



FLORIDA INSURANCE REPORT

RADEY THOMAS YON & CLARK

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Keeping You Informed About Florida

2012 LEGISLATIVE EDITION

Sine Die

The 2012 legislative session has come to a close -- at least the regular session, anyway. The session ended a minute shy of midnight on March 9, 2012, as lawmakers worked at a frenzied pace to address bills that were bouncing back and forth between the chambers.

No Florida session would be complete



"Dropping of the Hankie" - Sine Die

without a property and casualty insurance issue going down to the wire.

This year's hot topic was Personal Injury Protection, or PIP reform. The system has serious flaws, and a lot of effort went into developing solutions.

Our Legislative Edition provides an overview of the bills that passed and also the bills that did not. Also, make sure to check out the Legislative Update area of our website for a list of the survivors.

Insurance "Omnibus" Bill Affects Many Kinds and Lines of Insurance

By: Bert Combs

House Bill 1101 became this year's "omnibus" or "train" bill and in the end was the resting place for legislation affecting many kinds and lines of insurance, including automobile insurance, property insurance, and even a couple of provisions affecting health insurance. Several provisions relating to Citizens Property Insurance Corporation are included in the bill, and laws relating to surplus lines insurers, captive insurers, and alien insurance companies were also added to HB 1101.

The provisions in the Omnibus Bill include:

Auto Insurance

- Clarify that auto insurers may cancel a private passenger auto insurance policy within the first 60 days for nonpayment of premium.
- Allow insurers to cancel private passenger auto policies, regardless of whether the first 2 months of premiums need to be paid up front, within the first 60 days for non-payment of pre-

- mium when payment is subsequently dishonored.
- Clarify that when an insurer does not timely pay PIP benefits, the obligation will accrue interest at the rate established in the contract or the statutory interest rate that applies to judgments, whichever is greater, that is in effect on the date the payment became overdue.

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Get to Know...

By: Karen Asher-Cohen

BRIAN DEFFENBAUGH is Senior Counsel to the Florida Insurance Consumer Advocate, Robin Westcott. Brian has a bachelor's degree in economics from Notre Dame University and a J.D. from Florida State University. Brian began his career as an attorney in the Florida Senate. He also served as an attorney for many committees in the House of Representatives before leaving to work for the then Department of Insurance. In 1989 Brian returned to the Legislature where he served as staff director of the House Insurance Committee and then staff director of the Senate Banking and Insurance Committee. In 2008 Brian retired from the Legislature. Brian's most recent position before joining the Consumer Advocate's Office was as Director of Ethics for Citizens Property Insurance Corporation.

What do you see as your mission as the new General Counsel for the Consumer Advocate's Office?

Actually, my title is Senior Counsel to the Insurance Consumer Advocate. Having just started in this position in January, I was immediately involved in analyzing the insurance bills that were under consideration and evaluating their impact on insurance consumers and helping the Insurance Consumer Advocate, Robin Westcott, develop the pro-consumer position of the ICA office on the various bills. Now that session is over, I will be helping the office research and report on insurance issues that are important to consumers, in an attempt to educate consumers and policymakers while also determining whether any legislative or regulatory solutions are necessary to address problems that are identified.

The Legislative Session just ended. I know that the PIP reform bill was a big

issue for your office. What do you think of the bill that passed? Enough? Too much? Not enough reform?

I believe that the PIP reforms were significant and will result in meaningful premium savings for consumers. In particular, limiting coverage to \$2,500 for injuries that do not result in an emergency medical condition, should result in a meaningful reduction of PIP loss costs and, therefore, PIP premiums. Even though consumers will have lower benefits for non-emergency injuries, we believe that escalating PIP premiums are the primary problem facing consumers and it is appropriate to limit PIP coverage for less serious injuries, as well as to lower the economic incentive for fraud and overutilization, in order to achieve the goal of lowering premiums.

What other bills were you following?

We were closely following the major insurance bills, including (among others) the bills that:

- reduced coverage in the Florida Hurricane Catastrophe Fund
- revised the regulation of annuities based on the NAIC model regulation
- the "train" bill that made changes to various insurance issues
- reduced regular assessments for Citizens Property Insurance Corp., and
- allowed surplus lines insurers to take policies out of Citizens.

