Florida Insurance Report

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Rules for Workers' Comp Self-Insurers Get Major Rewrite

By: David Yon

The Division of Workers' Compensation, Bureau of Monitoring and Audit will hold a rulemaking workshop on proposed rule chapter 69L-5, F.A.C., Rules for Self-Insurers Under the Workers' Compensation Act on Monday, February 16, 2008 at 10:00 a.m.

The existing rules are being replaced with new rules that have been restructured and renumbered to "promote clarity and efficiencies to the process by which self-insured employers comply with the duties and obligations associated with the privilege of self-insuring pursuant to Chapter 440, Florida Statutes." The Division's notice also states that the purpose of Rule Chapter 69L-5, F.A.C., is to interpret and implement provisions of Chapter 440, Florida Statutes, regarding regulation by the Department of Financial Services and the Florida Self-Insurers Guaranty Association, Inc. of entities self-insuring the payment of compensation for Florida employees. The proposed new rules address the scope of the self-insurance authorization, the required filings, record maintenance and audit processes for self-insurers, the self-insurance process for both governmental entities and members and former members of the Florida Self-Insurers Guaranty Association, Inc., and the application process for and regulations regarding servicing entities. The

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State Farm Announcement Promises to Add Intensity to Legislative Session

By: Travis Miller

The recent announcement of State Farm Florida that it intends to discontinue property insurance in Florida undoubtedly will affect the volume and tone of bills filed in the upcoming legislative session. Until this announcement, the primary focal point of the 60-day session that begins in March was the Florida Hurricane Catastrophe Fund and its projected inability to pay reimbursements at statutorily-authorized levels. This will continue to be an important area of possible property insurance legislation, but we expect to see other bills targeted at the insurance industry as well.

Perhaps the most direct response to the State Farm announcement is a severe restriction on nonrenewals. A bill filed by Senator Fasano would prevent an insurer from nonrenewing more than 2% of its business in any year. While intended to squarely hit State Farm, and perhaps deter other insurers from thinking about the same move, this aggressive threshold could infringe on normal business adjustments and certainly would serve as a deterrent to new capital entering the state. Further, the effectiveness of such a bill on a previously-filed withdrawal plan such as State Farm's is unclear and therefore creates the possibility that insurers who remain in or enter the Florida market are punished by the acts of an insurer that is leaving. Fasano's bill is sometimes referred to as the "Hotel California" provision because insurers could check in any time they like, but they could never leave. Of course, the Hotel California analogy ends there, as the remaining market probably does not feel as if it is being treated to pink champagne on ice-- ultimately, leading to the bill's other working nickname, the "Roach Motel" provision.

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proposed new rules also adopt forms for use with the rules. Among other things the new rules would increase the minimum net worth requirement to qualify to self-insure and establish new guidelines to be used in determining the financial strength of current and former self-insurers. In addition, the proposed new rules require security deposits for current and former self-insurers to be based on the entities' long term issuer credit rating in order to create a more structured and objective system for determining financial strength necessary to ensure timely payment of current and future claims. The proposed new rules also outline the penalties for self-insurers who late-file reports, fail to file them, fail to maintain loss records, or misclassify losses or other data which impacts the calculation and collection of assessments for the Workers' Compensation Administration Trust Fund and the Special Disability Trust Fund. Finally, the proposed rules include a change in the specific excess insurance requirements regarding the maximum retention amount allowed without additional approval, provide for an electronic version of Form DFS-F2-SI-17, Unit Statistical Report, and eliminate the alternative method of application to self-insure.

State Farm/Legislature - *Cont. from Page 1*

Another bill filed by Senator Gaetz would amend the bad faith statute (section 624.155). The amendment would specify that an insurer has a "fiduciary duty" to treat its insureds fairly and in good faith. Of course, the legislature also can be expected to review the ability of an insurer to write auto insurance when an affiliate writes significant homeowners insurance in other states but not Florida.

The 2009 legislative session once again promises to be an active one for the Florida property insurance market.

