Florida Insurance Report

2013 Legislative Edition

RADEY THOMAS YON & CLARK

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

Compromise on Citizens Reforms Heads to Governor

By: Travis Miller

After months of committee meetings and discussions, the Florida legislature reached compromises on changes to Citizens Property Insurance Corporation in SB 1770. The bill now heads to Governor Scott's desk for review.

The months leading up to the 2013 legislative session included discussion of far-reaching proposals that would aggressively restore Citizens to its role as a residual property insurance market. However, by the time the House and Senate compromised with each other on key issues, they passed a bill that its primary Senate sponsor called "half a loaf" during the floor debate. Senator David Simmons, who spearheaded the Senate's efforts, referred to the final version of his bill as a "Citizens-lite" proposal. Nonetheless, he pointed to a number of beneficial changes in the bill that will help the market, even if less dramatically than he might have hoped at the outset.

Significant provisions in the bill include:

- Extending the exemption for medical malpractice insurance from Florida Hurricane Catastrophe Fund assessments until June 1, 2016.
- Exempting activities of Citizens in placing business with authorized insurers from the exchange of business statute.
- Prohibiting public adjusters from taking interests in salvage property without a signed affidavit.
- Adding a structural engineer to the Florida Commission on Hurricane Loss Projection Methodology.
- Gradually reducing the maximum personal residential dwelling limits that Citizens may write. The maximum limit will drop to $1 million as of January 1, 2014; $900,000 as of January 1, 2015; $800,000 as of January 1, 2016; and $700,000 as of January 1, 2017. The limit

Continued at Top of Page 2

Salary Tax Credit Survives

By: Travis Miller

The status of the salary tax credit against insurers' premium tax obligations became one of the highest profile insurance issues of the 2013 legislative session. The salary tax credit allows insurers to deduct 15% of the compensation they pay to Florida-based employees against the premium tax obligations they otherwise would pay. The credit is designed to encourage insurers to hire employees in Florida, bringing jobs to this state that otherwise might end up elsewhere.

Continued at Top of Page 3

INSIDE THIS ISSUE....

Legislature Adopts *Daubert* Expert Testimony Standard for Florida
DOR to Develop Retaliatory Tax Rule
Significant Changes to Annuity Law
Legislature Passes Captive Insurance Company Revisions

Compromise on Citizens

Continued from Page 1

will remain at $1 million in any area for which the Office of Insurance Regulation determines there is not a reasonable degree of competition.

- Precluding new construction seaward of the coastal construction control line from being eligible for a Citizens policy if permitted on or after July 1, 2014.
- Adding a consumer representative to the Citizens board (to be appointed by the Governor).
- Rendering personal residential and commercial residential risks ineligible for Citizens if they receive offers of coverage at rate levels equal to or less than the Citizens renewal premium.
- Allowing assuming insurers to use Citizens forms for up to three years on assumed business without obtaining Office of Insurance Regulation approval.
- Establishing an Office of the Inspector General within Citizens (with the Inspector General to be appointed by the Financial Services Commission).
- Requiring Citizens to report annually on its non-catastrophe loss ratios.
- Treating Citizens as a state agency for purposes of procurements and setting forth a hearing process for disputed procurements.
- Establishing a clearinghouse for personal residential policies to facilitate private market offers before risks enter Citizens.

Quite a few other proposals fell by the wayside as the bill moved from its original introduction to final passage. Some of these proposals dropped off early in the process, while others were in versions of the bill until its final days. Among the ideas that surfaced this year that did not make the final cut are:

- Increasing the "glide path" rate increases taken by Citizens each year.
- Requiring Citizens to charge actuarially sound rates for new business.
- Pegging Citizens rate levels to the rates of the Top 20 writers in the market.
- Reducing the maximum dwelling limits on personal residential policies to $500,000.
- Authorizing Citizens to engage in a surplus note program.
- Allowing Citizens to enter into risk-sharing agreements.
- Exposing Citizens to bad faith lawsuits, subject to the state's sovereign immunity cap.
- Allowing surplus lines insurers to participate in the clearinghouse process.
- Granting authority to appoint Citizens' executive director to the Governor and Chief Financial Officer.

