Florida Insurance Report

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RADEY | THOMAS | YON | CLARK

Attorneys & Counselors at Law

State Farm Rate Appeal Rejected

By: David Yon

On Monday, July 20, 2009, the First District Court of Appeal affirmed the Final Order of the Office of Insurance Regulation (OIR) disapproving State Farm's rate filing. State Farm's filing had initially requested an increase of 47.1 percent for its homeowners line of business. When OIR issued a notice of intent to disapprove the filing, State Farm requested a hearing before an administrative law judge (ALJ).

The hearing was held October 27-30, 2008. During the hearing State Farm argued it should be entitled to an increase of 67.0% based on the evidence before the ALJ. The ALJ found in favor of OIR's decision to reject the requested increase and issued a recommended order on December 12, 2008 recommending that OIR reject the proposed increase. The ALJ concluded that State Farm did not show by a preponderance of the evidence that either the indicated rate or requested rate in the rate filing was not excessive, inadequate, or unfairly discriminatory. OIR responded by issuing a final order on January 12, 2009. State Farm then appealed OIR's final order and requested the case be expedited. The First DCA affirmed OIR's order without issuing a written opinion. For copies of key documents please visit our website or contact any of our Insurance Team.

Mitigation Discounts Under Review

By: Travis Miller

Perhaps no regulatory issue in Florida is affecting as many insurers and attracting as much attention as the windstorm loss mitigation discount program. Insurers have urged that the discounts are too great, ultimately resulting in their not collecting enough premiums to cover the reinsurance costs associated with mitigated homes. In addition, questions have surfaced about the legitimacy of discount verification forms in some instances, with insurers finding that forms are not being completed accurately and sometimes that homes are not being inspected at all. Even an updated study by the firm that developed the original discount relativities suggests that Florida missed the mark when originally implementing the mitigation discounts, with the relativities erroneously being applied as discounts from a hypothetical "worst" risk instead of as adjustments from an average or base risk.

The merits of the current mitigation will come under review in at least two contexts. First, State Farm submitted a filing to the Office of Insurance Regulation on July 24 seeking to modify its mitigation discounts and to adjust or eliminate other discounts. *See,* "State Farm Seeks Changes to Discounts and Credits" on page 7 of this report. State Farm points out that the mitigation discounts should be applied as reductions from the base risk, or typical risk, cited in the original ARA loss relativities study. State Farm proposes that insureds with homes showing greater mitigation features than the typical risk will receive discounts (smaller than under the current program), but that insureds with lesser or no mitigation features will not be surcharged. At the same time, State Farm contends that the BCEGS credits should be reduced because they partially overlap with the mitigation discounts. Finally, the company proposes to eliminate some of its other discounts such as the home/auto discount. The Office of Insurance Regulation has 90 days in which to review State Farm's filing. The Florida Commission on Hurricane Loss Projection Methodology also will commence its review of Florida's mitigation discounts in mid-August.

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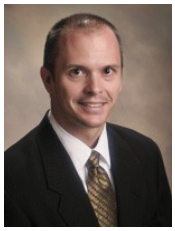


Travis Miller

A New President

By: David Yon

The firm's shareholders recently unanimously elected Travis Miller to be president of the firm. John Radey who has served as president since the beginning of the firm welcomed Travis to his new position and assured that, "Travis will have 100% of my support as the transition takes place with no disruption in the work of the firm." Travis' undergraduate degrees in finance and accounting give him a head start on understanding his duties. He is excited about the new opportunity and the future of the firm. Travis' primary practice area is insurance regulatory law and business transactions, and he is board certified in the area of state and federal governmental and administrative law. He has provided advice to clients in this area for 15 years and will continue to do so. John will continue his practice in complex administrative and commercial litigation. John's extensive knowledge and experience in these areas remains an important element of the services Radey Thomas Yon & Clark provides its clients.

