



FLORIDA INSURANCE REPORT

RADEY THOMAS YON & CLARK

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Keeping You Informed About Florida

2013 Legislative Session - A Range of Insurance Issues to Cover

By: Travis Miller, Nick Iarossi and Ron LaFace, Jr.

The New Year's celebrations are over and it's back to work in Tallahassee. Before the annual legislative session begins in March, the Florida Legislature will hold a series of committee weeks to begin hearing legislative proposals for 2013. The insurance-related issues under consideration will include: health insurance and specifically implementing provisions of federal healthcare reform; property insurance; workers' compensation, and bad faith/tort reform. The following are major insurance initiatives we expect to receive a lot of attention this year.



Implementation of Federal Healthcare Legislation

Florida Leaders delayed implementation of the Affordable Care Act until last fall's presidential election. With the election over and repeal of the expansive federal act not attainable, the Legislature must consider options for implementing it. This is likely to be challenging as the law remains unpopular among many in Florida's Republican-dominated legislative and executive branches. Long-time observers of Florida's legislative process will recognize that despite the Legislature's efforts to consider these issues early and throughout the session, they always seem to go down to the wire. We'll likely be hearing a lot about the Affordable Care Act, and its financial impact on the state, over the next four months. The most controversial issues are whether to expand Medicaid eligibility considering most of the federal funding associated with the expansion expires after three years and whether to implement a state-based insurance exchange or rely on a federal exchange as a default. Both the House and the Senate have established select committees on implementation of federal healthcare reform and will be considering these issues and other associated issues for legislative action this session.

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Get to Know...

By: Karen Asher-Cohen



JACK McDERMOTT is the new Director of Life & Health Product Review at the Florida Office of Insurance Regulation. Jack was born in Portland, Oregon and was raised in Stayton, Oregon – a rural town in the Willamette Valley. He holds a Bachelor of Arts (B.A.) in Political Science from Colgate University, a Master in Public Policy (MPP) from Harvard University, and a Bachelor of Business with a concentration in Risk Management & Insurance from Excelsior College. Before coming to the (then) Department of Insurance in 1996, Jack held a variety of jobs, including working in the telecommunications industry and the political consulting industry. Jack has held multiple positions at the OIR since starting in 1996.

Recently, I asked Jack the following questions.

1. What do you see as your mission as the new Director for Life & Health Product Review?

My goal is to maintain the outstanding performance of our unit, and to help companies comply with Florida's statutes and rules to quickly gain approval for their products to be sold in our state.

2. We're heading into the 2013 Legislative Session. Will you be looking for any changes in your area?

Obviously, the federal healthcare overhaul is the most significant issue confronting policymakers during the 2013 Legislative session from a Life and Health perspective. We look forward to lending our expertise to assist policymakers to make decisions that benefit all Floridians.

3. What's the best part of your job?

The best part of my job is the opportunity to meet with industry representatives to understand the workings of the marketplace, and to be the first to learn about innovative products the industry is developing.

4. What's the worst part of your job?

There really is not a "worst" part of my job; one of the most challenging parts of my job is Florida's short legislative ses-

sion that creates a frenetic atmosphere during those few months in the Spring when our Office is asked to analyze and comment on numerous legislative proposals that may impact the marketplace.

5. You've held different jobs here – what role do you like best?

All of the jobs have their advantages. I enjoyed the role as policy analyst from an analytical standpoint. I have also enjoyed being the L&H Examination coordinator, which gave me the opportunity to visit companies on-site to observe their operations. Finally, I enjoyed my most recent role as Director of Communications to assist the public in understanding the Office's accomplishments. In that respect, I enjoy my current job the most as it incorporates all elements of my previous work including policy analysis, communications, and an understanding of the industry.

6. What are the biggest challenges facing the OIR these days?

Given my current position, I should probably only address this from the Life & Health perspective. In that sense the answer is obvious – the changing landscape created by federal healthcare overhaul, working with Florida's policymakers to understand and develop a strategy for responding, and the impact federal healthcare overhaul will have on the marketplace.

7. How has the OIR changed since you first came here?

The greatest change occurred in 2003 during the Cabinet re-organization when the Florida Department of Insurance became the Florida Office of Insurance Regulation – and some of the insurance functions were divided between the OIR and the newly created Florida Department of Financial Services.

8. What advice would you give life and health companies that want to bring new products to the market?

My best advice is to set up a pre-filing conference with our forms and rates staff to outline the new product prior to

making an official form and rate filing. Some helpful information that a company can provide could include how the company plans to market the product, the statutes and rules the company believes govern the product, whether similar products have already been approved for sale in our state, and if not – whether this product has been approved for sale in other states.