CFO Sink Writes to State Farm

By: David Yon

State Farm Florida's announced plans to withdraw from the property market in the state of Florida and surrender its certificate of authority has generated many different responses. The governor of course stated the state would be better off without them. On February 3, 2009, CFO Alex Sink sent a letter to company President Jim Thompson urging the company to permit its agents to write business with other companies. Noting that State Farm's contracts with the company's agents limit their ability to place property business with any company other than State Farm and Citizens, Ms. Sink wrote:

> Given State Farm Florida's projected insolvency within the next two years and intended withdrawal, I find it inappropriate to limit your agents' ability to help your customers find the best possible property insurance coverage.
>
> She went on to say:
>
> For years, State Farm Florida has held itself out as a good neighbor to Floridians. Given your long-standing relationship with our state, I believe you owe it both to your agents and policyholders to withdraw from the market in the fairest manner possible. I urge you to immediately allow your agents to obtain insurance appointments from other property insurance companies. Your loyal insurance consumers deserve the opportunity to keep their relationship with their State Farm agent and be placed with the property insurance company that best meets their insurance needs.

There appears to be a strong regulatory and legislative effort to minimize the number of State Farm policies that find their way into Citizens Property Insurance Corporation.

Citizens Task Force Recommends Changes

By: Travis Miller

The Citizens Mission Review Task Force recently recommended a series of changes designed to restore Citizens' role as a residual insurance market. The task force held several meetings and voted on a variety of proposals, ultimately including the following in its report:

1. Strengthen Florida's Homes-- The task force believes the legislature should continue to pursue opportunities for the state to harden its homes against hurricanes.
2. Create a "Glide Path" for Rates-- Citizens' rates have been frozen since 2007 and will remain frozen throughout this year. This means Citizens is charging rates based on the Top 20 writers as those rates existed in 2005. The task force recommends that the current freeze not be extended past its January 2010 expiration. The task force believes Citizens should move toward rate adequacy gradually, with its overall increase being limited to 10% per year (15% by territory and 20% for individual policyholders).
3. Enforce the 15% Threshold-- Applicants are not supposed to be eligible for Citizens if they can obtain coverage that is within 15% of the Citizens price. The task force recommends a certification that would prompt a diligent search of the market.
4. Require Annual Affirmation of Eligibility-- Under this proposal, agents and policyholders would be required to affirm each year that the policyholder continues to meet Citizens' eligibility criteria.
5. Require a New Application Every Three Years-- This recommendation will cause policyholders to review their policies at least every three years and will improve Citizens' underwriting data. This in turn will assist companies wanting to remove policies from Citizens.
6. Limit Automatic Renewals-- The task force believes Citizens should offer only two annual renewals before the policyholder is required to go through a new application process.
7. Impose Penalties for Violation of Eligibility Requirements-- By adding penalties for applicants who violate eligibility standards, the task force believes consumers will be incentivized to more aggressively shop for coverage.
8. Eliminate Multi-Policy Discounts-- Last year, the legislature specified that a company could offer multi-policy discounts even when a policyholder's homeowners coverage is placed with Citizens. The task force would repeal this requirement (but would not prohibit discounts that are shown to be actuarially justified).
9. Repeal the Prohibition Against References to FIGA-- A longstanding Florida law prevents insurers and agents from discussing the existence of FIGA. The task force believes this law should be repealed and consumers should be made aware that FIGA is available to protect Florida homeowners.
10. Limit Insurance on Coastal Construction-- This proposal would prohibit Citizens from writing insurance in designated areas close to the coast. This would prevent Citizens from writing coverage on projects that otherwise aren't insurable in the private market.
11. Review HRA Boundaries-- The task force recommends review of the High Risk Account boundaries to make them more "geographically consistent."
12. Eliminate the Requirement for Citizens to Offer Commercial Non-Residential Policies-- By eliminating the commercial policies, the task force notes that Citizens' exposure and the resulting amount of assessments to Floridians will be reduced.
13. Study How to Move Commercial Residential Business to the Private Market-- Citizens reportedly insures about 60% of Florida's commercial residential structures. The task force believes this high volume warrants a study dedicated to the issue of reducing this exposure.
14. Amend the Agent Appointment Requirement-- Currently, an agent may retain his or her Citizens appointment provided that he or she had an appointment with any other voluntary writer at the time of the initial Citizens appointment. The task force would change this to require annual confirmation of an appointment with at least one insurer that is actually writing business and not engaged in substantial nonrenewals.

