Florida Insurance Report

RADEY THOMAS YON & CLARK

Volume X, Issue III www.radeylaw.com Keeping You Informed About Florida

RTYC Adds Two Attorneys in Of Counsel Role

By: Travis Miller

RTYC is pleased to announce the association of Ron LaFace, Jr. and Nick Iarossi with Radey, Thomas, Yon, and Clark, P.A. as "of counsel." Nick and Ron, along with lobbyist Gerald Wester, are principals in Capital City Consulting, L.L.C., a Tallahassee-based government relations firm. The addition of Nick and Ron to RTYC in their of counsel role will complement the firm's existing legal practices and give clients expanded access to governmental consulting services.

Nick Iarossi

Ron LaFace, Jr.

In 2003, Nick and Ron founded Capital City Consulting with Gerald Wester and Pat O'Connell. Capital City Consulting is a full-service public affairs firm providing services including government relations, crisis management, and issue advocacy. Over the last nine years, the firm earned acclaim in Florida Trend's "Florida's Biggest Lobbyists: Turning Up the Heat" feature and has been called "a rising star on Tallahassee's lobby scene" by the Palm Beach Post. Capital City Consulting prides itself on having the experience, contacts, and winning strategies to help its clients stand out in the capital city. The firm helps its clients successfully navigate government in ways that increase business opportunities, maximize government resources and incentives in the private sector, create public/private partnerships, reduce harmful existing regulation, and prevent the passage of punitive legislation or legislation that gives competitors unfair advantages. For more about Nick, Ron, and Capital City Consulting go to www.capcityconsult.com

Reinsurance Credit Rule Workshop

By: David Yon

The OIR has announced plans to hold a workshop in the Larson Building on May 14, 2012 at 9:30 to consider revisions to rule 69O-144.007, F.A.C., Credit for Reinsurance from Eligible Reinsurers. The rule implements a statute which gives the Commissioner of the Florida Office of Insurance Regulation the option to allow credit for reinsurance without full collateral for transactions involving assuming insurers not meeting the requirements of Florida law regarding authorization or eligibility. The notice states the current rule applies only to property and casualty insurance and the proposed change will apply the rule to life and health insurers.

Inside this issue:

News from NOAA

Hurricane season is right around the corner. NOAA has published changes to its text and graphical products for the 2012 hurricane season. A copy of this publication can be found on the Resources page of our website at www.radeylaw.com. These changes are effective May 15.

Saffir-Simpson Hurricane Wind Scale

NOAA has made some minor modifications to the Saffir-Simpson Hurricane Wind Scale with respect to hurricanes that are a category 3 or higher. These changes are being made to resolve "rounding issues associated with the conversion of units from knots to mph which are used for wind speed. "

A category 4 hurricane will be broadened by one mph at each end of the range and will result in minor modifications to category 3 and 5 wind speed thresholds. The changes are as follows:

From:

Category 3: 111-130 mph (96-113 kt, 178-209 km/h)
Category 4: 131-155 mph (114-135 kt, 210-249 km/h)
Category 5: 156 mph or higher (136 kt or higher, 250 km/h or higher)

To:

Category 3: 111-129 mph (96-112 kt, 178-208 km/h)
Category 4: 130-156 mph (113-136 kt, 209-251 km/h)
Category 5: 157 mph or higher (137 kt or higher, 252 km/h or higher)

There will be no change to the wind speeds currently assigned to Categories 1 and 2.

Tropical Cyclone Forecast Cone

The tropical cyclone forecast cone will be slightly smaller and represents the probable track of the center of a tropical cyclone. This chart defines the cones for the 2012 Atlantic and Pacific Basin:

Forecast Period (hours)	Circle radius Atlantic Basin (nautical miles)	Circle radius Eastern North Pacific Basin (nautical miles)
12	36	33
24	56	52
36	75	72
48	95	89
72	141	121
96	180	170
120	236	216

Other Items of Interest

The publication also discusses the definitions of tropical storm and hurricane watches and warnings; storm surge; names for the 2012 hurricane season and social media issues. The National Hurricane Center is now on Facebook and Twitter.

