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Attorneys & Counselors at Law

Early Bills Filed in Anticipation of 2010 Session

By: Travis Miller

Although the 2010 session is still nearly half a year away, some legislators are getting an early jump by filing bills. The following are some of the bills that have been filed (but it is important to remember that early filing does not necessarily mean the bills will be considered):

Homeowners Insurance— One early proposal (SB 352) would require the Office of Insurance Regulation to notify all homeowners policyholders of the potential that their policies may be terminated and their options upon such termination. The bill is strangely worded in that it clearly applies to homeowners insurance, but refers to terminations by providers and would require the OIR to advise of “providers” or “provider networks” accepting “enrollees.” The bill also would require the OIR to inform policyholders how they may contact brokers or counselors upon termination of their policies. A similar proposal—requiring OIR to provide information to consumers upon termination of their policies, has surfaced in prior sessions but has never gained consideration due to the obvious fiscal and practical concerns.

Health Insurance— A bill (SB 302) relating to health insurance, HMO’s and pre-paid limited health service organizations would govern contractual relationships

between those organizations and health care practitioners. Under the bill, the organizations could not enter into contracts with practitioners whereby the practitioners would be required to provide services to insureds/subscribers at a fee set by the organizations unless the services are covered services under the applicable subscriber contract/agreement. The prohibition would apply to contracts entered into on or after July 1, 2010.

Title Insurance— Senate Bill 260 would revise title insurance ratemaking and charges imposed by title insurance agents. Under the bill, a title agent would be able to charge a reasonable fee for primary title services, title services and closing services. The charge for the services would not constitute part of the charge for issuing the title insurance policy and would not constitute part of the title insurance premium. The title agent would be required to file the charges with the Office of Insurance Regulation, which then would publish the charges on the Internet. The title agent would be prohibited from pricing the ancillary services below their actual cost.

The bill also would revise the ratemaking procedures for title insurance. The structure of the rating law for title insurance would become similar to the law in effect for general property and casualty lines. A title insurer would be required to submit

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Public Adjuster Suits

By: David Yon

Two lawsuits have been filed seeking declarations that certain provisions of the public adjuster law are unconstitutional. One suit was filed in Leon County on behalf of Fredrick W. Kortum, Jr. and one was brought in Miami-Dade County on behalf of three adjusting firms. The lawsuits challenge subsection 626.854(6) and subparagraph 626.854(11)(b)(2), Florida Statutes. The suits name CFO Alex Sink as the defendant and provide notice to the Attorney General.

Cont. on Page 3



Inside this issue:

Get To Know...	2
State Farm Withdrawal Hearing Pushed Back	3
Kanjorski Releases Federal Insurance Office Proposal	4
CAT Fund Condition Improves	5
House Bill Would Make FIGA Changes	5
OIR Reports That the Medical Malpractice Market in Florida Continues to Strengthen	7
Consumer Advocate to Host Second Claims Roundtable	8



GET TO KNOW...

By Karen Asher-Cohen

RICH KOON - Director of Property & Casualty Product Review (Forms and Rates)

at the Florida Office of Insurance Regulation. Rich has been at the OIR and the former Department of Insurance since 1987. Recently, I sat down with Rich and asked the following questions:

1. *How did you end up at DOI?*

I grew up on a dairy farm in Culloden, in middle Georgia, and truly loved the lifestyle. I never dreamt of becoming an insurance regulator, but the economics of farming in the late 70's and 80's dictated my going to college to pursue something else. I first studied accounting at FSU. I started working part time at DOI in 1987 and then I switched my major to risk management/insurance. I started working full time at DOI in 1990, and later graduated with a BS in Risk Management/Insurance.

2. *What do you think are the biggest issues facing Florida companies these days?*

Property insurance issues continue to dominate the landscape.

3. *How has insurance regulation changed in your time here?*

It has changed a lot. We certainly have more active legislative sessions now and significantly more legislation to implement. It has been a real challenge for companies and regulators to keep up and to apply new laws. In the last two years there have been two sessions per year, which continue to pose significant challenges.

4. *What are the best parts of your job?*

I get to work with highly motivated, very educated, very experienced and knowledgeable individuals, who have taken on enormous tasks and been very dedicated to seeing it through, when they could have gone to the private sector. It is very rewarding to watch these people excel beyond their job descriptions. There are people here who have turned down more lucrative offers, which says a lot about them. These are not the stereotypical state workers that people sometimes talk about when they are not pleased with the level of service they receive from government. The people in this unit have been truly amazing. Our section has received nearly twice the level of files that we did 7-8 years ago, with the same level of staff, without the proper recognition that they deserve. Typically, you don't see such well-rounded individuals who can see the whole picture, as you do here. Working with them gives me encouragement. It also makes my job easier to manage, even in a very difficult environment.