The task force also recommended three changes to Citizens. First, it suggested that Citizens should improve the quality and quantity of policy level data made available to takeout companies. Second, the task force would like to see FMAP expanded to include data on all in-force policies at least 120 days prior to their renewal dates. Finally, the task force believes Citizens should be able to fine agents who do not abide by eligibility requirements.

During its deliberations, the task force also rejected several proposals. Among these, the task force voted not to recommend a prohibition against Citizens' writing new and renewal wind-only policies. The task force also voted against (by a 5-5 vote) recommending repeal of the Consumer Choice statute.

A copy of the final task force report may be found on our website.

OIR Issues STOLI Report

By: Travis Miller

The Florida Office of Insurance Regulation has issued a report entitled, "Stranger-Originated Life Insurance and the Use of Fraudulent Activity to Circumvent the Intent of Florida's Insurable Interest Law," identifying concerns with stranger-originated life insurance (STOLI). The OIR believes that STOLI transactions are illegal under Florida law; and it has provided legislative proposals for consideration in the upcoming session to clarify current law and enhance consumer protections.

The OIR describes STOLI as a plan to coax or entice someone to apply for a life insurance policy using fraudulent means for the benefit of speculators who seek to profit by purchasing a life insurance policy on a stranger. Most STOLI transactions involve seniors, whom the OIR believes can be victimized by participating in these transactions.

"STOLI schemes often rely on misrepresentation, falsification or omission of material facts in the life insurance application," said Insurance Commissioner Kevin McCarty. "There are undisclosed risks to our seniors who participate in these transactions." According to the OIR report, seniors may be harmed in several ways even when they are compensated for the transactions. For example, participating in these transactions might exhaust their life insurance purchasing capabilities, thereby exposing their families and assets to being unprotected. In addition, incentives provided to seniors to participate in these transactions might be taxable as personal income. The OIR further asserts that the transactions may expose seniors to other unexpected tax liabilities. The OIR also is concerned that seniors must disclose their medical records in connection with these transactions. Finally, the OIR asserts that STOLI transactions ultimately may lead to increases in the life insurance rates for persons over 65 years of age.

A copy of the OIR's report can be found on our website.

Rate Increase Recommended for Workers' Comp

By: David Yon

On January 26, 2009, Florida Insurance Commissioner Kevin McCarty announced he was denying NCCI's request for an 8.9% rate increase, but advised he would approve a 6.4% increase effective April 1, 2009 if the NCCI refiled for that amount. NCCI refiled as requested and on February 10, 2009 an order was issued approving the increase. The request is intended to address the impact on rates estimated as a result of the Florida Supreme Court decision in *Emma Murray v. Mariner Health Inc.* Commissioner McCarty stated : "The Court's decision eliminates the statutory caps on attorney fees that were imposed as a result of the 2003 reforms under SB 50A and will enable claimant attorneys handling workers' compensation claims to collect increased fees for their services. It's very early to know for sure what the full impact of the Supreme Court's decision on workers' compensation rates will be, but if history holds true, we will see these rates start to go up as more attorneys get back involved, likely extending the litigation process, with workers' compensation cases." After approving the increase Commissioner McCarty stated, "I hope that the legal and business communities will be able to come to an agreement on a plan for legislation that will maintain appropriate legal issues...for injured workers while also still keeping workers' compensation rates affordable." This issue is likely to be hotly debated during the 2009 regular legislative session.

Commissioner Asks Congress To Back Up Cat Fund

By: Tom Crabb

Florida Commissioner of Insurance Regulation Kevin McCarty is lobbying the federal government to back up the Florida Hurricane Catastrophe Fund ("Cat Fund"). The Cat Fund is Florida's state-run reinsurance program which last year faced a potential shortfall of $15 billion. The Cat Fund's 2008 maximum potential liability was $28 billion while it had only $13 billion to reimburse insurers for covered claims. In theory the Cat Fund could have issued bonds to cover that $15 billion shortfall; however, the global credit crisis and economic downturn would have made selling that much in bonds impossible. Commissioner McCarty is asking Congress to agree to loan the Cat Fund money to cover such a shortfall next season. The money would be repaid just as private sector bonds would be repaid, through policyholder emergency assessments. With such a loan agreement, companies would have the assurance that the reinsurance they bought from the Cat Fund would be there if and when it was needed. If a bond sale by the Cat Fund is again not feasible later this year, that would be welcome news.

