Florida Insurance Report

Keeping You Informed About Florida
Volume XII, Issue IV

Initial Season Fully Funded for FHCF

By: Travis Miller

The Florida Hurricane Catastrophe Fund ("FHCF") recently announced that it anticipates being able to fully fund its $17 billion in initial season obligations and being able to support a large portion of a subsequent season's obligations. Under its most recent projections, the FHCF would fall about $5 billion short of providing another $17 billion in capacity if it were to be exhausted in an initial season.

The FHCF's financial position is bolstered by a substantial cash balance, expected to be nearly $11 billion by year-end. The FHCF also continues to have $2 billion in pre-event notes outstanding, bringing its liquid resources for an initial season to $13 billion before considering its capacity to issue post event bonds. The remaining $4 billion is well within the FHCF's bonding capacity based upon its authority to levy assessments.

The strength of the FHCF is just one of many benefits associated with the series of hurricane-free years Florida has enjoyed recently. Just a few years ago, the legislature increased the amount of coverage the FHCF was authorized to issue only to find that the promised coverage might outstretch the FHCF's bonding capacity. Over the ensuing years, the optional TICL layer has been phased out and the FHCF has amassed substantial cash that will reduce its need for bonding, at least in an initial season.

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Governor's Race Remains a Toss Up Heading into Final Days

By: Travis Miller

Throughout the campaign, most observers have said that the race between incumbent Rick Scott and former Governor Charlie Crist will go down to the wire. A recent poll heading into the early voting period suggests this remains the case. According to a Quinnipiac poll, Scott and Crist are deadlocked at 42 percent each among likely voters, with Libertarian Adrian Wyllie polling at 7 percent. Without Wyllie in the race, voters are split 44 -44.

Men and women are split in their preferences. Scott leads Crist among men 46 – 38 percent, with 10 percent projected for Wyllie. However, Crist leads Scott 45 – 39 percent among women, with 6 percent for Wyllie.

Crist edges Scott slightly in independent voters, 41 percent to 38 percent. Republicans show strong support for Scott at 81 – 7 percent, with 6 percent for Wyllie. Democrats as expected strongly back Crist 86 – 5 percent, with 3 percent for Wyllie.

Both candidates also have significant negatives, with the public's negative view of each candidate polling over 40%.

Travis Miller's Article on the Florida Acquisition Statute Slated for Winter Edition of FORC Quarterly Journal

Travis Miller recently wrote an article on changes to Florida's acquisition statute for publication in the December 2014 edition of the Federation of Regulatory Counsel's Quarterly Journal of Insurance Law & Regulation. The article highlights changes to the acquisition statute made by the legislature during the 2014 legislative session. Most of the key changes took effect October 1, 2014.

Historically, section 628.461, Florida Statutes, has required acquiring parties to submit acquisition statements when acquiring five percent or more of the outstanding voting securities of a Florida-domiciled insurer or its parent. Alternatively, parties acquiring at least five percent, but less than ten percent, of the outstanding voting securities could file a disclaimer of affiliation and control. Under the revised statute, the filing threshold has been increased to ten percent. In addition, the legislature adopted a requirement for a person with existing control to make a filing when seeking to divest that controlling interest. The revised acquisition statute also ties into the newly adopted enterprise risk reporting requirements also adopted in 2014.

Uber in Compliance with Florida Insurance Requirements

By: Ted Prekop

The popular ride-sharing company Uber recently scored a major victory in Florida when the Office of Insurance Regulation ("OIR") found that its insurance policy complied with Florida's insurance requirements. Uber has been involved in a number of legal disputes around the country. The instant dispute arose when Hillsborough County's Public Transportation Commission received complaints about the sufficiency of Uber's insurance policy. Kyle Cockream, executive director of the Public Transportation Commission, forwarded a copy of Uber's insurance policy to OIR for review.

OIR found that the policy is legally binding and provides coverage comparable to other taxi services. OIR also noted that the $1 million liability limit exceeds what is required for other "for-hire" services. OIR further stated that Uber is permitted to conduct business in the state of Florida and that its policy covers passengers. OIR has opted to defer to the Florida Department of Highway Safety and Motor Vehicles on whether an Uber insurance policy, combined with a personal auto policy held by a driver, provides sufficient coverage under the Florida Financial Responsibility Law and whether the Uber insurance policy in question can be properly issued by a surplus lines carrier.