What do you think of this session as a whole?

Due to the passage of the PIP reforms, the session was relatively successful. Other insurance bills that passed generally appear to be reasonable and appropriate.

How has your job or view changed, going from a legislative role to the executive branch?

As a legislative staff director, in addition to the primary job responsibilities of analyzing proposed legislation, I was able to provide advice and counsel to Senators and Representatives in developing public policy solutions to insurance problems. Being on the "outside" in the ICA office does not allow for as great a level of influence, but it also allows more reasonable work hours and less stress. Also, my current job also allows me to focus on major insurance bills that affect consumers and pay less attention to minor bills that have little, if any, impact on consumers.

Do you see your role as pro-consumer vs. pro-industry?

Clearly, my role and the role of the ICA is pro-consumer. In some cases, the interest of consumers and insurers may align, particularly when the focus is on reducing premiums and fighting insurance fraud, as was the case for many of the PIP reforms issues.

What's the best part of your job?

The best part of the job is that our office represents consumers and we generally have the discretion to determine which issues we believe are most important to insurance consumers.

What's the worst part of your job?

There really isn't any "worst" part of the job, but having relatively strong opinions on almost any insurance issue, I often have to remind myself that I haven't been elected as the CFO nor appointed as the Insurance Consumer Advocate.

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What do you see as the biggest challenges facing Florida consumers?

The homeowner's insurance market continues to be the biggest challenge. We will continue to struggle to find ways to promote a healthy insurance market that provides consumers with a choice of financially strong carriers, while also having affordable insurance premiums. Similarly, the challenge is to have affordable premiums in Citizens, while having less reliance on assessments for financing losses.

What do you think are the challenges facing Florida insurance

companies?

Property insurers continue to face the challenge of finding a profitable business model in one of the most difficult and complex insurance markets in the world. In particular, competing with Citizens is a current challenge.

How do you get away from it all?

I love travelling, camping, and riding my bike. I also have a passion for live music, and love to go to music festivals, the Bradfordville Blues Club, and music meccas like Austin and New Orleans.

Substantial Revisions to Laws Affecting Insurance Agents and Adjusters Pass Unanimously

By: Bert Combs

House Bill 725 passed by a unanimous vote in both the House and Senate. The 91-page bill substantially revises license requirements for insurance agents and adjusters, and revises continuing education requirements. The bill also contains provisions that affect title insurance agencies and title insurance agents.

Major changes in the bill are designed to consolidate various license categories into fewer categories. The bill creates a new licensure classification called an "all-lines" adjuster to replace the separate licenses held by "independent" adjusters and "company" adjusters. Under the new law, these adjusters will hold the same "all-lines" adjuster license and the separate classifications will be converted to "appointment types." The bill also consolidates other types of "limited licenses" that will be issued by the Department of Financial Services (DFS), and creates a new type of limited license relating to the sale of insurance for portable electronics.

House Bill 725 substantially revises statutes relating to continuing education re-

quirements. Among the changes, licensees will be required to complete a 5-hour update course every two years which is specific to the license held by the licensee. The content of the course must be developed and offered by course providers that are approved by DFS. A licensee who holds multiple licenses must complete an update course that is specific to at least one of the licenses held. Except as otherwise provided, any remaining continuing education hours that are required are elective and may be met with any other courses approved by DFS.

As to title insurance, the bill specifically prohibits an employee of an agent or agency from "initiating contact" with any individual for the purpose of soliciting title insurance, unless that person is licensed as a title insurance agent or otherwise exempt from licensure. This provision makes the laws relating to title insurance like similar laws that are applicable to insurance agency employees. Provisions in the bill also create new continuing education requirements for title insurance agents.

Another notable revision in HB 725 adds an additional ground that DFS may use to suspend or otherwise discipline a licensee. The bill provides that failure to comply with any civil, criminal, or administrative action taken by child support enforcement programs is grounds for action against an applicant or licensee.