Proposed Viatical Rules Challenged

By: Tom Crabb

Two proposed rules of the Financial Services Commission regulating viatical settlement providers have been challenged and are now pending before the Division of Administrative Hearings. The first proposed rule – 69O-204.040 -- prohibits a viatical settlement provider from paying anything of value to a viatical settlement broker who is affiliated with the provider. The challengers – a provider and a broker – claim that the Florida Viatical Settlement Act does not give the Commission the authority to prohibit a broker from offering a settlement quote from any licensed provider regardless of any affiliation between the provider and the broker. The challenge says the Legislature "could have easily prohibited any compensation from a Provider to Broker, but did not intend to do so." The challenge also claims the proposed rule is vague and overly broad, as terms used in the rule – such as "control" – are defined nowhere. In sum, "OIR has subjectively decided that any and all affiliation, however minimal or indirect, whether any actual control is exercised, or whether other adequate safeguards for the meaningful protection of the viator are in place, should be prohibited." *Institutional Life Services (Florida), LLC and David Janecek v. Financial Services Commission*, DOAH Case No. 09-00385RP. The second proposed rule – 69O-204.030 – adopts a new Annual Report to be filed by providers. The proposed rule is being challenged by the Life Insurance Settlement Association ("LISA"), an industry trade group. LISA argues that OIR has no authority to require certain disclosures on the Annual Report. Specifically, LISA takes issue with Schedule B to the Report, which requires disclosure by the provider of the total number of policies purchased, the total gross amount of the policies purchased, and the total face value of the policies purchased for the last five years, regardless of whether those were Florida transactions. Schedule C requires a summary of the provider's business in every state in which a policyholder resides and disclosure of the total compensation paid for the policies purchased, among other things. LISA argues that the Commission has no statutory authority for this rule, which "would require viatical settlement providers to disclose, in a publicly available form, detailed information regarding their nationwide, and even international, business activities, as well as settlements not subject to Florida regulation." *Life Insurance Settlement Association v. Financial Services Commission*, DOAH Case No. 09-00386RP.

We will monitor these rule challenges. For additional information about regulation of the viatical settlement industry in Florida, please contact any of our insurance professionals.

Financial Services Commission Reports On Potential Cat Fund and Citizens Assessments

By: Tom Crabb

If Florida is unfortunate enough to experience a 1 in 50 hurricane season in 2009, Florida policyholders would face a 5% assessment from the Cat Fund, *for the next 30 years*. That fact is among the information contained in a report just issued by the Florida Financial Services Commission (head of the Office of Insurance Regulation) to the Florida Legislature about the aggregate net probable maximum losses, financing options, and potential assessments of the Florida Hurricane Catastrophe Fund ("Cat Fund") and Citizens Property Insurance Corporation ("Citizens") for the coming year. Florida law requires the report each year by February 1. This year's report provides some insight on the tenuous financial condition of the Cat Fund and Citizens and the extent to which Florida policyholders would be required to pay for deficits incurred by these entities.

For the Cat Fund – Florida's state run reinsurance program – a 1:50 storm season would result in a gross maximum probable loss of $34.4 billion and a projected emergency assessment of $21.6 billion. That translates to a 5.1% assessment on essentially all property and casualty lines of business (except medical malpractice and workers' compensation) that would run for the next 30 years. Citizens is Florida's residual market for property insurance. A 1:50 storm season would result in a probable maximum loss of $10.1 billion in the Citizens High Risk Account, which primarily includes policies on property close to the coast. After deducting reinsurance and Citizens' surplus, a $2.2 billion deficit would remain. This would result in a surcharge against Citizens policies of $450 million and a regular assessment of $1.7 billion. This $1.7 billion regular assessment – ten times the Citizens regular assessment levied in 2006 – would result in all property and casualty lines of business in this state other than workers' compensation and medical malpractice being assessed 5.1% one time.

In short, between Cat Fund and Citizens assessments, if 2009 is a 1:50 season, a policyholder with a homeowners policy with a $1000 annual premium would be assessed about $50, *31 times*, to pay these assessments, or about $1550 in assessments total. This is just one illustration from the facts in the report about the extent to which Florida has chosen a "pay later" approach when it comes to both the Cat Fund and, to a lesser extent, Citizens. A copy of the report can be found on our website.

