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Attorneys & Counselors at Law



2009 Legislative Session Off and Running

*Unexpected Change at Speaker And a List
of Insurance Issues*

By: David Yon

With term limits leaving legislators with little time for anything other than “on the job training” the election of a Speaker often happens quickly and before members really get to know each other. Representative Ray Sansom was scheduled to be the Speaker for this year. But when it became obvious that ethics charges concerning a job he was to receive from Northwest Florida State College and other issues would keep him from governing effectively, he stepped aside and members elected Larry Cretul from Ocala who became the Speaker on the first day of the 2009 session. Things have remained calm on the Senate side though as President Jeff Atwater remains in control as Senate President.

The 2009 session will have to address a deficit that started at \$2.9 billion and now some estimates suggest may grow as high as \$6 billion. Governor Charlie Crist has submitted his proposed budget that relies heavily on the Federal Stimulus Package

and new revenue from an agreement with the Seminole Indian Tribe for gaming activities that has yet to be approved, but some members have expressed a reluctance to rely on these revenue sources. The prospects of large cuts in jobs and revenue will make this a controversial session.

Concerns about the financial soundness of the Florida Hurricane Catastrophe Fund and Citizens Property Insurance Corporation, State Farm’s exit from the property market, attorney fee issues in workers’ compensation and more have legislators looking at a variety of insurance issues, including coverage levels for FHCF, funding sources, and lifting rate freezes for Citizens. And then there is credit scoring and efforts to ban its use.

It is too early to tell what will eventually pass, but here is an overview of some of the issues we will follow:

Annuities/Investor Protection

CFO Sink has been a tireless champion in the protection of senior citizens from investment/annuities scams and is behind legislation filed by Senator Mike Bennett (R) from Bradenton. Senate Bill 1372 pushes for tougher penalties for those agents who defraud seniors in what is known as “twisting” and makes it a third degree felony. A similar bill has been filed in the House (HB 981) by Representative Keith Fitzgerald (D) from Sarasota. Other bills filed on the subject of investor protection include: Senate Bills 724 and 2520 and House Bill 741—Annuity Contracts for Senior Consumers.

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OIR Outlines Legislative Priorities

At the March 10, 2009 Cabinet Meeting, the Office of Insurance Regulation unveiled its list of legislative priorities for 2009. These include:

Discriminatory Rating Practices

Top on the list is discriminatory rating practices. Commissioner McCarty advised that the prohibition of credit scoring by insurers was a major priority this year. To date 2 bills have been filed - Senate Bill 1524 by Senator Ronda Storms (R)

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from Brandon and House Bill 683 by Representative Priscilla Taylor (D) from Riviera Beach. The bills would rule out the use of rating criteria such as profession, education and credit score when purchasing insurance.

Stranger Originated Life Insurance

In February, 2009, OIR issued its report on Stranger Originated Life Insurance (STOLI), stating that STOLI transactions are illegal under Florida law and provided legislative proposals for consideration in the upcoming session. Senate Bill 1882 by Senator Mike Fasano (R) from New Port Richey and House Bill 1167 by Representative John Legg (R) from Port Richey have been filed to stop the creation of an insurable interest in strangers that could lead to increased rates for senior citizens who are typically the target of these schemes. Other bills filed on this topic include SB 1924 and HB 1461- Viatical Settlements

Title Insurance

Senate Bill 444 by Senator Mike Bennett (R) from Bradenton and House Bill 1267 by Representative Evan Jenne (D) from Ft.

Lauderdale have filed identical bills. The changes would authorize a title insurance agent or agency to charge a reasonable fee for certain services and prohibit charges for certain services from being set below the cost to provide such services. Additionally, the legislation would prohibit a person from knowingly quoting, charging, accepting, collecting, or receiving a premium for title insurance other than the premium approved by the Office of Insurance Regulation.

Property Insurance

Senate Bill 1820 by Senator Mike Fasano is the only property bill listed on OIR's list of legislative priorities even though more than a handful have been filed for the current session. Senator Fasano's bill prohibits insurers from "cherry picking" the most desirable risks and placing the "wind only" portion of the policy in Citizens. Additionally, incentives for placing risks in Citizens have been reduced as a method for encouraging the placement in the private market, specifically with the newest members of the property and casualty lines. Finally, the bill proposes changes to the rating law.