5. *What are the worst parts of your job?*

There is too much work and not enough resources. It is difficult to achieve what you want in such an environment. Also, our jobs are harder because there have been so many legal changes over a short period of time.

6. *How do you get away from all this?*

It's hard to get away, but I always try to get away with my family. My most important job is raising my kids. Both my boys play football, so it's great to watch them. We enjoy the outdoors, fishing, hunting, and team sports. My wife and I treasure our time with the boys.

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.



Early Bills - Cont. from Page 1

a filing annually, or in the alternative to file a rate certification stating that no rate change is needed. The title insurance rating law also would establish review standards for the proposed rates, and would require title insurers to submit their rates under a certification like the one that applies to rate filings under section 627.062.

The legislature only recently held its first committee meetings in anticipation of the 2010 session. The meeting of the Senate Banking & Insurance Committee was dedicated to updates on

the property insurance market. The Florida Office of Insurance Regulation provided an overview of the residential property insurance market. Citizens Property Insurance Corporation followed with a summary of its current exposures and the status of its rate filings. Finally, the committee received information about the claims-paying capacity of the Florida Hurricane Catastrophe Fund.

At this time, no meetings on specific proposals for 2010 have been scheduled. For additional information on these items or preliminary ideas being considered for the next session, please contact Travis Miller.



State Farm Withdrawal Hearing Pushed Back

By: *Travis Miller*

The hearing on the conditions to State Farm’s intended withdrawal from the Florida property insurance market has been rescheduled for December 17. The hearing was scheduled to take place in October and then again in November before being pushed back again until December. The hearing re-

lates to State Farm’s challenge to the conditions imposed on it by the Office of Insurance Regulation when the OIR approved State Farm’s intended withdrawal.

Insurance Commissioner Kevin McCarty commented at a recent Senate Banking and Insurance Committee meeting that the OIR and State Farm continue to discuss pending concerns and he hopes the parties can reach an accommodation by which State Farm will continue write property insurance in Florida in some capacity.

Public Adjuster Suits - *Cont. from Page 1*

During the 2008 session of the Florida legislature, CS for SB 2021 was passed and enacted as Chapter 2008-220, Laws of Florida. The new law created subsections 626.854(6) and (11)(b)(2). Subsection (6) prohibits a public adjuster from initiating contact with a policyholder until at least 48 hours have passed after the occurrence of an event that might produce a claim under a property insurance policy. Paragraph (11)(b)(2) limits the amount of fees a public adjuster may charge to handle claims under a property insurance policy.

Both lawsuits seek to have the 48 hour limitation declared unconstitutional alleging that it constitutes: (a) a prior restraint on protected speech in violation of the First Amendment of the United States Constitution and Article 1, section 4 of the Florida Constitution; (b) a violation of the “inalienable right to be rewarded for industry, the right to acquire, possess and protect property in violation of Article 1, sections 1 and 2 of the Florida Constitution; (c) a violation of the equal protection clause contained in Article 1, section 2 of the Florida Constitution; and finally (d) a tortious interference by the state with the plaintiff’s business.

The Miami-Dade lawsuit also seeks to have the fee limits declared unconstitutional because the limit: (a) violates the due

process clause by impermissibly impairing public adjusters’ right to contract; (b) deprives public adjusters of their property interests by imposing an arbitrary, irrational and oppressive limitation on their fees; and (c) the limit violates due process because it is not rationally related to a legitimate state interest.

The plaintiffs argue there was no real demonstration of harm being prevented or protected against by these laws and therefore the laws do not advance any significant government interest. They also argue that the laws are more restrictive than necessary to protect the policyholders. A successful case to defend these statutes will need to explain and demonstrate the basis for the statutes and how they do in fact relate to a legitimate state interest. The law was enacted after the legislature reviewed the report of a Task Force on Citizens Property Insurance Claims Handling and Resolution reported that public adjusters were in fact driving up claims costs unnecessarily.

We would expect the state to seek a change of venue for the Miami-Dade suit to Leon County. Please contact us for further information .



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.

