

# FLORIDA INSURANCE REPORT

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Keeping You Informed About Florida

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RADEY | THOMAS | YON | CLARK

Attorneys & Counselors at Law

## Annual Legislative Session Set to Begin

By: Travis Miller

The Florida Legislature's annual legislative session begins in March and runs for 60 days. Insurance issues have been part of every legislative session in recent years, and 2010 promises to be the same. The session will include revisiting several proposals from the past as well as a number of new ideas. As always, we expect that some of the key insurance issues will not be decided until the last week of the session.

Two factors will influence the legislature's decisions on insurance and other issues. First, resources are strained as the economic slowdown has reduced state revenues. The legislature has long past the point of making "easy" budget reductions, and any further reductions will directly affect agency staffing and programs.

Second, this is a significant election year in Florida. Governor Charlie Crist is running for the U.S. Senate and faces a tough primary battle from former Speaker of the House Marco Rubio, who has been appealing to the more conservative side of the Republican party. Crist's decision to vacate the Governor's seat prompted Democrat Alex Sink, the state's Chief Financial Officer, and Republican Bill McCollum, the Attorney General, to enter the race to replace him. McCollum faces a challenge from state Senator Paula Dockery. Meanwhile, two popular Democratic legislators, Dan Gelber and Dave Aronberg are vying to



replace McCollum as Attorney General. The candidate emerging from the Democratic primary will face either Lt. Governor Jeff Kottkamp or Holly Benson, who are battling on the Republican side. Sink's gubernatorial candidacy opened the door for current Senate president Jeff Atwater to run for Chief Financial Officer.

*Cont. on Page 3*

## Bill Tracking



RTYC tracks Senate and House bills each legislative session that are of interest to the insurance industry. Information on bills currently being considered for the 2010 regular Florida Legislative Session can be found on our website in the Legislative Updates section.

## Insurance Portal Launch

We are pleased to announce the launch of the Insurance Portal on our website. Located on the Insurance Portal are all the insurance resources we post on the site - news of the day, insurance blogs and podcasts, resources, and RTYC's Florida Insurance Report. We hope you find this a useful source of information.

## Accelerated Audits

By: David Yon

Deputy Insurance Commissioner Belinda Miller attended the Florida Chamber Insurance Summit in Orlando at the end of January and discussed some areas of increased regulatory effort and concern. Among other items, she described the Office's efforts to secure more information earlier about domestic insurers. Concerned that year-end results don't really provide enough lead time before hurricane season

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## GET TO KNOW...

By Karen Asher-Cohen

**ERIC LINGSWILER** – Eric is the Director of Life and Health Product Review (Forms and Rates) at the Florida Office of Insurance Regulation. Eric received his B.A. in Public Administration at Barry College. He plans to enroll in the Master’s program in Public Administration at Florida State University this summer. Eric joined the then-Florida Department of Insurance in 1995 as a forms analyst in the Bureau of Life and Health Forms and Rates. In 1999, he was asked to work in Specialty Products Administration, concentrating on viatical issues, and partnered with fraud investigators and state and federal law enforcement officials. In late 2003, just in time for the 2004-2005 hurricane seasons, Eric became the Bureau Chief for the Property & Casualty Forms and Rates Bureau. He then worked in Market Conduct Investigations in 2006, concentrating on unauthorized entities. In August, 2008, Deputy Commissioner Senkewicz asked Eric to serve in his current capacity. Eric has certainly come full circle at the OIR! Recently, I asked Eric the following questions.

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

This staff. The people here are incredibly hard workers and dedicated people. I know it sounds like a cliché, but I really mean it. All the people here have a great amount of expertise and are really smart. They do their jobs so well that this bureau practically runs itself. Without a doubt, the best part of my job is the staff.

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

Telling people “no” or having to tell people that their proposal is not acceptable to the Office. I hate having to tell people that we do not think that their proposal is in the best interest of the citizens of this great state. I understand that companies devote a great amount of time and other resources to proposing files and when their assumptions do not meet our expectations we have to disapprove their submissions.