If HB 725 is approved by the Governor, the bill's provisions will take effect October 1, 2012, except as otherwise specifically provided in the bill. The continuing education requirements that require new continuing education courses to be developed are not effective until October, 1, 2014.

Bills That Did Not Pass *RTYC Annual "Thumbs Down"*

Each year, the legislative session can be characterized as much by proposals that did not pass as by the ones that did. In the insurance arena, PIP reform dominated the 2012 session. Meanwhile, other proposals fell by the wayside. Here's a list of a few proposals that did not gain enough traction:

 **Bad Faith Reform--** After falling short last year, supporters tried a scaled down approach this year, but could not gain momentum.

 **FHCF Right-Sizing--** The FHCF wanted to shrink, but legislators were concerned with the impact on admitted market rates.

 **Citizens Glide Path--** Although Citizens' rates are inadequate, the legislature never seriously entertained a proposal to accelerate its path to adequacy.

 **Depopulation by Surplus Lines Insurers--** A bill to allow surplus lines insurers to remove policies from Citizens gathered significant attention, but in the end the legislature did not want to open this opportunity to non-admitted insurers.

 **Drug Repackaging--** A proposal to reduce workers' compensation costs by limiting amounts doctors can charge when dispensing repackaged medicine failed.

 **Restrictions on medical malpractice suits--** A bill imposing restrictions on medical malpractice suits stalled due to opposition from trial lawyers and ophthalmologists (who opposed a provision in the bill allowing optometrists to prescribe oral medications).

PIP Reform Squeaks Through on Final Day of Session

By: Travis Miller

After intense debate throughout the 2012 legislative session, the Florida House of Representatives and Senate reached a compromise on reforms for Florida's Personal Injury Protection (PIP) auto insurance system. The bill and its reform proposals were the subject of considerable analysis and discussion prior to the session and throughout its two-month term. Insurance Commissioner Kevin McCarty called for reforms due to escalating rates attributable to fraud and abuse, and both Governor Rick Scott and CFO Jeff Atwater were outspoken about the need to change the system.

The House supported strong reforms throughout the session and ultimately passed the compromise bill with the Senate by a comfortable 80-34 margin. The Senate, however, was slower to embrace substantial reforms. After working with the House on the compromise proposal, it still came down to a close 22-17 vote to pass the final package.

The bill contains a number of changes designed to limit rising PIP costs due to abuses in the system. The bill establishes a 14-day period in which injured persons must receive their initial care. It also provides that only \$2500 of the \$10,000 PIP limit may be used for non-emergency care. The bill contains limitations on chiropractic care and excludes coverage for massage therapy and acupuncture.

The Office of Insurance Regulation, within 60 days of the bill becoming law, will publish a report estimating the rating impact of the bill (a so-called presumed factor). By October 1, insurers will be required to make rate filings incorporating the impact of the bill. If an insurer's rate filing does not provide for at least a 10%

rate reduction for PIP, the insurer will be required to explain the reasons in detail. A second filing benchmark of a 25% reduction takes effect in 2014.

The bill also contains new anti-fraud provisions. Insurers may notify insureds within 30 days if they suspect fraud, and the insurers then will have 60 days in which to investigate the suspicious activity. In addition, the bill will allow for the creation of a non-profit fraud-fighting corporation, which will be funded by the industry and administratively housed within the Department of Financial Services.

Altogether, Governor Rick Scott was pleased with the bill. He commented, "This is a triumphant moment for the residents of Florida. Members of the Legislature heard our call to put Floridians ahead of special interests and combat the fraud that has become a billion dollar tax on drivers."

Insurance Commissioner Kevin McCarty likewise was pleased, saying "The Florida Legislature, along with Governor Scott and CFO Atwater, clearly recognize that it is critical that we change the incentives in the system to reduce PIP fraud."