CFO Offers Four-Point Plan for Reducing Cat Exposure

By: Travis Miller

Chief Financial Officer Alex Sink wrote to legislative leaders to present a four-point plan for reducing Florida's significant exposure to hurricane losses. The CFO advocates embarking on a course of gradual changes to reduce the state's financial exposure to future hurricanes. She seeks to moderate the effect of these changes on homeowners during these difficult economic times, but recommends that the state move forward with the following:

1. **Reduce the risk of Property Damage with My Safe Florida Home** - CFO Sink recommended that the hardening of homes be continued by rolling over the estimated \$20 million remaining in the program.
2. **Reduce Uncertainty of Bonding by Lowering Cat Fund Exposure** - CFO Sink urged the Legislature to reduce the risk exposure of the Cat Fund by gradually phasing out the TICL layer over a series of years. The CFO initially proposed this approach in the 2008 legislative session.
3. **Establish Florida's Reinsurance Program in the Fall, Not the Spring** - The CFO believes that catastrophe fund levels should be established in the fall to facilitate more orderly reinsurance markets and a wider array of available options.
4. **Gradually Return Citizens Back to Its Role as "Insurer of Last Resort"** - The CFO encouraged the Legislature to consider the recommendations of the Citizens Mission Review Task Force that would help return Citizens to its role as a residual market.

"We must establish a long-term, strategic vision for addressing hurricane risk," CFO Sink continued. Many of these issues surrounding the Florida Hurricane Catastrophe Fund and Citizens Property Insurance Corporation will continue to be hotly debated throughout the legislative session. To view the status of insurance-related bills, please visit the Legislative Update 2009 page of our website at www.radeylaw.com.

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Property Insurance

- SB 410 - Insurance/Unfair Competition/Deceptive Acts by Senator Fasano - requires insurers to write multiple lines of business if they do so in other states
- CS/SB 742 - Sinkhole Losses by Senator Fasano
- SB 960 - Civil Remedies Against Insurers by Senator Don Gaetz (r) from Fort Walton Beach
- SB 964 - Insurance/Fiduciary Duty by Senator Gaetz
- SB 1432 - Insurance Premiums by Senator Storms
- SB 1894 - Surplus Lines Insurers by Senator Bennett - makes clear surplus policies and rates don't need approval
- SB 2118 - Homeowners' Insurance/Policy Termination/Notice by Senator Charles Dean (R) from Inverness

Citizens Property Insurance Corporation

- SB 2146/HB 1359 - Revises the definition of term "subject lines of business" and prohibits assessing assessable insurers and assessable insureds for specified deficits under specific circumstances.
- SB 862/HB 1273 - Extends the rate freeze by 1 year.

Florida Hurricane Catastrophe Fund

- SB 1046 - Public Records/Florida Hurricane Catastrophe Fund by Senator Fasano
- SB 2036 - Residential Property Insurance by Senator

Bennett/HB 1171 by Representative Proctor

- SB 2384 - Property Insurance by Senator Fasano
- HB 437 - Florida Hurricane Catastrophe Fund by Representative Rader
- HB 1495 - Insurance by Representative Nelson

Workers' Compensation

The ink has barely dried on the opinion released by the Florida Supreme Court last year in the *Murray v. Mariner Health* case. Four bills and one shell bill (SB 1918 is anyone's guess at this point as to what it will address) have been filed on the subject of attorney's fees.

- SB 2072 - Attorney's Fees/Workers' Compensation by Senator Garrett Richter (R) from Naples
- SB 2280 - Workers' Compensation by Senator Dan Gelber (D) from Miami Beach
- HB 903 - Workers' Compensation Attorney's Fees by Representative Anitere Flores (R) from Miami
- HB 1489 - Workers' Compensation by Representative David Rivera (R) from Miami

We will continue to monitor insurance bills as they move through the legislative process. You can check out a list of most of the bills and their progress on the Legislative Update 2009 section of our website at www.radevlaw.com. Also look for our end of the session *Florida Insurance Report*.

Election Season Kicks Off

By: David Yon

While there is still a lot of speculation as to who will run for which office, CFO Alex Sink has officially begun running for reelection for the office of Chief Financial Officer. The final lineup for the 2010 election awaits the announcement of Governor Charlie Crist as to whether he will run for reelection or for the U.S. Senate seat now held by Senator Mel Martinez. Martinez has announced he would not seek reelection. If Governor Crist decides to run for the Senate seat, most "analysts" would expect the CFO to seriously consider running for Governor.

