Florida Insurance Report

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Legislature Reaches Tentative Budget Deal

By: David Yon and Travis Miller

The Florida Legislature in most years does not convene until early March. However, lawmakers got an early start in 2009 when they convened on January 5 to address declining state revenues amid the national economic slowdown. Confronted with a $2.3 billion budget deficit that must be addressed during the current fiscal year, a special session was called for early January. Late Sunday it appeared a budget agreement had come together. The budget must "sit" for 72 hours before a final vote can be taken.

The agreement reached would plug the budget hole by taking $400,000, more than half of the money the state has in last-resort reserves, and up to $700 million the state has invested in a special fund from a settlement with the tobacco industry reached years ago. It is hoped that at least some of this money will be repaid from funds the state would hope to get from the federal stimulus package.

The agreement does not resolve the expected shortfall for the upcoming fiscal year as projections there indicate another $4 plus billion deficit. So the legislature will almost immediately begin work on the next round of cuts. For the first time there is even discussion of looking for new revenue; possibly repealing some sales tax exemptions and maybe imposing a higher tax on cigarettes.

Legislative Leaders Make Committee Picks

By: David Yon

Senate President Atwater and House Speaker Sansom have announced their choices for legislative committee leadership positions.

Senate Leadership - Banking and Insurance

The new Chair for the Senate Banking and Insurance Committee is Garrett Richter, a Republican from Naples who succeeds Bill Posey. Richter, a past board member of the Florida Bankers Association and founder and CEO of the First National Bank of Florida, served one term in the House before being elected to the Senate in November. The Co-Chair position goes to Chris Smith, a Democrat from West Palm Beach. Smith, the former House Democratic Leader was actively involved in insurance issues while serving in the House from 1998 to 2006. The remainder of the Senate Banking and Insurance Committee is as follows:

J.D. Alexander (R) - Winter Haven
Michael Bennett (R) - Bradenton
Mike Fasano (R) - New Port Richey
Al Lawson (D) - Tallahassee
Jeremy Ring (D) - Margate
Ronda Storms (R) - Brandon
Alex Villalobos (R) - Miami

Other committee assignments of interest to the insurance industry are Don Gaetz (R) from Niceville as Chair of the Senate Health Regulation Committee and Lee Constantine (R) from Altamonte Springs as Chair of the Senate Judiciary Committee.

House Leadership - Insurance, Business & Financial Affairs Policy

Pat Patterson (R) an insurance agent from Deland has been selected by House Speaker Sansom to Chair the House Committee on Insurance. Co-Chair is D. Alan Hays, a Republican from Umatilla who served on the Florida Comprehensive Hurricane Damage Mitigation Advisory Council and chaired the My Safe Florida Home Advisory Council.

Inside this issue:

OIR Seeks Input on Mitigation Notice and Inspection Forms

By: Travis Miller

The OIR recently held a workshop to discuss potential changes to the form insurers must use to notify insureds of available mitigation discounts (the "Notice Form") and the form used by inspectors to verify wind mitigation features (the "Inspection Form"). In the Notice Form, insurers identify the potential discounts insureds may receive if their homes have various construction features or other loss prevention devices. The proposed revisions to the form remove references to the My Safe Florida program and other outdated language. Insurers had relatively few comments about the revised form, although it was suggested that insurers be allowed to eliminate the statement suggesting that insureds may obtain deductible reductions instead of discounts. Most insurers use the discount tables promulgated by OIR and do not have any option for reducing the deductibles.

The Inspection Form drew considerably more attention at the workshop. The proposed form has grown from two pages to five pages, largely because it would require inspectors to capture more information than under the current form. This is unusual, however, because the criteria identified in the form should correspond to the promulgated discount table. One comment at the hearing was to retain the consistency between the discount tables and the Inspection Form rather than expand the form to require information insurers cannot use. The longer form also increases opportunities for fraud unless the OIR takes steps to require the homeowner's name or address on every page of the form.

The workshop attracted considerable attention from engineers, contractors and inspectors who are in the business of providing inspections. Engineers oppose a change by the OIR that would require them to personally inspect properties rather than to accept the findings of employees under their control. Some competitors, and insurers, counter that engineers should be required to personally inspect the properties because the relevant statute allows them to conduct inspections, not their employees. This undoubtedly will be a subject of further comments and discussions with the OIR.

Travis Miller participated in the workshop and has been involved in issues relating to detecting and reporting fraud in the mitigation process. Please contact him or any member of our Insurance Team with questions.

