Florida Insurance Report

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OIR Proposes to Repeal Informal Conference Rule; Industry Challenges Repeal*

By: Travis Miller

The OIR recently proposed to repeal its administrative rule setting forth procedures for resolving insurer examinations. By statute, an insurer is entitled to a "hearing" on findings made by the OIR in its examination reports. The OIR has a long-standing rule specifying that the hearing will be conducted as an informal conference, not a formal administrative proceeding. This process has worked well in allowing insurers and the OIR to resolve differences in examinations, while a separate provision of the rule makes clear that the insurer retains its right to request a formal hearing before the examination report is filed.

About two years ago, the OIR proposed to amend the informal conference rule. However, it eventually abandoned this effort amidst industry objection. Now, the OIR proposes to repeal the rule in its entirety. The industry has opposed this repeal, primarily in fear that eliminating the clear opportunity for a formal hearing before publication will result in erroneous examination reports being released. The industry has cited concerns with exposure to civil actions from erroneous reports, as well as potential problems with having to report the purportedly final reports to other state regulators notwithstanding the insurer's objections to the contents of the reports. At a recent rule hearing, the OIR did not clarify its intent behind repealing the rule.

Industry trade associations have filed a rule challenge seeking to block the OIR's repeal of the rule. Travis Miller has been involved in monitoring the repeal and has analyzed the impact of this potential change. Please feel free to contact Travis for additional information.

* *As of the publication date - OIR is considering dropping the repeal of the rule.*

DFS Consolidates Call Centers, Saves State $5 Million Over Five Years

By: Tom Crabb

On July 10, 2008, Florida Chief Financial Officer Alex Sink announced plans to consolidate the Department of Financial Services' eleven consumer call centers to two such centers in Tallahassee and Largo, resulting in estimated savings to Florida taxpayers of $5 million over the next five years. Chief Sink said, "The people in our state are looking for innovative and effective ways of increasing productivity, while not sacrificing customer service." "Over the next five years, this plan will save millions in tax dollars and set a new standard for government efficiency in tight economic times."

The centers handle calls relating to insurance agents and agencies, educational consumer outreach, insurance fraud investigations, and workers' compensation enforcement, among other issues. The change is expected to be fully implemented by February 1, 2009. Dominic Calabro, President and Chief Executive Officer of Florida TaxWatch said, "By consolidating resources while improving customer service, CFO Sink is being more efficient with Floridians' tax dollars."

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Firm News

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NEWS FROM THE COURTS

Supreme Court Rules on Surplus Lines and Other Exemptions

By: Travis Miller

The Florida Supreme Court in *Essex Insurance Company v. Zota* recently answered a certified question presented by the Eleventh Circuit, and in doing so confirmed an important interpretation of the form and rate requirements and other provisions of the Florida Insurance Code. The Eleventh Circuit presented five certified questions to the Supreme Court pertaining to surplus lines issues. The Florida Supreme Court ultimately answered only one of these questions--whether Fla. Stat. 626.922 or 627.421 requires delivery of evidence of insurance directly to the insured, such that delivery to the insured's agent is insufficient. The Supreme Court ruled that delivery to the insured's agent is permissible. However, in arriving at this decision the Court made important interpretations of Section 627.021(2), Florida Statutes.

The Florida Insurance Code is divided into several "chapters," which are then further divided into "parts." For example, Chapter 627 generally deals with various types of insurance policies--property, life, health, etc. Part I of Chapter 627 is the rating law, which generally requires insurers to submit property and casualty insurance rates for OIR review. Part II of Chapter 627 contains provisions relating to policy forms, including the policy approval requirement. Subsequent chapters deal with specific types of insurance policies and related subjects.

Section 627.021 states that some types of insurance are exempt from Part I of Chapter 627 (the rating law). However, Section 627.021(2) seems to state that the entirety of chapter 627 does not apply to certain kinds of insurance, including surplus lines. Through principles of statutory construction, the Supreme Court in *Essex* determined that the statutory exemption from the "chapter" in fact applies only to the first "part" of Chapter 627. This means that surplus lines policies are exempt from the first part of Chapter 627 pertaining to rates, and therefore exempt from rate regulation. However, an insurer would need to review the subsequent parts of Chapter 627 and individual statutory provisions to determine whether surplus lines policies would be exempt from other requirements of Chapter 627.