OIR Still Looking for Right Approach to Holding Company Rules

By: David Yon

The Florida Office of Insurance Regulation continues to evaluate rules which may need to be adopted or revised to implement Chapter 2014-101 which revised the Florida Holding Company Act to make it more consistent with the NAIC Model Act on insurance holding companies. The changes generally provide more regulatory power to OIR over the holding company systems of insurance companies domiciled in Florida. In addition, Chapter 2014-100 provided new confidentiality provisions to protect information filed with OIR.

Deputy Chief of Staff Monte Stevens told the Florida Insurance Council Thursday OIR was not yet ready to begin this important rule development process. "There is no real update I can provide right now unfortunately. Our staff is still assessing the rules that will need to be updated and if any new ones need to be adopted. We are still probably a few months away."

The Legislature, during the 2014 session this spring, adopted SB 1300, the main package, and SB 1308 containing important public records exemptions. This legislation was the top priority of Insurance Commissioner Kevin McCarty, who needs it to retain Florida OIR's NAIC accreditation, and was strongly supported by the Florida Insurance Council.

FHCF - *Continued from page 1*

Over the last few years, the legislature has heard competing arguments from interested parties about changing the FHCF. Some observers want to reduce the size of the FHCF and increase industry copays to better ensure the FHCF can meet its obligations and reduce the state's exposure to assessments. Opponents have countered that reducing the role of the FHCF simply means that consumers will end up paying more, although perhaps only to a limited degree in the current reinsurance market. This has played out to a stalemate, with the basic structure of the FHCF remaining unchanged.

Jack Nicholson, Chief Operating Officer of the FHCF, pointed out that the FHCF's ability to meet most of its initial season obligations out of existing liquid resources is good for insurers and consumers. Nicholson also believes that the FHCF will be in a good position to meet its obligations from modest storms in back-to-back hurricane seasons. However, the FHCF still could end up needing to maximize its bonding, and therefore its assessments, if it were to be wiped out in an initial season and then experience a significant event in a subsequent season.

Travis Miller Participates in FSU Panels

Firm President Travis Miller recently participated in panel discussions with other insurance industry officials at Florida State University's College of Business. Travis spoke to students taking the Risk Management & Insurance Program's Introduction to Risk Management and Insurance course. Later, Travis and the other panelists spoke to students in the Risk in Business and Society course.

In addition to Travis, the panelists included:

- Angela Borthwick – Sales & Marketing Manager, Zenith Insurance Company
- David Brooks – Chief Risk Officer, XL Insurance
- Jeff Grady – President and CEO, FAIA
- Bruce McReadie – American PEO Insurers, Inc.
- Larry Patrick – Retired President, Auto Club South Insurance Company
- Pat Maroney – Professor Emeritus, Florida State University College of Business
- Scott Clark – Risk and Benefits Officer, Miami-Dade County School Board

The panel discussed the diverse opportunities for students majoring in Risk Management & Insurance. Many students enter the College of Business seeking generally to major in areas such as accounting, finance or marketing, but they haven't yet developed a sense of the particular industries in which they want to work. The panelists informed the students how the insurance industry encompasses most, if not all, of the disciplines taught in the College of Business. The panelists represented wide ranging aspects of the insurance business, from production to underwriting and risk management, to law, public sector opportunities and academia.

As perhaps the most rewarding part of the presentations, students had opportunities to ask questions of the panelists collectively and individually. A large number of students asked insightful questions about specific areas of the insurance business that interested them.

Fifth DCA Rules Insured Must Show More than Refusal and Subsequent Payment of Policy Benefits to Recover Attorney's Fees

By: Ted Prekop

In a recent opinion in Omega Ins. Co. v. Johnson, 2014 WL 4375189 (Fla. 5th DCA 2014), the Fifth District Court of Appeal ("Fifth DCA") held that the confession of judgment doctrine cannot be used to recover attorney's fees under section 627.428, Florida Statutes, when an insured only shows that an insurer denied a claim, the insured filed suit, and the insurer eventually pays benefits.