### **3. YOU’VE DONE SO MANY JOBS HERE – PROPERTY & CASUALTY, LIFE & HEALTH, UN-AUTHORIZED ENTITIES – WHAT ROLE DID YOU LIKE BEST?**

I think your satisfaction with a job depends on what time period you serve at that position. At the time, I have to say

that working in the Viaticals Section was the most exciting job. It was a rewarding investigative experience. I was able to work with the SEC, local police departments, and fraud investigators. We were able to use all those different agencies’ resources to try and right a wrong. But that job would not be the same today. At the time, we were dealing with organized crime issues and some very dangerous individuals. Very exciting.

### **4. WHAT ARE THE BIGGEST CHALLENGES FACING THE OIR THESE DAYS?**

Until recently, I would have said that the biggest challenge is the upcoming changes in federal health care. That will be incredibly time consuming for state regulators, and will require completely new legislation to be written. But now that the federal reforms are in a holding pattern, that challenge is not a concern right now. Our continuing challenge is to continue to provide the greatest service we can to the people of Florida with greatly diminished resources. We are constantly being asked to do more with less.

### **5. HOW HAS INSURANCE REGULATION CHANGED SINCE YOU FIRST CAME TO THE DEPARTMENT?**

I think the greatest change came with the constitutional amendment, which resulted in the Department of Insurance being divided up. This caused a lot of changes in the way insurance was regulated in Florida. I think regulation changed the most with the introduction of a professional appointed Commissioner, rather than an elected political agency head.

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

I started competing in triathlons. I competed in my first triathlon last year. Even with my bad knees, I have found the training to be a tremendous resource and a great stress reliever. Also, I studied martial arts for 13 years. I trained in Aikido and have a Shodan (1st degree black belt).

*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.*



## Annual Session - Cont. from Page 1

Atwater has House insurance committee chairman Pat Patterson as an opponent in the Republic primary, while Lorraine Ausley of Tallahassee will be the Democratic candidate. As these races currently stand, no member of the four-member Financial Services Commission (FSC) that oversees insurance will return in his or her same capacity next year, and at most only one of the four current members will return next year on the FSC.

Against these backdrops, the legislature must tackle some troubling issues in the Florida insurance market. The residential property market has seen several companies fail or struggle in recent years even with no hurricanes. Last year, Governor Crist vetoed a bill that would have allowed large insurers to charge rates in excess of their filed rates. The bill's sponsors are back again this year and now propose that all property insurers should

be able to avail themselves of this opportunity. Governor Crist has said he will veto any similar proposal again this year. Senate President Atwater recently indicated that he believes rates need to go up, but he favors a stair-step approach perhaps similar to the one the legislature approved for Citizens Property Insurance Corporation last year.

Among other bills filed for this session, one would require the Commissioner of the Office of Insurance Regulation to be subject to reappointment every two years. Another would return the Florida Hurricane Catastrophe Fund to a June 1-May 31 contract year to address unintended consequences of a prior change to an annual contract year. The health insurance industry will see legislation on prescription drug benefits as well as certain other types of coverages, and several proposals have been filed that would affect the title insurance industry.

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## Commissioner McCarty Taps McDermott as Communications Director

By: David Yon

On February 1, Insurance Commissioner Kevin McCarty announced that he was removing the "acting" from Jack McDermott's title, making him the Director of Communications for the Office of Insurance Regulation. His duties will include overall media relations, public information, speechwriting and content of all Office reports and publications. Jack has worked at the Office for 13 years, including being a manager in the life & health market conduct section and as a senior policy analyst.

But more importantly, Jack is one person who can at least match my obsession with running. While I have been known to run a lot of miles and cover distances from the marathon to 50 milers, Jack has now run 120 races of marathon distance or longer. Most impressive is his 30 marathons under the 3 hour mark. I recall his first marathon in 1999 and have had the pleasure of joining him in races for 10 years now (usually watching him run off in the distance).