Cancer Treatment Fairness Act Passes Late in Session

By: Travis Miller

The legislature passed the Cancer Treatment Fairness Act late in the 2013 session as part of HB 1159. The act takes effect July 1, 2014. It creates section 627.42391, F.S. relating to health insurers and section 641.313, F.S. relating to health maintenance organizations. The act requires insurers and HMO's to cover prescribed orally administered cancer medications in all of their products for which they otherwise cover cancer treatment medications. The act specifies that the insurers and HMO's also cannot impose cost-sharing requirements for orally administered treatments that are less favorable than cost-sharing requirements for covered intravenous or injected cancer treatments. The requirements, however, do not apply to grandfathered health plans under 42 U.S.C. §18011. The act also provides that if the cost-sharing requirement for intravenous or injected cancer medications are less than $50 per month, the cost-sharing for oral medications may be up to $50 per month.

Salary Tax Credit

Continued from Page 1

The potential repeal of the salary tax credit was not on the industry's radar screen at the beginning of the legislative session. However, Senator Joe Negron proposed the repeal in an effort to raise about $220 million in revenue that would be used to reduce motor vehicle registration fees. The fees would have been reduced by $12 per registration.

The insurance industry rallied to preserve the salary tax credit. Insurers provided numerous examples of service centers being opened or expanded in Florida since the adoption of the credit. The industry was able to show the beneficial effect of these jobs, consistent with Florida's emphasis on job creation over the last few years. Of course, some observers also pointed out that if insurers' costs increase, those costs ultimately are passed on to consumers in the form of higher rates. The net effect of the proposed repeal of the salary tax credit therefore might have been to tell consumers they are receiving a fee reduction in one area while causing them to pay more in another area, meanwhile establishing a disincentive to clean-industry job growth.

The full Senate supported the repeal, and it reportedly became a priority to Senate President Don Gaetz. However, the House of Representatives was not persuaded. The House proposed an alternative approach that would gradually reduce the vehicle registration fees over the next few years while leaving the salary tax credit in place.

The Senate and the House jockeyed back and forth on this issue over the last few days of the legislative session. Ultimately, the Senate tacked the repeal onto an insurance bill that was supposed to contain predominantly non-controversial statutory changes and clean-ups. Because this occurred late in the session, the House then was faced with either passing the bill with the salary tax credit repeal or letting the whole bill (HB 635) die. The salary tax credit therefore survived the session, although at the cost of many unrelated changes that for the most part were non-controversial and traveled through the session without opposition.

Salary Tax Credit Dispute Dooms Omnibus Bill

By: Travis Miller

As is often the case in legislative sessions, the House and Senate had bills that were supposed to carry non-controversial insurance issues. The idea is to segregate statutory clarifications, clean-ups, glitch fixes and other non controversial items from the higher profile issues affecting Citizens Property Insurance Corporation, the Florida Hurricane Catastrophe Fund, and similar topics for which we know opinions vary widely. The goal, of course, is that the bill, dubbed the "omnibus" bill, will pass. Unfortunately, things did not go as planned for this year's omnibus bill because the supposedly non-controversial bill became bogged down with amendments upon which there was substantial disagreement, primary of which was the repeal of the salary tax credit.

Among the many issues that met their demise in the ill-fated omnibus bill were:

- Allowing drivers to provide proof of auto insurance by electronic means;
- Provisions relating to agents in charge of agencies and branch locations;
- Converting insurance agency registrations into agency licenses and streamlining the licensing process;
- Allowing third party administrators to file financial reports on a fiscal year basis;
- Creating a sinkhole stabilization program for Citizens;
- Creating a uniform 120-day cancellation and nonrenewal notice period for personal residential policies;
- Clarifying that notices of changes in policy terms may be sent in their own mailings.

Hasan Decision Reversed and Expert Qualifications Revised in Medical Negligence Bill

By: Karen Asher-Cohen

SB 1792 revises the law relating to *ex parte* communications in a medical malpractice case, and reverses the Florida Supreme Court decision in *Hasan v. Garvar,* 108 So. 2d 570 (Fla. 2012), which was decided in December, 2012. The new law ensures that a non-defendant provider, who may be called as a witness in a medical malpractice action, has access to counsel through their liability carrier.