Looking Back While Looking Ahead

By: Travis Miller

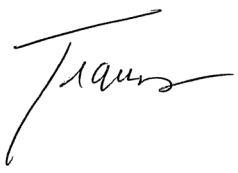
John Radey served as our first and only president since ten of us founded the firm more than six years ago. We shared a common commitment to client service and high quality legal work. We also shared the unanimous view from the beginning that John should lead the firm. He combined longstanding experience as a firm manager with a reputation as a top-flight litigator, and his business acumen would lead us from our infancy to becoming the firm we wanted to be.

John suggested from the outset that he would serve for a year or two before looking to transition the leadership role to another shareholder. The time passed quickly and two years became four...and then six. John mentioned a couple of times along the way that we should start thinking about the transition, but his fellow shareholders weren't too quick to take him up on his suggestion--why would we want to mess with a good thing?

This year, though, the timing was right. We saw an opportunity to transition the firm's presidency while continuing to avail ourselves of John's experience both as a manager and a litigator. John's office is still four doors down from mine, and he'll continue to work on current and future litigation projects around the firm. (In fact, John is covering depositions on an issue we are working on together even as I write this article).

The last six years have been some of the most fulfilling of my career, and I'm sure my fellow shareholders will agree. This is due in large part to the leadership John has provided since our inception and to the common values shared by our firm's professionals. In a business that sees frequent movement among firms and clashes of personalities, we are happy to say that every one of our original shareholders is still with the firm.

We have seen a lot of personal and professional growth since we started--children have been born and others have graduated high school or college, former runners are now graduating from law school or pursuing dental school, and attorneys who were once new hires have blossomed into excellent young lawyers. My hope for the next six years is to continue the successes of the last six--that we will continue to be a firm that provides high quality, cost effective legal advice in a collegial atmosphere that values the balance in our lives that sometimes seems so elusive. We thank our clients and friends for your support over the years and look forward to our continuing relationships. If you would like to provide feedback to us or if any of us can be of assistance, please do not hesitate to call.



GET TO KNOW…

By Karen Asher-Cohen

STEVE PARTON is the General Counsel for the Florida Office of Insurance Regulation. He has been at the Florida Office of Insurance Regulation and the former Department of Insurance since 1997. Before that, he enjoyed working at the Florida Public Defender's Office, the State Attorney's Office, and the Attorney General's Office as Chief of the RICO Section. Recently I asked Steve the following five questions.

1. What is the biggest legal issue facing the Florida Office of Insurance Regulation at this time?

The biggest issue facing all regulators, not just our Office, relates to possible federal regulation of insurance. From our perspective, we think that state-based regulation works best. We would point out the success we have had during this financial crisis. Even in these times, our companies have been very sound financially and have not suffered due to the financial crisis. Compared to the federally regulated entities, our state-regulated companies have done much better.

2. How has insurance regulation changed in your time at the Office?

From a legal aspect, I don't think it has really changed. As an office, we have become more careful in how we proceed with issues. And our success in legal matters has reflected that. We now take a stronger look at issues that we regulate to determine what is appropriate for litigation.

3. What is the hardest part of your job?

The legislative challenges are probably the greatest challenges we have to deal with. They are certainly the most difficult and sometimes the most frustrating part of the job.

4. What is the best part of your job?

This is a fun job, probably the most fun job I have ever had, and I've had some fun ones. It's fun because of the people I get to work with. These are very smart people. We have many spirited debates and end up with very good decisions. The people here are very dedicated. They take their jobs very seriously, but they do not take themselves too seriously. Also, we deal with some pretty important policy issues that affect many people. That responsibility makes this job very interesting.

5. How do you get away from all this?

I don't. Mostly, I'm not really able to get away. My wife can attest to that. I like to take long weekends with my wife. Unfortunately, there are many issues that are always ongoing and I often end up taking them with me, thinking about issues and working even when I'm away. This is not a complaint, just reality. But I do enjoy just getting out of town, to the mountains or the coast.