The Eleventh Circuit also certified a question as to whether an insured successfully bringing a claim against a surplus lines insurer may recover attorneys' fees under section 627.428. The Supreme Court did not answer this question because it was premature based on the posture of the case. However, the Supreme Court specified that based on its reasoning as summarized above, the insured may recover attorneys' fees under section 627.428 if it is ultimately successful. (The attorneys' fee provision is in Part II of Chapter 627).

To further discuss the *Essex* ruling on the applicability of Chapter 627 to surplus lines insurers or other types of insurance, please contact Travis Miller.

Agent Countersignature Laws Are Now History

By: Tom Crabb

Down went Nevada and then there were none. Agent countersignature laws required licensed out-of-state agents to have a policy countersigned by a licensed resident agent, sharing the commission with the resident agent even though the resident agent added nothing to the transaction but a signature. The Council of Insurance Agents & Brokers won a federal court case striking down Nevada's countersignature law as unconstitutional, ending the Council's six year fight to have such laws struck down in all 50 states. In a press release, Council President Ken A. Crerar said "This is the end of an absurd protectionist requirement that served only the self interests of small protectionist agents and not their clients." He continued "But it also is time for this industry to look at itself and see what else is out there that serves no purpose other than protecting weaker operations by posing barriers to business. That includes excess and surplus lines, anti-rebating laws and anything else that does nothing to support our clients and everything to skew the market."

United States District Judge Robert Hinkle threw out Florida's countersignature law in 2003, then concluding "In sum, no purpose is served by denying to Florida-licensed agents who live outside Florida the same rights and privileges afforded to Florida-licensed agents who reside within the state. The discrimination against nonresident agents is unconstitutional." *Council of Insurance Agents & Brokers v. Gallagher*, 287 F. Supp. 2d 1302, 1313 (N.D. Fla. 2003). Five years after Judge Hinkle's decision, agent countersignature laws have now been committed to history.

Appellate Court Rejects Health Insurer's Binding Arbitration Clause

By: Travis Miller

The First District Court of Appeal has rejected a life insurer's attempt to include a binding arbitration clause in its contracts in *United Insurance Company of America v. Office of Insurance Regulation*. The insurer included the binding arbitration clause in a filing submitted to OIR. OIR disapproved the clause, arguing that it caused deception as the risk being assumed and created ambiguity regarding the terms and benefits of the contract. The insurer pursued its administrative rights, and an Administrative Law Judge sided with the OIR. The OIR then entered a final order of disapproval, and the First DCA affirmed.

The First DCA reasoned that due to the state's right to regulate the business of insurance, the right to arbitrate disagreements as established by the Federal Arbitration Act does not trump the state's right to regulate insurance products. The OIR also cited provisions of the Insurance Code indicating that insurers have the right to bring civil actions for certain statutory violations. The OIR believes this implicitly precludes binding arbitration. Ultimately, the appellate court found the OIR's interpretation of Florida statutes to prevail over generalized preferences for arbitration as a dispute resolution method.

Travis Miller has participated in discussions with the OIR about mandatory arbitration clauses in other lines of business over the course of several years. For additional information on this topic, please feel free to contact him.

FSC Has Full Agenda

The Financial Services Commission will consider a long list of rules at the upcoming July 29th meeting - both for publication and final adoption.