Specifically, this bill amends section 456.057, F.S., Florida's physician-patient confidentiality statute, and authorizes the release of patient records and information disclosed to a health care practitioner or provider by a patient in the course of the care and treatment of such patient, without written authorization, to "the health care practitioner's or provider's attorney during a consultation if the health care practitioner or provider reasonably expects to be deposed, to be called as a witness, or to receive formal or informal discovery requests in a medical negligence action, presuit investigation of medical negligence, or administrative proceeding."

SB 1792 also revises section 766.106, F.S. in connection with interviews of the plaintiff's treating health care providers. The language added to the statute states that in informal discovery, a prospective defendant or his or her legal representative may interview the claimant's treating health care providers. However, notice must be provided to the claimant or the claimant's legal representative, who then has the responsibility of arranging the interview.

The bill amends section 766.1065, F.S. which addresses the statutory authorization form for release of protected health information. The amendments revise the statutory form to expressly permit "designated treating health care provider(s) ... and his/her/its insurer(s), self-insurer(s), and attorney(s)" to obtain and disclose protected health information for purposes of obtaining legal advice or representation arising out of the medical negligence claim described in a pre-suit notice.

Finally, the bill also revises the qualifications required to give expert witness testimony in a medical negligence action, so that an expert must be in the same, and not just a similar, specialty.

Legislature Adopts *Daubert* Expert Testimony Standard for Florida

By: Karen Asher-Cohen

In 1993, the United States Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, created a new standard for expert testimony in all federal courts, replacing the *Frye* test, which had existed since 1923. The U.S. Supreme Court has since confirmed *Daubert* in subsequent cases. HB 7015 amends section 90.702, F.S., in the Florida Evidence Code, to mirror Rule 702 of the Federal Evidence Code, thereby adopting what has come to be known as the *Daubert* standard. HB 7015 provides that a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion as to facts at issue in a case, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

The bill also provides that facts or data upon which an expert bases an opinion, that are otherwise inadmissible, may not be disclosed to a jury by the expert witness unless the trial court first determines that the probative value of the facts or data in assisting a jury to evaluate the expert's opinion, substantially outweighs the prejudicial effect.

Florida Hurricane Catastrophe Fund Stand-Off Results in No Change

By: Travis Miller

The legislature entered the 2013 session talking about reducing the amount of reimbursement capacity provided by the FHCF. It leaves Tallahassee without changing the limits at all, but not for lack of thorough discussion of the issue.

Lawmakers interested in reducing the state's assessment exposure urged a reduction in the FHCF to be phased-in over several years, from its current $17 billion down to $14 billion over a three-year period. However, other legislators were concerned that reducing the size of the FHCF would create upward pressure on rates. Even though private reinsurance pricing has softened somewhat this year, there's no assurance that would be the case over the next several years as the FHCF would be stepping down its coverage.

Other observers took an opposing view of how the FHCF's capacity should be deployed. Companies writing personal residential insurance in Florida pointed out that the FHCF's industry aggregate retention goes up each year, effectively causing them to purchase more of their reinsurance in the most expensive layers beneath the FHCF. Some lawmakers therefore proposed to leave the FHCF's capacity at $17 billion but to rollback its retention to $5 billion from its current level exceeding $7 billion. Insurers supporting this approach make the case that Citizens, and not the FHCF, poses the biggest assessment threat. This threat can be best mitigated not by reducing the size of the FHCF, but by deploying its capacity in a way that encourages admitted market writings.

These competing views played out to a stalemate. The legislature did not shrink the FHCF, and it didn't roll back the retention either. The end result is that the FHCF will continue to operate under its existing statutory obligations, at least until the issue resurfaces again next year.

Legislature Addresses the Patient Protection and Affordable Care Act (PPACA)

By: David Yon

While Florida did not take any action on new Medicaid choices under the federal law, it did enact CS/SB 1842 for the purpose of making changes to the Florida Insurance Code related to health insurance policies to address provisions of the Patient Protection and Affordable Care Act (PPACA).