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Citizens Property Insurance Corporation

Should Citizens Property Insurance Corporation be a residual market, or a competitive market selling products below their actuarially indicated rates? Individual legislators have diverging views on this, and certainly the public policy emanating from the legislature as a whole has varied over time. Most recently, more policymakers are expressing concern with the adverse impact Citizens assessments could have on all Floridians. Most Floridians do not have a policy with Citizens, but all Floridians eventually will pay its assessments to make up for years of selling insurance at levels that are not actuarially sound.

Senator David Simmons, chair of the Senate Banking and Insurance Committee, says major parts of Florida's property insurance market are "broken or are at least in need of significant repair." Citizens' continuing influx of new business at the rate of about 8000 policies per week certainly fits this description. On the other hand, some lawmakers are already expressing concern with proposals that would alter the state-mandated glide path cap on Citizens' rates. Chairman Simmons' committee heard testimony from Commissioner Kevin McCarty and members of the industry on how best to depopulate Citizens. Citizens President Barry Gilway also presented his ideas on a clearinghouse to help keep policies out of Citizens by seeking private company quotes. We also expect Citizens' proposed surplus note program or similar concepts to surface. The House Insurance Chairman is looking for Citizens depopulation ideas, but will also review the implementation of a wind-storm mitigation credit process to ensure fairness of credit application and hardening incentives.

9. How do you get away from it all?

My wife and I enjoy running and travel. I have especially enjoyed the marathon distance having completed an official marathon race (or longer) 158 times. I have now completed a marathon in 38 different states, and have run the Boston Marathon 11 consecutive times (2002-2012). However, my favorite experience was running the Maratona di Roma (Rome Marathon) with my wife Laura in March of 2012.

Florida Hurricane Catastrophe Fund

The legislature might entertain proposals to reduce the maximum single-year payout of the Florida Hurricane Catastrophe Fund (FHCF). The FHCF advanced a similar proposal last year, but the proposal did not pass due to concerns about its impact on primary rate levels--by shrinking the FHCF too much or too fast, insurers would need to raise their rates, putting pressure on policyholders. At the same time, the disparity between private market rates and the capped rates at Citizens would grow, compounding Citizens' existing exposure problem. Jack Nicholson and the FHCF have been talking about a revised approach (sometimes referred to as a "right-sizing" proposal) that would make smaller changes to the FHCF over time.

Workers' Compensation

Re-packaging prescription drugs at medical clinics promises to be a hotly contested issue in the workers' compensation arena. The Florida Office of Insurance Regulation has identified drug costs as a cost-driver that is causing workers' comp rates to go up again after years of reductions. Other groups like the Florida Medical Association have said they will be involved this year, arguing that the costs are overstated and changing the system would adversely affect patient access to medications.

The 2013 legislative session will offer a wide range of insurance issues to follow. We will continue to monitor them on our website at www.radevlaw.com

Cabinet Passes Emergency Rule to Implement New PIP Form

By: *Karen Asher-Cohen*

In order to prevent anticipated “confusion in the marketplace,” the Florida Cabinet unanimously passed an emergency rule implementing changes to a form filled out by auto accident victims seeking health care. The new form specifies that patients can only receive up to \$2,500 in non-emergency care. The Legislature passed HB 119 during the 2012 legislative session, implementing the non-emergency care cap, which took effect January 1st. Some insurers were worried patients would seek care expecting their personal injury protection (PIP) insurance to cover the expense, leading to lawsuits.

“In an abundance of caution for the industry as well as to

protect consumers, we want to make sure consumers are advised of their benefits, specifically with regard to the new policies after January 1,” Insurance Commissioner Kevin McCarty told Cabinet members. The Office of Insurance Regulation is also seeking to implement the new form under the normal rule-making procedures, but because so many of HB 119’s provisions took effect on January 1st, an emergency rule adopting the new form in December was necessary.

A copy of the new form can be found on our website at www.radeylaw.com.

Bills Filed that Affect Citizens Property Insurance Corporation Rates

By: *David Yon*

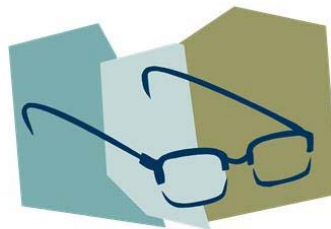
One of the first bills of the year directed at Citizens would limit the corporation’s ability to charge new policyholders an actuarially sound rate. SB 96 and its companion bill HB 107 would expressly limit any rate increases implemented by Citizens to 10% for any new or existing policies. Citizens has been considering charging new policyholders the full actuarially sound rate. Since new policyholders may have been charged more or less than Citizens proposed rates, it logically follows that the 10% cap should not be applied to those policies. Many argue that charging the appropriate rate would minimize potential deficits for Citizens and also limit the rapid growth the corporation is still experiencing.