- 69O-203.070 - Annual and Quarterly Reports; Forms - The rule is being updated to require prepaid health service organizations filings be submitted on NAIC Health blanks. *(Final Adoption)*
- 69O-157.004, .104, .114 and .117 - Long Term Care, Out-of-state Group - Provides that long term care policy is incontestable after 24 months and removed the clause that prohibited a long term care policy from providing for less than 24 consecutive months for nursing home care. *(Final Adoption)*
- 69O-167.004 - Required Preinsurance Inspection of Private Passenger Motor Vehicles - Adopts a revision to the existing form in order to comply with changes to statute. Section 627.744 requires auto insurers that insure cars that have not been insured without interruption for the prior 2 years to perform a preinsurance inspection. *(Final Adoption)*
- Part IV of Rule Chapter 69O-170 - Arbitration Rules of Procedure - The OIR is repealing this part of the rule chapter now that the right to arbitration no longer applies to rate filings. *(Publication)*
- 69O-170.0144 - Public Hurricane Loss Projection Model - Fee Schedule - This new rule implements section 18 of Chapter 2008-66, Laws of Florida establishing a fee schedule for access and use of the Public Hurricane Loss Projection Model. *(Publication)*

Please contact any of our insurance professionals for questions regarding these rules.

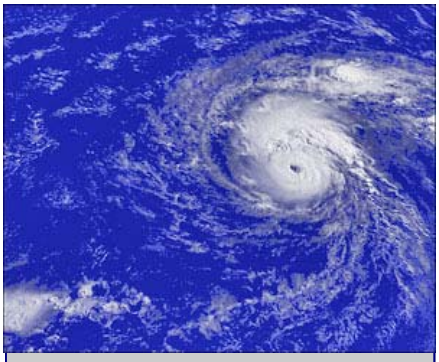
Rule Adopting Civil Remedy Website Moves Forward

By: Travis Miller

The Department of Financial Services continues to pursue an administrative rule adopting the form of its current website for reporting civil remedy notices. The DFS will hold a hearing on the proposed rule on July 23, 2008, if requested by an interested party. Travis Miller of RTYC attended the initial workshop on the rule.

The process of submitting civil remedy notices historically has involved mailing paper forms and materials—sometimes voluminous materials, to DFS and the insurer. The new website is designed to turn the process into an electronic one. Insurers will be able to designate persons within their organizations who will receive email notice when civil remedy notices are filed. Insurers also are able to update the status of their files through the website.

The website is currently operational at https://apps.fldfs.com/civilremedy. Please contact Travis Miller with any questions about the rule.

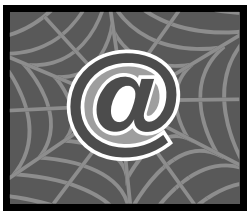


Hurricane Bertha

2008 Hurricanes

What's in a name? Since 1953 the National Hurricane Center has provided a list of pre-approved names for the hurricane season. The names are recycled every few years, however, a name does get retired if it is associated with a catastrophic hurricane. Here is this year's listing. Let's hope none of them retire!

Arthur	Laura
Bertha	Marco
Cristobal	Nana
Dolly	Omar
Edouard	Paloma
Fay	Rene
Gustav	Sally
Hanna	Teddy
Ike	Vicky
Josephine	Wilfred
Kyle	



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OIR Seeks Feedback on CEDRA Reporting

By: Bert Combs

The Office of Insurance Regulation recently conducted a workshop to discuss revisions to its Catastrophic Event Data Reporting (CEDRA) requirements. This claims data reporting is governed by Section 627.713 and Rule 69O-142.015. The purpose of workshop was to get some initial feedback from the industry before formal rulemaking proceedings are held. There will also be additional "training" sessions once the new CEDRA data templates and forms are adopted by rule.

The workshop was helpful in terms of showing how the new online system will work and several significant issues were discussed. A downloadable version of a demo that shows how the CEDRA reporting will occur is available upon request by sending an email to disasterreporting@fldfs.com. The new system essentially uses the "Data Reporting" component of i-Portal to input the data. https://iportal.fldfs.com/ifile/default.asp

Two of the more significant changes to the CEDRA requirements are (1) claims data will now be input on a claims-level basis and not on a aggregate basis like it has been done previously and (2) a new component of the reporting (Section C in the attached data templates) will be required quarterly, regardless of whether a catastrophic event occurs. This "Section C" requires reporting of nonrenewal and cancellation information on commercial lines policies. A third issue that will be important relates to whether data is reported on a group or company basis.