The PPACA requires health insurers to make coverage available to all individuals and employers and prohibits exclusions for pre-existing conditions. States are permitted to enforce these provisions, but if the U.S. Department of Health and Human Services (HHS) determines that a state has failed to substantially do so, it must step in and enforce the law. HHS currently is proposing a collaborative agreement with OIR to define each entity's role in the enforcement of the PPACA in Florida.

According to the staff report SB 1842 makes the following changes to the insurance code:

Provides that a provision of the Insurance Code or rule adopted pursuant to the Code applies unless such provision or rule prevents the application of a provision of the PPACA.

Authorizes the OIR to assist the HHS in enforcing the provisions of the PPACA by reviewing policy forms and performing market conduct examinations or investigations for compliance with the PPACA.

Authorizes the Division of Consumer Services within the Department of Financial Services (DFS) to respond to complaints by consumers relating to requirements of the PPACA.

Temporarily suspends the requirement that health insurers and HMOs (insurers) obtain approval from the OIR for non-grandfathered health plans (for which rates must be filed with the HHS) for plan years 2014 and 2015.

Requires insurers to provide a notice to individual and small group policyholders of non-grandfathered health

Continued on Page 12

DOR to Develop Retaliatory Tax Rule

By: Donna Blanton

The Florida Department of Revenue ("DOR") is initiating rulemaking to consider whether fees paid by independent agents in an insurer's state of domicile should be included in Florida's retaliatory tax computations.

The rulemaking efforts, which begin with a workshop on June 18, 2013, follow a decision in April by DOR to cease relying on a non-rule policy that directed DOR's field auditors to include such fees in the computations.

The issue involves DOR's interpretation of section 624.5091, Florida Statutes, which governs the retaliatory tax levied by DOR against foreign insurance companies doing business in Florida. Specifically, DOR in recent years began applying the tax to agent-paid license fees levied in the states of domicile of foreign insurance companies, even though the agents appointed by such foreign insurance companies are independent contractors (not employees of the foreign insurance companies) who bear sole liability for the fees.

DOR historically had not included such agent fees in the retaliatory tax calculation. The changed interpretation was not the result of any statutory change or new rule, thus raising the question of whether DOR had authority to apply the policy. As a result of the changed interpretation, some foreign insurers were subject to higher retaliatory taxes in Florida. Additionally, because these foreign insurers – relying on Florida law and past practices of DOR – did not calculate domicile state agent fees in their original premium tax returns to Florida, the insurers were subject to penalties and interest fees levied by DOR following audits.

The American Insurance Association ("AIA"), which represents more than 300 major property and casualty insurance companies, in February presented the DOR leadership with a draft petition challenging DOR's non-rule policy as contrary to the Florida Administrative Procedure Act ("APA"), which requires state agencies to articulate their policies through rules. After considering the legal issues raised in the petition, DOR stated that the agency would no longer rely on the non-rule policy and would begin the rulemaking process to consider how independent agent fees levied in an insurer's state of domicile should be treated for purposes of the retaliatory tax calculation.

Florida's retaliatory tax is calculated as part of an insurer's premium tax return. As explained by the Florida Supreme Court, the retaliatory provision "imposes a tax upon a foreign insurer doing business in Florida equal to the difference between all taxes, licenses, and fees imposed on Florida insurers by the foreign insurer's state or country of domicile and all taxes, including premium taxes, licenses, and fees imposed on the foreign insurer by the State of Florida." *Gallagher v. State*, 605 So. 2d 62, 70 (Fla. 1992). The purpose of the retaliatory tax is "to promote the interstate business of domestic insurers by deterring other states from enacting discriminatory or excessive taxes." *Department of Revenue v. Zurich Ins. Co.*, 667 So. 2d 365, 366 (Fla. 1st DCA 1995) (paraphrasing *Gallagher*). "The retaliatory tax statute authorizes retaliatory taxation against foreign-domiciled insurers in the amount by which their state of domicile would tax Florida insurers in excess of Florida's comparable tax." *Id.*

Section 624.5091(1)(a) provides in relevant part:

> When by or pursuant to the laws of any other state or foreign country any taxes, licenses, and other fees, in the aggregate, and any fines, penalties, deposit requirements, or other material obligations, prohibitions, or restrictions are or would be imposed upon Florida insurers or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses, and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements, or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this state, so long as such laws of such other

Continued at Top of Next Page

Retaliatory Tax - Continued

> state or country continue in force or are so applied, the same taxes, licenses, and other fees, in the aggregate, or fines, penalties, deposit requirements, or other material obligations of whatever kind shall be imposed by the Department of Revenue upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in this state.