Proposed Bill To Amend New Condo Law Circulated

By: Tom Crabb

A draft "glitch" bill is currently being circulated with some of the industry's suggestions on pulling back from some of the significant and controversial changes made to Florida law last year regarding the insurance of condominiums. There are several changes in the current draft that address these issues. The provision of the law that required a condo association be an additional named insured and loss payee on a unit owners policy is deleted, as is the provision that allowed condo associations to force place unit owners insurance on behalf of an owner who failed to provide evidence of coverage. Ambiguous references to "special" assessment coverage have been changed to the more familiar "loss" assessment coverage and references to "hazard" insurance throughout the law are changed to "property" insurance. This is just a working draft and it is premature to predict what the final version of this bill, if any, will include. We will of course continue to monitor this important issue. For more information about the condo law or the proposed changes, please contact myself or any member of our Insurance Team.

NEWS FROM THE OFFICE OF INSURANCE REGULATION

By: David Yon

McCarty Elected NAIC Secretary-Treasurer

Insurance Commissioner Kevin McCarty was elected to the position of secretary-treasurer for the National Association of Insurance Commissioners (NAIC) at the Winter Session. McCarty has been active in the NAIC serving as a member of the Executive Committee, the Government Relations Leadership Council, the International Insurance Relations Leadership Group; and as chairman of the influential Property & Casualty (C) Committee and the Catastrophe Insurance Working Group. In a release issued by the Office of Insurance Regulation McCarty stated:

"I am honored to be elected to serve insurance consumers nationwide as an officer of this prestigious organization. I am confident that my experience and leadership abilities as the insurance commissioner of the fourth most populous state will enable me to be an effective part of the NAIC team that will lead the organization through the challenging times that now are facing our economic marketplaces."

We wish Commissioner McCarty every success in his new role with the NAIC.

OIR Receives Renewal of Accreditation

The National Association of Insurance Commissioners (NAIC) recognized the Florida Office of Insurance Regulation at its Winter National Meeting for renewal of its Financial Regulation Standards accreditation. The NAIC has determined the Office has met the NAIC's standards for regulating the solvency of insurance companies. The Office first received the accreditation status in December of 1990 and received follow up accreditations in 1998 and 2003.

To earn the accreditation, the Office had to demonstrate that: Florida had adequate solvency laws and regulations to protect consumers; it used an effective and efficient financial analysis and examination process; and, that it maintained appropriate organizational and personnel practices to effectively carry out its solvency regulation duties.

"This is a great honor for the Office and something which should give Florida consumers confidence that the Office is doing everything it can to assure to the extent possible that companies selling insurance in our state are adequately funded," said Insurance Commissioner Kevin McCarty. "Our team of financial analysts takes great pride in the thoroughness of the reviews they perform on all companies. It is a tedious and time-consuming process, but one that has consumer protection as its primary mission."

Wayne Johnson Appointed Director of Rehabilitation and Liquidation

On December 12, 2008, CFO Alex Sink announced that Wayne Johnson would be the Director of the Division of Rehabilitation and Liquidation, removing the "interim" from his title.

Wayne Johnson began his career with the Department of Insurance in 1992 (as it was known then) as an examiner whose duties included reviewing applications by new companies for licenses to do business in Florida. During his rise, Wayne has reviewed the financial statements and operations of both the most successful companies and those unable to survive. The experience makes him well qualified for this position.

He worked as the Assistant Director of the division since 2001, and as the Interim Division Director since August.

I am thrilled about the position," said Johnson. "I think the division does a lot of great work for the state of Florida, and I'm honored to have this opportunity." He is a Certified Financial Examiner and graduate of Florida State University.

Congratulations to Wayne Johnson on his new position.

Effects Of The Economic Crisis, Election, and International Market Among The Issues Vetted At The 2008 Insurance Forum

By: Tom Crabb

Two hundred insurance company officers, state regulators, insurance regulatory attorneys and risk management professionals, as well as Michael McRaith, the Director of the Illinois Division of Insurance, met in Chicago on November 18th for the 2008 Insurance Forum, a discussion of current issues facing the insurance industry and emerging trends in insurance regulation. The Forum consisted of eight interactive panel discussions led by industry experts. Among the highlights of the general points raised and discussed were that:

