Florida Insurance Report

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Attorneys & Counselors at Law

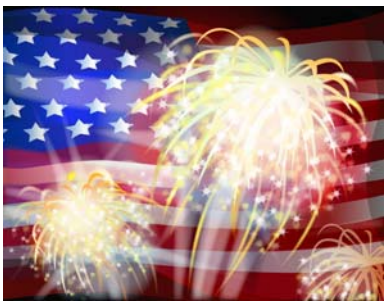
Consumer Advocate to Resume Report Card Discussions

By: Travis Miller

The Office of the Insurance Consumer Advocate held workshops and hearings in 2009 to consider administrative rules relating to the development of a "report card" on insurers' complaint ratios and claims-handling. The rules, numbered 69M-236.001-.005, would assign letter grades ranging from A through E based upon each insurer's complaint ratio in relation to its market share and based upon the average time it takes to pay claims in relation to the median industry time to pay claims.

The rulemaking process took a back seat to the legislative session earlier in 2010 when the industry sought to clarify certain requirements in the statute authorizing the report card. For example, the industry has been concerned with provisions of the rule that would include both valid and invalid complaints in determining insurers' grades. Many members of the industry believe it is inappropriate to have invalid complaints count against insurers' grades, notwithstanding a response that all insurers should be similarly affected by any imprecision in the rule. The legislature addressed this concern in its 2010 property insurance package, but Governor Crist vetoed the bill.

Now in the absence of any corrective legislation, the Office of the Insurance Consumer Advocate has indicated that it intends to continue with earlier efforts to adopt a rule. The latest draft of the rule would provide for a report card that reviews insurers' performance annually rather than over a five-year period. Although the rule no longer refers to valid and invalid complaints, the nature of the information used in calculating the complaint ratios will mean that invalid complaints continue to adversely affect insurers' grades. The latest draft of the rule is likely to prompt continued discussion about how to properly score insurers' relative performance in the areas of consumer complaints and timeliness of claims payments.



Inside this issue:

Governor Crist Calls for Special Session

By: David Yon

On Thursday, July 8, Governor Charlie Crist called for a special session to consider adding a constitutional amendment on the November ballot banning offshore drilling in Florida waters.

The session would run from July 20 to July 23. "I feel a compelling duty to protect Florida," Crist said in his press conference from Tallahassee.

It appears the Governor may have support in the Senate, but not the House. Crist said he expects Senator Alex Villalobos, R-Miami, to sponsor the resolution in the Senate. Leaders in the House however have stated they oppose a special session. They note state law already bans drilling in state waters and accuse Crist of political grandstanding.

The amendment must be done by August 4 to make the November ballot.

At this time, the call does not include any consideration of insurance issues. However, there has been some discussions with legislative leadership that it should be added in order to override the Governor's veto of SB 2044, the omnibus property bill.

A copy of the call is on our website.

GET TO KNOW…

By Karen Asher-Cohen

BEN DIAMOND - Ben joined the Department of Financial Services in February of 2007 as Special Counsel to CFO Alex Sink. A native of Tampa Bay, Ben graduated from Yale University, and earned his J.D. from the University of Florida Levin College of Law, where he served as Editor-in-Chief of the *Florida Law Review*. Prior to entering state government, Ben clerked for Judge Emmett Ripley Cox on the United States Court of Appeals for the Eleventh Circuit, and practiced law in Tampa with the law firm Barnett, Bolt, Kirkwood, Long and McBride. Ben was named General Counsel of the Department of Financial Services in February of 2009.

How do you view your role as General Counsel?

The Department of Financial Services has so many different responsibilities. We have sworn law enforcement officers who investigate arson and insurance fraud crimes, we oversee the state's workers compensation system, we regulate insurance agents. CFO Sink, as the state's chief fiscal officer, manages the investment of state funds and accounts for those funds. I work with some very talented lawyers here to make sure that in carrying out these responsibilities the Department is acting within the letter and the spirit of the law, and is serving the public well. This means serving as a "compliance" officer, but also providing strategic advice as to how we can best serve Floridians in our role as the state's fiscal watchdog and consumer advocate.