(Emphasis supplied).

This is the statutory language that DOR will be interpreting and must abide by in drafting any new rule. It will be important for DOR to understand that many insurers do not employ captive insurance agents, i.e., agents who write policies for only one insurer. Rather, such insurers appoint independent agents, who also may be appointed by many other insurers. When an agent is appointed by an insurer to write policies in Florida, the insurer pays an original appointment fee of $60 and a biennial renewal of that fee, which also is statutorily set at $60. § 624.501(6)(a), Fla. Stat.

Pursuant to the DOR form that governs the retaliatory tax calculation, an insurer completing its premium tax return typically would enter the Florida appointment fees paid in that year in Column A of the form. The form directs the insurer to complete Column B "using the state of incorporation's tax law to determine tax owed using Florida premiums, personnel, and property." *Id.* The Instructions for completing the form are more specific as to how the insurer should calculate agent's fees for Column B: "Enter the agents' fees paid by the insurer or agent to the State of Florida in Column A. Enter any like or similar fee imposed upon insurers or agents writing premiums in the state of incorporation using the insurer's Florida agents, in Column B."

Historically, many insurers calculated the amount based on what a Florida-based insurer would pay in the foreign insurer's domicile state to appoint agents in that domicile state. In other words, if the appointment fee is $100 in the insurer's state of domicile, the insurer would multiply $100 times the number of agents the foreign insurer appointed in Florida, and that would be the figure placed in Column B. For many years that method of calculating the agents' fees portion of the retaliatory tax was accepted by DOR and was not questioned by DOR auditors.

In recent audits, however, DOR began requiring foreign insurers to include in their calculations the license fees paid by agents, not insurers, in the insurers' domiciliary states. For example, some states charge agents a license fee and a license renewal fee that is separate from the appointment fee paid by the appointing insurer. DOR had recently required foreign insurers to include those agent-paid fees in the insurer's state of domicile in the Column B calculation on the form. The result was a higher retaliatory tax paid by some insurers, as well as interest and penalty charges in many cases.

It is not yet clear whether DOR will seek to formally incorporate its more recent policy concerning agent fees into the new rule. All interested persons will have an opportunity to participate in the workshop and submit written comments to DOR on this issue. The workshop will begin at 10 a.m. on June 18 and will be held at DOR's offices, 2450 Shumard Oak Boulevard, Building One, Room 1220, Tallahassee, Florida.

Donna E. Blanton is a shareholder whose practice focuses on state administrative law and litigation. She was lead counsel on behalf of AIA in connection with the nonrule policy challenge at the Department of Revenue.

An electronic copy of the firm's Florida Insurance Report is available by sending a request to Kendria Ellis at kellis@radeylaw.com. The next edition of our Report will be delivered to your computer's inbox.

Significant Changes to Annuity Law

By: David Yon

In the end, not a single member of the house or senate voted against CS/CS/SB 166 which made significant revisions to the laws in Florida governing annuities. The bill substantially revises sections 627.4554 and 626.99, F.S., by expanding consumer protections previously applied only to sales to consumers aged 65 and above to all consumers purchasing annuities. Most of these protections are based on the NAIC model regulations. The bill also retains current law limiting the surrender charges and deferred sales charges that may be imposed upon senior consumers.

The primary consumer protections contained in the bill as summarized by the senate committees include:

Suitability of Annuities – The bill requires an insurer or insurance agent recommending the purchase or exchange of an annuity that results in an insurance transaction to have reasonable grounds for believing the recommendation is suitable for the consumer, based on the consumer's suitability information. The bill imposes additional duties on insurers and insurance agents when a transaction involves the exchange or replacement of an annuity.

