

# FLORIDA INSURANCE REPORT

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Keeping You Informed About Florida

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RADEY | THOMAS | YON | CLARK

Attorneys & Counselors at Law



## State Policy Group Releases Public Adjuster Study

By: *Travis Miller*

Florida's Office of Program Policy Analysis & Government Accountability (OPPAGA) has released a report relating to the regulation of public adjusters in Florida. The report does not present any conclusions regarding issues that have been presented by the insurance industry and the public adjusting industry. However, the report provides an overview of the current debate about the role of public adjusters in personal residential claims.

The report mentions that the number of public adjusters in Florida has grown from 678 in fiscal year 2003-04 to 2914 in fiscal year 2008-09. Florida has significantly more public adjusters per capita than other states surveyed. The report notes, however, that the number of complaints against public adjusters has been relatively constant over the last few years. The report also compares several aspects of Florida's regulatory system to the regulatory schemes in other states.

According to OPPAGA, policyholders represented by a public adjuster submitted 26% of non-catastrophe claims filed with Citizens Property Insurance Corporation in 2008, including 24% of new claims and 54% of reopened claims. For catastrophe claims, public adjusters represented policyholders in 39% of the files, consisting of 19% of new claims and 57% of reopened claims. The report mentions that public adjuster representation prolongs claims processing time and results in higher claims settlement. The report does not draw conclusions regarding these results but instead includes an appendix listing reasons cited by public adjusters and insurers.

A copy of the report can be obtained from our blog page at [www.radeylaw.com/blog](http://www.radeylaw.com/blog).

## DFS Revamps Insurer Representative Penalty Rules

By: *David Yon*

The Department of Financial Services (Department) has long maintained a rule chapter, 69B-231, that is intended to establish standards for implementing the Department's duties to impose disciplinary action under sections 626.611, 626.621, 626.631, 626.641, 626.681 and 626.691, Florida Statutes, and to describe likely penalties and procedures for determining appropriate

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## GET TO KNOW...

By Karen Asher-Cohen

**ROBIN WESTCOTT** – Robin Westcott attended Florida State University and Florida State University College of Law, where she graduated in 1993. Robin immediately began working as an attorney at the (then) Department of Insurance, Division of Rehabilitation and Liquidation. In 2002, she left the DOI to work in private practice and later at the Agency for Workforce Innovation. In 2004, she came back to the Office of Insurance Regulation as an attorney in the Division of Legal Services. Robin became Deputy Director of the Bureau of Property & Casualty Financial Oversight, and was promoted to the position of Director in November, 2007.

Recently, I asked Robin the following questions.

### **1. WHAT IS THE BEST PART OF YOUR JOB?**

The best part is definitely the team I am working with. I am very fortunate to work for a Commissioner who understands the marketplace and the world of insurance. Also, I work for a great Deputy, Belinda Miller, who is the most knowledgeable person in insurance issues. The team here is phenomenal.

### **2. WHAT IS THE WORST PART OF YOUR JOB?**

The worst part is having to deal with the limitations of being a state agency, and how difficult it is to reward good performance and people's commitment to state government. It is challenging to deal with the bureaucracy when working with a business unit this large. Also, it's a challenge to try and take care of good people who work so hard. There are never enough resources to do the job and work within this budget.

### **3. WHAT ARE THE BIGGEST ISSUES FACING THE OIR THESE DAYS?**

We are always trying to balance the need for a competitive marketplace and consumer protections that we must make sure are in place. Also, we are challenged by the volatility that comes with every legislative session. We are not sure what will happen this legislative session or how the Legislature will react to the marketplace.

### **4. WHAT CHALLENGES DO YOU SEE IN THE FLORIDA MARKETPLACE?**

We focus so much on the property market, which we must do, but we need to make sure that we also pay attention to all the other lines of business. Every line of business has its own cycle and we need to remember to look at all areas of the marketplace and give them the necessary attention as well. This is a dynamic marketplace. While we are still working through so many issues related to the property market, we have to remember that we also have medical malpractice, worker's compensation, and other P&C lines. We want to always be pro-active and responsive to the dynamics of all the business lines in Florida.

