Florida Insurance Report

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RADEY

Radey Named One of the Best Companies to Work for in Florida - Third Year in a Row

The firm again has been named one of the Top 100 companies to work for in Florida by *Florida Trend* magazine. This marks the third consecutive year that Radey has been named as one of the best companies to work for in Florida.

"We are pleased to again be recognized by *Florida Trend* as one of the top places to work in Florida," said firm president Travis Miller. "We are privileged to maintain an outstanding work environment as we strive to assist our clients. Being recognized in this manner encourages us to raise the bar for future years."

Florida Trend goes through a detailed process to determine the best places to work. The process begins with a survey inquiring about companies' hiring practices, benefits, work environment, community involvement, and other attributes. This is followed by surveys sent individually to all of a company's employees. The Top 100 places to work include large, medium, and small employers. Of the 31 small employers that made this list, the firm ranked 10th.

Radey is one of only four Tallahassee-based companies to make this year's Top 100 list. In addition, the firm is one of only seven law firms to make this list this year. *Florida Trend* made particular mention of Radey's employee benefits as a factor in making the firm a top place to work.

Laura Dennis joins the Radey Team

The firm is pleased to announce that Laura Dennis has joined the firm as an associate. Laura joins the firm after serving for the last two years as a clerk to Judge Patricia Fawsett of the United States District Court for the Middle District of Florida.

Prior to her judicial clerkship, Laura graduated among the top ten students in her class at the Florida State University College of Law. She holds an undergraduate degree in finance from Florida State University, where she graduated summa cum laude. Laura was previously an intern at the First District Court of Appeal in Tallahassee and for the Securities and Exchange Commission in Atlanta.

"Laura is a talented lawyer who comes to us with valuable experience as a judicial clerk and with a background in finance," said firm president Travis Miller. "This unique combination will be helpful as we serve our clients in regulated industries like insurance."

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Florida Auditor General Audits Office of Insurance Regulation

By: Karen Asher-Cohen

The State Auditor General released its Operational Audit of the OIR last month, making the following findings:

> ***Finding No. 1***: Office policies and procedures should be enhanced to require that the reasoning and judgments supporting Property and Casualty (P&C) rate filing decisions be sufficiently documented.
> ***Finding No. 2***: The Office did not use existing accounting codes to facilitate the preparation of, nor had the Office prepared, detailed analyses comparing regulatory costs to the regulatory fees and taxes designated to cover those costs.
> ***Finding No. 3***: Periodic information technology (IT) user access reviews had not been conducted by individuals knowledgeable of user roles and responsibilities. Additionally, Office-specific procedures addressing Office IT applications had not been developed.
> ***Finding No. 4***: The Office had not timely obtained and reviewed the independent service auditor's report related to the controls designed and established by the National Association of Insurance Commissioners for the database that maintains the P&C insurer financial information used by the Office in its financial analyses processes.

While this audit focused on the Life and Health forms review process and market investigations, the audit also followed up on findings from the 2011 and 2012 reports to determine if the Office had taken any action to address the previous findings. Regarding Finding No. 1 concerning the lack of documentation on property and casualty rate filing decisions, the Report states that, similar to its 2011 report, "... our evaluation of the process used by Office staff to review P&C rate filings disclosed that, while Office staff documented responses to certain criteria when evaluating the reasonableness of a rate filing, Office policies and procedures did not require that Office staff document the reasoning, judgments, and calculations supporting those responses or the rate filing decisions made." The audit report continues: "While Office management indicated in response to our audit inquiry that its existing policies and procedures were adequate, the lack of supporting documentation for P&C rate filing decisions limits the Office's ability to later explain specific actions taken regarding the rate filing and to support the reasonableness of the rate filing decisions made." The Recommendation to the OIR reiterates that the Office should "enhance its policies and procedures to require Office staff to sufficiently document the reasoning and judgments supporting P&C rate filing decisions."

In her August 29, 2013, response to the Auditor General, OIR Chief Of Staff Audrey Brown stated the following regarding the lack of documentation on property and casualty rate filing decisions: "The Office will enhance its transmittal documentation to provide additional detail of the reasoning and judgments supporting property and casualty rate filing decisions. The Office will also look into using an outside actuary to review its documentation of rate filings to further ensure its filings are fully supported and files are complete."

