Florida Insurance Report

Keeping You Informed About Florida
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Radey Again Named to Florida Trend "Best Companies" List

Florida Trend magazine has named Radey one of the Top 100 places to work in Florida for the fourth consecutive year. "We are pleased that Florida Trend again has named us one of the best places to work in Florida," said firm president Travis Miller. "We strive to maintain a positive work environment while at the same time working hard to serve our clients. The Florida Trend designation depends heavily on the feedback from our employees, so we see this honor as a sign that we are achieving a good balance in the workplace."

Florida Trend goes through a detailed process to establish its list of the Best Companies to Work For in Florida. 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.

Radey is one of only four Tallahassee-based companies to make the list this year.

Radey Shareholders Recognized in The Best Lawyers in America 2015

The Radey Law Firm proudly announces the following shareholders were chosen by their peers for inclusion in the 2015 edition of *The Best Lawyers in America*: Donna Blanton, Bert Combs, Travis Miller, Harry Thomas, and David Yon. Blanton is listed in the practice area of Administrative/Regulatory Law and Government Relations, and Combs, Miller, Thomas and Yon are listed in the practice area of Insurance Law.

Congratulations to Donna, Bert, Travis, Harry, and David!

Inside this Issue:

Crist Unveils Property Insurance Agenda

By: Travis Miller

One of Governor Charlie Crist's first acts as a Republican governor was to convene a special session on property insurance. Crist promised to drop property insurance rates "like a rock," and the Republican legislature complied with his requests by expanding the Florida Hurricane Catastrophe Fund resulting in presumptive rate reductions for Florida residential property insurers. During the same era, Citizens Property Insurance Corporation's rates were legislatively capped. As a result, Citizens grew rapidly, the FHCF announced that it could not provide enough capacity to reach the expanded limits for which insurers were paying premiums, and consumers faced fewer choices as private market interest waned.

Since then, the "glide path" enacted by the legislature has produced slow but steady rate changes for Citizens that have brought Citizens' rates in line with the market. The success of the glide path can be seen in the modest rate changes approved for Citizens for 2015 as described elsewhere in this report. The FHCF's promised capacity has returned to its re-expansion levels, and the FHCF is better positioned than ever to meet the obligations it might incur in a given hurricane season. The private market has also returned to Florida. Several major insurers that previously pulled back on Florida writings have started to issue new policies again. Numerous Florida-based insurers are competing for business, and Citizens' policy count has dropped by more than 500,000 policies, reducing the potential assessments on all Floridians.

Now running as a Democrat, Charlie Crist has released an insurance plan criticizing the current state of the market. Crist blasts Governor Rick Scott for doing "absolutely nothing" to help homeowners with higher premiums and for allowing insurers to raise rates. Crist's five-point plan on insurance includes:

Work to Lower Insurance Premiums - Crist would "mandate that insurance companies pass reinsurance savings on to consumers."

Work with Common Sense Members of the Legislature to Repeal the Anti-Consumer Laws Passed by Rick Scott - Crist alleges that coverage reductions during Rick Scott's tenure have not resulted in corresponding rate reductions. Crist points to increased sinkhole deductibles and the removal of structures such as pool cages, awnings, gazebos and similar items from base policies as examples.

Require Transparency for All Insurers - Information on insurers' rates, coverage and participation in the Florida market should be open to the public. This reference is unclear considering that all form and rate filings are publicly available, and insurers' activity can be seen in QUASR reports.

Increase the Coverage of the State's Cat Fund - By expanding the coverage available from the FHCF, insurers can "dramatically reduce" costs to homeowners.

Advocate for a National Cat Fund - Crist will push for a national catastrophe fund enabling Florida to provide reinsurance to Citizens and other insurers at much lower rates.

The Scott campaign responded to Crist's proposals by saying they are taken from the "Obama playbook" of bigger government and skyrocketing debt. The Scott campaign argues that Crist drove Citizens to uncontrollable levels and left policyholders on the hook for billions in potential liability. The campaign also responded that Crist's prior effort to expand the FHCF created a potential deficit that would have resulted in major assessments on policyholders because the FHCF could not "borrow enough money to make good on its promise to pay hurricane claims."

Mold Related Services Workshop Held

By: Ted Prekop

On September 5, 2014, a rules workshop was held on the Mold Related Services Program. The workshop covered proposed rules 61-31.701 and 61-31.702, F.A.C. These proposed rules seek to implement sections 468.8424 and 468.842, Florida Statutes. Various groups, including the Florida Insurance Council ("FIC") submitted comments to the proposed rules. FIC expressed concern over the lack of clear standards as to when an assessment or remediation should be conducted and suggested that the trigger for inspection be the presence of visible mold growth.