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## Audits - Cont. from Page 1

she disclosed that the Office has asked a number of its domestic property writers to provide audited financial statements by April 1. The Office has also requested mid-quarter data from some companies.

Ms. Miller said that a number of the "60 new businesses" licensed in the last few years "won't make it." The Office's goal, she said, is to identify them as early as possible and protect policyholders in the best way possible, including finding buyers or mergers.

OIR wants legislation this year to raise the minimum surplus for new insurers from the current \$5 million. At least one draft bill has appeared proposing to raise the amount

to \$20 million. The office is not accepting business plans with only \$5 million in surplus now, she noted.

For existing insurers, OIR wants improved modeling of losses and spread of risk. Some insurers do a good job on this now, "but some of them just don't get it," she said.

Licensing of new companies "probably should slow down a bit," she said. "We probably need to focus on only very solid companies coming into the market at this point."

*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.*



# RTYC Appellate Practice Focuses on Insurance Appeals

Radey Thomas Yon & Clark attorneys serve as appellate counsel in insurance-related cases in both Florida and federal courts. Although some of these appeals arise in cases in which RTYC has served as trial counsel, some insurers retain RTYC to handle appeals in cases handled by other lawyers at trial to bring a fresh perspective to their cases.

RTYC lawyers have participated as either lead counsel or co-counsel in more than 200 reported appellate opinions in state and federal courts. Shareholders Karen Asher-Cohen and David A. Yon both represented the former Florida Department of Insurance (now the Office of Insurance Regulation) in a number of high-profile appellate cases relating to insurance issues when they worked at the Department, and have continued to participate in appellate cases in private practice. For example, Ms. Asher-Cohen co-wrote the briefs in *Barnett Bank v. Nelson*, a United States Supreme Court case relating to the sale of insurance by financial institutions, and she served as co-counsel in two major cases before the 11th U.S. Circuit Court of Appeals, *Blackfeet Nat'l Bank v. Nelson*, and *Vesta Fire Insurance Corp. v. State of Florida*.

In addition, firm shareholders Donna Blanton and Elizabeth McArthur are charter members of the First District Court of Appeal, American Inns of Court, an organization of First District Court of Appeal judges and appellate lawyers who meet regularly to discuss state appellate court issues. The following section highlights recent appellate decisions in Florida affecting the insurance industry. To discuss these cases further, please feel free to contact the author. Additional information about our appellate practice can be found at [www.radeylaw.com](http://www.radeylaw.com).

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## Coventry's Work Papers Submitted To OIR Before Amendment Are To Remain Confidential

By: Tom Crabb

Coventry First LLC is a Florida viatical settlement provider. It provided the OIR with thousands of pages of documents during OIR's regulatory investigation of Coventry's business in 2007. When the documents were produced, the Insurance Code made them confidential and exempt from disclosure under Florida's public records law as investigation "work papers." After the documents were produced, the Code was amended to make such documents confidential and exempt only until the exam report is filed or the investigation is complete. In short, a time limit on the "work papers" exemption was added to the Code. The OIR received a public records request for many of the documents and Coventry in response went to court to protect the documents, arguing that the Code amendment could not be applied retroactively to the documents it had produced before the amendment. The trial court issued a temporary injunction prohibiting the OIR from filling the public records request with the documents subject to the "work papers" exemption.

The OIR argued to the trial court that the amendment applied retroactively, meaning that the Coventry documents could become publicly available. On February 12, 2010, the First District Court of Appeal disagreed, holding that Coventry had a vested property right in the continued confidentiality of the documents that prevented retroactive application of the amendment. Also, while Coventry had a lower court order protecting disclosure of the documents while its dispute with OIR was ongoing, OIR disclosed some of the Coventry confidential trade secrets in an Order to Show Cause and then argued the public records dispute was moot as a result. The First District again disagreed, holding that the OIR's public release of Coventry's protected information "was improper and will not be available to bootstrap up a later claim of mootness." In short, Coventry's documents produced during OIR's market investigation prior to the 2007 Code amendment will remain confidential and exempt from disclosure under the public records law. *Coventry First, LLC v. State of Florida Office of Insurance Regulation*, Case No. 1D09-804, \_\_\_ So. 3d \_\_\_ (Fla. 1st DCA 2010).

