Whether it is Dodd-Frank or the Affordable Care Act, the federal government has become increasingly involved in the insurance arena. As your president, I intend to vigorously defend the role of state-based regulation, highlight our accomplishments, and continue to work for regulatory modernization and national uniformity to create an insurance framework that benefits both consumers and the insurance industry."

Other officers elected by the NAIC during the Fall Meeting include James Donelon as President-Elect (Louisiana Commissioner), Adam Hamm as Vice-President (North Dakota Commissioner) and Monica Lindeen as Secretary-Treasurer (Montana Commissioner). All of the commissioners will assume their new roles January 1, 2011.

OIR Releases 2011 Annual Report on Medical Malpractice

By: Karen Asher-Cohen

The Florida Office of Insurance Regulation (Office) released its 2011 annual report on the medical malpractice insurance market in Florida. The Office is required to issue a summary and analysis of the state of the medical malpractice insurance industry on an annual basis pursuant to Florida Statutes. The report features 2010 data compiled from Office rate filings, financial data, and the closed-claims database.

The report showed positive trends for the industry in Florida. The average return on surplus for companies operating in

Florida shows that this line of insurance continues to be profitable. There were 61 medical malpractice rate filings approved during 2010 in Florida. The average approved rate change for physicians and surgeons medical malpractice, the largest segment of medical malpractice insurance, decreased rates 2.6%.

The annual report compared Florida's medical malpractice data to data from other states with the largest medical malpractice markets including: California, Georgia, Illinois, Maryland, Massachusetts, New York, New Jersey, Ohio, Pennsylvania, Texas, and Washington. The report showed that Florida's loss ratios, and non-loss costs were competitive with other states in this peer group.



Florida and Georgia Regulators Renew Catastrophe Response Agreement

By: Travis Miller

Florida Insurance Commissioner Kevin McCarty and Georgia Insurance Commissioner Ralph Hudgens have renewed an agreement between the states to ensure continuity of operations of mission critical functions in the event of a catastrophe that causes significant disruption to either state's operations. Under the agreement, members of an affected state will use temporary workspace designated by the other's state until the infrastructure of the affected state has been restored.

"The Georgia Department of Insurance appreciates this opportunity to work together with our Florida colleagues to improve both states' ability to provide essential regulatory services and protections to our citizens in the event of a man-made or natural disaster," said Commissioner Hudgens. "We hope and pray, of course, that such a disaster never occurs. If it does, however, this agreement increases the level of preparedness of both departments."

"I appreciate the opportunity to work with Commissioner Hudgens to craft an agreement that is mutually beneficial to both of our states," said Commissioner McCarty. "It is essential that we are proactive in our planning to allow each office to provide critical services and information to emergency response teams and the public directly following a major catastrophe. This agreement increases our capacity to perform these important functions."



Appellate Update

By: Tom Crabb

Claim Payment To Insured Following OIR Intervention That Was Accepted By Insured Without Reservation Bars Later Claim Of More Damage

United Property and Casualty Ins. Co. v. Valladares et al., Case No. 3D10-2706 (Fla. 3d DCA 2011).

An insured suffered damage to his home as the result of a broken water pipe. The company denied coverage as excluded under the policy. The insured complained to the OIR, which investigated and initiated a proceeding against the company. In a consent order with the OIR, the company agreed to pay the insured \$23,000, which the insured accepted immediately and without reservation. The insured then sued the company for breach of contract for loss of use of the home while it was being repaired. The trial court entered summary judgment for the insured for loss of use of benefits and the company appealed. On October 19, 2011, the Third District Court of Appeal held that the payment to the insured constituted an offer of full settlement, which the insured accepted by cashing the check, "the payment was an accord and satisfaction as to the losses known and alleged at that time."

Trial Court Cannot Confirm Appraisal Award That Has Already Been Paid To Create The Basis For An Award Of Attorney's Fees

State Farm Florida Ins. Co. v. Silber, 36 Fla. L. Weekly D2298A, Case No. 4D10-1549 (Fla. 4th DCA 2011).

An insured made a claim for property damage arising from a pipe leak, and the company invoked an appraisal clause in the policy. The appraisers selected by the company and insured were unable to select an umpire so the insureds filed a petition with the trial court to appoint an umpire, which umpire was ultimately selected by the parties before the court acted. The appraisal resulted in an award to the insured of \$23,000, which the company paid within seven days. The insureds then went back to the trial court seeking an award of interest pursuant to section 627.70131 (5)(a) of the Code, which allows for interest if a claim is not paid within 90 days, but says that "failure to comply with this subsection shall not form the sole basis for a private cause of action." The trial court then confirmed the appraisal award, awarded interest, and then awarded attorney's fees and costs on the claim for interest. The Fourth District Court of Appeal concluded this was improper. First it was improper for the trial court to confirm an appraisal award. A trial court cannot confirm an appraisal award that has already been paid (and where the insurer admitted coverage, only disputed the amount) in order to create a basis for an award of attorney's fees as such would be contrary to the "laudable goal of the appraisal process." Because the trial court could not confirm an appraisal award already paid, and because the statute prohibits a cause of action only for fees, the insureds had no viable claim for interest or related attorney's fees.



DFS Adopts Rule on Use of Designations by Licensed Insurance Professionals

By: David Yon

The general purpose of rule 69B-215.235, is described as to "set forth standards to protect consumers from dishonest, deceptive, misleading, and fraudulent trade practices with respect to the use of certifications and professional designations in the marketing, solicitation, negotiation, sale or advice made in connection with an insurance transaction by any licensee."

The rule provides that only lawful designations, (i.e., CLU, ChFC), by recognized organizations that maintain published standards and procedures to assure the ongoing competency and ethical conduct of members or conferees may be used. The use of self-conferred or baseless designations by licensees is prohibited. The rule will become effective on November 16, 2011.

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Travis Miller Featured in A.M. Best Insurance Law Podcast



Firm president Travis Miller recently was featured in the latest episode of A.M. Best's Insurance Law Podcast, a series that examines timely and important legal issues affecting the insurance industry, from an attorney's point of view. In this episode, Travis discusses the pending proposal by the Florida Hurricane Catastrophe Fund to shrink its size and increase its costs over a multi-year period. The FHCF has proposed this measure to reduce its size to a more conservative level in light of potential concerns with raising enough bonds to meet the full amount of its contractual commitment to participating insurers. Although this is a worthy goal, Travis points out that any public policy initiatives affecting the property and casualty insurance market should be viewed as a whole or else existing problems could be worsened. For example, if a reduction in the size of the FHCF, or an increase in the industry retention, causes the private market's rate needs to increase while Citizens Property Insurance Corporation's rate increases remain capped, the proposal could thwart depopulation efforts by causing the state-run Citizens to look relatively more attractive. This would be counter to what policymakers, including Governor Rick Scott, have been advocating recently.

Travis' podcast can be found online at feeds2.feedburner.com/InsuranceLaw.

Founded in 1899, A.M. Best Company is a leading insurance rating and information source. In 2011, the Radey law firm was named to A.M. Best's list of recommended insurance attorneys.



Happy Thanksgiving

The family of Radey Thomas Yon and Clark wish you and yours a happy and healthy Thanksgiving.