Proposed rule 61-31.701 is entitled "Minimum Standards and Practices for Mold Assessors." This proposed rule details the substantive and safety procedures to be used during a mold assessment, as well as the content requirements for the Mold Assessment Report produced as a result of inspection. Proposed rule 61-31.702 is entitled "Minimum Standards and Practices for Mold Remediators." This proposed rule list the requirements for Mold Remediation Work Plans ("MRWP") that must be completed by mold remediators prior to action. Additionally, the proposed rule details the procedures to be utilized by mold remediators in removing mold from a contaminated structure.

The proposed rules are available at the Resources Section of our website at www.radeylaw.com.

Information to be Provided when Recommending the Surrender of an Annuity or Life Insurance Policy with a Cash Value

By: Karen Asher-Cohen

The Department of Financial Services has published a notice of a rule development workshop to be help on September 26, 2014, regarding proposed Rule 69B-215.090, F.A.C. The proposed rule is entitled: "Information to be Provided when Recommending the Surrender of an Annuity or Life Insurance Policy with a Cash Value," and is intended to implement the provisions of a new statute passed by the 2014 Legislature – section 627.4553, F.S., "Recommendations to surrender." The new statute took effect on July 1, 2014.

If an insurance agent recommends that a person surrender an annuity or life insurance policy with a cash value, but does not recommend that the surrender proceeds be used to purchase another annuity or life insurance policy, section 627.4553 now requires that before the execution of the surrender check, the agent (or company if there is no agent) must provide information related to the surrender. The statute requires the following information be provided: "the amount of any surrender charge, the loss of any minimum interest rate guarantees, the amount of any tax consequences resulting from the transaction, the amount of any forfeited death benefit, and the value of any other investment performance guarantees being forfeited as a result of the transaction."

For a copy of the notice and proposed rule language, please go to our website: www.radeylaw.com.

OIR Enters Order Establishing Citizens Rates

By: Travis Miller

The Florida Office of Insurance Regulation ("OIR") has entered an order setting rates for Citizens Property Insurance Corporation's personal residential accounts. Whereas most insurers file rates for review and approval by the OIR, the OIR by law is required to actually set Citizens' rates. Citizens submits filings that are considered by the OIR in setting the rates. In addition, the OIR considers any public feedback it receives and conducts a hearing on the proposed rates.

The overall statewide average rate reduction for homeowners 3.7%, which is a slightly bigger decrease than the 3.4% suggested by Citizens. The effective date for the new rates is February 1, 2015.

The following chart provides more details about the rates established in the OIR's recent order. The OIR continues to review filings for Citizens' commercial programs.

(Incl. Sinkhole and FHCF Cash Buildup Factor Changes)		
Account	Original Rate Requested	Estimated Rate Established
HOMEOWNERS MULTI-PERIL #14-13202 (Personal Lines Account)	-5.8% decrease	-6.1% decrease
HOMEOWNERS MULTI-PERIL #14-13203 (Coastal Account – Wind Only)	+3.8% increase	+3.8% increase
HOMEOWNERS COMBINED #14-13202 & #14-13203 (Personal Lines and Coastal Accounts)	-3.4% decrease	-3.7% decrease
PROPERTY/PERSONAL DWELLING FIRE #14-13383 (Personal Lines Account)	-4.5% decrease	-4.7% decrease
PROPERTY/PERSONAL DWELLING FIRE #14-13384 (Coastal Account – Wind Only)	+6.8% increase	+6.6% increase
MOBILE HOMEOWNERS #14-13667 (Coastal Account – Wind Only)	+8.2% increase	+8.2% increase
MOBILE HOMEOWNERS MULTI-PERIL #14-13668 (Persona Lines Account)	-4.3% decrease	-4.6% decrease
MOBILE HOMEOWNERS PHYSICAL DAMAGE ONLY (DWELLING FIRE) MULTI-PERIL #14-13749 (Personal Lines Account)	-4.3% decrease	-4.8% decrease
MOBILE HOMEOWNERS PHYSICAL DAMAGE ONLY (DWELLING FIRE) #14-13751 (Coastal Account – Wind Only)	+8.6% increase	+8.6% increase

Circuit Court Declares Florida's Workers' Compensation Act Unconstitutional

By: Laura Dennis

On August 13, 2014, the Circuit Court of the Eleventh Judicial Circuit issued an opinion in *Florida Workers' Advocates, et al. v. State,* No. 11-13661 CA 25 (Fla. 11th Cir. Ct. Aug. 13, 2014), finding that the exclusive remedy provision in the Florida Workers' Compensation Act (the "Act") is unconstitutional.