Cat Fund Revisions Fall Short

By: Travis Miller

The Florida Legislature did not adopt proposed changes to the size of the Florida Hurricane Catastrophe Fund during the 2012 session. Jack Nicholson of the FHCF developed a proposal he referred to as "right-sizing" the CAT Fund to ensure it has access to enough resources to pay promised reimbursements without regard to poor global market conditions. The proposal would have reduced the amount of coverage available from the FHCF over several years while at the same time increasing the industry retentions and co-pays and increasing the cost through an extension of the rapid cash buildup factor.

The proposal stalled in the Florida House of Representa-

tives fairly early in the session due to concerns over the impact on admitted insurers' rates and a potentially related adverse impact on Citizens Property Insurance Corporation. Insurers estimated their rates would go up a minimum of 12-14% even with no change in market pricing, and potentially double that amount when they would be forced to enter the market seeking to replace the disappearing FHCF coverage. Citizens' rates, however, remain subject to the legislatively imposed glide path. Increasing rates in the private market therefore would not be met with corresponding increases in Citizens, and Citizens would continue to attract more risks based solely on its subsidized pricing.

Senator J.D. Alexander sought solutions in the Senate and eventually proposed a significantly scaled down version of the FHCF proposal. The bite-sized approach to right-sizing would have made a small reduction to the FHCF coverage and a small increase to its co-pay without increasing the cost through the rapid cash buildup factor. This would have reduced the impact on admitted market insurers' rates. Even so, the House did not agree with the approach. Thus, while the FHCF proposal was linked to the Citizens assessment revisions in the Senate, the Senate on the last day of session passed a bill dealing only with the Citizens assessments and left the FHCF right-sizing proposal to be considered in the future.

Insurers estimated their rates would go up a minimum of 12-14% even with no change in market pricing, and potentially double that amount when they would be forced to enter the market seeking to replace the disappearing FCHF coverage.

Surplus Lines Depopulation Bill Stalls

By: Travis Miller

A proposal to allow surplus lines insurers to remove policies from Citizens Property Insurance Corporation failed in the waning days of the session. Lawmakers considered ways of reducing the size of Citizens, and one proposal that emerged was to allow surplus lines insurers to assume policies from Citizens using a process similar to that used by admitted insurers. The bill sought to protect consumers by placing restrictions on the insurers seeking to assume these policies.

Some legislators objected to the proposal, expressing concerns that surplus lines insurers are not regulated and therefore would not be subject to the continuing

regulatory oversight like that of an admitted insurer assuming policies from Citizens. A typical assumption program results in policyholders being assumed by an insurer unless the policyholders "opt out" of the process. Opponents of the surplus lines proposal were successful in amending it so the process for those insurers would be an "opt in." This rendered the process impractical and ineffective, killing the premise behind the bill. Supporters ultimately were not able to pass a more favorable version of the bill and it died in the session's final days.

Proposals that would make surplus lines insurers part of the Citizens solution

likely will always be the subject of concern for some admitted insurers and for consumer groups alike. However, the larger concern for the health of the Florida residential property insurance market is lawmakers' continuing unwillingness to solve concerns with Citizens' rate inadequacy and consequently the continued reliance on potentially large multi-year assessments (taxes) on all Floridians as a funding source.

Title Insurers Reporting

By: David Yon

Section 5 of HB 643, requires each title insurance agency and insurer licensed to do business in this state and each insurer's direct or retail business in this state to maintain and submit information, including revenue, loss, and expense data, as the Office of Insurance Regulation determines necessary to assist in the analysis of title insurance premium rates, title search costs, and the condition of the title insurance industry in this state.

This information must be transmitted to the Office annually by March 31 of the year after the reporting year. The Financial Services Commission is directed to adopt rules regarding the collection and analysis of the data from the title insurance industry.

It is unclear when data under this section must first be collected or reported. Clearly, it need not be reported in 2012 as the law will not become effective until July 1, 2012 and the reporting date is March 31. The first possible reporting date would be March 31, 2013. However, it is not clear if there would be data to report by then. The Office must first determine what data is "necessary." In addition the Financial Services Commission (FSC) is directed to adopt rules regarding the collection and analysis of the data. The FSC could certainly promulgate a rule during 2012, but it would not necessarily provide licensees the time necessary to put in place the needed processes for the collection and reporting of data. It is unclear whether the Office could direct what is "necessary" before the FSC promulgates rules. As a result, it will be important to follow the implementation of this bill to determine how OIR and DFS implement it.