Documentation of Sales Transaction – The bill requires agents and agent representatives to record recommendations made to a consumer.

Prohibitions on Agents – The bill prohibits agents from dissuading or attempting to dissuade a consumer from truthfully responding to the insurer's request for suitability information, filing a complaint, or cooperating with the investigation of a complaint.

Unconditional Refund Period – The bill expands to 21 from 14 days the unconditional refund period for all purchasers of fixed and variable annuities.

Limit on Surrender Charges – The bill retains the prohibition against surrender charges or deferred sales charges in annuity contracts issued to a senior consumer exceeding 10 percent of the amount withdrawn. The charge must be reduced so that no surrender or deferred sales charge exists after the end of the 10th policy year or 10 years after the premium is paid, whichever is later.

Penalties – The bill authorizes the imposition of corrective action, appropriate penalties, and sanctions on insurers, agents, managing general agencies, or insurance agencies that violate the requirements of section 627.4554, F.S. An insurance agent must pay restitution to a consumer whose money the agent misappropriates, converts, or unlawfully withholds.

Legislature Passes Captive Insurance Company Revisions

By: Travis Miller

HB 1191 makes adjustments to Florida's captive insurance company statutes in Chapter 628. The bill revises the definition of qualifying reinsurer parent companies to include those holding a certificate of authority from the OIR and those qualifying for credit for reinsurance under section 624.610(3), F.S. (which includes accredited and trusteed reinsurers).

The bill also allows an industrial insured captive insurance company to insure the risks of an industrial insured group or its stockholders or members and their affiliates, and also to insure the stockholders or affiliates of the parent corporation of the reinsurer. An industrial insured captive insurance company also will be authorized to provide workers' compensation and employers' liability coverage in excess of $25 million in the annual aggregate as long as it maintains at least $20 million in unencumbered capital and surplus.

Under the bill, the deposit requirements applicable to authorized insurers as set forth at section 624.411, F.S. will apply to captive insurers. A pure captive insurer also will be required to submit risk management control standards to the OIR to ensure that the parent or an affiliate is able to exercise control of the risk management function of any controlled unaffiliated businesses to be insured by the pure captive insurer.

The Interstate Insurance Product Regulation Compact

By: David Yon

It is always a very difficult road to traverse when trying to standardize review of products across state lines. Nevertheless, CS/CS/HB 383 "almost" enacts into Florida law, in part at least, the Interstate Insurance Product Regulation Compact (the Compact), model legislation adopted by the National Association of Insurance Commissioners. The Compact provides for the development of uniform national standards for life insurance, annuity, disability income insurance, and long-term care products (including rate filings for the latter two insurance products) and application of these standards to insurer filings. A filing approved through the Compact is effective in all compacting states in which the insurer is authorized to write that line of business. Currently, 40 states (and the Commonwealth of Puerto Rico) have enacted the Compact. Insurers, however, have the option of filing with individuals states, rather than utilizing the Compact.

Under CS/CS/HB 383, however, Florida opts out of all uniform standards related to long-term care insurance, specifically adopts the standards in effect on March 1, 2013 and opts out of future standards and material changes to existing standards. It also provides that Florida opts out of standards that are in conflict with specified consumer protections in Florida law.

The new law also requires the OIR to prepare a report that examines the extent to which Compact standards provide consumer protections equivalent to those under state law and the Administrative Procedure Act for annuity, life insurance, disability income, and long-term care insurance products. The OIR must submit the report to the Senate President, Speaker of the House of Representatives, and the Financial Services Commission by January 1, 2014.

Additionally, the law specifies that the OIR will work with the Compact commission to handle public records requests in accordance with Florida law. The law does not go into effect, other than for the section requiring the OIR's report, until July 1, 2014.

Uninsured Motorist Notice Law Clarified

By: Travis Miller

Pursuant to section 627.727, F.S. insurers must inform policyholders of their uninsured motorist coverage options. Current law provides that if the notice is signed by a named insured, applicant, or lessee, that signature establishes a conclusive presumption there was a knowing acceptance of the coverage limitations. In HB 341, the legislature has clarified that the presumption applies on behalf of all insureds under the policy. This eliminates ambiguity as to the scope of the presumption as to persons insured under the policy but who do not sign the form. The effective date of this change is the date it becomes law, assuming that is the case.