CLAIMS LEVEL DETAILED REPORTING

The primary objections to individual claim reporting relate to the burden associated with reporting on a claims level basis and maintaining the confidentiality of data that is submitted in this way. The concern of course is that the data would consist of a list of all of an insurer's pending claims by county and could be subject to misuse by plaintiff lawyers. OIR responded by stating that insurers will be free to assign random tracking numbers to the claim, the policy, and the claim id that is issued in CEDRA. However, this may not resolve all of insurers' concerns. OIR understands insurers' concerns and is going to respond to the confidentiality issue at a later date after consulting its legal department.

QUARTERLY REPORTING FOR COMMERICAL LINES

Another significant issue is the change in Section C that will require quarterly reporting of policy nonrenewals, cancellations, policies in force, etc. for commercial lines policies, regardless of whether a catastrophic event occurs. OIR claims that this reporting is necessary too as a "check" against the CEDRA data that is provided elsewhere (e.g., does the insurer's number of claims in a county match up in a reasonable way against policies in force in a particular county). OIR also explained that this data is necessary for commercial lines policies because it is not captured by the current QUASR reporting for residential policies.

NO MORE REPORTING ON A GROUP BASIS

Finally, another significant issue for some companies will be the fact that insurers will not be permitted to report on a group basis. Reports will have to be filed for each insurer

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CEDRA Reporting - *Cont. from Page 4*

This issue was not specifically discussed during the workshop but it was an issue when revisions were being discussed late last year.

There were other company-specific questions addressed during the workshop and the data templates and instructions will be revised further in response to comments. However, these changes are mainly focused on making the headings and definitions in the data template more understandable.

Rulemaking proceedings will be scheduled in the near future at which additional comments can be provided to OIR. OIR stated that the first report would be required at the earliest for the 3rd Quarter (November 15, 2008). Please feel free to contact Bert Combs with any questions or concerns regarding CEDRA reporting and the upcoming rule hearings.

My Safe Florida Home Program Meets Mitigation Goals A Year Early, Stops Taking Applications

By: Tom Crabb

In 2007, the Florida Legislature created the My Safe Florida Home program, providing 400,000 Florida homeowners with free wind inspections and the ability to apply for grants to harden their homes against potential wind damage. The inspections suggest ways homeowners can protect their homes against wind damage and inform the homeowner whether he or she is eligible for a discount on their wind premiums because of their home's ability to withstand damage during a storm. Fifty-eight percent of homeowners who have obtained the free inspection have qualified for a reduction in their wind premium averaging $219.31. To date, the program has approved approximately 39,000 mitigation grants and has paid more than 18,000 grants totaling over $63 million.

On July 3, 2008, Florida CFO Alex Sink announced that the program had met the Legislature's goals a year ahead of schedule and that no new applications would be accepted. CFO Sink said "When the Florida Legislature created the My Safe Florida Home program, their intent was to create a culture of mitigation in our state." "Almost half a million homes later, homeowners served by this program are better informed and most are better prepared for the next big storm." The program has run through its allotted $250 million and was not without problems or critics. Computer problems and improper contracts hampered the program, which ultimately strengthened fewer than 1 percent of Florida's 4.5 million homesteaded properties. Nonetheless, 400,000 Florida homeowners benefitted from the program and Florida is better equipped to face a storm as a result.

Public Hurricane Model - Fee Schedule

By: David Yon

The 2008 property bill (Chapter 2008-66, Laws of Florida) makes a provision for the use of the public hurricane loss projection model by residential property insurers. This access includes "all assumptions and factors and all detailed loss results, for the purpose of calculating rate indications in a rate filing and for analytical purposes, including any analysis or evaluation of the model required under actuarial standards of practice." Further, it provides that by January 1, 2009, OIR is to establish by rule a fee schedule for access to and use of the model.