Citizens Assessment Mechanism to be Revised

By: Travis Miller

The legislature passed a bill in the recently concluded 2012 session changing the way Citizens will recover deficits through assessments. The bill was unique in that it enjoyed broad support from the Office of Insurance Regulation, the Insurance Consumer Advocate, Citizens Property Insurance Corporation and the insurance industry. Despite this support, the proposal was in jeopardy on the session's last day due to a Senate effort to attach Florida Hurricane Catastrophe Fund (FHCF) reform to it. However, the attempt at FHCF reform was pulled, and the Citizens revisions passed.

Historically, the assessments to be levied on the insurance industry have been a two-tiered approach (leaving aside the Citizens policyholder assessments). Upon recognizing a deficit, Citizens would levy a "regular" assessment on participating insurers, which then would have to promptly remit their respective shares of the deficits to Citizens. The insurers then would submit filings to the Office of Insurance Regulation to recoup the amounts of their assessments from policyholders by adding a percentage surcharge into policies over a period of one year or longer. Although the process for recouping the assessment amounts sounds easy in theory, it created a lot of filing activity for the Office of Insurance Regulation and often proved to be administratively cumbersome for insurers. If Citizens' deficits were too large to recover solely through regular assessments, it would levy "emergency" assessments in ensuing years. Instead of being paid-and-

recouped, the emergency assessments operate simply as surcharges that insurers put on their policies and collect for remittance to Citizens.

In the bill passed this session, the regular assessments will be eliminated for Citizens personal lines (PLA) and commercial lines (CLA) accounts. This means the deficit recovery mechanism will be emergency assessments, which reduces burdens on the Office of Insurance Regulation and the participating insurers. For the coastal account, the legislature could not eliminate the regular assessments altogether due to concerns about ensuring Citizens can meet its potential financial obligations. However, the legislature was able to reduce the regular assessment percentage from 6% to 2%, with further deficits to be recovered through emergency assessments.

The legislature should be applauded for passing this widely supported bill that reduces administrative burdens on the Office of Insurance Regulation and insurers while helping alleviate potential cash flow concerns to the private market that otherwise could have occurred after significant storms.

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- Specify that an insurer providing PIP coverage does not have a right of reimbursement from an owner or registrant of an automobile used as a taxi cab.

Property Insurance

- Provide a definition of the term “rebate” within the context of performing repairs made pursuant to sinkhole damage.
- Specify that the alternative dispute resolution procedure for personal and commercial residential property insurance claims can be requested only by the policyholder, as a first-party claimant, or by the insurer.
- Provide that when the notice of loss is reported more than 36 months after a declaration of a state of emergency by the Governor, the alternative claim dispute resolution process is not available.

Citizens Property Insurance Corporation

- Require Citizens to begin offering a basic personal lines policy similar to an HO-8 policy by January 1, 2013.
- Require that in establishing replacement costs for dwelling coverage, Citizens must accept the lowest valuation from three specified sources.

Surplus Lines Insurance

- Provide that a surplus lines carrier is not required to provide 45 days’ notice of nonrenewal if the insurer has manifested its willingness to renew.
- Provide that an insurer with surplus as to policyholders of \$25 million or less can qualify as a limited apportionment company for all statutory purposes.

Health Insurance

- Allow a not-for-profit self-insurance fund to purchase for its members coverage for health, accident, or hos-

pitalization if certain conditions are met.

- Provide that mandated health benefits are not intended to apply only to limited benefit types of health benefit plans, unless specifically designated otherwise.

Captive Insurers

- Deletes the current definition of captive insurer and substantially redefines captive insurers and requirements to operate various kinds of captives, including “pure captives,” “special purpose captives,” “industrial insured captives” and “captive reinsurance companies.”
- Establishes capital and reserve requirements for each type of captive insurer and removes the current requirement that captive insurers are also subject to the same level of surplus specified for various lines of insurance written in this state.

