Florida Insurance Report

RADEY THOMAS YON & CLARK

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OIR Expands Forms Certification Process

By: Travis Miller

The Office of Insurance of Insurance Regulation has issued a second order allowing property and casualty insurers to certify their forms' compliance with Florida law rather than going though the regulatory process. The current order applies to all property and casualty lines of business other than workers' compensation. A similar order issued earlier this year was limited to those commercial lines of business subject to the streamlined rate process previously enacted by the Florida legislature.

The OIR's order creates a one-year opportunity for P&C insurers to proceed with forms without prior regulatory approval. Under the order, an insurer may certify to the OIR that a form meets applicable requirements of Florida law. The certification must be made by the company president, CEO, general counsel or chief compliance officer. It must be submitted to the OIR at least 30 days prior to the insurer's using the affected form in the market. If a Notice of Change in Policy Terms also applies to the proposed form, the notice of change also must be submitted.

At its recent business development symposium, the Office of Insurance Regulation encouraged commercial insurers to take advantage of its earlier order. The OIR pointed out that only 36 out of 1200 commercial filings involved certifications. This is likely due in part to the prior order still being relatively new and insurers still evaluating how to prepare and submit certifications.

With this most recent order expanding the certification process, insurers will increasingly consider how to use the certification process to make filings, particularly when the filings relate to statutory changes or other common filing issues.

Florida Supreme Court Affirms 48-Hour Post Event Adjuster Solicitation Ban as Unconstitutional

By: Tom Crabb

On July 5, 2012, the Supreme Court of Florida affirmed a decision by the Florida First District Court of Appeal that the statutory ban on public adjusters initiating contact with a claimant within 48 hours of an event that may be the subject of an insurance claim is an unconstitutional restriction on the public adjusters' right to engage in commercial speech.

A 2008 statute (s. 626.854(6), Fla. Stat.) provided that public adjusters could not "initiate contact or engage in face-to-face or telephonic solicitation" with an insured within 48 hours of an event that may be the subject of a claim. The statute attempted to alleviate perceived pressure by public adjusters on traumatized homeowners in the immediate aftermath of a hurricane.

Continued on Page 5

Inside this issue:

OIR Discusses Status of Federal Health Care Reform	2
Second DCA Affirms Constitutionality of Neutral Evaluation Process	3
An Early Look at the 2013 Legislative Agenda	4
Four Shareholders Nominated to Florida Trend Legal Elite 2012	6
Appellate Updates	7

OIR Discusses Status of Federal Health Care Reform

By: Travis Miller

The Florida Office of Insurance Regulation recently summarized the status of implementation of federal health care reform at a meeting of the Florida Health Insurance Advisory Board. Michelle Robleto, the OIR's Deputy Commissioner overseeing life and health insurance, provided the update.

The OIR's summary began with a recap of the new law, including the reforms effective September 23, 2010. Changes include the new medical loss ratio (MLR) requirement and the rebates provided to policyholders. Among the changes highlighted were the elimination of lifetime limits and restrictions on annual limits, first dollar coverage for preventative care, and the appeals process. Additional reforms mentioned include the requirement to provide dependent coverage up to age 26, the elimination of pre-existing condition exclusions for those under 19 and the elimination of pre-authorization requirements for OB/GYN care.

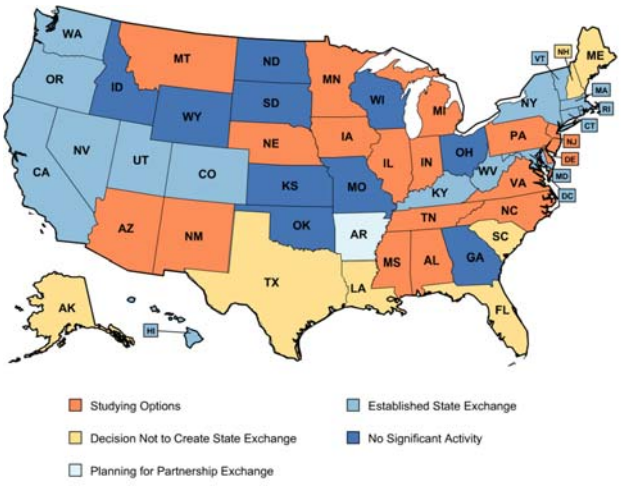
Going forward, several additional elements of the new law remain to be implemented in 2014. These include the establishment of health care exchanges, the potential expansion of Medicaid, and the individual mandate with employer penalties.