- Financial statements for the third quarter of 2008 will show an aggregate reduction in surplus among U.S. insurers approaching $100 billion due to investment and catastrophe losses. Nonetheless, insurers are expected to weather the current financial crisis well compared to banks and other financial institutions and few insurance company failures are expected.
- Large investment losses are expected to put upward pressure on insurance rates in the near term. For commercial lines, the long slide in average rates is expected to end and rates will stabilize if not increase, leading to favorable impacts on earnings.
- Credit default swaps, the complex derivative financial transactions that caused the liquidity crisis at AIG, are likely to become regulated by more states as insurance contracts. Other states will likely follow New York in regulating many such swaps as insurance contracts, in part by requiring such swaps to be issued only by licensed financial guaranty insurers. However, there is still a fundamental lack of understanding at both the state and federal level about how these transactions work and how best to regulate them.
- Regulation by the federal government of insurance companies is now much more likely. It is expected that a federal Office of Insurance Information will soon be created within the Treasury Department to advise Congress, the administration, and other government decision makers about national insurance policy. Furthermore, it is looking more likely that the federal government will create a "systemic risk regulator" with responsibility over the entire financial system, including insurance, akin to the Securities and Exchange Commission.
- Reinsurers will fare relatively well in the near term, in part due to the inability of state-backed reinsurance funds such as the Florida Hurricane Catastrophe Fund to raise money through bond issuance in the current market, causing an increased demand for private reinsurance.
- D&O losses paid by U.S. insurers will reach $5.9 billion as a result of lawsuits related to the subprime-mortgage crisis.
- Insurance holding companies will continue to purchase savings banks in order to come under the supervision of the federal Office of Thrift Supervision and qualify for federal bailout money under the Troubled Assets Relief Program ("TARP"). At least four such transactions are already in the works.
- Financial examination of insurers will continue to expand. Regulators will continue to adjust their oversight of companies based on prospective solvency risks facing the companies, especially as identified in a risk-focused financial examination. The rapidly changing economic conditions have caused many to question whether insurance companies should be examined every year rather than every three.

I was privileged to attend the 2008 Insurance Forum, as it presented a valuable opportunity to discuss these issues and other emerging trends in insurance regulation with a variety of industry leaders. For more information about the issues addressed at the Forum or how our firm can help your company navigate the Florida insurance market, please contact myself or any member of our Insurance Team.

Cover Florida Makes Debut

By: Travis Miller

The Agency for Health Care Administration (AHCA) and the Office of Insurance Regulation (OIR) have entered into contracts with participating Cover Florida insurers, which began making the low cost health plans available on January 5. The new health insurance plans are intended to make affordable health insurance coverage and access to health care available to Florida's 3.8 million uninsured applicants age 19 to 64. Four of the six participating carriers also insure children of applicants.

"Many families and small business owners have worried about the possibility of costly medical bills, waiting for years for health insurance they can afford to buy," Governor Charlie Crist recently said. "Affordable access to health care will be a reality for Florida's hard-working families and businesses."

The Cover Florida plan was unanimously approved by the 2008 Legislature. No tax dollars were allocated to make the plans available to Floridians. Instead, the six participating carriers designed 25 health insurance products designed to meet the program's goals. Each insurer offers at least two benefit options – one with catastrophic and hospital coverage, and one focusing on preventive care.

The State of Florida selected the participating carriers through a competitive bidding process. The carriers were chosen based on their ability to provide innovative and affordable health insurance products. Cover Florida plans contain no mandates for participation and are portable from one employer to another, because they are individual policies. The programs are voluntary for both employers and policyholders, and employers at their discretion may voluntarily share in the cost of the plan with their employees or may assist employees with a payroll deduction, providing a pre-tax benefit for the employee and a payroll tax break for the employer.

"The 25 Cover Florida plans will provide Floridians with flexibility and choices regarding their health care," AHCA Secretary Holly Benson said. "Like any good health insurance, they will help people take control of their health care by allowing them to choose primary and preventive care over costly visits to emergency rooms."

Blue Cross and Blue Shield of Florida and UnitedHealthcare plans will be available in all 67 Florida counties. In addition, four counties will have additional options offered by Florida Health Care Plans; Medica Health Plan of Florida; and Total Health Choice. JMH Health Plan will also serve Miami-Dade County.

Going forward, OIR will monitor the sale of the products and address consumer concerns. "Throughout the negotiation process, every effort was made to ensure that uninsured Floridians would get the greatest access to medical care for the best price," Commissioner McCarty said. "One great feature of the plans is that no one can be turned away by a Cover Florida plan because of a pre-existing medical condition."