Special Session Likely for December

By: *David Yon*

Governor Charlie Crist and Senate President and CFO candidate Jeff Atwater both expressed support for holding a special session in December. The focus of the call would be a rail system for Florida. So far Speaker of the House Larry Cretul has been less than receptive to the call for a December special session. It is not likely at this point that there would be any insurance issues on the agenda. Atwater attended meetings

October 19, in Washington that discussed Florida's efforts to win \$2.6 billion in federal money to build a high-speed rail system that would initially link Tampa and Orlando and eventually could extend to Miami. A critical consideration in whether Florida can secure funds is the state’s own commitment to a rail project. Atwater has indicated he would like to take up the Sun-Rail issue before the end of the year, as the federal government is expected to make decisions about high-speed rail funding this winter. Florida's regular legislative session does not start until March.

Kanjorski Releases Federal Insurance Office Proposal

By: Travis Miller

United States Representative Paul Kanjorski of Pennsylvania has released a discussion draft of a proposed Federal Insurance Office Act of 2009 that would create the Federal Insurance Office within the U.S. Department of the Treasury. The authority of the Federal Insurance Office would extend to all lines of business except health insurance.

Duties of the Federal Insurance Office:

The legislation would provide for the Federal Insurance Office to perform the following duties:

- ✓ Monitor all aspects of the insurance industry, including identifying potential gaps in the regulation of insurers that could lead to a systemic crisis in the insurance system or the United States financial system
- ✓ Recommend to the Board of Governors of the Federal Reserve System that it designate an insurer (including its affiliates) as a Tier 1 financial holding company under other regulatory reforms being pursued by the federal government
- ✓ Assist in the administration of the Terrorism Insurance Program established in the Department of the Treasury under the Terrorism Risk Insurance Act of 2002 (TRIA)
- ✓ Coordinate federal efforts and establish federal policy on prudential aspects of international insurance matters
- ✓ Determine whether state insurance measures are preempted by International Insurance Agreements on Prudential Measures
- ✓ Consult with the states on insurance matters of national importance and prudential insurance matters of international importance
- ✓ Perform other related duties assigned to the FIO by the Department of the Treasury

Collection of Data by the Federal Insurance Office:

The Federal Insurance Office will advise the Department of the Treasury on major domestic and prudential international insurance policy matters. A key component of the FIO's authority is its ability to collect information from the insurance industry. Under the proposed Act, the Federal Insurance Office would be authorized to collect information from insurers and their affiliates. Insurers defined as smaller insurers would be exempt from

the data collection requirement.

The Act specifies that submission of the data to it does not result in a waiver of applicable privileges or invalidate existing confidentiality requirements under applicable law or agreements.

The Federal Insurance Office's duties will culminate each year in a report to the President and Congress on the state of the insurance industry, any actions taken by the office relating to preemption, and other information deemed relevant by the Director of the FOI or requested by congressional committees overseeing insurance.

Preemption of State Insurance Laws:

The Act provides for the Federal Insurance Office to adopt policies preempting state requirements if those requirements would treat a non-U.S. insurer that is subject to an International Insurance Agreement on Prudential Insurance Measures less favorably than a U.S. insurer licensed in the state. The Act also provides for preemption of state measures that are inconsistent with international insurance agreements.

Preservation of State Regulation:

The preemption provisions under the draft Act are limited, and the Act specifically reserves much of the current insurance regulatory system to the states. The Act provides that it does not preempt any state requirement governing insurers' rates, premiums, underwriting or sales practices, or coverage requirements.

Related Information:

For an expanded version of this article, please see Travis Miller's blog at www.radevlaw.com.

For a brief overview of the relationship between the proposed Federal Insurance Office Act and Florida confidentiality laws, please refer to Travis Miller's related podcast in the Podcasts section of www.radevlaw.com.

Travis Miller practices primarily insurance regulatory law, business and transactional law, and administrative law. He regularly assists insurance companies and other regulated parties before the Florida Office of Insurance Regulation and the Florida Department of Financial Services. Travis is Board Certified by The Florida Bar in State and Federal Administrative and Governmental Practice



Cat Fund Condition Improves; '04 and '05 Losses Climb

By: Travis Miller

The Florida Hurricane Catastrophe Fund's estimated claims-paying capacity for October is \$19 billion. At this level, the FHCF would be able to fully fund the mandatory layer of coverage and would be able to begin making TICL reimbursements. However, the aggregate funding still would be about \$4.2 billion less than the FHCF's potential obligations for the current hurricane season.

The FHCF's liquid balance at the end of this year is pro-

jected to be \$4.5 billion. The FHCF also has \$3.5 billion in pre-event note proceeds, bringing its liquid resources to \$8 billion. This is combined with an estimated post-event bonding capacity of \$11 billion to reach the estimated \$19 billion in claims-paying capacity. The FHCF's projected ability to issue bonds is up substantially from the estimate a year ago, and even from the estimate the FHCF released in May of this year.