What is the best part of your job?

I enjoy the public service aspect of this job. Ultimately, we are trying to make decisions that are in the best interest of the people we represent. That is a very satisfying thing to do everyday. I also really enjoy working for CFO Sink and with her senior management team. We all work extremely well together, and it has been a great experience to be a part of the leadership here during CFO Sink's administration.

You started in private practice. What made you join the public sector?

I have always wanted to pursue a career in public service. My grandfather, Dante Fascell, began his career in state government, and represented South Florida in the United States House of Representatives for thirty-eight years. I saw first hand from his career all the good you can do in public life. So it was an easy decision for me when Alex Sink was elected and offered me a position on her team in Tallahassee. As a young lawyer I jumped at the opportunity.

What are the biggest challenges facing the insurance market these days?

These are very challenging times for Florida's property insurance market. In the past few months OIR found two domestic insurers to be insolvent, Northern Capital Insurance Company and Magnolia Insurance Company – and these insolvencies occurred *without* a major hurricane impacting the state. OIR also announced a series of actions that represent new strategies in the regulation of property insurance companies – most notably, in my mind, doing away with the requirement that property insurance companies maintain a specific level of catastrophic reinsurance. We are living through an unprecedented financial crisis that has impacted all sectors of our economy, and insurance is no exception. We'll have to continue to navigate the issues facing our property insurance market – to find innovative ways to attract more capital to Florida, to provide a regulatory environment that makes Florida an attractive place to do business, and ultimately to have more good insurance choices available for Florida consumers.

How has your life changed since coming to work at DFS?

I have developed a great appreciation for people who spend their careers in government and public service. For the most part, people in government are working very hard with limited resources to provide as much good service as they can for Floridians. I have also gained a greater understanding of the issues facing Florida. This is an extremely diverse and complex state, and working in government allows you the opportunity to begin to develop a deeper understanding of the state's issues, which are complicated and challenging.

What is your advice for someone considering state government service?

Go for it. You will learn so much. I worked here at DFS for several years with a great mentor, Dan Sumner, who was a career attorney with the Department. Dan is now the General Counsel to Citizens Property Insurance Corporation. When Dan was wrapping up his work here we sponsored a fellowship in his honor – the Daniel Sumner Fellowship in Law and Public Policy – to attract bright lawyers to state government service. We have already had two fellows come through the program, and I think they have both had very positive experiences in government. Our next Sumner fellow starts work in a few weeks. I hope this is a program that will be continued in years to come.

How do you get away from it all?

I play the piano and I like music. I like to work out and I go to the gym at FSU early in the morning, when all the students are still asleep. And I read a lot – mostly fiction.

Florida Supreme Court Decides Pollutant Liability Case

By: Travis Miller

The Florida Supreme Court on June 17, 2010, rendered a decision in Curd v. Mosaic Fertilizer, LLC, __ So.3d __, 2010 WL 2400382 (Fla.), relating to liability for damages arising from the release of pollutants. In that case, the Court considered the following two questions certified to it by the Second District Court of Appeal as questions of great public importance:

1. *Does Florida recognize a common law theory under which commercial fisherman can recover for economic losses proximately caused by the negligent release of pollutants despite the fact that the fishermen do not own any property damaged by the pollution?*
2. *Does the private cause of action recognized in Section 376.313, Florida Statutes (2004), permit commercial fishermen to recover damages for their loss of income despite the fact that the fishermen do not own any property damaged by the pollution?*

The Court answered both questions in the affirmative-- fishermen do have common law and statutory rights of action for damages arising from the release of pollutants even though they do not own the property damaged by the pollution.