Additionally, as outlined above, the Auditor General's report also included recommendations to seek legislative changes to recover regulatory costs and revenues, to have IT user access reviews performed by knowledgeable supervisory staff, and to timely secure and document the review by an independent service auditor of the NAIC controls for the Financial Data Repository.

First DCA Hears Oral Argument Relating to Florida's No-Fault Law

By: Bert Combs

House Bill 119 (2013) made substantial changes to Florida's Motor Vehicle No-Fault Law that became effective January 1, 2013. After this date, to be eligible for no-fault medical benefits, persons injured in motor vehicle accidents are required to receive initial treatment and care within 14 days from specified providers. Up to $10,000 in medical benefits are available for emergency medical conditions and up to $2,500 in medical benefits are available for non-emergency medical conditions. Among other changes, House Bill 119 also excluded massage and acupuncture from covered medical benefits. These no-fault benefits are provided by statute as an alternative to the right to sue for injuries wrongfully caused by another person.

On January 8, 2013, a constitutional challenge was filed in Leon County Circuit Court by a number of plaintiffs claiming that the law (1) violates their procedural and substantive due process by taking away their ability to contract and earn a living through their chosen profession; (2) violates substantive due process because it is not rationally related to a legitimate public policy or objective; (3) violates the single subject rule and the separation of powers; and (4) violates the right of the people to have access to the courts to seek redress for their injuries.

In response to this lawsuit, Judge Terry Lewis entered a temporary injunction against the Florida Office of Insurance Regulation (OIR) prohibiting enforcement of certain provisions of the No-Fault Law subject to a full hearing on the merits. The judge based his decision only on the plaintiffs' allegation that the law affects access to the courts. The injunction was entered on March 18, 2013 and applies to the sections of HB 119 that "require a finding of emergency medical condition as a prerequisite for payment of no-fault benefits or that prohibit payment of benefits for services provided by acupuncturists, chiropractors and massage therapists."

The Office of Insurance Regulation initially received an automatic stay of the circuit court injunction, and the injunction did not immediately go into effect. However, OIR's request to keep the stay in effect pending a full hearing on the merits was later denied. Therefore, the temporary injunction is now in effect subject to an appeal that OIR filed at the First District Court of Appeal. Various trade associations representing insurers and medical professions whose interests are affected by the appeal have also filed amicus briefs with the appellate court.

Among other things, OIR argues in its appellate brief that the temporary injunction is facially defective. OIR also argues that the First District Court of Appeal should address the plaintiffs' likelihood of success on the merits of its case and reverse the trial court altogether. Finally, OIR states that the plaintiffs cannot demonstrate the irreparable harm that is required for the injunction or that the injunction would even address their purported harm, or that the equities weigh in plaintiffs' favor.

Each side argued their case at oral argument held on September 17, 2013. The appellate court's questions focused primarily on the constitutional basis on which the trial court's injunction was based – a denial of the plaintiffs' access to court. The judges questioned both sides about the plaintiffs' legal standing to bring the case by asking whether the plaintiffs had been injured and whether the revisions to the No-Fault Law actually denied any of the plaintiffs' access to bring a lawsuit. The court also questioned whether it needed to address whether the temporary injunction was properly entered if the plaintiffs did not have legal standing to bring the action.

The First District Court of Appeal has entered an order giving the pending appeal expedited treatment. However, it is unclear how quickly the appellate court will act following oral argument or the scope of any opinion that the appellate court will enter. Until then, the uncertainty surrounding the changes that the Florida Legislature enacted in HB 119 will continue.

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CFO Atwater Writes to Commissioner McCarty to Lower Property Rates

By: Karen Asher-Cohen

CFO Jeff Atwater sent a letter to Commissioner Kevin McCarty, asking why homeowner's rates in Florida were not declining now that reinsurance costs are apparently going down. Atwater wrote: "For more than a decade, insurance companies have argued that their property insurance rate increases have been due in large part to rising reinsurance costs. But if this is their justification for years of rising rates, can you please explain why a significant drop in reinsurance costs worldwide has not yet corresponded with a significant drop in property insurance rates for Floridians?" He said he based his questions on reports he had read this year by reinsurance professionals and analytics firms, that reinsurance costs had gone down approximately 15-20%. The CFO concluded by saying, "... right now there is no evidence that Florida families are benefitting as they should be from the drop in reinsurance rates."