## Appellate Updates

By: Toni Egan and Tom Crabb

### ***Liability For “Blast-Faxing” Covered By Commercial General Liability Policy***

Gone but not forgotten are the days when a barrage of junk faxes streamed out of every fax machine nonstop. In a class action lawsuit, Southeast Wireless was accused of sending 24,000 unsolicited fax advertising messages in violation of the federal Telephone Consumer Protection Act. Southeast had a commercial general liability policy that provided coverage for claims arising out of advertising injury, such as publication of material that violates a person’s right of privacy. Southeast tendered the lawsuit to its CGL carrier, who denied coverage and refused to defend Southeast. On January 8, 2010, the Supreme Court of Florida held that there was coverage for Southeast under the terms of its CGL policy. Of critical importance, and contrary to the lower court, the Supreme Court concluded that the Act provides the privacy right to seclusion and that here there was the written publication of 24,000 facsimiles that violated that privacy right. The lower court had said there had to be private information revealed in the fax, rather than just having the recipient’s seclusion disrupted by a junk fax regardless of its content. For those who remember “blast-faxing” at its peak, calling it a disruption of seclusion is certainly accurate but far too kind. *Penzer v. Transportation Insurance Company*, Case No. SC08-2068, 35 Fla. L. Weekly S73a (Fla. 2010).

### ***Coverage Issues Must be Resolved Before an Appraisal of the Amount of Loss is Ordered***

Frances and Cheryl Corridori’s home sustained damage during Hurricane Wilma. They filed a claim, which was paid by their insurer. Two years later, after the claim had been closed, the insureds submitted a supplemental claim for damages discovered by a public adjuster. The insurance company denied the claim, concluding that the damages claimed were not in fact supplemental to the original damages and that the insured breached the policy by failing to comply with the proof of loss requirements. The insureds filed a petition to compel an appraisal of the loss with the trial court. Without taking any evidence, the trial court granted the motion, finding that the claim was supplemental and that the insureds had not breached the policy. The insurance company appealed the trial court’s order to appraise the loss. Citing to a 2002 Florida Supreme Court opinion, the Court of Appeal overturned the trial court’s order, stating that

“coverage issues must be resolved before an appraisal of the amount of a loss is ordered. . . . Once the court establishes that the losses are covered by a policy, then those losses may be appraised.” *Sunshine State Ins. Co. v. Corridori*, 35 Fla. L. Weekly D289a (Fla. 4<sup>th</sup> DCA 2010).

### ***PIP Amendment Requiring Presuit Notice Before Filing An Action For Overdue Benefits Cannot Be Applied Retroactively***

A 2001 amendment to the Florida Personal Injury Protection law required that an insurer be notified before a suit is filed seeking overdue PIP benefits. The amendment also gave insurers additional time to pay overdue claims, mandated the payment of interest and penalties up to \$250.00, precluded a suit for attorney’s fees if the insurer paid within the time allowed by statute, and tolled the statute of limitations. On February 4, 2010, the Supreme Court of Florida held that this amendment does not apply to policies issued before the effective date of the amendment. An insurance company, supported by the Third District Court of Appeal, had attempted to apply this statute retroactively, to a policy issued before the amendment. The Supreme Court concluded this was improper, holding that the PIP amendment affected the substantive rights of the insured by implicating the availability of attorney’s fees, granting an insurer more time to pay benefits, and delaying the insured’s right to sue the insurer. *Menendez et al. v. Progressive Express Ins. Co.*, Case No. SC08-789, 35 Fla. L. Weekly S81a (Fla. 2010).