The fertilizer company owned or controlled a holding pond containing wastewater from a phosphate plant. When a dike gave way, pollutants spilled into Tampa Bay. Fishermen complained that the pollutants then killed underwater plant life, fish, and other marine life, but of course the fishermen did not have any ownership interest in the marine life. An appellate court ruled that the fishermen could not recover because the fishermen did not sustain any damage to their property. However, the appellate court certified the above questions to the Florida Supreme Court for further analysis.

The Florida Supreme Court first considered the potential for recovery under Section 376.313, Florida Statutes. The Court found that Florida statutes relating to pollution liability are clear and unambiguous in allowing "any person" to recover for damages suffered as a result of pollution and in providing a liberal scope of potential damages. The Court therefore found that the fishermen could pursue statutory claims.

Regarding potential common law claims, the Court found that the fertilizer company did owe a duty of care to the fishermen that was not shared by the public as a whole. The fishermen were within the foreseeable zone of risk associated with the release of pollutants from the wastewater holding facility. The Court found that the fishermen therefore could bring their common law claims in addition to the statutory claim.

For an expanded version of this article, please see our Blog at www.radeylaw.com.

Florida Case Results in Drywall Damages Award

By: Travis Miller

A Florida couple recently was awarded $2.4 million in damages in a jury trial involving allegedly defective Chinese drywall. The jury ruled that the plaintiff homeowners should recover more than the cost of removing the drywall and renovating their home. The jury awarded damages for loss of enjoyment of the home and for the reduction in resale value associated with the stigma of Chinese drywall. The home reportedly was valued at $1.6 million.

The defendant in the case was drywall distributor Banner Supply Co., which faces numerous other lawsuits for defective drywall. The jury found Banner Supply 55% responsible for the damages, with manufacturer Knauf Plasterboard Tianjian and two related entities responsible for the remainder. Knauf Plasterboard was not a defendant in the case.

Counsel for Banner Supply has indicated that an appeal is under consideration.

Informational Memoranda

DFS Issues Bulletin to all Workers' Compensation Carriers Regarding Order Setting Assessment Rate for the Workers' Compensation Administration Trust Fund for Calendar Year 2011

By Karen Asher-Cohen

On June 17, 2010, the Department of Financial Services issued Informational Bulletin #DFS-02-2010, notifying all workers' compensation carriers and self insurers of its Order setting the Assessment Rate for the Workers' Compensation Administration Trust Fund for the Calendar Year 2011. Pursuant to section 440.51, Florida Statutes, the DFS is required annually to estimate in advance the amounts necessary for the administration of Chapter 440, and to notify carriers and self insurers of the assessment rate by July 1 of each year. The assessment rate is calculated based on the anticipated expenses of the administration of Chapter 440 for the next calendar year. Beginning January 1, 2011, the assessment rate for the Workers' Compensation Administration Trust Fund is 0.98%.

For a copy of the DFS Informational Bulletin, and the DFS Order, please see our website at www.radeylaw.com.

OIR Issues Memorandum to Health Insurers and HMOs

By Karen Asher-Cohen

On June 21, 2010, the OIR issued Informational Memorandum #OIR-10-04M, to notify all health insurers and HMO's of the recently enacted federal program, the Patient Protection and Affordable Care Act (PPACA), Section 1102, which established a temporary Early Retiree Reinsurance Program ("ERRP"), effective June 1, 2010 and ending January 1, 2014. The U.S. Department of Health and Human Services will directly reimburse participating employment-based health plans for a part of the cost of early retirees' health benefits, which include medical, surgical, hospital, prescription drug, and mental health services. The PPACA has set aside $5 billion for this program. The Memorandum explains that an "employment-based health plan" is one which is maintained by an employer and provides health benefits to early retirees. Both self-funded and insured plans are eligible, including plans sponsored by private entities, state and local governments, not-for-profit entities, religious entities, unions, and other employers.