The Office is proceeding with rule development and the workshop on rule 69O-170.0144 is scheduled for July 22, 2008, at 9:30 a.m. in Room 116 Larson Building, 200 East Gaines Street, Tallahassee, Florida. While a copy of the fee schedule was not available when this newsletter went out, we will monitor developments and make available a copy of the fee schedule as soon as it is available. You can obtain a copy by contacting Kendria Ellis or any of our insurance professionals. You can also periodically check our website the Events Calendar section at www.radeylaw.com.

LIFE AND HEALTH COMPLIANCE ISSUES

OIR Issues Informational Memoranda as a Result of 2008 Legislative Changes

Over the past several weeks, the Office of Insurance Regulation has issued a series of Informational Memoranda to notify insurers of legislative changes enacted during the 2008 regular legislative session.

- Bone Marrow Transplant Procedures and Identification Cards - OIR-08-3M

This informational memorandum addresses changes to section 627.4236, Florida Statutes contained in House Bill 535 (Chapter 2008-119, Laws of Florida). The changes address the definition of bone marrow transplant and specify that an outline of coverage must accompany an identification card. Identification cards are not required to be filed for approval; however, the act (effective January 1, 2009) does require filing amendments to existing and approved forms with OIR to ensure compliance with the new provisions.

- Long-Term Care Secondary Addressee - OIR-08-4M

Senate Bill 2012 (Chapter 2008-220, Laws of Florida) made legislative changes to section 627.94073, Florida Statutes. Policyholders are to be notified at least annually of the right to designate a secondary addressee for their long term care policies. Notice of possible lapse in coverage must now be sent to the policyholder and the secondary designee. Contract forms implementing these new provisions must be amended and filed with the OIR.

- Dependent Coverage - OIR-08-5M

The purpose of this memorandum is to notify insurers about changes made by Senate Bill 2534 (Chapter 2008-32, Laws of Florida) relating to dependent coverage. Insurers that offer coverage under group, blanket, or franchise health policies that insure dependent children must offer the option of insuring a child to the end of the year that the child reaches 30 years of age. This applies to policies issued or renewed on or after October 1, 2008. To assure compliance, all rates, notices, and contract amendments applicable to dependent children must be filed with the OIR.

- Credit Life & Credit Disability Insurance - OIR-08-7M

House Bill 343 (Chapter 2008-75, Laws of Florida) makes changes to sections 627.553, 627.679, and 627.681, Florida Statutes, pertaining to debtor groups and credit life and credit disability. Section 627.553 removes the $50,000 limit and exception for loans not exceeding one year in duration. Section 627.679 is amended to remove the $50,000 limit for credit life and allows for a limit not to exceed the amount of the indebtedness. And finally, section 627.681 removes the ten (10) year limit for credit disability.

The Office encourages insurers to review the legislative bills. Further OIR states that the informational memos are not intended to be a comprehensive analysis of the bills. The chapter laws referred to in this article can be found in the Legislative Update section of our website and the informational memos can be found in the Resources section.

DFS Adopts Military Sales Practices Rule

The Department of Financial Services has adopted administrative rule 69B-240.001relating to military sales practices. The stated purpose of the rule is to protect active duty service members from dishonest and predatory sales practices relating to life insurance and annuities. The rule lists various locations on military installations and circumstances in which insurance solicitations are prohibited or restricted. The rule also contains a detailed list of sales practices that are considered unfair and deceptive when used in connection with active duty military personnel.

For a copy of the newly adopted rule, please contact any member of our insurance team.

Blanton and McArthur Become Members of American Inn of Courts

Shareholders Donna E. Blanton and Elizabeth McArthur have accepted invitations to become charter members of the First District Court of Appeal American Inn of Court. An American Inn of Court is a mixture of no more than 80 members including judges, experienced lawyers, law professors, less experienced lawyers, and law students in an organized and continuing structure.

Its goal is to enhance directly the professional and ethical quality of legal practice in the area served by the court. Both Ms. Blanton and Ms. McArthur were invited to join the Inn as master members.