The Office of Insurance Regulation previously expressed concerns about the potentially disruptive effect of the medical loss ratio requirement on this state's health insurance market. However, the state was not able to obtain an exemption. This has resulted in $123.6 million being refunded to covered persons, or an average of $168 per person. The averages are $240 in the individual market, $190 in the small group market, and $94 in the large group market. The OIR also summarized the rebates by insurer, with Golden Rule refunding the most in the individual market and both United Healthcare and Blue Cross Blue Shield paying significant refund amounts in the small group market.

The OIR next provided an overview of the health insurance exchange requirement, including the opportunity to decide whether to establish an exchange, enter into a partnership or rely on the federal fallback. With the November 2012 deadline approaching for states to notify the federal government of their intent, Florida has determined that it will not be creating a state exchange. The OIR's presentation included a summary of the various states' current positions on the exchanges.

The Office of Insurance Regulation also listed several concerns with the federal law. First, some observers point out that the law does little to control health care costs. At the same time, there will be significant increases in costs associated with expansions of the Medicaid program and with the increases in benefits. The community rating aspects of the law in effect penalize the young, and the increased standardization suppresses innovation in the market. Ultimately, this leads to fewer consumer choices. Also, the future role of agents in the process is unclear as the mandates and standardization take over.

Finally the OIR identified states that might opt out of Medicaid expansion. Florida Governor Rick Scott has said this state will not expand Medicaid. Likewise, the OIR identified Louisiana, Texas, Mississippi, and South Carolina as states that might opt out.



Source: Henry J. Kaiser Family Foundation: Health Reform Resource as of July 9, 2012

OIR Seeks to Repeal Penalty Guidelines

By: Travis Miller

Florida's administrative rule providing guidelines for insurer penalties might go by the wayside under a proposal by the Office of Insurance Regulation. The OIR will conduct a public hearing on August 16, 2012 to consider repealing the existing rule, 69O-142.-011. The rule has been in effect since November 6, 1994.

The repeal of this rule shows the pros and cons of efforts to reduce administrative rulemaking. In recent years, the executive branch and the legislature have emphasized reducing the number of rules in effect because administrative rules are characterized as burdensome and as impediments to economic development. In the case of the penalty guideline rule, the statutory authority relating to insurer fines has changed since the rule's adoption, and several of the substantive provisions referenced in the rule probably have changed too.

On the other hand, an often overlooked aspect of regulatory rulemaking is that agencies' rules provide guidance and predictability to those governed by them. The penalty guidelines rule categorizes various types of insurer conduct, ranging from the most severe, even willful, violations to minor or technical violations. The rule also discusses the potential impact of aggravating and mitigating factors and the effect of corrective measures. The rule plainly incentivizes insurers to cooperate in identifying potential concerns and correcting them. Admittedly, the incentive to mitigate errors should exist without the rule, and the OIR can exercise discretion and take these factors into account when it identifies deficiencies. However, gone will be the benefit of a rule that tries to create a predictable framework for both the OIR and the companies it regulates.

Second District Court of Appeal Affirms Constitutionality of Neutral Evaluation Process

By: David Yon

In the case *State Farm Florida Insurance Company v. Jairo Buitrago*, (Case No. 2D11-4509) the Second District Court of Appeal quashed an order from a circuit court finding section 627.7074 unconstitutional. The circuit court found that the law unconstitutionally encroached upon the judiciary's powers and, as such, directed the Department of Financial Services to cease and desist from taking any further action on the neutral evaluation regarding the Buitragos' claim. In particular, the circuit court ruled that the neutral evaluation misappropriated its judicial authority by permitting the Department, as an executive agency, to become the trier of fact and by allowing the Department to adopt rules during the proceeding that may not comply with any formal rules of evidence or procedure.