### **5. YOU SEEM TO HAVE DONE IT ALL HERE – YOU'VE WORKED WITH RECEIVERSHIPS AND ADMITTED COMPANIES, AS A LAWYER AND AS A REGULATOR. WHAT ROLE DO YOU LIKE BEST?**

I really enjoy this position. I feel like everything has led me to succeed and excel at this position. That is the great thing about being at this agency for so long and having done so many different jobs. I have learned so many different pieces of this industry. Now, when I sit in this chair, I can see how all the pieces fit together, and how all my different roles led to this position. I feel like I grew into this job, and that I'm smarter now about how I do my job.

### **6. HOW DO YOU GET AWAY FROM ALL THIS?**

I just started karate lessons and I love going to the gym, which helps me stay sane. I do a lot of volunteer work at my children's schools [Robin is the proud Mom of a son and daughter, ages 10 and 13]. Also, I was just elected President-elect of our middle school's PTSO, so that will keep me busy as well.

*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.*



## **DFS-Penalty Rules - Cont. from Page 1**

penalties for all resident and nonresident insurance agents, customer representatives, adjusters and service representatives licensed under Chapter 626 in the event of violations of the insurance code.

The Department has announced its intention to engage in rule development. The purpose of the proposed rule development is to update these rules that govern suspension and revocation of licenses of insurance agents, customer representatives, service representatives and adjusters. The amendments include adding

## **FHCF Date Fix Planned**

*By: Travis Miller*

It seemed like a good idea at the time-- the FHCF contract year would follow the calendar year instead of the current June 1-May 31 . Insurers would be able to better plan their reinsurance programs, and potential changes to the FHCF in each annual legislative session would not have an imminent effect on insurers.

Unfortunately, the change in the FHCF's contract year has threatened to require participating insurers to recognize more than a full year's FHCF cost in 2010 if the contract year is not changed back to its June 1 beginning. Insurers will recognize the remaining 5/12 of their 2009-2010 FHCF premium in 2010, and also would recognize the entire 2010 FHCF premium this year if the law is not changed in this year's session. Due to this adverse impact, there seems to be consensus among the industry, the OIR and legislators that an FHCF date fix is needed.

The proposed fix is still in the drafting phase. In its current form, the fix would cause the FHCF contract year to revert to June 1 through May 31. Insurers would sign their contracts by March 1 of each year to become effective June 1. By signing in

penalties for statutes recently adopted by the Florida Legislature and deleting laws that have been repealed. The rules are also updated by increasing penalties for violating certain laws that the Department asserts require more severe penalties based on its experience in dealing with the frequency and severity of these violations. A time for a hearing, provided one is requested, has been set for Thursday, January 28, 2010, 9:00 a.m. in the Larson Building in Tallahassee, Florida.

A copy of the proposed rule is available on our website on the resources page in the insurance section. Or you can email any of our insurance professionals for a copy or more information.

March, the industry and policymakers hope to preserve the objective of not having last minute legislative changes alter reinsurance programs for which negotiations are underway and perhaps almost completed.

Another potential change to the FHCF would be to allocate its capacity between an initial year and subsequent years. Some observers fear the potential market disruption that would occur in subsequent years if FHCF and private reinsurance capacity is diminished by a significant event occurring in the current year. A draft currently under consideration would cap the mandatory layer of the FHCF in an initial season at \$17 billion until such time as the capacity for subsequent seasons also reaches \$17 billion. After that, any additional capacity would be split equally between the initial season and subsequent seasons.

Opinions diverge, however, on whether the industry's aggregate retention beneath the FHCF should be lowered. Some insurers would like to see the retention rolled back to displace some of the expensive low-layer coverage they must buy beneath the FHCF. Others contend that lowering the retention would unduly deplete FHCF resources, reducing its capacity for larger events in the future and exposing unrelated lines of business to assessments.

## **Need a Copy?**



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## Limited Apportionment Form Available

By: *Travis Miller*

The form by which insurers may seek limited apportionment status has been released for 2010 and can be obtained on our blog page at [www.radeylaw.com/blog](http://www.radeylaw.com/blog). Companies that qualify for limited apportionment status must submit the form and related information by March 31, 2010.