Mutual Insurance Holding Company Act Amended

By: Travis Miller

The legislature in SB 356 amended the mutual insurance holding company statutes to apply to subsidiary insurance companies that are not-for-profit companies or nonprofit health care plans for which the mutual insurance holding company directly or indirectly holds a majority of the voting interest. The bill also amends section 628.271, F.S. governing dividends to stockholders to apply the same standards to dividends or distributions from not-for-profit insurance subsidiaries to a mutual insurance holding company. The bill further expands the definition of financial guaranty insurance companies to include not only stock insurers, but also now mutual insurers.

Legislature Authorizes Electronic Delivery of Commercial Policies

By: Travis Miller

HB 157 modifies section 627.421, F.S. relating to the delivery of insurance policies to allow insurers to deliver commercial insurance policies electronically unless an insured specifically notifies the insurer that it does not consent to the electronic delivery. The insurer will be required in its electronic delivery to inform the insured that it may request to receive a copy of the policy by U.S. Mail.

For purposes of the bill, commercial insurance includes, but is not limited to, workers' compensation, employers' liability, commercial auto liability, commercial auto physical damage, commercial residential, commercial nonresidential, farm owners, and the commercial products exempted from the prior rate approval requirement at section 627.7062(3)(d), F.S.

. . . And Also Allows Insurers to Post Policies on the Internet

In a separate bill (HB 223), the legislature authorized any property and casualty insurer to post its policies and endorsements on the Internet in lieu of delivering physical copies to insureds as long as the policy forms do not contain personally identifiable information. If an insurer chooses to post its coverage forms on the Internet, the insurer must:

- Make the policy documents easily accessible on the Internet as long as they remain in effect;
- Archive expired policy documents on the Internet for at least five years and make any expired documents available to the insured upon request for at least five years after expiration;
- Post the policy documents in a manner that they can be printed and saved using software or applications that are widely used on the Internet without charge;
- Notify insureds in the customary manner of communication, upon issuance of a new or renewal policy, that the insureds may request a paper or electronic copy of the policy and endorsements, without charge. Upon any changes to the policy or endorsements, insurers likewise must notify insureds of their opportunity to request paper or electronic versions of the documents without charge;
- Identify in the declarations page the exact policy form and endorsements that apply.

Assuming the Governor signs this bill into law or allows it to become law without signature, it will become effective July 1, 2013.

Forms Certification Process to Continue for Commercial Lines - Not Personal

By: Travis Miller

The legislature altered Florida's form and rate filing statutes in SB 468. Perhaps most significantly, the legislature specified that a forms certification process similar to the one currently in effect by OIR order will continue for commercial property and casualty insurance. However, personal lines and workers' compensation are specifically carved out of the statutory change and will be subject to the forms review and approval process. The new statute is effective July 1, 2013, assuming the bill becomes law.

The same statute expands the lines of commercial insurance that are not subject to prior rate review and approval. Newly exempted lines include medical malpractice insurance for facilities that are not hospitals, nursing homes or assisted living facilities, and medical malpractice insurance for health care practitioners who are not dentists, physicians, osteopathic physicians, chiropractic physicians, podiatric physicians, pharmacists or pharmacy technicians.

The bill also extends the exemption of medical malpractice from the Florida Hurricane Catastrophe Fund assessment base until June 1, 2016. This provision also is set forth in other legislation passed in the 2013 session.

CFO Gets More Power Over State Contracts

By: Brittany Adams Long and Donna E. Blanton

The Legislature gave Florida's Chief Financial Officer ("CFO") more authority over state contracts in a bill that passed on the last day of the 2013 session, but he did not get all that he wanted.

The measure, HB 1309, gives the CFO authority to audit grant agreements and agency contracts to ensure the adequacy of internal controls for complying with the terms of the agreement. The bill provides that the CFO perform an audit of executed contracts and discuss the audit with the official whose office is subject to the audit. The agency head has 30 days after the receipt of the final audit report to provide an explanation or rebuttal concerning findings requiring corrective action. The bill does not specify what happens if an agency head fails to respond or act on the audit findings.