Alien Insurers

- Create an exemption from the license requirements for an alien insurer issuing life insurance or annuity contracts covering only persons who are not residents of the U.S., if the alien insurer meets certain requirements.
- Amend the current exemption provisions relating to such alien insurers by providing that an insurer who has an affiliate is not disqualified from obtaining an exemption, and by expanding the definition of nonresident to include trusts or other entities domiciled outside the United States.

Miscellaneous Provisions

- Specify that a salvage motor vehicle dealer is not required to carry \$25,000 combined single-limit liability coverage for bodily injury and property damage, or the \$10,000 PIP coverage, for vehicles that cannot be operated legally on state roads.

- Clarify that a current exemption from filing specified reinsurance information applies to any insurer with less than \$500,000 in direct written premiums in Florida in the preceding calendar year, and not more than \$250,000 of premium during the preceding calendar quarter and less than 1,000 policyholders at the end of the preceding calendar year.
- Allow the Department of Financial Services to provide license examinations in Spanish at the expense of the applicant.
- Expand the list of entities to whom a limited license for travel insurance may be issued.
- Allow a licensed independent adjuster or a licensed agent to supervise up to 25 individuals who are not required to obtain a license to perform claim functions for portable electronics insurance claims.
- Provide that a resident of Canada cannot obtain a license as a nonresident independent adjuster for the purpose of adjusting portable electronics insurance claims, unless the individual obtains an adjuster license in another U.S. state.
- Specify that it is an unfair or deceptive act or practice for someone to knowingly present a property and casualty certificate of insurance that has been altered after being issued.

The omnibus bill unanimously passed the House by a vote of 114-0 and the Senate by a vote of 40-0. If the bill is approved by the Governor as expected, its provisions will take effect July 1, 2012, except as otherwise specifically provided in the bill. Many provisions of the bill state that they become effective upon the bill becoming law, instead of July 1.

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Workers' Compensation Excess Profits Provision Eliminated

By: *Travis Miller*

The legislature passed a bill (HB 941) that included a provision eliminating the excess profits calculation for workers' compensation and employer's liability insurance. The excess profits provision, currently located at section 627.215, Florida Statutes, requires insurers to report their premiums, losses and expenses in the affected lines of business by July 1 of each year. The data then results in a determination of whether the insurer's profits over the preceding three-year period have exceeded the anticipated underwriting profits in its rate filings by more than five percent. Any profits in excess of this amount are subject to refunds to policyholders.

The proposal to eliminate the excess profits calculation arose in the House of Representatives. No companion bill was filed in the Senate. During the House committee process, supporters of the reform argued that the excess profits law is outdated and originated when Florida had a different system for compensating injured workers. They also urged that repealing the excess profits provision would be a positive signal for the Florida market, ultimately leading to more competition. The amount of excess profits returned over the course of the law's existence has been relatively modest in relation to the aggregate premiums, so the law serves as a regulatory deterrent without much corresponding benefit to consumers. Supporters also mentioned that Florida is one of only four states with such a law.

The primary opposition to the proposal came from the trial lawyers, who argued that the proposal would take money away from small businesses. However, Florida's major business groups supported the reform because they believe the benefits of a better regulatory climate are more beneficial in the long run.

Although the House proposal seemed to be stalled without a companion in the Senate, it was added as an amendment to another bill that moved through both chambers. Assuming the bill becomes law, it takes effect July 1, 2012.

The legislature previously carved commercial property, commercial casualty and commercial umbrella liability insurance out of the law effective January 1, 1997. If the current bill becomes law, it will not apply to any lines of business. Florida still will have an excess profits provision for residential property insurance at section 627.06291. However, the triggers for that provision would require an insurer to earn, over the course of 10 years, profits exceeding its anticipated underwriting profit by amounts exceeding 10% of earned premium, and excess profits refunds must be made only if the insurer's surplus exceeds the amount of its 250-year PML.

A Capital Law Firm for Regulated Industries

301 South Bronough Street, Suite 200, Tallahassee, FL 32301

850-425-6654/850-425-6694 (Fax)

www.radeylaw.com