People on the Move at OIR

By: *Karen Asher-Cohen*

Commissioner McCarty has named Wenceslao Troncoso as his new Deputy Commissioner for Life & Health.

Wences comes to the position from the Legal Division at OIR. He will replace Michelle Robleto, who resigned to work in the private sector.



Website Watch - 2013 Legislative Session

The 2013 Florida Regular Legislative Session kicks off March 5 and so does RTYC’s Legislative Update section on the firm’s website. We will post insurance-related bills and keep you up to date on the progress through the legislative process. At the conclusion of session, we will provide a summary on the survivors of the 2013 session and the ultimate fate of the insurance-related bills.

OIR Releases Workers' Compensation Report

By: Travis Miller

The Florida Office of Insurance Regulation has released its most recent annual report discussing the State of Florida's workers' compensation insurance market. According to section 627.211(6), Florida Statutes, the Office of Insurance Regulation must prepare a report for the legislature each year assessing the competitiveness of Florida's workers' compensation market. In this year's report, the OIR concludes the market is competitive because, among other things, a large number of independent participants are writing coverage in this state and none has meaningful control over the market. Additionally, there are no significant barriers to entry and exist. The OIR characterizes the market as "well capitalized and robust."

According to the report, out of the country's six most populous states, Florida is one of only two in which the residual market does not dominate. The report points to

prior legislative reforms as greatly reducing workers' compensation rates in Florida, but acknowledges that the rate reductions have flattened and recent years have seen small increases.

The report cites drug costs, the costs of inpatient and outpatient care, and the costs of ambulatory surgical centers as areas where further legislative reforms could reduce rates. The OIR estimates the reductions could range from 8.6% to 9.4% if the legislature were to adopt fee schedules based on specified percentages of Medicaid rates.

The legislature is expected to give some consideration to workers' compensation issues in the upcoming 2013 legislative session. The potential for savings in areas noted by the OIR will be among the ideas considered.

Workers' Compensation Division to Discuss Electronic Submission of Notice to be Exempt at Rule Development Workshop

By: David Yon

The Florida Division of Workers' Compensation has submitted a Notice of Proposed Rule Development for Rule 69L-6.012, F.A.C.: Notice of Election to Be Exempt from Requirements to Purchase Workers' Compensation Insurance.

The Notice states that the proposed rule provides for electronic submission of exemption applications (Form DFS-F2-DWC-250, Notice of Election to be Exempt) through the DWC Notice of Election to be Exempt system, along with streamlined reporting requirements; other related forms are also updated to reflect the revised reporting requirements. Electronic submission provides applicants with an online system to complete and pay for their exemptions, eliminating the cost of postage and mailing and reducing the time for applicants to receive their exemption certificates. The proposed rule is intended to implement legislative changes from the 2012 session.

If requested in writing and not deemed unnecessary by the agency head, a rule development workshop will be held on Tuesday, January 22, 2013 at 10:30 a.m. at 2012 Capital Circle, SE, Room 102 Hartman Building.

For a copy of the proposed rule please contact any of our insurance regulatory team.

Commissioner McCarty Makes Presentation to Senate Banking and Insurance Committee on Ways to Improve Property Market

By: David Yon

Insurance Commissioner Kevin McCarty responded to Senate Banking and Insurance Committee Chair David Simmons' request for ideas on how to improve the property market in Florida with a wide variety of ideas he labeled "Principle-Based Reforms for Florida's Property Insurance Market." Commissioner McCarty presented his ideas at the Banking and Insurance Committee meeting held on January 16, 2013. His goals included the following:

- Return to a free market approach (within parameters to prevent abuse)
- Enhance Florida's attractiveness as a place for insurers to do business
- Align policyholder risk and reward
- Expand risk-sharing opportunities
- Stimulate additional private sector capital
- Reduce the overall exposure of Citizens
- Ensure policies and coverages are meaningful for Florida consumers

The Commissioner identified the desired outcomes as follows:

- Restructure alternative markets so they become residual markets to provide quantifiable risk management for Florida
- Maximize the risk-bearing capacity of the private market, including attracting new capital
- Promote consumer choice, responsibility and market power
- Enhance meaningful risk mitigation programs

To accomplish these outcomes he identified the following options:

- Convert Citizens into three separate entities and change its mission to acting as a truly residual market entity. One entity would insure the current "Coastal Accounts" for the peril of wind much like the Florida Windstorm Association used to operate. Another entity would in-

sure the "Truly Residual Risks" in the interior part of the state. And the third would be a "sinkhole facility." The Truly Residual Risks would charge rates based on the top 20 private writers in each area, perhaps with an additional surcharge. To be eligible for the Coastal Accounts entity buildings would have to meet "Code +" building standards.