The cost of plans varies, depending on the applicant's age, gender and choice of preventive coverage or catastrophic and hospital coverage. Many of the plans have monthly premiums on average of $155 or less, with all of the preventive plans offering coverage for, on average, $155 or less, which was an important price point for the administration. Cover Florida plans are available to Florida applicants age 19 to 64 who have been without health insurance for at least six months, or who are recently unemployed – even if there are pre-existing health conditions. Floridians may also be eligible if, during the previous six months, they have lost employer-sponsored health benefits or are no longer covered by public health insurance programs. The hope is that many uninsured Floridians will opt for a low cost health plan as an alternative to expensive emergency room treatment. Interest in these plans will be monitored, as current financial conditions sometimes result in difficulty among the uninsured population affording the premiums associated with even low cost health plans.

Surplus Lines Finally Subject to Citizens Emergency Assessment

By: Tom Crabb

Effective December 15, 2008, homeowners and commercial property policyholders insured by surplus lines carriers were subject to the Citizens Property Insurance Corporation Emergency Assessment. This is the emergency assessment arising from the hurricanes of 2004 and 2005 that policyholders insured by admitted carriers have been paying since July 1, 2007 and which is expected to continue for 10 years. Surplus lines policyholders got the seventeen month reprieve from the assessment because the Florida Surplus Lines Service Office had an overage from its collection of the 2006 Citizens Regular Assessment that the OIR allowed to be applied to the subsequent Emergency Assessment. That overage has now run out and therefore surplus lines agents must begin collecting the assessment from assessable insureds. There are currently over 150 surplus lines carriers in Florida. For more information about this or the other Florida assessments, please contact myself or any member of our Insurance Team.

Workers' Compensation Division Proposes Insurer Standards and Practices Rule

By: David Yon

The Division of Workers' Compensation issued a Notice of Proposed Rule Development for rule chapter 69L-24, F.A.C. The rule is entitled Workers' Compensation Insurers' Standards and Practices and the stated purpose of the rule is to establish uniform guidelines under which the Department of Financial Services, Division of Workers' Compensation, will monitor, audit, and investigate regulated entities to ensure compliance with statutory obligations under the workers' compensation law, Chapter 440, Florida Statutes. Among other things the rule will include requirements regarding the timely payment of workers' compensation benefits to injured workers, the timely payment of medical bills to providers, and the timely reporting of workers' compensation data to the Department. Regulated entities include, but are not limited to carriers, service companies, third-party administrators, self-serviced self-insured employers or funds, managing general agents, and data submitters that are responsible for adjusting workers' compensation claims or submitting information and data regarding those claims to the Department. The rule also will establish uniform guidelines to penalize regulated entities for failure to provide timely payment of workers' compensation benefits to injured workers, for failure to timely pay medical bills to providers, and for failure to timely report workers' compensation information or data to the Department, based on findings made during the process of monitoring, auditing and investigating those regulated entities. A workshop was tentatively scheduled for Tuesday, January 6, 2009 in Tallahassee, Florida.

Legislators Eye Trust Funds

By: Travis Miller

With a $2.3 billion budget shortfall in the current year and more than $4.0 billion next year, several state trust funds are being eyed as potential revenue sources, including a couple of funds related to insurance. A House of Representatives' proposal would sweep $60 million from the Insurance Regulatory Trust Fund and $55 million from the Worker's Compensation Administration Trust Fund.

The House also is considering a proposal to take another $600 million from the budget stabilization fund, leaving a balance of only $72 million in the fund that serves as the state's emergency savings account. State CFO Alex Sink has written to legislators urging them not to dip into this emergency fund, which the state uses to meet expenses if unforeseen situations arise. The House also is looking at a potential $400 million transfer from the Lawton Chiles Fund to help fill budget holes, as well as borrowing another $600 million from the fund to make up for its $600 million raid on the budget stabilization fund. CFO Sink opposes the transfer from the Lawton Chiles Fund, arguing that that corpus of the trust fund generates a perpetual revenue stream that is used to pay for children's health programs.

Other programs identified as potential targets for cuts or transfers include the Florida Forever program, in which the state buys land to preserve the state's natural resources, and a state transportation trust fund used to pay for transportation projects.

OIR Releases 2008 Workers' Compensation Annual Report

By: David Yon

Subsection 627.211(6), Florida Statutes requires the Office to submit an annual report to the Legislature evaluating the competition in the Florida workers' compensation market, including an analysis of the availability and affordability of coverage and whether the current market structure, conduct and performance are conducive to competition. The Office has released the 2008 report that included the following findings:

1. Based on a comparative analysis across a variety of economic measures, the workers' compensation market in Florida appears to be competitive.