On a related note, the FHCF continues to see development from the 2004 and 2005 hurricane season. The FHCF expects to issue another \$300-\$600 million in bonds to meet those continuing obligations. The sale of these additional bonds is not expected to occur until early 2010.

Citizens Refiles Rate Changes But Still Far From Adequacy

By: Travis Miller

Citizens Property Insurance Corporation has refiled its Personal Lines Account rates with the Office of Insurance Regulation, seeking statewide average rate increases of 5.4% for homeowners. Other personal lines products likewise are seeing single-digit proposed rate increases, whereas the proposed rate changes for commercial residential accounts averages 10.1%.

In submitting the proposed rates, Citizens notes that its rates remain about 40% below the actuarially indicated amount. The smaller requests are attributable to a glide-path approach to the rate increases adopted by the legislature earlier in 2009. The legislature specified that the rate change for any individual policyholder cannot exceed 10%. However, after taking into account that some territories show indicated rate decreases, the statewide average rate change becomes 5.4%.



House Bill Would Make FIGA Changes

By: Travis Miller

A House bill (HB 159) filed for the 2010 session would make changes to Florida's insurance guaranty associations. The bill proposes to reduce the number of property and casualty accounts operated by FIGA from three to two by combining the auto liability and auto physical damage accounts. Other P&C lines of business (like homeowners and commercial multiperil) would continue to be administered through the so-called "all other" account.

The bill also would increase the life and health guaranty association's payout on life insurance policies. The bill proposes that the life and health association would cover up to \$300,000 in cash value and \$500,000 in aggregate benefits (including cash value) on any one life. This would be an increase from the current limits of \$100,000 in cash value and \$300,000 in aggregate benefits.

Finally, the bill would authorize insurance agents to discuss the existence and purpose of the life and health guaranty association. This is similar to authorization passed in 2009 for the property and casualty guaranty association.

OIR Reports That The Medical Malpractice Market In Florida Continues To Strengthen

By: Tom Crabb

Medical malpractice insurance rates continue to decline as new companies enter the marketplace, while profitability is down slightly from last year. This was the message from the Office of Insurance Regulation in its recently released 2009 Annual Report on the state of the medical malpractice insurance market in Florida. The report, which is required annually by law, reviews profitability and solvency characteristics of medical malpractice carriers, rate filings received by the OIR, and closed claim data. Return on surplus for Florida's leading medical malpractice insurers was 9.5%, which is off slightly from last year's 11%. For companies submitting rate filings for the coverage of physicians and surgeons, the average approved rate change was negative 7.1%. For the 22 insurers that comprise 80% of Florida's medical malpractice market, solvency risk "does not appear to be a critical issue" and those same insurers have shown "favorable reserve developments" for the third year in a row. Approximately \$700 million was paid by insurers on medical malpractice claims, \$519 million in damages and \$181 million in loss adjustment expenses. Seven new carriers entered the Florida market last year.

In a release on the OIR's website, Commissioner McCarty said "This report also shows the total medical malpractice insurance premium for the state of Florida dropped in 2008 for the fifth consecutive year" and that "This is very encouraging news for doctors and hospitals." For a copy of the Report or more information about the medical malpractice insurance market in Florida, please contact me or anyone on our Insurance Team.



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.

ACLI Challenge to Suitability Rule Dismissed

By: Travis Miller

The American Council of Life Insurance challenged an administrative rule adopting forms for use in suitability determinations. However, an administrative law judge recently dismissed the challenge based on the intricacies of Florida administrative law.

Under Florida law, a person who is substantially affected by an administrative rule may challenge the rule within specified time periods. If the agency later amends the proposed rule, a person who is substantially affected by the change and who did not previously challenge the rule may file a challenge at the time of the change. In that case, the challenging party is not limited to challenging the change-- it may challenge the entire proposed rule.

In the ACLI's case, the Department of Financial Services had previously filed a suitability rule and also had made one prior amendment. Following a second proposed amendment, ACLI sought to challenge the rule. DFS argued that ACLI was not substantially affected by the proposed rule as evidenced by its failure to challenge the rule following its initial publication and first amendment. DFS further argued that the change giving rise to the second amendment was non-substantive and therefore could not substantially affect ACLI. DFS therefore asserted that the second amendment to the rule did not afford ACLI a new opportunity to challenge the proposed rule. The administrative law judge agreed with the DFS' position.