Governor Nixes FHCF Premium Tax Program

By: Travis Miller

Governor Rick Scott has vetoed HB 5505, which would have created a program by which insurers could prepay premium taxes in exchange for future credits, with the proceeds being used to create liquidity for the Florida Hurricane Catastrophe Fund (FHCF). The Governor stated in his veto message that he would not approve the bill because the proposal was not fully vetted in the committee process during the 2012 session but instead emerged late in the budget conference process.

The proposal would have allowed the State Board of Administration (SBA), which administers the FHCF, to sell up to $1.5 billion in prepaid tax certificates. The maximum amount applicable to any one tax year would have been $150 million. The SBA then would have loaned the proceeds from the sale of these certificates to the Florida Hurricane Catastrophe Fund Finance Corporation, creating liquidity for the FHCF.

When the bill passed the legislature, Jack Nicholson of the FHCF raised questions and potential concerns about it. Dr. Nicholson was uncertain about how the program would be administered and whether it would be an effective means of enhancing the FHCF's liquidity.

Florida Surplus Lines Service Office to Act as Clearinghouse for NIMA, Inc.

By: Karen Asher-Cohen

The member states of NIMA, the Non-Admitted Insurance Multi-State Agreement, approved a Premium Tax Clearinghouse services agreement and license agreement, through which NIMA, Inc. contracted with the Florida Surplus Lines Service Office ("FSLSO") to act as its central clearinghouse for the collection and allocation of surplus lines premium tax payments for multi-state surplus lines policies. The FSLSO will begin receiving filings, as the NIMA clearinghouse, for policies issued or renewed on or after July 1, 2012. The FSLSO will also serve as the clearinghouse administrator and technology platform provider.

"The FSLSO strives to deliver leading edge technology to all its customers, and we are proud to have the opportunity to provide that same level of service to the states of NIMA, Inc.," said Gary Pullen, Executive Director of the Florida Surplus Lines Service Office. "As an organization, we are pleased to be a part of this national effort to streamline the collection and remittance of surplus lines taxes."

NIMA, Inc., a non-profit corporation, was established by the NIMA member states to establish a mechanism to report, collect, allocate and distribute surplus lines tax revenues in accordance with the Non-Admitted and Reinsurance Reform Act ("NRRA"). The NRRA, part of the Dodd-Frank Wall Street Reform legislation, passed in 2010 and provides that only the "home state" may collect premium tax payments for non-admitted insurance. However, through the NIMA agreement, member states are able to collect premium taxes owed to their state even when they are not the home state of the policy, thus protecting each participating state's tax revenue on surplus lines policies.

Implementation of PIP Law Under Review

By: Travis Miller

The Office of Insurance Regulation (OIR) and other state agencies are considering the implementation steps needed for the recently passed Personal Injury Protection (PIP) reform bill (HB 119). One of the key upcoming action steps is for insurers to make their initial rate filings responding to cost savings resulting from the new law. The filing deadline is October 1, 2012. The OIR has indicated the effective date of the rate filings should be January 1, 2013. This will allow for submission of the required filings by insurers and the requisite review period by the OIR. The next filing deadline will be the following year and will apply to policies to be issued or renewed after January 1, 2014. The Office of Insurance Regulation's upcoming report on the PIP law is expected to affirm that the impact of the PIP reforms will be unique to individual insurers and the rate impacts by insurer will vary.

Insurers also will need to consider whether their forms reference the use of the Medicaid fee schedule. A court has ruled the use of this is permissive, but not mandatory, and therefore insurers need to refer to the fee schedule in their policies if they intend to apply it in their forms.

The PIP reform law contains many nuances, and insurers already are identifying "glitches" or inconsistencies in the law's dates and deadlines. Insurers should review the new law carefully and plan ahead as they implement it.

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OIR to Update Life and Health Filings

By: Karen Asher-Cohen

The Florida Office of Insurance Regulation has filed a notice of proposed rule development in the Florida Administrative Weekly to update and edit the forms and instructions contained in the Life & Health I-File electronic form filing system. The OIR will hold a rule development workshop on May 8, 2012, at 9:30 a.m. at the Larson Building, to discuss the proposed changes to the Universal Standardized Data Letter, with interested parties.

A copy of the rule notice and the proposed form changes can be found at our website, www.radeylaw.com.

For questions about the proposed changes or any L&H filings, please contact karen@radeylaw.com.