The OIR endorsed the Early Retiree Reinsurance Program, stating the following: "The Florida Office of Insurance Regulation (Office) believes the ERRP can be of benefit for many Florida employers in these uncertain economic times. Therefore, we ask for your help by identifying and contacting all of your employment based group policyholders that would be eligible for the ERRP and informing them of the availability of this new program. We further ask you to identify any provisions in their plan you believe would qualify for the "cost-savings" requirement, or revisions they might make to qualify."

For more information, and to see a copy of the OIR Memorandum, please visit our website at www.radeylaw.com.

Appellate Updates

By: Tom Crabb

Out-of-State Doctors Not Entitled To Presuit Notice In Medical Negligence Actions

The First District Court of Appeal has concluded that the presuit notice requirement before filing a medical malpractice action does not apply to an out-of-state physician. A patient was treated at an Alabama hospital by a physician licensed in Alabama but not in Florida. The doctor's discharge of the patient included a direction that the patient continue a certain medication. The patient was transferred to Florida, where she later died allegedly as a consequence of reactions to an overdose of the medication prescribed by the Alabama doctor. The estate filed a medical malpractice suit against the Alabama doctor but failed to give him the presuit notice required by section 766.106(2), Florida Statutes, which must be sent to "prospective defendants." The Circuit Court for Okaloosa County dismissed the suit because of the failure to provide the required presuit notice. The First District Court of Appeal reversed, concluding that a physician licensed only in another state is not entitled to the presuit notice. Citing a 1993 Florida Supreme Court decision, the First District concluded it was "only logical" that the term "prospective defendants" included health care providers as defined in chapter 766, which includes "any person licensed under chapter 458." Persons licensed under chapter 458 are Florida-licensed physicians. As such, the Alabama-licensed physician did not qualify as a "prospective defendant" under the statute requiring presuit notice. The Court's decision was also informed by the maxim that restrictions on access to the courts (requiring presuit notice restricts a plaintiff's access to the courts) must be construed in a manner that favors access to the courts. *Dirga v. Butler*, --- So. 3d ---, Case No. 1D09-3819 (Fla. 1st DCA 2010).

OIR's Viatical Settlement Provider Exam Letters, Policies, Procedures, and Manual Not A Rule Requiring Adoption

Coventry First, LLC, a Florida licensed viatical settlement provider, has lost another round with the OIR in its dispute over OIR's demand that it produce records of its transactions with out-of-state viators. Before the First District Court of Appeal, Coventry argued that certain documents used by the OIR in its examination of viaticals constituted administrative rules that never went through the formal adoption process required by Florida's Administrative Procedures Act. If an agency statement meets the APA definition of a "rule," it must be adopted under the procedures specified in the APA. Coventry argued the OIR could not use those "unadopted rule" documents to demand the production of records related to transactions with out-of-state viators. The First District Court of Appeal, affirming an earlier order by an Administrative Law Judge, held that the documents did not constitute a "rule" under the APA. Coventry had argued that the OIR's examination letter and policies and procedures manual were such unadopted rules. As to the examination letter, which OIR sends to viaticals requesting production of records for examination (including out-of-state records), the Court concluded that the letters were not forms requiring information for which the OIR has no statutory authority because the OIR has the statutory authority to request out-of-state records. As to the OIR's policies and procedures manual, which also requires the production of out-of-state records, the Court concluded that they did not have the force and effect of law required to make them "rules" but were instead internal management memoranda which are used subject to the discretion of examiners. The Court noted that it is the Florida Viatical Settlement Act – and not the OIR policies and procedures manual – that gives the OIR the authority to review a settlement provider's transactions with out-of-state viators. *Coventry First, LLC v. Office of Insurance Regulation*, --- So. 3d --- , Case No. 1D09-5783 (Fla. 1st DCA 2010).