This case stems from an action where an employee brought a negligence suit against their employer. The employer asserted the affirmative defense of workers' compensation immunity under section 440.11, Florida Statutes. Section 440.11, Florida Statutes, provides that the Act shall be the "exclusive" remedy "in place of all other liability" for an injured employee or that employee's spouse, children, or representative. § 440.11, Fla. Stat. (2003). Thereafter, the employee amended the complaint to add a claim for declaratory relief, requesting the court to declare section 440.11 invalid on the grounds that it violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution, that it violates the Access to Courts provision in the Florida Constitution, and that it violates the right to be Rewarded for Industry provided by the Florida Constitution. The Florida Workers' Advocates and the Workers' Injury Law & Advocacy Group intervened in the action, and the employer withdrew his affirmative defense and was severed as a party from the declaratory relief claim, which proceeded separately. After the Eleventh Circuit denied a motion for summary judgment on the grounds that there was no present controversy to support a claim for declaratory relief, Elsa Padgett intervened in the action and, along with the Florida Workers' Advocates and the Workers' Injury Law & Advocacy Group, filed a motion for Summary Final Judgment. Judge Cueto's 20-page opinion did not address the specific facts of Ms. Padgett's case, but found in her favor.

In reaching his decision, Judge Cueto reasoned that the Florida Legislature has been eroding the rights of injured employees in phases, repealing numerous classes of benefits without replacing any of them with equivalent benefits. In support, Judge Cueto relied on the Florida Supreme Court's opinion in *Kluger v. White,* 281 So. 2d 1, 4 (Fla. 1973), which held that the Legislature may only abolish a preexisting right if a reasonable alternative exists to protect that right. Additionally, Judge Cueto stated that eliminating these rights without providing injured employees with a reasonable alternative violates Article I, section 2 of the Florida Constitution.

In addressing the erosion of rights previously afforded to injured employees, Judge Cueto noted that prior to 1968, the Act provided full medical care benefits and some indemnity benefits for injured employees that suffered from partial loss of wage earning capacity. However, certain amendments to the Act in 2003 eliminated all compensation for a loss in wage earning capacity that was not "total in character" and limited the benefits a permanently and totally disabled employee could receive. The 2003 amendments also require injured employees to pay medical co-payments after reaching maximum medical improvement and allows for the apportionment of all medical costs. Additionally, in 1970, the Florida Legislature repealed the right of employees to opt out of coverage of the workers' compensation scheme without providing a reasonable alternative in exchange.

"The benefits in the Act have been so decimated," Judge Cueto stated, "that it no longer provides a reasonable alternative to tort litigation." Judge Cueto further opined

Continued on top of Page 6

Chapter 440 Unconstitutional - Cont.

that while there may have been a compelling interest for the exclusivity provision when the Act was passed in 1935 (which included more benefits and the right for employees to opt out), none of these interests are present today. Thus, because the Act does not provide an adequate remedy to injured employees, Judge Cueto held that the exclusive remedy provision found in section 440.11, Florida Statutes, is invalid and unconstitutional under the Florida and the United States Constitutions.

Judge Cueto also called on the Florida Legislature to determine "what must be included in a Florida workers' compensation law to meet the minimum threshold for it to be a constitutional exclusive remedy." In particular, Judge Cueto directed the Legislature to the Florida Supreme Court case, *Martinez v. Scanlan,* 582 So. 2d 1167 (Fla. 1991), which determined that the Act remains constitutional so long as it provides full medical care and some compensation for total or partial disability.

On August 26, 2014, the State of Florida, through the Attorney General, appealed the August 13, 2014, order. The appeal is currently pending before the Florida Third District Court of Appeal.

Florida's Bad Faith Action Law Continues to Evolve Under New Fourth DCA Opinion

By: Ted Prekop

Florida's bad faith action law continues to evolve with the recent opinion in *Cammarata v. State Farm Florida Insurance*, 2014 WL 4327948 (Fla. 4th DCA 2014). In an *en banc* decision, the Fourth District Court of Appeal ("Fourth DCA") held that an "an insurer's liability for coverage and the extent of damages, and not necessarily an insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe."