Efforts to Stop the Use of Credit Scoring Continue

By: David Yon



The Office of Insurance Regulation has become increasingly active in its efforts to ban the use of credit scoring in Florida for rating and underwriting purposes. The Office has now created a new web page entitled "The Office's Efforts to Curb Insurers' Use of Credit Scoring, Occupation and Education in Making Rating Determinations." The first item on the page is a link to a description of the history of legislative and regulatory actions on this subject. There are additional links that provide the following information:

- Rule 69O-125.004, Use of Credit Reports and Credit Scores by Insurers, F.A.C.
- Proposed Rule on Use of Credit Reports and Credit Scores by Insurers
- FTC Report - July, 2007
- Credit Scoring and Insurance: Costing Consumers Billions and Perpetuating the Economic Racial Divide - June, 2007
- Commissioner McCarty Testimony Before the U.S. House of Representatives Subcommittee on Oversight and Investigations Of the House Committee on Financial Services - May 21, 2008
- The Use of Occupation and Education as Underwriting/Rating Factors for Private Passenger Automobile Insurance - March, 2007
- Hearing on the Use of Occupation and Education as Underwriting Factors to Determine Motor Vehicle Insurance Premiums - February 9, 2007.

Commissioner McCarty has requested legislation that prohibits altogether the use of credit scoring and has made it one of his "priorities." Two bills have been filed: SB 1524 by Senator Storms and HB 683 by Representative P. Taylor. The bills preclude the use of discriminatory rating criteria such as profession, education and credit score when consumers purchase insurance.

Update on Viatical Rule Challenges

By: Tom Crabb

In the last issue of the *Florida Insurance Report*, I discussed two challenges to proposed administrative rules related to viatical settlement providers. Here is an update on the status of that litigation.

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. A one day hearing before Administrative Law Judge T.K. Wetherell, II, was held on February 19, 2009 and the parties next file proposed recommended orders. *Institutional Life Services (Florida), LLC and David Janecek v. Financial Services Commission*, DOAH Case No. 09-00385RP.

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 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. In this case, the parties have agreed to proceed via written submissions – they have waived a hearing and instead will each submit Proposed Summary Final Orders to Administrative Law Judge Suzanne Hood no later than March 31, 2009. The ALJ will then likely issue her Final Order on the rule challenge sometime in April. *Life Insurance Settlement Association v. Financial Services Commission*, DOAH Case No. 09-00386RP.

We will continue to monitor these important rule challenges.

CFO Sink Names New Communications Director

By: David Yon

Kyra Jennings was named new communications director for the Department of Financial Services, effective February 23, 2009, CFO Alex Sink announced last month. A Tallahassee native, Jennings has worked as a communications professional in Washington, D.C., with numerous political campaigns and in Congress before joining CFO Sink's office.

"I am pleased to have Kyra Jennings join my team and know she will continue our office's strong tradition of keeping Floridians informed about the pressing financial and insurance issues in our state," said CFO Sink. "As Floridians face challenging economic times, Kyra will help me stress the necessity of fiscal responsibility and accountability for Florida."

"I'm honored that CFO Sink has given me the opportunity to help communicate her goals and ideas for Florida's financial future as her communications director," said Jennings. "I am eager to help CFO Sink serve Floridians and to highlight CFO Sink's constant commitment to fiscal responsibility and her continued leadership during these tough economic times."

Jennings most recently served as the Southern Regional Press Secretary for the Democratic Congressional Campaign Committee (DCCC), where she helped guide the communications strategy for successful Congressional campaigns across the Southern United States, including two winning campaigns in Central Florida. Jennings previously was communications director for Representative Zoe Lofgren (D-California) and worked at the Democratic Leadership Council (DLC).

Florida Emergency Manager Tapped To Head FEMA

By: Tom Crabb

Craig Fugate, Director of the Florida Division of Emergency Management, has been nominated by President Barack Obama to head the Federal Emergency Management Agency. Fugate, a Democrat, was appointed to run the Florida Division in 2001 by then-Governor Jeb Bush. Unfortunately since then, Florida provided Fugate with a wide range of disaster management experience. In the wake of September 11th, Fugate upgraded the state's terrorism response plans and security forces. But it was the 2004 hurricane season that tested Fugate's mettle when four hurricanes hit Florida, causing over \$42 billion in damage and killing 117 people. Fugate and the rest of the Division were given high marks for the state's response to those storms, including quickly getting supplies and personnel to the areas of Florida where they were needed most. During his tenure at the Division, Fugate has also advocated personal responsibility for disaster preparedness in the form of hurricane mitigation measures and the need to have an individual emergency plan. Mr. Fugate's experience should serve him well at FEMA and all Floridians should benefit from having a FEMA Director who is keenly aware of our state's needs following a hurricane or other emergency.