First District Concludes That Agent Was Not An "Insurer" Subject To Attorney's Fees

The First District Court of Appeal has reversed a trial court's conclusion that an agent is an "insurer" subject to attorney's fees under section 627.428, Florida Statutes. That statute provides for the award of attorney's fees following an award of a judgment against an "insurer" under a policy executed by the insurer. An insured obtained flood coverage through an insurance agent. After suffering a loss, the insured discovered it had $125,000 less coverage under the policy than it thought it had. After collecting the policy's full value from the insurance company, the insured sued the agent for negligent procurement of insurance coverage. The agent argued that the insured had instructed it to reduce the amount of the coverage and the insured argued that it gave no such instruction. In addition to finding the agent negligent, the trial court awarded the insured attorney's fees under section 627.428. The First District reversed, holding that such statute applies only to an "insurer" and that the agent in this case was not an insurer. The Court held that to be an "insurer" one must be a "contractor in the business of entering into contracts of insurance" and that an agent may be an "insurer" only if it is a party to the insurance contract. When, as here, the agent merely facilitates the contract to which the insurance company and insured are parties, the agent is not an "insurer" for purposes of a fees award. Moreover, the Court noted that the purpose of the statute -- to encourage insurance companies to pay valid claims and compensate insureds forced to litigate for coverage -- would not be served by a conclusion this agent was an "insurer" subject to attorney's fees. *Underwood Anderson and Associates, Inc. v. Lillo's Italian Restaurant*, --- So. 3d ---, Case No. 1D09-4373 (Fla. 1st DCA 2010).

Civil Remedy Program Goes Online

By: David Yon

The Department of Financial Services sent an email to insurers to notify them of recent changes to the Civil Remedy Notice (CRN) program.

Effective December 27, 2009, rule 69J-123.002, Florida Administrative Code (F.A.C.), was amended to make the CRN online system the only method for insurers to provide the disposition of a notice to the department. Part 2 of 69J-123.002, F.A.C., provides "Authorized insurer reports to the Department as required by Section 624.155(3)(e), F.S., regarding the disposition of the alleged violation shall be electronically added to the existing Form DFS-10-363 specific to the notice being addressed."

Disposition reports must be added directly to the existing Civil Remedy record on the CRN online system. To do so, insurers are advised to locate the original Civil Remedy Notice using the Search page and then select "Add Information" at the top of the CRN to type or paste the report into the text box provided. The Department will no longer accept disposition reports submitted via any other method.

The only items required by law as part of the Civil Remedy process are the Civil Remedy Notice form required in Part 1 and the Disposition required in Part 2. Other communications between the parties are not required to be sent to the Department. Should either party desire to have documentation added to the CRN record in addition to the required "Notice" or "Disposition," it must also be submitted electronically using the "Add Information" function. Communications sent to the Department in any other manner will not be added to the electronic record, pursuant to Part 3 of the rule.

Scott Challenges Public Campaign Law

By: David Yon

Rick Scott, the surprise challenger to Bill McCollum in the republican primary race for governor, filed a law suit on July 8, 2010 seeking to invalidate funding provisions of the Florida campaign finance law. Florida's campaign finance law provides for matching funding for candidates once one member of the races spends $24.9 million, or $2 for every registered voter in the state. Scott has already spent $21 million on his campaign and certainly will exceed the cap in the very near future. That will entitle McCollum to matching dollars and undermine Scott's huge spending advantage to date. Scott's challenge asserts the Florida campaign finance law that gives his opponent, Bill McCollum, a dollar-for-dollar match for any amount Scott spends above $24.9 million violates Scott's First Amendment rights to political speech and 14th amendment right to due process. Scott's suit also claims he will be penalized again because he plans to support whomever wins the Republican nomination for governor.

A similar case was filed in Arizona challenging that state's law. It was found to be unconstitutional, but the Ninth Circuit Court of Appeals reversed the decision. The case now appears headed to the U.S. Supreme Court.