The appellate court concluded that section 627.7074 did not encroach on the circuit court's judicial authority. The court cited a history of accepting such alternative dispute resolution procedures and found no basis to conclude that the neutral evaluation procedures outlined in section 627.7074 were unconstitutional. The court noted that section 627.7074(13) merely states that the neutral evaluator's written recommendation is admissible in a subsequent action. The subsection does not require the circuit court to be bound by the neutral evaluator's recommendation, nor does it require the circuit court to place greater weight on the recommendation than on any other evidence. In addition, the circuit court must still determine preliminary questions concerning the admissibility of the recommendation pursuant to section 90.105 (evidence code), and the court could consider possible exclusion on the grounds of prejudice or confusion pursuant to section 90.403.

An Early Look at the 2013 Legislative Agenda

By: Travis Miller

The campaign commercials on TV are a constant reminder that the fall election cycle is rapidly approaching. The presidential election commands most of the attention, but state legislative races have the most immediate bearing on insurance legislation in this state. As soon as the winners emerge from this fall's elections, the legislature will hold an organizational session and committee weeks will begin. This will rapidly lead to the 2013 session early next year. At this early stage, we can speculate that a wide range of insurance topics are likely to arise in 2013.

Citizens Property Insurance Corporation and the Florida Hurricane Catastrophe Fund

It goes almost without saying that Citizens Property Insurance Corporation and the Florida Hurricane Catastrophe Fund (FHCF) will be the subject of legislative debate next year. Support for reducing Citizens' policy count has grown in recent months as policymakers look to shrink the potential assessment burden and enhance the private market. New CEO Barry Gilway is actively seeking to reduce Citizens' policy count by 500,000 policies or more. However, Citizens serves as a lower cost alternative in many instances because its rates are subject to mandated subsidization -- a statutorily imposed glide path. Discussion in next year's session therefore can be expected to center upon Citizens' rate levels and coverage.

Potential legislation relating to the size of the FHCF also might resurface. Earlier this year the FHCF advanced legislation that would gradually reduce its size and increase its cost over several years. The proposal arises from the FHCF's concern that global economic conditions diminish its ability to issue bonds. The FHCF seeks to provide coverage at levels it considers a "sure thing" rather than facing the possibility of not being able to fully pay.

Federal Health Care Act

The Supreme Court's recent ruling ensures that Florida and other states must evaluate the new health care law and potentially make legislative changes needed to implement it. Governor Rick Scott has said repeatedly that Florida will not expand its Medicaid program. Likewise, Florida is not expected to create a state health insurance exchange. Even so, these issues are likely to evolve over the next several months, and the 2013 session will address (through action or omission) Florida's position on the new law.

Workers' Compensation

Governor Rick Scott and Insurance Commissioner McCarty seek to reduce the cost of doing business in this state. In the insurance arena, the cost of workers' compensation insurance plays into this overall goal. The OIR likely will pursue several changes to help control workers' compensation costs. One topic likely to re-emerge is the issue of drug re-packaging. The OIR also supports the recommendation developed by the Three-Member Panel last year. Drug re-packaging reform was among these recommendations. In addition, the panel recommended that the Division of Workers' Compensation continue its practice of permitting health care providers to electronically submit medical bills to insurers, provided the insurer agrees to accept the submission of electronic medical bills. The panel further recommended that the Division determine whether to mandate electronic billing no later than 2015.

The panel also recommended that the legislature consider repealing section 440.13(15), Florida Statutes, and replace it with an alternative that translates the mandates of section 440.13(16), Florida Statutes, (Standards of Care) into meaningful treatment guidelines. The panel suggested that the legislature study the various types and sources of available practice guidelines to determine which is most appropriate for Florida and determine how it should be developed and implemented.

Finally, the panel recommended that the legislature consider authorizing an interim study to determine whether to

Continued on Top of Next Page

An Early Look… ***Continued from Page 4***

retain, update, amend, or replace the Florida Uniform Impairment Rating Schedule.

Holding Company Model Act

The Office of Insurance Regulation is expected to seek adoption of the NAIC Model Holding Company Act and Regulation. Florida-based insurers will recognize that the OIR recently asked a series of questions about insurers and their holding companies, and it reminded insurers to ensure their holding company registration statements are up to date. The OIR would like to take the further step of adding Florida to the states adopting the model act.

Life Insurance

OIR, the Florida Insurance Council, the American Council on Life Insurance and others are expected to pursue adoption of the interstate compact on life and health products and an expanded annuities suitability law similar to HB 1065 from the 2012 session.