Karen Asher-Cohen brings a unique perspective to our Insurance and Litigation teams, having been the Director of Insurer Services and Deputy General Counsel at the (then) Florida Department of Insurance. Karen has over 25 years of experience as a Florida lawyer, in areas such as insurance regulatory law and complex litigation, including the defense of class action lawsuits.

OIR Expands Relationships with Other Regulators

By: Travis Miller

The Office of Insurance Regulation recently announced cooperation agreements with the state of Georgia and with the United Kingdom. The agreement with Georgia provides for post-catastrophe assistance and renews and revises a similar agreement entered into in 2006. The agreement allows the insurance department of the state affected by a catastrophe to draw upon the resources of the other to ensure continuity of critical regulatory functions. Regulators from the affected state will be able to use the offices of the non-affected state until services can be resumed at the affected state's offices.

The OIR also entered into a Memorandum of Understanding with the U.K. regulator to share information and coordinate regulatory duties regarding issues of common interest. OIR entered into a similar understanding with the German regulator in June. The Memorandum of Understanding with the U.K. formalizes a working relationship that Florida and the U.K. have enjoyed on an informal basis in the past. It allows the regulators to formally request assistance with investigations and examinations of issues related to regulated companies under their respective authority. According to the OIR, approximately 18% of the $20 billion in reinsurance capacity deployed in the Florida market is issued by Lloyd's of London. "The longstanding link between Florida and the U.K. insurance market is one of the key facets of our marketplace," said Commissioner McCarty. "In our increasingly volatile globalized market, a proactive approach to regulatory cooperation is critical for our responsibilities regarding the monitoring of financial solvency and general policyholder protection."

Conditional Receipt of Premium with Application for Life Policy Does Not Give Rise to a Policy of Life Insurance When the Applicant Dies before the Policy Issued

By: Harry Thomas

Harry Thomas and Lisa Scoles were successful in obtaining summary judgment for United Insurance Company of America on a claim that the signing of a conditional receipt and the receipt of a premium payment was sufficient to establish a contract between plaintiff and United when the executed application provided that no liability exists until a policy is delivered to and accepted by the owner.

Plaintiff's complaint alleged that on April 5, 2006 she applied for a life insurance policy with United on her fifteen-year-old son, Tyler and her 16-year-old son Travis. Plaintiff was designated as the beneficiary in each of the applications. United's agent assisted with completion of the applications. The applications clearly stated in the paragraph above the applicant's signature that the agent could not accept any risk, modify policies, waive any rights or requirements of United and that it was agreed that unless otherwise stated in a conditional receipt bearing the date of the application, that no liability exists until: (a) a policy is delivered and accepted by the owner; and (b) the first premium is paid while the health and occupations of the proposed insured are as described in this application. Upon completion of the applications the plaintiff paid the first month's premium for each son and was issued a conditional temporary receipt which provided that for insurance to be effective the following five conditions must first be fulfilled: (a) All Company Requirements have been completed and received by the Company within 60 days from the date of application; (b) The first premium has been paid in full; (c) All questions in the application have been answered; (d) All answers given in the application are true and complete; and (e) The Proposed Insured is acceptable to the Company under its rules and practices, for the plan and amount applied for, without amendment, at the rate class applied for or at the standard premium, as of the date all the Company Requirements are received by it. Plaintiff testified that upon completion of the application and her payment of the initial premium that the agent told her that her sons were covered.

Upon receipt of the applications, United's underwriting department notified the agent that additional information regarding the manner of payment by electronic funds transfer and the completion of a field inspection report by the district office was required before processing of the applications could be completed. On May 28, 2006, plaintiff's son Tyler died from asphyxiation, aspiration of food and dysphasia. At the time of Tyler's death a field inspection report had not been completed by the district office and the additional information regarding the manner of payment had not been provided by the applicant. While the agent was made aware of his death, United's underwriting department was not notified of Tyler's death. Sixty days after receipt of the application, and in accordance with the terms of the Conditional Temporary Receipt, United closed the file for each application and returned the premiums paid with the applications because information required to complete the application process had not been received. No policy was ever issued on the lives of either of plaintiff's sons. Based on the terms of the application, the conditional receipt, the plaintiff's failure to provide the required additional information, the lack of a field inspection and the fact that no policy was ever issued, United moved for summary judgment.