Need Your Own Copy?

One of the enjoyable things about preparing our newsletter is the frequent comments we receive from readers. Many times readers tell us they received the newsletter from a colleague. Any reader who would like to receive a copy of the newsletter directly, either by mail or email, may request a copy by sending an email to Kendria Ellis at kellis@radevlaw.com or by calling her at (850) 425-6654.

FHCF Looks for Options

By: David Yon

Faced with a potential shortfall of available cash in both the TICL layer of coverage and the mandatory level, the FHCF staff is searching for ways to raise additional money to pay claims in the event of a major storm. The Cat Fund reports it has about \$7.5 billion in cash for the 2009 hurricane season. Staff believes the FHCF may be able to raise an additional \$3 billion in post-event bonds. This balance creates immediate capacity of \$10 to \$10.5 billion. There could be a \$7 billion gap in funding for the mandatory program and up to a \$20 billion shortfall if funding were necessary for the entire mandatory program and all of the TICL layer and the bond markets don't respond.

The Cat Fund and its advisors made a presentation to the State Board of Administration (Governor, AG and CFO) on March 10, 2009 regarding some options to address the problems:

- (a) Secure capital markets products such as pre-event financing.
- (b) Obtain bank markets standby agreements to provide the FHCF with a liquidity bridge.
- (c) Explore contingent capital market products which include put options or similar agreements (such as the Berkshire deal last year).
- (d) Purchase traditional reinsurance.
- (e) Purchase finite reinsurance.
- (f) Explore alternative risk transfer products such as catastrophe bonds or industry loss warranties.

Of the various product ideas listed above, the FHCF advisor stated that only products (c), (d), or (e) were considered viable, given the financial market conditions and the needs of the FHCF. Of these, product (c) is potentially the most promising choice given its potential benefits and costs.

The other option discussed at the meeting was securing a "federal backstop." Crist sounded optimistic at the meeting about obtaining Federal cooperation and noted he had already met with the secretary of the U.S. Department of Treasury. There was also discussion about whether the Treasury would need legislative authority to provide such a backstop. U.S. Sen. Bill Nelson and U.S. Rep. Ron Klein announced recently they were filing federal legislation to establish the federal backstop. Possible options include a guarantee that the Treasury Department would buy bonds which the Cat Fund needed to sell and could not on the troubled financial markets or other forms of federal financial loans.

"I am relatively optimistic," Crist said. "Even if there isn't some kind of formal action...the reality is, (after a major hurricane), the federal government comes in anyway." In the meantime insurers wonder just how much coverage they have.

Governor Crist Open To Citizens Rate Increase

By: Tom Crabb

Citizens Property Insurance Corporation may finally be starting on the path to actuarially sound rates after Florida Governor Charlie Crist indicated that he is open to the idea of a rate increase. The state-run property insurer - which currently has over one million policies -- has not had a rate increase since 2006 and has had its rates frozen by law since 2007. The Governor said that Citizens should be "solvent and protected," which is a different tone from the Governor's relentless campaign against rate increases by all property insurers, including Citizens, since he took office. The House and Senate appear to be on board to support an increase in Citizens rates of as much as 20 percent this year. In January, the Citizens Mission Review Task Force recommended that lawmakers cap Citizens' rate increases at a statewide average of 10 percent per year. It will take a number of such increases to return Citizens to actuarially sound rates and then, eventually, to restore it to its role as a residual market entity.

Citizens Board Approves Bond Sale

By: David Yon

Citizens Property Insurance Corp. board tentatively approved the sale of up to \$2.5 billion of bonds to raise funds for claims from the 2009 hurricane season. The funds would go into Citizen's high risk account and be used to pay claims for the 2009 hurricane season.

The agency plans the sale of fixed-rate, tax-exempt securities with maturities of one to five years, according to the Citizens website. After the initial sale next month, the insurer aims to sell the balance before the beginning of the storm season. The bonds won't likely carry insurance, Citizens reports said.

Four senior sale managers have been selected: Bank of America (replacing Merrill Lynch), Citigroup, Goldman Sachs Group and Morgan Stanley, Citizens said.