*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.*



*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.*

## Mitigation Discount Review Returns to Legislature

By: *Travis Miller*

In the 2009 session, the Florida Legislature heard growing concerns about the impact of Florida's mitigation discount program on insurers' rate levels and ultimately on their financial performance. Although most parties have uniformly recognized that mitigation is an important long-term policy goal for the state, the insurance industry has identified concerns with the manner in which the mitigation discounts have been implemented. This prompted the legislature to request a report from the Florida Commission on Hurricane Loss Projection Methodology on issues surrounding the mitigation discount program. The modeling commission held a series of meetings to collect information and ultimately produced a report identifying

problems with the discount system and a series of recommendations.

With the modeling commission's report now complete, the task of deciding how to fix and improve the system returns to the legislature. Among its recommendations, the commission suggests:

1. Removing the OIR from the process of determining the mitigation discounts; this instead would be done by the modeling commission through standards that would apply to each of the various models as part of the commission's annual review process.
2. Requiring insurers to use the same model to determine their mitigation discounts as they use to develop loss costs.
3. Allowing both debits and credits when appropriate under a particular insurer's rating plan.

4. Giving separate consideration to the various coverages (A, B, C and D).
5. Applying the discounts only to the portion of the premium affected by the mitigation features.
6. Increasing penalties for mitigation fraud.
7. Creating an independent inspection organization and having all properties inspected periodically.

By making some of the recommended changes, the legislature can begin to alleviate problems with the mitigation discount process that have contributed to the relatively poor financial performance of the residential property insurance market in recent years. In addition, the Office of Insurance Regulation has nearly completed the rulemaking process required to improve the mitigation verification form and reduce opportunities for fraud in that process.

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## Senate Bill Proposes Comprehensive Restructuring of Title Insurance

By: *Travis Miller*

A bill (SB 1836) proposed in the Florida Senate would result in a thorough restructuring of title insurance regulation in Florida. Currently, the Office of Insurance Regulation oversees title insurers, including the solvency of those insurers and the rates for title insurance. The Department of Financial Services then has jurisdiction over title insurance agents. Under the Senate bill, all of the current regulatory functions would be consolidated under the Department of Financial Services.

The bill would create a new Division of Title Insurance within the Department of Financial Services. This new division would have transferred to it all of the current title insurance regulatory functions currently engaged in by the Office of Insurance Regulation, as well of those of DFS' agent and agency section. The bill is 229 pages long, creating a stand-alone regulatory system for title insurance.

*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*



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## FHCF Bill on Fast Track

By: *David Yon*

Senate Bill 1460 addresses unexpected accounting problems created by 2009 legislation

changing the Florida Hurricane Catastrophe Fund year for its reimbursement contracts to a calendar year basis and is on the

fast track for approval, perhaps in the first week of session. The bill will return the contract year to June 1st through May 31st. However, it will require the FHCF to publish its aggregate coverage and retention amounts by January 1st and for insurers to execute contracts with FHCF by March 1st.

## Rate Filing Process Under Review

By: *Travis Miller*

Opinions vary widely on Florida's rate filing process for residential property insurance rates—increases in reinsurance costs in 2006 led to significant rate increases later in the year, ultimately leading to the presumed factor and true-up legislation and orders in 2007. Since then, mitigation discounts and other factors have led to poor performance in the residential property market and assertions that rate levels are simply too low. It is no surprise, then, that the 2010 legislative session already promises a wide range of proposed solutions, some of which take opposite sides of the debate.

One proposal would simply eliminate the “use and file” rate filing provision. This provision currently remains in the rating law, but has been suspended for use in the residential property insurance market. A bill filed for this session would permanently delete the provision.