OIR Issues Order to Streamline Commercial Form Filings

By: Karen Asher-Cohen

On April 9, 2012, Florida Commissioner McCarty issued an "Order Exempting Specified Forms from the Requirements of Section 627.410, Florida Statutes." In recent years, the Florida Legislature amended section 627.062, Florida Statutes, to exempt certain lines of commercial insurance from prior rate filing approval. Those rate filings are now filed as informational filings with the OIR. Pursuant to this Order, effective immediately, the exempted lines and products in section 627.062 are now also exempt from prior approval for forms, with certain conditions. The rationale stated in the Order is that the OIR is experiencing a historically high volume of commercial form filings, resulting in a lengthy backlog for approval of filed forms. The Order states: "Due to the statutory exemption of certain ... commercial lines risks from rate filing and approval requirements, in conjunction with consideration of the typical sophistication of commercial insurance consumers and the need to make products available to the commercial marketplace in a timely manner, the OFFICE finds the review and approval of policy forms, as required under Section 627.410, Florida Statutes is not practicable when the form is for use in certain ... types of commercial lines risks, and such form has been diligently and thoroughly reviewed by the company for quality and legal sufficiency to assure compliance with Florida Law."

This pilot program is in effect for one year from the date of the Order. There are three criteria for the informational form filing: (1) the form will be used for a commercial line that is exempt from prior rate filing approval under section 627.062; (2) the form must be submitted to the OIR in an informational filing 30 days prior to issuance; and (3) the filing must contain a notarized certification by the company President, CEO, General Counsel, or chief compliance officer, on company letterhead, certifying that the form is in compliance with all applicable Florida laws. The exact wording for the certification is contained in the Order.

It is important to note that this Order does not apply to form filings for the commercial automobile line that has been "deregulated" under section 627.0651(14), which is not the statute that is referenced in the Order [627.062]. Also, based on discussions with the OIR, it is our understanding that the Order applies to pending form filings as well, as long as the filings have not yet been reviewed by an analyst and already found to not be in compliance as per an outstanding clarification letter.

When using this streamlined form filing process, the burden will be on the company to ensure compliance with Florida law. Companies should take care to exercise due diligence in their review and analysis of Florida law and the provisions of the filed forms. Of course, companies can still choose to file forms for full review and prior approval under section 627.410, F.S. A copy of the Order can be found on our website at www.radeylaw.com.

If you have any questions about form filings pursuant to this Order, contact karen@radeylaw.com.

Cat Fund Right-Sizing Supporters Vow to Bring It Back

By: Travis Miller

The key Senator and Representative who promoted the Florida Hurricane Catastrophe Fund (FHCF) right-sizing proposal expressed disappointment that the bills did not receive more attention in the recently concluded session. At least in the case of those who are eligible to return to the legislature next year, they vow to keep pushing for the reform.

The proposal would have gradually reduced the size of the FHCF and increased its cost over several years. However, the measure stalled when lawmakers realized it would increase the private market's rates and increase the disparity between those rates and the rates in effect by the state-run, actuarially deficient Citizens Property Insurance Corporation.

Representative Bill Hager called the legislature's inaction "extremely disappointing," and he dismissed the idea that other issues justifiably overshadowed this proposal. Representative Hager urges that in a hurricane-exposed state like Florida, bills that reduce the state's potential exposure should be a priority. Representative Hager says he will bring the proposal back next year. His Senate counterpart J.D. Alexander, however, is term-limited and won't be back. Another Senator will need to step to the forefront on this legislation, but there are several likely supporters.

Opponents of the proposal recognized that reducing FHCF coverage will result in more reinsurance being purchased in the private market, which ultimately would lead to increased rates for consumers. Politically speaking, there's no good time for rate increases, but there is a bad time--- an election year following several years of a down economy. Some insurers expressed reservations about the bills too, stating that if their rates go up more than those of Citizens Property Insurance Corporation, the residual market will continue to expand.