Limited apportionment status is available to insurers that have \$25 million or less in surplus and write at least 25% of their business in the State of Florida. Upon qualifying for limited apportionment status, the insurer may elect to spread payment of any regular assessments of Citizens Property Insurance Corporation over 12 months rather than paying the entire amount within 30 days. In addition, limited apportionment companies have an opportunity to purchase a \$10 million layer of coverage (including one reinstatement) from the Florida Hurricane Catastrophe Fund for \$5 million.

## Agent Association Supports Greater Freedom for Insurers

By: *Travis Miller*

The Florida Association of Insurance Agents is urging Florida policymakers to allow insurers greater rate flexibility, which in turn will give consumers more choices. FAIA noted that Citizens Property Insurance Corporation remains too competitive with the private market as insurers are not able to charge sufficient premiums to warrant remaining in the state. FAIA was joined in its comments by consumer advocate Walter Dartland, executive director of the Consumer Federation of the Southeast.

FAIA points to the recent struggles of several small insurers as a sign of rate inadequacy and inadequate capitalization. The Office of Insurance Regulation, on the other hand, indicates that poor underwriting results in the industry are a result of broader economic concerns.

Senator Mike Bennett and Representative Bill Proctor have proposed an updated version of the consumer choice bill they championed last year. The 2009 version would have been limited to a small number of insurers, but would have allowed those insurers to offer rates higher than their filed and approved rates. To eliminate concerns that the bill would create inequities among insurers, the legislators have proposed in the

current version of the bill to allow all residential property insurers to participate. Rate regulation undoubtedly will continue to be a significant topic throughout the 2010 session.

## Health Insurers Sign Cancer Trial Compact

By: *Travis Miller*

Florida's major health insurers have entered into a compact signed by state Senators to cover cancer trials. Insurers joining the compact include Humana, Blue Cross Blue Shield, Aetna, Cigna, United Healthcare, AvMed Healthplans and Vista Healthplans. These insurers comprise about 90% of the group health insurance market.

The compact provides for the insurers to cover patients in phase II, III and IV clinical trials approved by specified health organizations. Florida is the fifth state to enter into this type of compact with the health insurance industry.

## RTYC Kicks Off 2010 United Way Campaign

By: *Travis Miller*

Radey Thomas Yon & Clark recently "kicked off" its United Way campaign for 2010. RTYC has supported the United Way of the Big Bend for several years, receiving the President's Award for participation in each of the last three years. The 2010 campaign got underway with a tailgate-style lunch served at the firm attended by firm employees and United Way representatives.

Meg Baldwin of the Refuge House attended as a representative of agencies supported by the United Way. Ms. Baldwin, a former professor at the Florida State University College of Law, renewed acquaintances with some of her past students who are now RTYC lawyers. Now the Executive Director of the Refuge House, Ms. Baldwin talked about the services her agency offers to the community and the support it receives from the United Way. She also gave special thanks to RTYC shareholder David Yon, who for many years has directed the Tallahassee Turkey Trot running events on Thanksgiving Day. The Refuge House is among the charities that benefit from Turkey Trot proceeds.

*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*



# OIR Issues 2009 Workers' Compensation Report

By: David Yon

The Office of Insurance Regulation has issued its 2009 report for the Legislature regarding the state of the workers compensation market in Florida. The report, required by section 627.211(6), Florida Statutes, concludes that:

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

The report emphasized the importance of the 2003 tort reform and the limitations on fees for attorneys to holding down the cost and making the line profitable. Rates went down again for the seventh straight year.

The report suggests there are 251 entities writing workers' compensation including 246 private insurers and 4 self-insurance funds. The residual market, the FWCJUA, had 826 policies as of November 2009 with corresponding premiums of \$5.7 million, a very small part of the market. The following is a summary of the decreases for the year and since 2003.

	<u>2009</u>	<u>Since 2003</u>
<b>Manufacturing</b>	-4.7%	-60.0%
<b>Contracting</b>	-10.8%	-65.4%
<b>Office and Clerical</b>	-6.2%	-63.3%
<b>Goods and Services</b>	-3.8%	-62.2%
<b>Miscellaneous</b>	-6.7%	-62.1%
<b>TOTAL</b>	-6.8%	-63.2%

"The 2009 report clearly demonstrates that Florida's 2003 legislative reforms, combined with the Legislature's passage of House Bill 903 that restored caps on attorney's fees, have continued to lead to declines in workers' compensation rates and stability in the marketplace," said Insurance Commissioner Kevin McCarty in the release. "This is especially important for Florida businesses given the current economic environment."