FROM THE COURTS

Court Rules in Insurer's Favor

By: David Yon

FCCI INSURANCE COMPANY v. NCM OF COLLIER COUNTY, INC.,
Case No. 2D08-4093

In this case, FCCI Insurance Company ("FCCI") sought certiorari review of the trial court's order denying its motion for summary judgment in its action to collect workers' compensation premiums from defendant NCM of Collier County, Inc. ("NCM"). The Court held that the trial court departed from the essential requirements of the law in denying FCCI's motion for summary judgment because the trial court was not the proper forum to resolve NCM's defense to the motion. The Court found instead that NCM first had to contest the premium calculation under section 627.371, Florida Statutes. The ruling held that: "A party challenging the good faith calculation of retrospective workers' compensation premiums must pursue such a challenge in an administrative forum.... Thus, an insurer's motion for summary judgment should be granted in an action to collect retrospective workers' compensation premiums when the insured defends against the motion based on a challenge to the good faith calculation of the premiums but has not exhausted its administrative remedies pursuant to section 627.371. In this case, NCM has defended against FCCI's motion for summary judgment based on a challenge to FCCI's good faith calculation of the final premiums. NCM has not exhausted its administrative remedies but is attempting to challenge FCCI's calculations in the trial court.

Question Of The Validity Of Uninsured Motorists Anti-Stacking Provision Certified To The Supreme Court of Florida

By: Tom Crabb

Florida law requires the knowing acceptance of nonstacked uninsured motorists coverage by an insured while Delaware law requires no such formalities. The Supreme Court of Florida will now have to reconcile whether the anti-stacking provision of a Delaware insurance policy is valid against a Florida driver covered by both Florida and Delaware policies. The federal Eleventh Circuit Court of Appeals has certified to the Supreme Court of Florida the question of whether an uninsured motorists anti-stacking provision executed in Florida with a Floridian as the named insured for a car registered and garaged in Delaware is valid under Florida law.

A person injured by an uninsured motorist was the named insured on two insurance policies, both of which were issued in Florida but one of which insured a car that was registered and garaged in Delaware. The policy on the Delaware car contained an anti-stacking provision, a provision that prevents coverage for different vehicles from being added together. The insurance company refused to stack the UM coverage under the policy insuring the Delaware car with that insuring the Florida car, citing the anti-stacking provision in the Delaware policy. Florida law allows an insurer to offer nonstacking UM coverage, but there are specific requirements as to notice to the insured, knowing acceptance by the insured of the rejected coverage, and revised premium rates. See s. 627.727, Fla. Stat. The insurer went through none of these formalities on the insurance policy issued on the Delaware car. Under Florida public policy described in detail by the Eleventh Circuit, UM coverage is stacked unless there is a knowing rejection by the insured. The court can use Florida public policy as an avenue to use Florida law to interpret the Delaware policy on the Delaware car and find that the coverages stack, notwithstanding the language of the Delaware insurance policy. The question the Supreme Court will have to answer is whether Florida's public policy favoring stacking trumps an anti-stacking provision issued under Delaware law on a Delaware car. *Rando v. Geico*, --- So. 2d ---, Case No. 08-13247 (11th Cir. 2009).

The Medical Protective Company Wins Federal Case on Motion to Dismiss

By: Karen Asher-Cohen and Toni Egan

In 1999, a patient brought a medical malpractice claim against two insured doctors. Pursuant to section 627.4147(1)(b)1., Florida Statutes, which permits an insurer to admit an insured's liability and settle a malpractice lawsuit within policy limits without the permission of the insured, The Medical Protective Company reached a settlement agreement with the patient. Subsequently, the doctors filed a series of lawsuits in state court against Medical Protective, and when the state courts did not rule in the doctors' favor, the doctors filed a federal lawsuit in the Southern District of Florida.