- Allow Citizens to enter into risk-sharing arrangements with the private market. Opt outs for policyholders for these programs would be severely limited.
- Institute "rate bands" to provide private insurers flexibility in their pricing.
- Codify the Certification Process that permits carriers in certain lines of business to use their forms without having to obtain prior approval.
- Modify current rating rules to align mitigation credits to a company's modeling results.
- Permit the formation of Reinsurance Pools for voluntary participation by insurers. The goal would be to increase the bargaining power of smaller Florida insurers.
- Expand consumer choice and enhance consumer market power. This would be done by allowing more product flexibility and choice (deductibles for example), permitting more consent to rate options, expanding web based pricing and product comparisons and creating clearinghouses.

It is of course the very beginning of the legislative season for 2013 and the actual session does not start until March 5th. The debate and questions at the workshop were lively. Chair David Simmons announced at the end of the meeting that his staff will produce a proposed committee bill containing many of these proposals. It is impossible to predict as this time what will happen this year, but these certainly are ideas that are worth watching as the process moves forward.

CFO Atwater Encourages Comprehensive Approach to Property Reform

By: Travis Miller

Florida Chief Financial Officer Jeff Atwater spoke before the Senate Banking & Insurance Committee to say that “standing still” on Florida property insurance issues is not an option. Atwater encouraged the committee to pursue legislation designed to reduce the potential assessment burden on all Floridians that would arise from deficiencies in the state-created insurance entities. In doing so, Atwater asked the committee to consider how various parts of the overall picture will affect policyholders—ensuring that changes made to Citizens Property Insurance Corporation, the Florida Hurricane Catastrophe Fund, or other aspects of the market are neither at odds with each other nor cumulatively burdensome on policyholders. CFO Atwater’s comments prefaced lengthier detailed presentations made by Commissioner Kevin McCarty and Citizens’ Chief Executive Officer Barry Gilway.

Florida Supreme Court Defines Limits on Physician-Counsel Communication

By: Patrick Flemming

Florida insurance providers and physicians alike should take note of the Florida Supreme Court’s recent decision addressing Florida’s physician-patient confidentiality statute, Section 456.057(8), Florida Statutes (2012). In *Hasan v. Garvar*, the court held that the statute prohibits a nonparty treating physician’s ex parte communications with counsel provided by the defendant’s insurance company. *Hasan v. Garvar*, No. SC10-1361, 2012 WL 6619334 (Fla. Dec. 20, 2012).

Hasan arose when a plaintiff in a medical malpractice suit was denied a protective order to restrict his nonparty, treating physician from attending a predeposition conference with an attorney retained by the physician’s insurance provider, which was also the insurance provider for the defendant. Judge Gerber, writing for the Fourth District Court of Appeal, affirmed the ruling of the trial court, which denied the plaintiff’s motion and, instead, issued an order limiting the ex parte discussion to nonprivileged information.

The Florida Supreme Court reversed the decision of the Fourth District Court of Appeal, holding that Florida’s physician-patient confidentiality statute prohibits ex parte communication between “nonparty treating physicians and others outside the confidential relationship *whether or not they intend to discuss privileged or non-privileged matters.*” Justice Lewis, writing for the majority, noted that the statute’s

design provides only three situations in which patient confidentially may be waived, none of which existed in *Hasan*. Further, the court characterized ex parte meetings between nonparty treating physicians and counsel, wherein the physicians and counsel agreed to not discuss confidential information, as “pure sophistry.” According to the court, by scheduling a predeposition conference with the treating physician, the insurance provider impermissibly attempted to “foster an environment conducive to inadvertent disclosures of privileged information.”

Chief Justice Polston, with whom Justice Canady joined in dissent, found the court’s decision troubling, stating that he was “unaware of any other circumstance where this Court has prohibited someone from consulting a lawyer for legal advice.” Not only did Chief Justice Polston argue that the majority’s opinion violated, in part, the First Amendment’s protection of commercial speech, he viewed the majority’s decision as paternalistic and dismissive of the oaths of ethical conduct to which Florida lawyers subscribe, because it “assum[es] that ethical violations will occur.”

With the decision of *Hasan*, Florida’s high court acknowledged Florida’s robust physician-patient confidentiality statute and articulated the legal limits on ex parte communications.

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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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