Although the dismissal means that ACLI cannot proceed with a general challenge to the rule, a substantially affected party might be able to challenge the way that the rule is applied to it after its adoption (an "as applied" rule challenge). In recognition of this possibility, ACLI and DFS reportedly continue to discuss concerns with the rule to alleviate future concerns.

Consumer Advocate to Host Second Claims Roundtable

By: Travis Miller

Insurance Consumer Advocate Sean Shaw held a claims roundtable during the summer to allow interested stakeholders to discuss possibilities for improving the residential claims paying process. The roundtable consisted primarily of contractors and insurance company claims personnel. Although both contractors and insurers seek to determine the amount of damage to be repaired and to make those repairs as promptly as possible, the roundtable revealed areas where there are gaps in communications because of the parties' different perspectives. For example, a local contractor might know that when a building suffers certain damage, the building code requires comprehensive updates that require replacement of items in the home that did not sustain direct damage. If the contractor is unaware of the need to distinguish between property that is damaged and property that needs to be replaced due to law and ordinance requirements, the contractor is likely to submit a repair estimate that exceeds the insurer's expectations. This can cause a delay in the claims payment process as the insurer seeks to understand why the contractor is proposing to replace items that were not reported as damaged in information provided to it. The Consumer Advocate is hopeful these types of disconnects can be limited after future

storms, resulting in more consumers receiving their settlements faster than under the current process.

Following the earlier roundtable, the Consumer Advocate's office has developed a series of recommendations. The recommendations relate primarily to the continuing education and training of persons involved in the claims settlement process, including insurance company personnel and adjusters, contractors, and agents. Some of the recommendations focus on a proposed claims-handling brochure that insurers would be required to develop and disseminate following claims. Other recommendations relate to improving the uniformity of Florida's building code and its interpretations.

The Consumer Advocate's office has scheduled a follow up roundtable for November 18 to further discuss the recommendations. Interested parties will be allowed to comment on the recommendations, but only if they attend the roundtable in person.

For a copy of the recommendations developed by the Consumer Advocate's office following the last roundtable discussion, please see the insurance resources section of our website. For questions about the roundtable process, please feel free to contact Travis Miller.

Shareholder Donna Blanton Helps Raise Funds in United Way Campaign

RTYC Release - Firm News

Shareholder Donna Blanton is among several Tallahassee women lawyers hosting a wine tasting on November 5, 2009, to raise funds for the United Way of the Big Bend's "Power of the Purse" leadership organization.

The 6 p.m. tasting, at Tallahassee's Wine Warehouse on Market Street, is among a number of "purse parties" planned this year by the "Power of the Purse" steering committee in support of a new targeted funding project, Homelessness to Health. Dollars raised will be applied toward special, focused programs serving women, girls and children who are experiencing homelessness.

The Homelessness to Health program will be administered by the Big Bend Homeless Coalition, serving residents of HOPE

Community, a transitional housing program for families and adults. The program will include women and child-centered activities, education, and support services focused on physical and emotional health. Funds for the Homelessness to Health project will be raised above and beyond the United Way's annual campaign giving.

The "Power of the Purse" is a leadership organization of the United Way of the Big Bend consisting of women who commit to giving at least \$1,000 each year to the organization. Ms. Blanton is a longtime "Power of the Purse" member and serves this year on its steering committee.

Tickets for the tasting are \$15, with proceeds benefitting the Homelessness to Health program. Tickets can be bought at the door.

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Experience.Service.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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Welcome to the New www.radeylaw.com

We are pleased to announce updates to our website at www.radeylaw.com. We have redesigned the site and have added features that will better enable us to disseminate information to clients and friends. Among the new features on our site, you will find:

- ✓ A new blog page where firm professionals offer timely insights about issues affecting the insurance industry
- ✓ A podcasts page where we'll offer brief audio summaries that can be played directly from the site or added to an ipod/mp3 player
- ✓ Electronic sign-up for our insurance and employment law reports; our employment law section has significant cross-over with our insurance practice and offers periodic updates on issues that are of interest to insurers and other employers
- ✓ Links to the LinkedIn and Twitter accounts of our professionals (through their biography pages)

In addition, the website will continue to offer information than many of our friends have enjoyed over the years:

- ✓ Daily headlines from around the state on key insurance issues
- ✓ An events calendar highlighting upcoming meetings affecting the industry
- ✓ Legislative updates throughout each session identifying the status of major bills

We are always looking to improve our site and would welcome any comments you have about the new content.