Although numerous trial court Inns operate around the country, the First DCA's Inn is only the third appellate Inn of Court in the United States. The First DCA's Inn was organized by Judge James R. Wolf. Other First DCA judges participating as charter members are Judges Charles J. Kahn, Peter D. Webster, William A. Van Nortwick, and Brad L. Thomas.

The First District Court of Appeal is one of five appellate courts in Florida that have jurisdiction to review most final judgments or orders of trial courts. Additionally, the district courts of appeal have the power of direct review of most administrative action, including final orders issued pursuant to the Administrative Procedure Act. Because of its location in Tallahassee, the state capital, the First DCA hears many cases involving the actions of state government.

RTYC Shareholders Receive Honors -

Florida Trend Legal Elite and Super Lawyers of 2008

Radey Thomas Yon & Clark is proud to announce the honors received by a number of our shareholders this year.

Florida Trend - Legal Elite 2008

Susan Clark, Christopher Lunny, and Harry Thomas were nominated by their fellow members of the Florida Bar for this year's Florida Trend Legal Elite.

Susan Clark is the head of the firm's Energy, Telecommunication and Public Utility practice and a former Commissioner and Chairman of the Florida Public Service Commission. Susan represents clients before state and federal agencies that regulate public utilities, as well as in state and federal courts. *Chris Lunny* heads up the Labor and Employment Law practice area. Chris practices labor and employment law, business immigration and litigation. His clients include insurers, health care providers, trade groups and hospitality businesses. *Harry Thomas* has over 30 years of experience in complex civil litigation, including class action defense in both state and federal courts. Harry has represented many insurance company clients in class actions and related regulatory administrative litigation.

Florida Super Lawyers - 2008

Three RTYC shareholders have been named Florida *Super Lawyers* for 2008. *Donna E. Blanton* and *Elizabeth McArthur* were selected in the area of Administrative Law, and *Harry O. Thomas* was selected in the area of Commercial Litigation. Super Lawyers is a listing of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Polling, research and selection are performed by Law & Politics, a publication of Key Professional Media, Inc. Super Lawyers magazine is published as a special supplement in leading newspapers and city and regional magazines across the country. The Florida edition was published on June 21, 2008.

Atlanta Here We Come!

Attorneys and Staff Meet Goal for Breast Cancer Walk

We met our goal and so eight women from Radey Thomas Yon & Clark, including all six of the firm's women lawyers, are going to Atlanta for the Breast Cancer 3Day Walk in October. Each member of our "Radey Law" team will walk 60 miles in three days and, in the process, raise money for breast cancer research. Team members are Shareholders Karen Asher-Cohen, Donna E. Blanton, Susan Clark and Elizabeth McArthur; Associates Toni Egan and Lisa Scoles; Paralegal Laureen McElroy; and Office Manager Peggy Smith.

Net proceeds benefit Susan G. Komen for the Cure and National Philanthropic Trust, funding important breast cancer research, education, screening, and treatment. GO TEAM!

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Success for clients is our success.

Radey Thomas Yon & Clark, P.A. believes that service to clients must be efficient and dedicated. Our location in Tallahassee, Florida, provides us the opportunity to be at the heart of the regulatory, legislative, and judicial arenas. The Florida Insurance Report is provided to our clients and friends in a condensed summary format and should not be relied upon as a complete report nor be considered legal advice or opinion.

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Commissioner Supports All-Perils Policies

By: Travis Miller

In a recent opinion column, Commissioner Kevin McCarty urged adoption of an all perils policy. The Commissioner referenced recent floods as he pointed out the confusion sometimes created by having flood damage excluded from the standard homeowners policy. As a solution to reduce consumer confusion, he suggested that the insurance policy should be a standard, multi-peril policy that "fairly represents all risks."

Commissioner McCarty noted that an all-perils policy would cost more than current policies. However, he believes this approach could save billions of dollars in federal bailouts and in litigation costs arising from disputed causes of loss, such as the wind versus flood debates seen in Florida and Mississippi following hurricanes.

For a copy of the Commissioner's opinion piece, please contact Travis Miller.