The case arose from a dispute between the insureds and State Farm Insurance ("State Farm") after the insureds' house was damaged in October, 2005 from Hurricane Wilma. In September, 2007, nearly two years after damage occurred, the insureds filed a claim with State Farm under their homeowner's policy. State Farm inspected the home and concluded that the damage did not exceed the policy deductible, and as a result denied the insureds' claim. The two parties engaged in an appraisal process. The insureds' appraiser found the damage to be above the deductible amount, but State Farm's appraiser found it to be below. Subsequently, a neutral umpire was appointed who found that the damage was higher than the policy deductible, but lower than the insureds' appraiser's amount. State Farm's appraiser agreed to the damage estimate and State Farm agreed to pay the umpire's damage estimate less the policy deductible.

The insureds then filed an action in circuit court alleging that State Farm did not attempt to settle their claim in good faith. State Farm moved for summary judgment on the basis that because its liability for breach of contract had not yet been determined, the bad faith action was not yet ripe. State Farm cited to *Lime Bay Condominium v. State Farm Florida Insurance Co.*, a Fourth DCA case in which the insureds attempted to file a bad faith claim while their breach of contract claim against the insurer was abated. The court ruled that the bad faith claim was not yet ripe due to the abated breach of contract action.

The insureds argued that the only preconditions for a bad faith suit were liability for coverage and the extent of damages, and *not* liability on breach of contract. In support of their position, the insureds cited *Trafalgar at Greenacres-Ltd. v. Zurich American Insurance Co.,* another Fourth DCA case finding that an appraisal in favor of the insured

Continued at Top of Next Page

Bad Faith Claims - Continued

meets the precondition for filing a bad faith claim. The circuit court granted summary judgment to State Farm, leading to the instant appeal.

The Fourth DCA began its Majority Opinion by chronicling the various events that had occurred between the parties. The court then examined a number of Fourth DCA and Florida Supreme Court cases. Ultimately, the court based its decision on the Florida Supreme Court's decision in *Vest v. Travelers Insurance Co.,* 753 So.2d 1270 (Fla. 2000). Citing the 4th DCA decision in *Brookins v. Goodson* with approval, the Florida Supreme Court held in *Vest* that "a resolution of some kind in favor of the insured is a prerequisite" for a bad faith action to proceed and that the favorable result need not be obtained by trial or arbitration. Based on this decision, the Fourth DCA held that a bad faith action becomes ripe not when liability for breach of contract is established, but when an insurer's liability for coverage and the extent of damages are determined.

In a Specially Concurring Opinion, Judge Gerber, along with Judges Conner, Forst, and Klingensmith, warned of the "slippery slope" that could occur as a result of the Majority Opinion. Specifically, under the Majority Opinion, any time an insurer disputes a claim, but ultimately ends up paying less than its initial offer, an insured could bring a bad faith action. Judge Gerber suggested two alternatives that the Florida Legislature might adopt to avoid this slippery slope: (1) require an insured to establish the insurer's liability for breach of contract before suing for bad faith; or (2) require an insured to obtain a settlement amount above a certain percentage of the insurer's initial offer.

Citizens Clearinghouse Extended to Renewal Policies

By: Travis Miller

Earlier this year, Citizens Property Insurance Corporation opened its legislatively mandating "clearinghouse" process for new business. Citizens now is expanding the clearinghouse process to HO-3 policies renewing in Citizens on or after November 1.

The clearinghouse process allows participating insurers to specify criteria for which they would be interested in making offers of coverage to Citizens policyholders. If a current Citizens policyholder receives an offer from an insurer participating in the clearinghouse at a premium level that is equal to or less than the Citizens premium, the policyholder is no longer eligible to remain in Citizens. Of course, the policyholder may explore his or her options with other insurers, but the policy will not remain in Citizens.

Citizens recently began informing policyholders of the renewal clearinghouse in advance of their upcoming renewal dates. Letters will be sent about 45 days before policies' renewal dates, and renewal packages will be sent about 45-50 days before renewal for policyholders remaining eligible for Citizens renewal coverage.

The clearinghouse process began in January for new business. Citizens advises that about 3300 policyholders have found coverage through the clearinghouse. However, Citizens has seen its new business volume drop from about 26,000 policies per month to about 16,000 policies per month, and private market insurers have continued to assume substantial numbers of policies from Citizens throughout 2014. The expansion of the clearinghouse is part of an overall reduction in Citizens' policy count in favor of competitive coverage offered in the private market. "Many customers will benefit from more-comprehensive coverage, lower pricing and vastly reduced assessment risk in the event of a major storm," Citizens President Barry Gilway said.

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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