On the other hand, proponents of last year's “consumer choice” bill have filed a new version this year. Last year's bill would have applied to only a small number of large insurers. Those insurers

would have been allowed to deviate from their filed and approved rates. Both chambers of the legislature passed the bill last year, but Governor Crist vetoed it. Among the bill's critics, some insurers that did not qualify to participate in last year's proposal complained that the bill would have placed them at a competitive disadvantage. To address this concern, the bill's sponsors created this year's version to include all residential property insurers. Governor Crist has indicated that he will veto this year's version too, if it passes.

The staff of the Senate Committee on Banking & Insurance has been trying to develop a middle ground approach that would give insurers flexibility in their rates while avoiding significant rate spikes. It has drafted a proposal that would require the OIR to publish an inflationary factor each year, and insurers would be able to make streamlined filings to adjust their rates to incorporate this inflationary factor as well as certain reinsurance or financing cost changes.

As the 2010 session begins, there is no doubt that the status of insurers' rates and the corresponding effect on solvency will be key areas of discussion.

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## Legislature Revisits Process of Retaining Banking and Insurance Commissioners

By: *Travis Miller*

Florida certainly has a unique structure for insurance regulation. The Financial Services Commission (consisting of the Governor and Cabinet) is responsible for selecting the insurance commissioner and the top banking regulator. The four-member FSC must approve the selection of each of these commissioners by a majority vote, with the added caveat that the Governor and the Chief Financial Officer must be on the prevailing side of the vote. Under current law, once the selection is made, the commissioner essentially holds office in perpetuity until such time as the FSC may elect to remove him or her, also by a majority vote

consisting of both the Governor and the CFO.

A proposal (HB 1011) in the 2010 legislative session would make two changes to this process. First, it would strike the requirement for the Governor and Chief Financial Officer to both be on the prevailing side of the vote. This would allow any three of the FSC members to determine whether a commissioner should be initially appointed or subsequently retained. Second, the bill would require each commissioner's appointment to be reviewed and confirmed every two years. This, course, would create a formal process for reviewing the commissioners' performance, but at the same time a biannual review could put the commissioner positions in a fairly continuous state of uncertainty and speculation.

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## OIR Grants Variance from Travel Rule

By: *David Yon*

The Office of Insurance Regulation issued a variance from its travel underwriting rule (69O-125.003) to permit companies to underwrite applicants for travel to the countries of Afghanistan and Iraq. A copy of the Petition and the Order can be found in the resources section of our website at [www.radeylaw.com](http://www.radeylaw.com).

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### **Commissioner McCarty speaks at FSU's College of Business - Center for Insurance Research**

*By Karen Asher-Cohen*



Florida Insurance Commissioner Kevin McCarty was a featured speaker on January 28, 2010, at the Kick-Off Luncheon for Florida State University's College of Business - Center for Insurance Research. The Commissioner eloquently addressed the theme of the day, "Reforming Insurance Regulation: Where do we start?" The distinguished panel of speakers also included Moira Campion McConaghy, Manager of Government Relations for the Washington, D.C. office of the NAIC, and Dr. Andreas Richter, Director of the Institute for Risk Management and Insurance at Ludwig-Maximilians-Universitat in Munich, Germany. The speakers addressed future trends in insurance regulation, on a state, national, and international level, before a capacity crowd.

Commissioner McCarty mentioned during the luncheon that although approximately 40 states have joined an interstate compact for the review of new products, Florida and several other large states have not been a part of the compact. He believes, however, that Florida soon will be able to join the compact if the legislature passes legislation that it has been developing with OIR input.

### **Travis Miller Joins Insurance Center Advisory Board**

As a support arm for the Risk Management & Insurance department, the goal of the Center for Insurance Research is to support and enhances the department's research, facilitate increased opportunities for the program's graduates, and encourage alumni participation and involvement. Immediately following the kick-off luncheon, the Center held a meeting of its inaugural advisory board. RTYC president Travis Miller is a member of the board and has worked closely with the FSU Risk Management & Insurance department both on the kickoff luncheon and its ongoing activities.