New Annuity Sales Practices Amendments Take Effect

By: David Yon

Chief Financial Officer Alex Sink has made tougher regulation and oversight of annuity sales a high priority. She helped push legislation in 2008 designed to target agents using predatory annuity practices against seniors. Effective January 1, 2009, that legislation strengthens the fines against agents who target Floridians using fraudulent annuities sales practices. The legislation also makes it a third degree felony to submit a fraudulent signature, prohibits agents from using fake designations to falsely imply financial expertise, and clarifies and strengthens suitability requirements that agents must meet when selling an annuity to a consumer.

"This legislation represents a good first step," CFO Sink said. "We were able to increase protections for seniors and punish agents who commit financially devastating crimes. That said, I will continue to push for it to be a felony to intentionally deceive a senior into an inappropriate annuity product. And I'm not going to rest until we're able to put unscrupulous agents that prey on our seniors behind bars."

The highlights of the law which amended section 627.4554, Florida Statutes, include:

- Agents licensed in Florida must take a minimum of three hours of continuing education on the subject of suitability in annuity and life insurance transactions.
- Any person who willfully submits fraudulent signatures on an application or policy-related document commits a felony of the third degree.
- Any agent who misuses a designation to imply they have specialized training or knowledge or misrepresents their actual qualifications, commits a violation of the unfair trade practices law.
- The type of information the agent is required to collect from the senior consumer to determine suitability when recommending an annuity.
- Requires the agent to complete a detailed comparison form comparing the benefits of the senior consumer's existing annuity to the one being recommended by the agent as a replacement.
- Increases the period in which the consumer can obtain an unconditional refund if the consumer decides not to accept the life or annuity policy from 10 to 14 days from the date the policy is received.
- Imposes maximum fines of \$30,000 for each willful violation for twisting, churning and submitting fraudulent signatures.

OIR Publishes Changes To Financial Examination Rule Related To Exam Contractors

By: Tom Crabb

Back in October, the Financial Services Commission proposed amendments to the administrative rule related to the examination of insurers, rule 69O-138.005, F.A.C. Among other things, those amendments provided the qualification criteria for the investment specialists and information technology specialists who will now participate in the financial examination of insurers pursuant to the new risk-focused framework for examination. Under the new risk-focused framework, all operational risks facing the company are evaluated as part of the examination, including IT risks, therefore specialists with new and different skill sets are required. On March 6, 2009, the Commission published additional proposed changes to the rule. First, there is language that the rates charged for the examination must be "consistent with

rates charged by other firms in a similar profession and shall be comparable with the rates charged in comparable examinations" so as to "protect the examined insurer from being overcharged for the examination." This is a critical concern for companies as the cost of a risk-focused financial examination – especially for the first one conducted on a company – is significantly higher than under the prior format and can easily run hundreds of thousands of dollars. The changes also provide a process by which contractors can get on an approved list of contractors to be used by the OIR. Finally, when selecting a contractor, the OIR is to consider the contractor's experience with the specific kind of insurance which is the subject of the examination. Hopefully this will provide another means to keep the examination expenses to a minimum. For more information about the proposed rule or the new risk-focused financial examination process, please contact myself or any member of our Insurance Team. We will continue to track the progress of this proposed rule.

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Susan Clark Among 25 Women You “Need to Know” in Tallahassee

By Travis Miller

The firm congratulates shareholder Susan Clark on recently being named by the *Tallahassee Democrat* as one of 25 women people “need to know” in Tallahassee. The newspaper accepted nominations for the honor and selected 25 prominent Tallahassee women based on their professional accomplishments and community involvement.

"First of all, I have been very lucky in the people I have worked with. They have always been people who inspired you to do well," said Clark, a founding partner of Tallahassee law firm Radey, Thomas, Yon & Clark. "The more you were capable of, the more responsibility they would give you." She had to have been thinking about the rest of us, her fellow shareholders,

right? Not really—Susan was referring to former Florida Public Service Commission Chairman Joseph P. Cressy, whom she regarded as a great teacher.

Susan began working at the Public Service Commission in 1980. Initially a mid-level attorney, she became head of the Appeals Section. She then was named General Counsel, and ultimately was appointed by Governor Lawton Chiles to be on the commission. She served on the commission for nine years.

"It was always interesting, always important and meaningful to the state. I enjoyed going to work every day," Clark said.

Susan served on the board of directors of the Mary Brogan Museum of Art & Science and was a key member of the RTYC team that completed a 60-mile walk last fall to raise money to combat breast cancer.

Her fellow shareholders agree that Susan is someone people “need to know,” and we’re glad we do!