The Complaint filed in the federal lawsuit alleged that section 627.4147(1)(b)1., Florida Statutes, is unconstitutional and that Medical Protective violated two provisions of Florida's Unfair Insurance Trade Practices Act ("FUITPA") (sections 626.9541(1)(c) & (e) - defamation and making false material statements, respectively) by reporting to the Florida Office of Insurance Regulation, as required by section 627.912, Florida Statutes, information regarding the patient's claims, the settlement, and the identities of the doctors. Medical Protective filed a motion to dismiss on the grounds that the doctors did not have standing to raise the constitutional claim, that there was no private right of action permitted under the sections of the FUITPA that the doctors alleged the insurer violated, and that Medical Protective had absolute immunity from suit under the plain language of section 627.912(4), Florida Statues, which provides that there "shall be no liability on the part of, and no cause of action of any nature shall arise against, any person or entity reporting hereunder or its agents or employees or the office or its employees for any action taken by them under this section."

The court granted Medical Protective's motion to dismiss in full. The court did not address the merits of the constitutional claim; rather, the court found that the doctors did not have standing to bring the constitutional claim. With respect to the claims of defamation and making false material statements, the court determined that the cited sections of the FUITPA did not confer an individual the ability to bring a private right of action against an insurer. The Court did not address the absolute immunity argument under section 627.912(4) in its order. If you would like a copy of the court's opinion, please contact Karen Asher-Cohen or Toni Egan.

Surplus Lines Fix Bill Surfaces

By: Travis Miller

Two prominent court decisions last year introduced unwanted uncertainty in the application of Florida's insurance code to surplus lines insurance. In its *Essex* decision, the Florida Supreme Court addressed questions certified to it from the Eleventh Circuit Court of Appeals. In its opinion, the Florida Supreme Court determined that a provision of the insurance code generally thought to exempt surplus lines insurance from all form and rate regulation in Florida actually only exempts surplus lines insurance from rate regulation--form filing requirements and other substantive provisions therefore arguably would apply. Following the Supreme Court's decision, the 11th Circuit remanded the case to the U.S. District Court for the Southern District of Florida. The litigation is ongoing.

Soon after the *Essex* decision, the 11th Circuit in the *CNL Hotels* case remanded the case to the U.S. District Court for the Middle District of Florida because the *Essex* decision potentially rendered the exclusionary endorsement at issue void because it was part of an unfiled surplus lines policy. The case settled on remand. However, the ripple effect of these decisions was felt throughout the industry as surplus lines insurers tried to assess whether form filing and other traditional admitted market requirements apply to surplus lines insurance.

The industry and the OIR have worked cooperatively on legislative solutions clarifying that admitted market requirements do not apply to surplus lines policies. With the 2009 session fast approaching, House Bill 853 has now been filed clarifying that the traditional admitted market filing requirements do not apply to surplus lines insurance unless they specifically refer to surplus lines. In addition, the bill indicates that it should have retroactive effect back to 1988 and contains a severability clause in case any provision (such as the retroactivity) is ultimately determined to be invalid.

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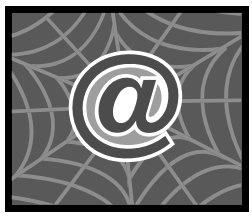

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Radey Thomas Yon & Clark, P.A. believes that service to clients must be efficient and dedicated. Our location in Tallahassee, Florida, provides us the opportunity to be at the heart of the regulatory, legislative, and judicial arenas. The Florida Insurance 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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Bert Combs Receives AV Rating

All 11 RTYC Shareholders Rated "AV" by Martindale-Hubbell

Bert Combs was recently awarded the AV Rating by Martindale-Hubbell. All eleven of Radey Thomas Yon & Clark's shareholders have achieved the highest peer review rating from Martindale-Hubbell, which conducts confidential surveys of attorneys concerning the competence and ethical standards of their peers.

"AV" is the highest rating assigned by the organization and identifies a lawyer with very high to preeminent legal ability. The rating also signifies that the lawyer maintains the highest of ethical standards.

Bert practices primarily insurance regulatory, administrative, pharmacy and business law. Bert has a degree in Risk Management and Insurance from Florida State University. While attending Florida State, Bert was employed by a Lloyd's of London broker to assist in the placement of risks and the administration of claims in the London market. In 1995, Bert worked in Legal Services at the Florida Department of Insurance and during his employment gained insight into Florida's insurance regulatory process.

RTYC shareholders holding the "AV" rating are Karen Asher-Cohen, Donna E. Blanton, Susan Clark, Bert Combs, Jeff Frehn, Christopher Lunny, Elizabeth McArthur, Travis Miller, John Radey, Harry Thomas, and David Yon.

Congratulations Bert!