Florida Office of Insurance Regulation 2012 Industry Conference

By: Karen Asher-Cohen

The Florida Office of Insurance Regulation will host its 2012 filing symposium, entitled "Successful Strategies for Business Development." The conference will be held on June 14, 2012 at the Florida State University Conference Center in Tallahassee. The agenda contains general sessions for all insurers, such as remarks by Commissioner McCarty and Chief of Staff Audrey Brown; a presentation on Trade Secrets by OIR attorney Wenceslao Troncoso; and remarks by Mary Mostoller on company admissions via the I-file system. The day will then be split into sessions specific to Property & Casualty or Life & Health insurers. The Property & Casualty sessions will include break-out sessions on legislative changes; rate filings for commercial property, medical malpractice, homeowner's coverage, and private passenger auto filings; form filings; and the I-file system. The agenda also includes roundtable discussions on P&C rates and forms. On the Life & Health side, the OIR will host a product review panel headed by Eric Lingswiler and a financial oversight panel moderated by Toma Wilkerson. If you are interested in registering for the conference, go to www.floir.com for more information. A copy of the agenda is available at the Event Calendar page on our website at www.radeylaw.com. Presentations from the conference will be available on the OIR website after the conference as well.

Governor Regains Control of Executive Branch Rulemaking

By: Travis Miller

Governor Rick Scott has signed HB 7055 into law restoring the Governor's ability to direct rulemaking at agencies under his control. The legislature passed the bill this year in response to the Florida Supreme Court's decision in *Whiley v. Scott*. That case arose from the Governor's first official act when he took office, which was to issue Executive Order 11-01 relating to rulemaking by administrative agencies. In the order, the Governor directed administrative agencies under his control to suspend existing rulemaking activities and not to proceed with administrative rules until approved by a newly created Office of Fiscal Accountability and Regulatory Reform. The Governor's objective in issuing the Executive Order was to ensure that administrative rulemaking would not serve as an impediment to job creation, which was a cornerstone of the Governor's campaign.

The Executive Order presented an interesting question of administrative law and the impact of the separation of powers doctrine. Executive branch agencies may adopt rules only as authorized by the Florida legislature. In doing so, agencies must follow procedures and timeframes established by the legislature. The Governor's Executive Order therefore raised a significant question as to the ability of the state's chief executive to direct rulemaking at agencies under his direct control once those agencies have embarked upon a rulemaking path established by the legislature.

The Florida Supreme Court ruled in *Whiley v. Scott* that the Governor overstepped his constitutional authority when he interfered with agency rulemaking. The Supreme Court found that the administrative rulemaking process is an extension of the legislative process from which it arises, leaving the Governor unable to suspend or alter the process. Two justices dissented in the 5-2 decision, arguing that the agencies affected by the Governor's Executive Order were within his direct control and the Governor should be able to affect their rulemaking. The dissenting justices argued the Governor was simply exercising his ability to oversee the affairs of his own agencies.

When signing HB 7055 into law, the Governor wrote that "the Legislature has stated in no uncertain terms that *Whiley* was wrongly decided." The Governor called the public policy set forth in the new law consistent with the "traditional view of executive power." Senator Don Gaetz, who sponsored the Senate version of the bill concurred, stating that "individuals appointed by the Governor to head a state agency should by supervised by those who are elected to serve the public."

Florida Seeks Captives

By: David Yon

OIR released an announcement on April 25, 2012 touting changes to its captives law after the implementing bill was signed by the Governor.

The release noted that existing law had already created provisions authorizing the creation of U.S. domiciled captive insurers by establishing operational criteria and standards. This year's legislation, House Bill 1101, added new provisions specifying criteria for the formation, incorporation, coverage, capital and surplus, reporting, licensure and reinsurance of captive insurers.

"We welcome captive insurers to Florida's insurance marketplace. The new law will encourage the formation of new captive insurers, which will promote increased investment in our insurance marketplace...." said Kevin McCarty, Florida's Insurance Commissioner.

House Bill 1101 permits or enhances the creation of "pure captives, industrial insured captives, special purpose captives and captive reinsurance companies." The law greatly expands the type of captives Florida may now approve. It permits captive insurance companies to provide all insurance under the Florida Insurance Code, except for workers' compensation and employer's liability, life, health, personal motor vehicle, and personal residential property insurance. A special purpose captive for example is a "captive insurance company that is formed or licensed under this chapter that does not meet the definition of any other type of captive insurance company defined in this section."

Please feel free to contact us for more information about this new law or the types of captives now authorized.

Appellate Updates

By: Tom Crabb

Mediation Requested By Insured Does Not Foreclose Later Appraisal Demand By Insurer

State Farm Florida Insurance Company v. Unlimited Restoration Specialists, Inc., Etc., Case No. 5D11-2456, 37 Fla. L. Weekly D712b (Fla. 5th DCA 2012).