- The workers' compensation market in Florida is served by a large number of independent insurers.
- None of the firms have sufficient market share to exercise any meaningful control over the price of workers' compensation insurance.
- The Herfindahl-Hirschman Index (HHI) indicates that the market is not overly concentrated.
- There are no significant barriers for the entry and exit of insurers into the Florida workers' compensation market.
- Based on entries and voluntary withdrawals, it would seem that the Florida workers' compensation market is an attractive market for insurers.

2. Of the six most populous states, Florida is the largest market dominated by private market insurers, rather than a state-sponsored residual market. This degree of private activity indicates that coverage should be generally available in the voluntary market. The residual market is small, suggesting that the voluntary market is absorbing the vast majority of demand.

The Office has raised a concern about the impact of a recent Florida Supreme Court decision regarding attorneys fees. The report noted, " One of the reforms in the Workers' Compensation law that is often credited with saving money in the workers' compensation system, and therefore in the rate needed by workers' compensation insurance companies, is the change in Section 440.34, Florida Statutes, that was made in 2003 providing a formula for attorney's fees. Part I of that law now states "A fee... may not be paid for a claimant in connection with any proceeding arising under this chapter, unless approved as reasonable by the judge of compensation claims ...." "Any attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of benefits secured, 15% of the next $5,000 of the amount of benefits secured, 10 percent of the remaining...."

The report noted that in *Emma Murray v. Mariner Health Inc. and ACE USA*, SC07-244 (hereinafter referred to as the *Murray* decision), the Florida Supreme Court held that this statutory formula in the first part of the workers' compensation law did not limit attorneys' fees under a separate subsection (3) of the law, and therefore a lawyer representing a workers' compensation claimant is entitled to a "reasonable fee." The "reasonable fee" standard that was established in a prior case, *Lee Engineering*, was cited in the *Murray* decision as the appropriate standard. This standard allows a workers' compensation judge awarding fees to consider a variety of factors including the complexity of the case and the skill required. Because the fee is not limited by the strict formula in 440.34(1), Florida Statutes, the *Murray* decision is being cited as one that returns attorneys' fee awards to the same system that existed prior to the 2003 reforms. (See also Tom Crabb's article "Uncapped Reasonable Fees Return for Workers' Compensation Claimant Attorneys" in Volume 6, Issue 9 of the firm's *Florida Insurance Report.)*

NCCI has submitted a filing to the Office requesting an 18.6% rate increase (8.9% in year one and the balance in year two) to address estimated cost increases from the *Murray* decision.

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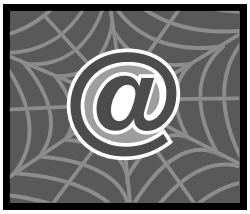

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Bush Decides Not to Seek U.S. Senate Seat

By: Travis Miller

Former Florida Governor Jeb Bush ended weeks of speculation by announcing that he will not run for the U.S. Senate seat being vacated by current Republican Senator Mel Martinez. Martinez announced several weeks ago that he will not run again when his term expires in 2010, creating a chain of dominoes that could have implications on other state Cabinet and legislative offices.

The popular former Governor expressed interest in running, which deterred some (but not all) candidates from expressing interest of their own. However, since Bush's announcement after the holiday break, potential Republican and Democratic candidates have been busy assessing their chances.

Rumored potential Republican candidates include Attorney General Bill McCollum, former House Speaker Marco Rubio, former House Speaker Allan Bense and U.S. Representative Connie Mack. McCollum is the only one on the Republican short list who has run statewide. Of course, his candidacy would create opportunities for Republicans and Democrats to vie for his AG seat. There also has been speculation about Governor Crist's interest in the position.

Chief Financial Officer Alex Sink, is considered the most formidable Democrat and has said she will decide soon whether to enter the race. "I'm very seriously considering the race. It's an enormous opportunity to serve the people of Florida. ... I have a few more people I'd like to have the opportunity to speak to about it," Sink said after Jeb's announcement. Other possible contenders are state Senator Dan Gelber and U.S. Representatives Kendrick Meek, Ron Klein and Allen Boyd. If Sink runs, her CFO seat would be attractive to several candidates, including some current state legislators.

Martinez has said he will serve the rest of his term, but some rumors have him resigning before 2010, allowing Republican Governor Charlie Crist to appoint a successor.