During discovery, contrary to complaint allegations, it was learned that a second conditional temporary receipt was issued to the plaintiff on April 11, 2006. While disputed by the agent, the plaintiff testified, contrary to her complaint allegations, that while the application was completed and signed on April 5, she did not pay the first premium until April 11 and that was when she was given the second receipt. The second receipt was different than the first receipt in that it did not contain any of the five conditions listed in the first conditional receipt issued on April 5. Additionally during discovery plaintiff testified that the agent checked the box on the application selecting electronic funds transfer as the method for making future premium payments, that she did not want to pay by electronic funds transfer for at the time she did not have a checking account.

Plaintiff opposed the motion for summary judgment by contending that the application signed by plaintiff along with the second conditional receipt coupled with the agent's alleged error-laced statements to the applicant at the signing of the application was sufficient to establish the existence of a contract for life insurance.

In addition, the plaintiff argued that she signed the applications without reading them, that the agent had checked the wrong box on the application specifying the manner of payment as she did

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RTYC Attorneys Prevail - Cont.

not intend to pay future premiums via electronic funds transfer, and that while she was told that a field inspection had to take place she was never informed of the additional information needed regarding the manner of payment the agent selected. Finally, plaintiff argued that the agent violated United's operating rules regarding how the application should have been completed and because the agent learned of Tyler's death on May 29, 2006, United had notice of the death before the sixty-day application period expired.

In its motion for summary judgment United relied on well established Florida law that an insurance policy becomes effective only when the insurance company receives and accepts the offer of the insurance application. Facts showing that an application for life insurance has been submitted, along with an initial payment of premium, are not sufficient to demonstrate that a contract for insurance has been established. United also brought to the attention of the court Florida cases holding that when a conditional receipt specifies the conditions that must be established prior to issuance of the policy and such conditions are not fulfilled in their entirety, no insurance coverage results.

After consideration of the memoranda of law submitted by the parties and extensive argument from counsel, the court on June 5, 2006, entered final judgment for United finding that no contract of insurance ever came into existence because United never accepted the application submitted by plaintiff.

The following are some key points from the findings made by the court:

1. The starting point for the court's decision was the language from the application signed by the plaintiff which provided that unless otherwise stated in a conditional receipt bearing the date of this application no liability exists until a policy is delivered and accepted by the owner. The court found that while the first premium was paid no policy was issued and delivered and neither of the conditional receipts at issue in the case modified the requirement that a policy be delivered to and accepted by plaintiff prior to becoming effective.
2. Plaintiff had been made aware of the need for a field inspection report to be completed as part of the application process. The court relied on the fact of the uncompleted field inspection report to support the conclusion that the application process was not completed at the time of the applicant's death. The court expressly stated that "The court's ruling places a great deal of weight on the lack of a field inspection and plaintiff's knowledge of the need thereof. The court did not place as much weight on the lack of the additional information needed regarding the manner of payment by electronic funds transfer."
3. The court accepted plaintiff's testimony that the agent who took the application told her she was covered. However, the fact of any such statement was over ridden by the language in the application signed by plaintiff which states that "No agent can: a) accept any risks; b) modify policies; or c) waive any rights or requirements of United Insurance Company of America."

Lakoe Jackson v. United Insurance Company of America, Inc., Case No. 08 1079 CAA, Circuit Court of the Second Judicial Circuit in and for Gadsden County, Florida. Final Judgment, June 5, 2009.

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.