The bill stops short of giving the CFO power to conduct an audit of an agency's contract before the contract is executed. Earlier versions would have given the CFO broad power to determine whether the contract was legal and whether it included sufficient information such as a clear statement of work, deliverables, and performance measures. The CFO would have had the authority to return a contract to an agency if the CFO did not find it sufficient.

CFO Jeff Atwater, an independently elected Republican Cabinet officer who heads the Department of Financial Services, has sought in recent years to expand his oversight of state contracting, which is now largely governed by the Department of Management Services ("DMS"), an agency under the sole control of Republican Gov. Rick Scott. The most high-profile battle between the agencies concerned a contract entered into by DMS that included payments for artwork at the new First District Court of Appeal, dubbed the "Taj Mahal" in the press for its $50 million price tag. Atwater, whose office has the responsibility for paying the state's bills, refused to pay the gallery that framed the historical photographs, which led to lawsuits against the agencies. The matter ultimately was resolved through a settlement agreement that resulted in the gallery owner receiving the money she was due under the contract.

HB 1309 makes a number of other changes in state contracting, including a requirement that all state vendors agree to comply with Florida's broad public records laws. Contractors would be required to maintain records related to a public contract as a public agency does, to provide access to public records, and ensure that exempt and confidential records are not disclosed. This provision may allow members of the public to seek public records directly from a private contractor doing business with a state agency, although it's not immediately clear if the civil or criminal penalties in section 119.10, Florida Statutes, relating to violations of the state's public records laws, would apply to a private contractor.

The Legislature also enacted HB 5401, amending the "Transparency Florida Act" relating to state contracting. The bill expands the existing statutory requirement that contract information be posted on a website maintained by DFS.

Brittany Adams Long is of counsel to the Radey law firm. She previously worked at the Florida Department of Management Services ("DMS"), where she had responsibility for state contracting matters. Donna E. Blanton is a shareholder who specializes in Florida administrative law and litigation, including procurement disputes.

PPACA - Continued from Page 5

plans that describes or illustrates the estimated impact of the PPACA on monthly premiums.

Makes the following changes that would allow or require insurers to take certain actions that would preserve the status of grandfathered health plans which, in general, are plans under which an individual was insured on March 23, 2010, and which are exempt from many of the requirements of the PPACA:

If a policy form covers both grandfathered and non-grandfathered health plans, the bill allows an insurer to non-renew coverage only for all of the non-grandfathered health plans, subject to certain conditions.

Requires that claims experience for grandfathered health plans be separated from non-grandfathered health plans for rating purposes, as also required by the PPACA.

Allows an insurer to discontinue a policy form that does not comply with the PPACA without being subject to the current prohibition on selling a new, similar policy form after a policy form is discontinued.

Requires DFS registration of navigators, who are individuals who provide assistance and information to an individual regarding choices for enrollment in a qualified health plan (QHP) and facilitates enrollment in a QHP.

Provides two different definitions of "small employer" – one for grandfathered health plans and one for non-grandfathered health plans.

Requires the dissolution of the Florida Comprehensive Health Association (FCHA) by September 1, 2015.

Specifies that health insurers and HMOs may non-renew individual conversion policies if the individual is eligible for other similar coverage.

Repeals the statute that establishes the Florida Health Insurance Plan, which has never been implemented.

How these provisions are implemented will, obviously, be critical to the insurance industry in Florida. We will stay on top of that process. A more comprehensive version of this article can be found on the blog page of our website at www.radeylaw.com. Please do not hesitate to contact us for more information.

Our Insurance Team

Karen Asher-Cohen
karen@radeylaw.com

Donna E. Blanton
dblanton@radeylaw.com

Bert L. Combs
bcombs@radeylaw.com

Thomas A. Crabb
tcrabb@radeylaw.com

Angela D. Miles
amiles@radeylaw.com

Travis L. Miller
tmiller@radeylaw.com

Harry O. Thomas
hthomas@radeylaw.com

David A. Yon
david@radeylaw.com

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.

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