The high-profile topic of Stranger-Owned Life Insurance (STOLI) and its prohibition in Florida also is likely to return.

Personal Injury Protection

Finally, the legislature might not have much appetite to deal with Personal Injury Protection (PIP) reform after the battles of 2012. Nonetheless, implementation of key aspects of the law remains pending, especially as Pinnacle Actuarial Consulting evaluates the expected savings due to the reforms. Insurers' rate filings due by October 1 must reduce rates by ten percent, or else the insurers will be required to demonstrate why the expected savings haven't been achieved.

We can already see that a wide range of topics might be actively debated in the 2013 legislative session. The fall campaign season will determine the cast of participants, and as soon as that is set the committee process will lead us quickly into the debate of these topics. As always, we'll follow the proposals on our website at www.radeylaw.com.

Florida Supreme Court…Continued from Page 1

In 2009, a public adjuster filed suit claiming that his constitutional right to free speech was violated by the statute as it precluded all communication from a public adjuster to an insured for 48 hours. The Department of Financial Services claimed the statute was permissible because it did not preclude written communication from a public adjuster to an insured during those 48 hours. The trial court agreed with the Department and upheld the statute after finding that it regulated the adjusters' conduct, not speech. The First District reversed the trial court, holding that the statute regulated the adjusters' commercial speech and applied to all forms of contact by the adjusters when it barred them from "initiat[ing] contact" with insureds. The First District concluded that the Department failed to establish that the 48-hour ban was justified by the chance that some public adjuster may unduly pressure hurricane victims or otherwise act unethically towards them immediately after a storm.

The Supreme Court of Florida first agreed with the First District that the statute barred all communications by public adjusters for the first 48 hours, not just oral or face-to-face communications. Then after citing U.S. Supreme Court precedent that business solicitation is protected commercial speech, it affirmed that the Department failed to show that the statute was no more "extensive than necessary to serve the State's interests." The State has an interest in protecting such insureds, but the statute was more extensive than necessary in protecting that interest at the expensive of the commercial speech rights of public adjusters.

Jeffrey H. Atwater v. Frederick W. Kortum, Case No. SC11-133 (Fla. 2012)

Four Shareholders Nominated to Florida Trend Legal Elite 2012

The ninth edition of *Florida Trend* Legal Elite has been issued and we are proud to announce that four shareholders have been recognized by their peers this year, two for the first time, Karen Asher-Cohen and Jeffrey Frehn. Donna Blanton and Christopher Lunny, who have consistently been nominated, are also included this year. Lawyers were asked to name those fellow attorneys whom they hold in the highest regard or would recommend to others.

Karen is a member of the firm's Insurance Team, having served many years at the Office of Insurance Regulation, ultimately reaching the position of Deputy Commissioner. Karen has over 25 years experience primarily in the areas of litigation, insurance, and regulatory law. Karen provides advice to clients concerning compliance with state and federal insurance laws and rules, product development, rate filings, formation and acquisition of companies, and reinsurance transactions.

Donna is Board Certified by the Florida Bar in State and Federal Government and Administrative Practice. Donna practices in the areas of Florida administrative law and appellate advocacy, with an emphasis on cases involving public procurement, insurance regulation, energy, telecommunications and public utility law, professional licensing and discipline, and affordable housing. Donna has been nominated for *Florida Trend's* Legal Elite five times.

Jeff over the past 22 years has represented clients before numerous state agencies and at the Division of Administrative Hearings. Jeff's practice areas include healthcare and government procurement. Jeff has represented both private and public entities in bid protests and other disputes involving some of the state's largest contracts. His healthcare representation has included hospitals, physicians, DME providers and other healthcare entities.

Chris heads up the firm's labor and employment practice and also practices corporate law and litigation. Chris represents management and has extensive experience assisting clients in the resolution of issues that arise in all phases of the employment relationship. In litigation, Chris represents public and private employers in all forms of employment related litigation, including breach of non-competition agreements, trade secret concerns, Fair Labor Standards Act litigation, and the defense of race, age, disability, pregnancy, gender discrimination/sexual harassment and whistleblower claims. Chris has been nominated for *Florida Trend's* Legal Elite for the past 6 consecutive years.

Congratulations to our four nominees!