Mitigation Discounts - *Cont. from Page 1*

The Florida Commission on Hurricane Loss Projection Methodology also will commence its review of Florida's mitigation discounts in mid-August. The Florida legislature in the 2009 session directed the loss projection commission to review the implementation of the mitigation discounts. The modeling commission recently announced a work plan, available on the Insurance Resources page of our website, outlining how it will proceed with the review and deliver a report prior to the 2010 legislative session. The commission will begin in mid-August by inviting the Office of Insurance Regulation, Florida Department of Financial Services, the insurance industry and others to discuss their interpretations of statutes and rules governing the mitigation discounts. The commission then will hold additional meetings to discuss how the discounts have been implemented, the perceived problems with the discounts, and potential solutions. The loss projection commission's study might form the basis of legislative action in the 2010 session.

Florida Assessment Calculator Now Online

By: Tom Crabb

The Office of the Insurance Consumer Advocate has created an internet-based program to illustrate an insurance consumer's potential assessment liability if Florida were to sustain a 1 in 25 year, 1 in 100 year, or 1 in 250 year hurricane. Florida has three entities with assessment authority: the Florida Hurricane Catastrophe Fund ("Cat Fund"), Citizens Property Insurance Corporation ("Citizens"), and the Florida Insurance Guaranty Association ("FIGA"). By plugging in his or her annual premium for homeowners, auto, and business insurance, the calculator shows how much the consumer can expect to pay in assessments if a storm to one of those levels hits. For example, a consumer paying $1,000 a year for homeowners insurance and $1,000 a year for auto insurance will pay approximately $1,088 in assessments following a 1 in 100 year storm. This is in addition to the financing costs that would apply if an assessment by Citizens or the Cat Fund is spread over a period of several years.

In conjunction with the launch of this program, the Consumer Advocate's office also released a report discussing the assumptions underlying the calculator, some of which are quite interesting. The assumptions include that the hurricane would first make landfall near Tampa or Miami and that storms at the 1 in 25, 1 in 100, and 1 in 250 year levels would cause $25.92 billion, $65.63 billion, and $98.54 billion in losses and expenses, respectively. The calculator does not include any insurer insolvencies (which would result in FIGA assessments) for the 1 in 25 and 1 in 100 year levels. The calculator also assumes that the Cat Fund would be able to borrow enough money to meet its entire potential $27.18 billion obligation, even though current estimates show about a $10 billion shortfall between the Cat Fund's total obligation and its borrowing ability given current market conditions. Despite the limitations inherent in any calculation of assessment liability, this online calculator should give consumers a good idea of the extent of their liability following a hurricane. The calculator and related report are available online at http://www.myfloridacfo.com/AssessmentCalculator/Consumers/AssessmentCalculator.aspx. Please contact any of our Insurance Team members if you have any questions about the assessment and recoupment mechanisms of FIGA, Citizens, or the Cat Fund.

Associate Tom Crabb practices insurance regulatory law as well as insurance-related commercial litigation and corporate law. His recent experience includes preparing companies for risk-focused financial examinations, company and producer licensure issues, and viatical settlement law.

Insurance Consumer Advocate Hosts Claims Roundtable

By: Travis Miller

Florida's Insurance Consumer Advocate Sean Shaw recently held a roundtable to facilitate discussions between insurers and contractors about improving the claims resolution process. The roundtable featured representatives of the insurance industry, homebuilders associations and adjusting firms. The discussion centered around improving the process of preparing and reviewing repair estimates. The Department of Financial Services hopes that claims can be resolved more quickly if contractors include information in their estimates that insurers consider important in their reviews. As a specific example, contractors typically don't have a need to separately identify the cost of code upgrades when they present repair costs. However, insurers might need to distinguish between coverage that is available under the basic policy limits and coverage attributable to law and ordinance upgrades.

The Consumer Advocate intends to develop a series of recommendations arising from the roundtable. He also mentioned the possibility of hosting additional roundtables or telephone conferences relating to the claims process. The Consumer Advocate also acknowledged that the recent roundtable did not include (and was not intended to include) discussion of the roles of other parties in the claims process such as public adjusters.