Commissioner McCarty responded two days later and cited to various reasons why a significant drop in reinsurance costs has not necessarily translated into an immediate drop in homeowner's rates in Florida. First, McCarty stated that there is no firm rule dictating how much reinsurance a company must buy, and that in fact, many Florida property insurance companies will buy more reinsurance when reinsurance rates drop. This will result in maintaining homeowner's rates while giving companies additional coverage to pay claims after a catastrophic event.

Second, McCarty pointed out that not enough time has passed for insurers to reflect any decreases in their reinsurance premiums, given the terms of reinsurance contracts, and the time involved in compiling, filing, and receiving approval for a rate filing, and then the time it takes to program and send policyholder notices for a potential rate change.

The Commissioner also noted that not every insurance company will realize a decrease in its reinsurance costs, and that the cost to purchase reinsurance from the Florida CAT Fund has actually increased this year. Moreover, companies may still require premium increases due to residual rate need and current loss experience and expenses.

McCarty's letter closed by saying: "I agree that it is necessary to provide economic relief to Florida families and the Office will remain vigilant in its review of rate filings in accordance with Florida law to ensure all possibilities for such relief are identified and passed along to consumers."

OIR Issues Informational Memorandum Regarding Changes to Annuity Law

By: Karen Asher-Cohen

OIR issued Informational Memorandum No. OIR-13-02M, entitled "Insurers Selling Annuity Contracts in Florida." The stated purpose of the Memorandum is to notify insurers selling annuities of the 2013 legislative changes in SB 166 (Laws of Florida Chapter No. 2013-163) to sections 626.99 and 627.4554, F.S. The new law takes effect October 1, 2013. OIR's Memorandum specifically directs insurers to the change in section 626.99, F.S. (section 2 of the new law), which now requires unconditional refunds be given to all fixed and variable annuity consumers, not just those 65 years of age and older. Also, the refund period has been increased from 14 to 21 days, and insurers must now provide certain disclosure statements on the cover page of the annuity contract to all consumers, again not just those 65 years of age or older.

While not specifically mentioned in the Memorandum, the new law also changed the entire wording of section 627.4554, "Annuity Investments." The new section also incorporates by reference specific DFS forms, such as the Annuity Suitability Questionnaire and the Disclosure and Comparison of Annuity Contracts form. Importantly, new paragraph (5)(i) states that: "Sales made in compliance with FINRA requirements pertaining to the suitability and supervision of annuity transactions satisfy the requirements of this section. This applies to FINRA broker-dealer sales of variable and fixed annuities if the suitability and supervision is similar to those applied to variable annuity sales."

Citizens Policies Issued to Nonresidents Draws Attention

By: Travis Miller

Recent attention to the number of policyholders who do not reside in Florida but are insured by Citizens Property Insurance Corporation might prompt legislation in the 2014 session. Representative Bill Hager of Delray Beach recently suggested that lawmakers could consider prohibiting people who don't live in Florida from being eligible for coverage from Citizens. Hager said that notwithstanding efforts in 2013 to reduce Citizens' size, "... the figures of current out-of-state and out-of-country policies are evidence that there is still more work to be done."

Citizens reportedly has issued nearly 180,000 policies to people who live outside of the state. Considering that Citizens' rates are capped under the glide path, this is perceived as "subsidizing" nonresidents at the expense of Florida residents who will be required to pay assessments on various types of property and casualty insurance policies following depletion of Citizens' surplus. Diverse groups such as the Florida Chamber of Commerce, Associated Industries of Florida and the Florida Wildlife Federation are said to favor revisiting this issue.

Middle District Interprets Structural Damage Requirement

By: Travis Miller

The United States District Court for the Middle District of Florida has interpreted the "structural damage" threshold for sinkhole losses in an Order issued September 3, 2013, in *Gonzalez v. Liberty Mutual Insurance Company*. The court began its discussion by providing several examples of logical flaws that can arise when words having more than one meaning are used out of context. The court used this predicate to assert that many Florida state courts have rendered erroneous decisions because of flawed reasoning as to what constitutes "structural damage."

Broadly summarized, Florida's sinkhole statutes indicate that coverage is available when sinkhole activity causes "structural damage to a building." Many courts, and in particular Florida state courts, have reasoned as follows: (1) the statute refers to structural damage; (2) a building is a structure; (3) therefore, coverage exists if there is any damage to the building. The *Gonzalez* court traced Florida's sinkhole statutes to show that it is wrong to simply equate buildings to structures.