Rates Set for SDTF and Workers' Compensation Administration Trust Fund

By: David Yon

The Department of Financial Services announced that on June 28th the Chief Financial Officer issued an Order setting the assessment rate for the Special Disability Trust Fund (SDTF) for Calendar Year 2013. The Order set the assessment rate for the SDTF for calendar year 2013 at 1.43%. The current rate is 1.44%. The Department also announced that an Order was issued for setting the assessment rate for the Workers' Compensation Administration Trust Fund for Calendar Year 2013 at 1.68%. The current rate is 1.74%.

Appellate Updates

By: Tom Crabb

Five Years Is Too Long To Wait To Assert Coverage Defense If The Insured Has Been Prejudiced By The Delay

United Automobile Insurance Company v. August Chiropractic, Inc., Case No. 10-457 AP (Fla. 11th Cir. Ct. 2012).

In a coverage dispute case, the insurer knew it had a basis to assert a coverage defense more than five years before it moved to add the defense to those already pleaded. Before the coverage lawsuit was filed, during an examination under oath, the insurer discovered that the loss may have been covered by other insurance. During the following five years in which the case continued, the statute of limitations expired on the insured's ability to seek coverage under that other policy. Thereafter the insurer sought the trial court's permission to raise the coverage defense for the first time. The county court denied the request and the insurer appealed to the circuit court. On April 17, 2012, the circuit court affirmed the decision of the county court. Because the insurer knew or should have known of the coverage defense but failed to assert it, the prejudice suffered by the insured in not being able to seek coverage under the other policy outweighed the interests of the insurer in being able to add the defense years later.

Supreme Court Grants Review Of Case Interpreting Replacement Cost Coverage Provision

On June 8, 2012, the Florida Supreme Court granted review of *Amado Trinidad v. Florida Peninsula Insurance Company*, --- So. 3d ----, 2011 WL 1878115 (Fla. 3d DCA 2011). *Trinidad* was decided by the Florida Third District Court of Appeal on May 18, 2011. *Trinidad* is a coverage dispute in which the insured argues that his insurer improperly failed to include amounts for overhead and profit when it paid a claim on his homeowner's insurance policy. Trinidad's home was damaged by fire. His policy called for payment on a replacement cost basis. The insurer accepted coverage and paid the claim but refused to pay amounts sought by Trinidad for overhead and profit. Trinidad did not hire a contractor or submit a repair estimate from a contractor but nonetheless argued that he was entitled to payment for overhead and profit. The Third District held that because the insured had not hired a general contractor, spent any money for overhead and profit, or become contractually obligated to pay for such costs, payment for a contractor's overhead and profit was not owed by the insurer. The Court also held that section 627.7011(3), Florida Statutes, which relates to depreciation holdbacks in replacement cost policies, only requires that replacement costs be paid without a holdback for depreciation, and does not require payment of profit and overhead which have not been incurred nor are likely to be incurred.

Business Pursuits Exception to Homeowners Policy Can Apply To Acts Allegedly For Solely Personal Gain

PURE v. Felger, Case No. 2011CA011404AXX (Fla. 15th Cir. Ct. 2012).

Although the title of this column is Appellate Updates, every now and then a trial court order merits brief mention. Mr. Felger had homeowners and excess liability policies that contained an exception for business pursuits. Felger is the principal of a company that provides psychic hotlines and advertises the same with celebrity endorsers. In a lawsuit in federal court, Felger was sued for "separately and distinctly" (i.e., individually, separately from his company) violating state and federal law relating to those advertisements. He sought coverage for this claim under his liability policies and the insurer refused, citing the business pursuits exception. Felger argued the exception did not apply because the allegations against him were "separate and distinct" from the "legitimate operation" of the company. The Court first noted that business pursuits are those "primarily taken in pursuit of a business interest" and then held that the business pursuits exception applied because Felger's conduct "squarely fell in the natural range and scope of his business pursuits," the advertisement of psychic services. Interestingly, Felger sought coverage under his personal policies after his commercial carrier denied coverage. Essentially, his personal insurer denied coverage claiming the conduct was business and his commercial carrier denied coverage claiming the conduct was personal. The Court declined to reconcile the two: "[We] will not, and cannot, evaluate . . . the conduct of another insurance company not before the Court."

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