OIR NEWS

OIR Issues Memoranda on COBRA Premium Reductions and Coverage for Autism Spectrum Disorder

By: Tom Crabb

On July 9th, the OIR issued two informational memoranda to all life and health insurers and HMOs. The first, OIR-09-02M, concerns changes enacted under the federal stimulus law that provide for temporary premium reductions under the state benefits continuation program better known as mini-COBRA. Certain eligible individuals may pay only 35% of the full mini-COBRA premium under their plan for up to 9 months. The insurer may recover the remaining 65% subsidy through a credit on its quarterly employment tax return. The second memo, OIR-09-03M, is a reminder of the Florida Insurance Code's requirements for coverage for individuals with autism spectrum disorder. Effective April 1, 2009, a large group health insurance policy or group health benefit plan offered by an insurer or HMO must provide coverage to eligible individuals for autism spectrum disorder. Details discussed in the memo include who is an eligible individual, which insurers are exempt, and specifics regarding the mandatory coverage. If you would like copies of these memoranda, or have any questions about them, please contact us.

Workshop Scheduled for Fee Change

By: David Yon

The OIR announced it will hold a workshop on August 20, 2009 in room 142 of the Larson Building to consider revising the fees to be charged for use of the public hurricane loss projection model. The fees are currently described in rule 69O-170.0144, F.A.C. and expectations are they would be increased by revisions to the rule. For more information please contact any of our Insurance Team Members.

State Farm Seeks Changes to Discounts and Credits

By: David Yon

State Farm Florida Insurance Company has submitted a filing to the Office of Insurance Company seeking to substantially reduce many of the discounts and credits now available to its homeowners policyholders. The filing which follows the recent decision of the First District Court of Appeal affirming the OIR's decision to reject the company's rate filing, would significantly reduce credits and discounts for mitigation devices such as shutters, impact resistant windows and reinforced doors. Also proposed for elimination are discounts for having more than one policy with the company, burglar alarms and updating plumbing, electrical and air conditioning systems. State Farm Florida which also has filed a plan to withdraw from Florida, has consistently asserted it cannot operate profitably in Florida with its existing rate structure. The Office will be reviewing the filing over the next 90 days. For more about the status of mitigation discounts in Florida, see our related article "Mitigation Discounts Under Review" on the front page of this report.

David Yon has practiced primarily in the area of insurance, administrative, regulatory, and business law for over twenty-five years. He has represented many of the major insurance writers in the country, as well as small start up companies in the Florida regulatory process.

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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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Court Rules Judges Must be Selected from Designated Nominees

By: Toni Egan

On July 2, 2009, the Florida Supreme Court held that the Governor must fill the vacancy created by the retirement of Judge Robert J. Pleus, Jr. in the Fifth District Court of Appeal with one of the six nominees recommended by the Judicial Nominating Commission ("JNC"). The JNC originally certified the list of six nominees in November, 2008. In a letter dated December 1, 2008, the Governor rejected the list of nominees, and in the interest of diversity, requested that the JNC consider the applications of three African Americans who had applied to fill the vacancy. The JNC met to consider the Governor's request; however, they did not alter their recommendation and resubmitted the original list of nominees to the Governor. The Governor did not fill the vacancy, and a petition seeking an order compelling the Governor to fill the vacancy was filed in the Florida Supreme Court. The Supreme Court held that the Governor lacks authority under the Florida Constitution to seek a new list of nominees from the JNC and that the Governor has a mandatory duty to fill the vacancy with an appointment from the list certified to him in November, 2008. In reaching its decision, the Supreme Court stated that "while we applaud the Governor's interest in achieving diversity in the judiciary – an interest we believe to be genuine and well-intentioned – the [Florida] constitution does not grant the Governor the discretion to refuse or postpone making an appointment to fill the vacancy on the Fifth District Court of Appeal." In a written statement responding to the Court's order, Governor Crist said he was disappointed by the decision but that he looks forward to interviewing and considering the nominees recommended by the JNC.

Associate Toni Egan practices primarily in the areas of employment and insurance law and litigation. Her recent experience includes advising clients on issues related to the Fair Labor Standards Act and Family Medical Leave Act.