An insured's home was damaged by a water leak and a dispute arose over the amount to be paid by his insurer to repair the damage. By letter, the insurer notified the insured of his right to participate in the property insurance mediation program established by statute (627.7015) and advised the insured that if he did not choose mediation, the insurer would demand appraisal to resolve the amount of the loss as provided by the policy. The insured elected mediation, which ended in impasse. The insurer then demanded appraisal. The insured refused to participate in the appraisal process and instead sued the insurer, citing a rule of the Florida Office of Insurance Regulation providing that "if the parties are unsuccessful at resolving the claim [in mediation], the insured may choose to proceed under the appraisal process set forth in the insured's insurance policy or by litigation . . ." (Rule 69O-166.031, F.A.C.).

The insurer moved to dismiss the claim, arguing that the statute enabling the rule provides that an insurer does not waive the right to later seek appraisal if the insured is the one requesting mediation. The statute, section 627.7015(7), provides that an insured shall not be required to participate in a contractual appraisal process if either: 1) the insurer fails to notify the insured of the right to seek mediation; or 2) "the insurer requests the mediation, and the mediation results are rejected by either party." Following the rule language that says the insured "may choose to proceed . . . by litigation," the Volusia County Court denied the insurer's motion to dismiss and the Circuit Court for Volusia County, sitting in an appellate capacity, affirmed the decision of the county court. The insurer then appealed to the Fifth District Court of Appeal, which reversed both the lower courts on March 23, 2012, holding that the rule "modified and enlarged the statute when it allowed the insured the choice of how to proceed following an unsuccessful mediation that the insured, itself, requested."

The statute provides that if the insurer seeks mediation which leads to impasse, then the insured does not have to submit to appraisal. But here it was the insured that sought mediation and the rule's attempt to allow the insured to avoid appraisal in this situation impermissibly "enlarged the statute."

FIGA Avoids Attorney's Fee Award After Failing To Take Action On Insured's Claim As Statute Of Limitations Was About To Expire

Susan Gena v. Florida Ins. Guar. Ass'n, Case No. 1D11-1783, 37 Fla. L. Weekly D707a (Fla. 1st DCA 2012).

In 2005, an Atlantic Preferred insured's home suffered damage by Hurricane Wilma. Atlantic Preferred thereafter became insolvent and FIGA became responsible for the payment of its covered claims. In 2008, the insured filed her claim with FIGA. On May 16, 2008, about two months after the insured submitted her claim, FIGA sent her a letter informing her that it did not have time to investigate and respond to her claim before the statute of limitations expired on June 2, 2008, and recommended she "seek legal advice immediately." The insured sued FIGA the day before the limitations period expired and the parties eventually proceeded to appraisal, which resulted in a $131,000 award to the insured. The Leon County Circuit Court confirmed the appraisal award but denied the insured's motion for attorney's fees. While an insured is entitled to attorney's fees after obtaining a judgment against his or her insurer (section 627.428(1), Fla. Stat.), when FIGA pays a covered claim on behalf of an insolvent insurer, FIGA is liable for fees only if it "denies by affirmative action, other than delay" a covered claim (s. 631.70). The Circuit Court concluded that FIGA never denied the claim by affirmative action when it told the insured it could not take action before her statute of limitations was to expire. On March 22, 2012, the First District Court of Appeal affirmed, holding that there was no affirmative denial by FIGA and even if there was, it was brought about by delay, which excepts FIGA from a fee award. In dissent, Judge Thomas wrote that FIGA's two month delay was a constructive denial of the insured's claim and that because the insured later received payment for her covered claim in litigation, FIGA should be subject to her fees. There was unrefuted evidence in the court below that the claim could have been adjusted in one week. Otherwise, FIGA "could continue to deny claims with impunity by simply alleging there was "insufficient time" to resolve the claim, thus forcing policyholders to wait months for emergency and necessary payments and repairs and, as here, endure the cost of litigation to obtain their rightful insurance proceeds."

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Radey Thomas Yon & Clark, P.A. believes that service to clients must be efficient and dedicated. Our location in Tallahassee, Florida, provides us the opportunity to be at the heart of the regulatory, legislative, and judicial arenas. The Florida Insurance Report is provided to our clients and friends in a condensed summary format and should not be relied upon as a complete report nor be considered legal advice or opinion.

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