The report concluded that "availability does not appear to be a significant concern in the aggregate, although it does appear that small firms, new firms, and construction firms may face some market shortfalls in the voluntary market. The residual market is small, suggesting that the voluntary market is absorbing the vast majority of demand. While not without risk, the growth of the use of PEOs among smaller employers has, as well, helped availability by making coverage affordable." It also concluded that rates were generally affordable noting the 63% drop since 2003.

*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.*



## **Florida Lawsuit Filed Over US-Made Drywall With Chinese Drywall-Like Defects**

By: Tom Crabb

The problems plaguing drywall are allegedly not limited to that manufactured in China. A lawsuit has recently been filed in the United States District Court for the Southern District of Florida alleging defects comparable to those found of late in Chinese-manufactured drywall. The lawsuit, against National Gypsum Company and Banner Supply Company, alleges violations of the Florida Deceptive and Unfair Trade Practices Act and negligence, among numerous other counts, and seeks both damages and injunctive relief, including for ongoing medical monitoring. The named plaintiffs seek certification of the suit as a class action. A lawsuit has also been recently been filed in Louisiana against numerous property insurers, alleging those companies improperly denied claims arising from damages caused by defective Chinese drywall.

Drywall problems arose during the building boom of the mid-2000's, as builders coping with a supply shortage sought new suppliers. Chinese drywall has been linked to the damage and destruction of home heating and air conditioning and electrical systems. The defects, which are thought to arise from formaldehyde and sulfur compounds within the drywall, have also led to numerous health concerns. Aggregate damage estimates to property have been placed as high as \$25 billion, not counting the health claims. In general, insurers have denied claims for damage maintaining there is not coverage under property policies.

Florida Insurance Commissioner Kevin McCarty, as chair of the Catastrophe Insurance Working Group of the NAIC Property and Casualty Insurance Committee, organized a public hearing at the NAIC winter meeting to seek information on the implications to regulators and insurers of the defective Chinese drywall. Commissioner McCarty said "While much speculation, or rhetoric, in conjunction with facts and figures is available, there is a large question of what impact this has on the insurance industry." David Kodama of the Property Casualty Insurers Association of America discussed the issue facing insurers: "[The issue] is complicated because there is *correlation* between the drywall and problems in people's homes but no demonstrated chain of *causation* thus far. It is complicated because people are reporting physical health symptoms but not consistent symptoms. It is further complicated because neither homeowners nor general liability policies are construction warranties. As insurers, PCI members want to help their customers, but must do so within the confines of each insurance contract, as that contract applies to each individual claim situation." These recent lawsuits will begin to address these issues and we will continue to monitor them and the impact on Florida companies.

*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.*



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## **CFO Sink Appoints R. Jai Gillum to the Florida Commission on the Status of Women**

By Karen Asher-Cohen

CFO Alex Sink has appointed R. Jai Gillum to the Florida Commission on the Status of Women. Ms. Gillum will begin her term on January 1, 2010 and will serve until December 31, 2013. At 31, she is the youngest woman currently on the commission. Gillum is the Director of Appointments for the Office of Boards, Commissions and Residual Markets at the Department of Financial Services, and also serves as Staff Director to the Financial Literacy Council and a liaison to the Florida Healthy Kids Corporation. "I am honored by my appointment to the Florida Commission on the Status of Women and thank CFO Sink for this opportunity," said Gillum. "I look forward to offering a fresh perspective to best serve the women of Florida."

## **Fourth District Agrees with Dismissal of Mitigation Credit Challenge**

*By: Travis Miller*

The Fourth District Court of Appeal recently agreed with a trial court's dismissal of a purported class action challenging an insurer's application of mitigation discounts. The homeowner brought suit and sought class action status for similarly situated policyholders when his insurer allegedly failed to notify him of the opportunity to receive a discount for his hip roof and consequently did not provide that discount to him.