In *Gonzalez*, the plaintiff essentially made the simple argument–the building was damaged, and therefore the structural damage standard was met. The insurer, on the other hand, argued that structural damage exists only when damage affects the structural integrity of the building. The court agreed with the insurer, first because principles of statutory construction show that structural damage means something more than merely damage to the structure. The court reviewed the development of Florida's sinkhole statutes between 1981 and 2005. The court further interpreted the statutes in light of the legislature's expressed intentions in the introductory language in the 2011 statutory revisions. The court found that the 2011 revisions were intended to clarify the meaning of structural damage because the legislature essentially was disagreeing with the Florida courts' incorrect application of the structural damage standard. The court also found that when statutes refer separately to "physical damage" and "structural damage," it is clear that structural damage must mean something more than mere damage to the building. The court supported its view by citing numerous cases from other jurisdictions interpreting "structural damage" in contexts other than sinkhole claims. The court found that courts regularly interpret structural damage to mean damage that affects the structural integrity of a covered building.

The court sided with the defendant insurer, finding that something more than mere damage to a building is necessary to show the required "structural damage" under the sinkhole statutes. The court directed that a judgment be entered in favor of the insurer, with the judgment declaring, "Structural damage to the building is damage to a part, material, or assembly of the building that affects the stability of the building or that supports a dead or designed live load, and the removal of which part, material, or assembly could be expected to cause a portion of the building to collapse or fail."

Several Lawsuits Filed Challenging SB 1792

By: Laura Dennis

The 2013 legislative session concluded on May 3, 2013. One bill, SB 1792, was passed that relates to the litigation of medical malpractice cases. Specifically, SB 1792 sought to amend section 766.106, Florida Statutes, to permit a prospective defendant in a medical malpractice action to conduct an ex parte interview with a claimant's treating health care provider as part of informal discovery. SB 1792 also sought to amend section 766.1065, Florida Statutes, by revising the form for the authorization of the release of protected health information, providing for the release of protected health information to certain health care providers, insurers, and attorneys, and authorizing certain individuals and entities to conduct ex parte interviews with a claimant's health care providers. SB 1792 was signed by the Governor and became effective on July 1, 2013.

Under the previous version of section 766.106, a prospective defendant could not interview the claimant's treating health care provider without the consent of the claimant. Section 766.106(6)(b)(5) now provides that:

> A prospective defendant or his or her legal representative may interview the claimant's treating health care providers consistent with the authorization for release of protected health information. This subparagraph does not require a claimant's treating health care provider to submit to a request for an interview. Notice of the intent to conduct an interview shall be provided to the claimant or the claimant's legal representative, who shall be responsible for arranging a mutually convenient date, time, and location for the interview within 15 days after the request is made. For subsequent interviews, the prospective defendant or his or her representative shall notify the claimant and his or her legal representative at least 72 hours before the subsequent interview. If the claimant's attorney fails to schedule an interview, the prospective defendant or his or her legal representative may attempt to conduct an interview without further notice to the claimant or the claimant's legal representative.

Since the passage of SB 1792, at least five separate lawsuits have been filed in federal and state court challenging the ex parte provisions of SB 1792. At least two federal lawsuits have been filed in the United States District Court for the Southern District of Florida, one lawsuit has been filed in the United States District Court for the Northern District of Florida, and state cases have been filed in both Broward and Escambia County. The lawsuits contend that the ex parte provision, now codified as section 766.106(6)(b)(5), Florida Statutes, violates the state's privacy laws and the federal privacy provisions in the Health Insurance Portability and Accountability Act ("HIPAA"). The lawsuits also challenge the revisions made to the "Authorization For Release of Protected Health Information" that a patient's doctor signs under section 766.1065, Florida Statutes. In particular, the lawsuits contend that the revised standardized form would authorize the release of information in a way that exceeds the limited release of protected health information as allowed by HIPAA.

Judge Robert Hinkle of the United States District Court for the Northern District of Florida has scheduled a hearing for September 18, 2013, on the lawsuit filed in the Northern District. Judge Hinkle will hear arguments about issuing a preliminary injunction and temporary restraining order.

Experience.Service.Success.

The Radey Law Firm 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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