Model Audit Rule – More Changes

By: David Yon

The Office has issued a Notice of Change for the Model Audit Rule (69O-137.002) and has noticed the revised rule for hearing before the Financial Services Commission on July 27, 2010. The changes were intended to address concerns raised by the staff of the Joint Administrative Procedures Committee. John Rosner, Chief Attorney sent a letter on April 25, 2010 expressing his concerns with the rule.

In general the criticisms objected to the discretion left in many parts of the rule for the Office to grant extensions and exceptions. The Office responded by removing the discretion (often changing "may" to "shall") in some cases and removing the exception completely in others. Overall these changes make the rule less flexible. One of the more significant changes removes language permitting OIR to grant an extension of time to file an audited financial statement upon a "showing of good cause." Another example is the elimination of a provision in the rule allowing members of an audit committee to participate even if they are not "otherwise independent" when they are required by law to participate on the committee.

We will have a more detailed comparison on our website at www.radeylaw.com.

Upcoming Events - *Mark Your Calendars*

Date	Rule Name/Title	Purpose/Summary	Location
July 27, 2010 9:30 a.m.	69O-137.001– Annual and Quarterly Reporting Requirements	This rule is being amended to adopt the 2010 NAIC Quarterly Statement Instructions and also adopts the 2010 NAIC accounting practices and procedures manual. By adopting the current versions of these NAIC instructions and manuals, the Office is establishing up-to-date, uniform standards for annual and quarterly reports which will provide the information necessary for the Office to evaluate insurers' financial conditions.	Room 142 Larson Building
July 27, 2010 9:30 a.m.	69O-138.001–NAIC Financial Condition Examiners Handbook Adopted	This rule is being amended to adopt the 2010 NAIC Financial Condition Examiners Handbook. By adopting the newest version of the handbook, this rule ensures that the procedures used by OIR to examine insurers are the current generally accepted accounting practices	Room 142 Larson Building
July 30, 2010 10:00 a.m.	69B-220.001–Licensure of Emergency Adjusters 69B-220.051–Conduct of Public Adjusters and Public Adjuster Apprentices 69B-220.201–Ethical Requirements for All Adjusters	The purpose of the proposed amendments is to update the rules and incorporate recent legislative changes to Part VI of Chapter 626, F.S. The proposed amendments to Rule 69B-220.001, F.A.C., define when an "emergency" exists and provide the procedures to obtain an online emergency adjuster license from the Department. The proposed changes to Rule 69B-220.051, F.A.C., clarify the responsibilities and requirements of public adjusters and public adjuster apprentices, specify the terms and conditions of contracts, require the license number on advertisements, and prescribe practices to ensure fair dealing between public adjusters and claimants. The proposed changes to Rule 69B-220.201, F.A.C., update the code of ethics for all adjusters, clarify the ethical responsibilities and requirements of all adjusters, and provide special requirements for public adjusters.	Room 116 Larson Building
August 3, 2010 9:30 a.m.	69O-200.004–Qualification to Obtain and Hold a License 69O-200.005–Use of the Statutory Deposit 69O-200.006–Contractual Liability Insurers 69O-200.009–Form Filings 69O-200.014–Exemption from Financial Examination 69O-200.015–Forms Incorporated by Reference	Incorporates into the existing rules a new category of Motor Vehicle Service Agreement Companies: "Motor Vehicle Manufacturers." In Sections 634.011(7) and 634.041(12), Florida Statutes, the legislature created a new category of Motor Vehicle Service Agreement Companies: "Motor Vehicle Manufacturers." These amendments address the legislative mandate to modify the rules and forms to incorporate this new category.	Room 116 Larson Building

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RADEY | THOMAS | YON | CLARK
Attorneys & Counselors at Law

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.

RTYC Summer Bowling Party

The summer heat in Tallahassee brings a sense of creativity when planning summer parties. The firm hosted a fun night at a Tallahassee bowling alley for staff, friends, and family.

There were the serious bowlers who came prepared with their own ball and shoes. There were former bowlers who were a bit rusty. And there were those who bowl just for fun. The turnout was great and everyone had a wonderful time.