In Florida, insurers are required by statutes and implementing rules to notify insureds each year of the availability of mitigation discounts. When the plaintiff did not receive his discount, he brought suit in the circuit court. However, the circuit court dismissed his suit, arguing that the plaintiff had failed to first avail himself of remedies under Florida administrative law.

In general, Florida law provides that when an adequate remedy is available under administrative law, a person must pursue that administrative remedy before (or instead of) commencing civil litigation. In the case of the mitigation discounts, a statute sets forth a procedure by which any person aggrieved by the rate charged by an insurer must first contact the insurer and the Florida Office of Insurance Regulation. The trial court found that the plaintiff did not follow this procedure for addressing his con-

cerns with the rate charged by his insurer, which precluded him from initiating the circuit court action.

On appeal, the plaintiff argued that the trial court failed to properly distinguish between the "rate" charged by an insurer and the insurer's failure to apply a state-mandated discount. In other words, the plaintiff suggested that he did not have a problem with the insurer's rate but instead only questioned its failure to give a required discount off of that rate. The appellate court, however, agreed with the trial court and suggested that the plaintiff's interpretation is too narrow. The appellate court stated that in mathematical terms, the premium for an insurance policy is simply the rate for the exposure multiplied by the amount of insurance ( $\text{Premium} = \text{Amount of Insurance} * \text{Rate}$ ). In the plaintiff's case, the amount of insurance he was seeking was not affected by the discount. Thus, in order for the plaintiff to argue that his premium was improper, he could only be complaining about the "rate" charged for the insurance. This leaves the plaintiff's claim squarely within the scope of the statutory procedure requiring a policyholder to first contact the insurer and the OIR if concerned with the "rate" charged for a policy.

The requirement for an insured to raise concerns with mitigation discounts in the administrative forum instead of through civil suits is significant because the administrative forum does not lend itself to class actions.

It is not yet clear whether the plaintiff will seek rehearing in the case.

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## **Fraud Division Gets New Director**

*By: Travis Miller*

The Florida Department of Financial Services has named John Askins as the new Director of the Division of Insurance Fraud. Askins has more than 30 years' experience with the Division of Insurance Fraud. He retired in 2008, but has now returned effective immediately. Prior to initially joining the Division of Insurance Fraud, Askins spent four years in the United States Navy and four years working for the Miami-Dade Police Department.

The Division of Insurance Fraud has 155 sworn law enforcement officers, managers and administrators. In addition, it has

48 non-sworn civilian support staff members.

"I am so pleased to have someone with John's experience and expertise coming back to lead our top-rated Division of Insurance Fraud," said CFO Sink. "John will be able to hit the ground running, continuing our ongoing fight to crack down on insurance fraud in Florida and protect everyday Floridians against fraud and abuse."

"It is a privilege to return to the Division of Insurance Fraud to lead such a strong team, and I thank CFO Sink for this opportunity," said Askins. "I look forward to continuing our strong tradition of cracking down on insurance fraud and holding these criminals who steal millions of dollars from consumers and businesses accountable."

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## Democrats Field CFO Candidate

*By: Travis Miller*

For many months the Republican primary between Senate President Jeff Atwater and House member Pat Patterson looked like it would determine who will succeed Alex Sink as Florida's Chief Financial Officer. However, that changed earlier this month when Democrat Loranne Ausley of Tallahassee announced that she will run for the seat.

Ausley is a former two-term member of the state House of Representatives. Although she left office due to term limits, she has remained involved in public policy initiatives such as chairing the Florida Healthy Kids program. Ausley has been running for a state Senate seat and has raised about \$274,000, but will now shift gears and launch her statewide campaign. Using defined elections law procedures, she likely will be able to transfer existing campaign funds to her CFO race.

The Chief Financial Officer in Florida is one of four members of a collegial body that oversees insurance and banking regulation. In addition, the CFO regulates individual licensees of agents and adjusters, investigates and prosecutes insurance fraud, and operates the state's consumer services unit. The CFO position became open for new candidates in 2010 due to a series of political dominoes. Governor Charlie Crist announced that he would run for U.S. Senate. Current CFO Alex Sink and current Attorney General Bill McCollum then sought to move into the Governor's chair being vacated by Crist. Altogether, all four of the Governor and Cabinet positions in Florida will change in 2010, with three newcomers taking over and either Sink or McCollum succeeding Crist.