The facts of the case were simple. The insured purchased a homeowner's policy from the insurer that included a provision for sinkhole damage coverage. When the insured's home was damaged, she filed a claim for policy benefits. Upon receipt of the claim, the insurer commissioned a professional engineering and geology firm to ascertain the cause of the damage. The engineering firm's report concluded that sinkhole activity was not the cause of damage, and as a result, the insurer denied the claim in a letter with the report attached. The letter contained all of the required disclosures and informed the insured of her right to participate in a neutral evaluation program at the insurer's expense.

The insured never responded to the letter and instead hired her own engineering firm to evaluate the cause of damage. The insured's engineering firm found that sinkhole activity was likely the cause of the damage to the insured's home. The insured then waited nearly a year to file her lawsuit alleging that the insurer had breached the homeowner's insurance policy. Notably, the insured did not include a copy of the report she had commissioned in her complaint. In fact, the insurer only obtained the report during the course of discovery.

The insurer filed a motion for a neutral evaluation and a stay of litigation which was subsequently granted by the trial court. The neutral evaluator found that the cause of the damage to the insured's home was sinkhole activity. Upon receipt of this report, the insurer tendered policy benefits to the insured, and the insured filed a Motion for Confession of Judgment and Motion for Attorneys' Fees, Costs, and Interest, which was subsequently granted by the trial court, leading to an appeal.

On appeal, the insurer argued that it did not wrongfully withhold policy benefits from the insured because it followed the statutory directives and reasonably and justifiably relied on the report issued by its engineering firm. The insured argued that because the insurer denied her claim, forced her to file suit, and eventually paid the policy benefits, she should be entitled to attorney's fees under section 627.428, Florida Statutes.

The Fifth DCA began its analysis by stating the policy behind an award of attorney's fees under section 627.428: to penalize an insurer for wrongfully forcing an insured to bring suit. The court noted a "wrongful or unreasonable denial of benefits that forces the insured to file suit is necessary to apply the doctrine and award fees under the statute." It then restated the confession of judgment doctrine, which states that "the tender of policy benefits or a settlement agreement is 'functional equivalent of a confession of judgment or a verdict in favor of the insured' and thus can be utilized as the basis for an award of attorney's fees."

The Fifth DCA reversed the trial court, holding that an insured cannot rely merely on the fact that an insurer denied his or her claim and later tendered benefits under the policy to recover attorney's fees under section 627.428.

Sinkhole Case

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The Fifth DCA noted that, while not a complete bar to liability, compliance with the statutes governing the investigative process "goes a long way toward fulfilling [the insurer's] obligations under its contract." Additionally, the Fifth DCA stated that the professional engineering report required by the statute is presumed correct. In the instant case, the insurer complied with all of its statutory obligations, and the insured never presented any evidence to rebut the presumption of the report's correctness. As a result, the Fifth DCA held that the insured was not entitled to attorney's fees under section 627.428.

Federal Circuit Court Declares Florida's Medical Negligence Action Presuit Statute Fully Compliant with HIPAA

By: Laura Dennis

On October 10, 2014, the Eleventh Circuit Court of Appeals issued an opinion in *Murphy v. Dulay,* -- F.3d --, 2014 WL 5072710 (11th Cir. Oct. 10, 2014), finding that section 766.1065, Florida Statutes—which requires a plaintiff seeking to bring a medical negligence claim to execute a written authorization form for release of protected health information—is fully compliant with the Health Insurance Portability and Accountability Act ("HIPAA").

This case stems from an action brought by Glen Murphy, a Florida resident who received medical treatment from Dr. Adolfo C. Dulay. Mr. Murphy considered bringing suit against Dr. Dulay for medical negligence; however, Florida law requires that a prospective plaintiff in a medical negligence action comply with several presuit requirements. For example, a prospective plaintiff must provide a 90-day notice of the "intent to initiate litigation for medical negligence." § 766.106(2)(a)-(3)(a), Fla. Stat. The presuit notice must be accompanied by an executed authorization form permitting the release of medical information. § 766.106(2)(a), Fla. Stat.

Section 766.1065, Florida Statutes, describes the required form and content of the written authorization that must be filed with the presuit notice. Among other things, the authorization must include a list of the prospective plaintiff's treating health care providers and must permit the doctor defendant, his insurer, adjuster, or attorney, to conduct an *ex parte* interview of the treating health care providers. § 766.1065(3), Fla. Stat. Mr. Murphy was concerned that the *ex parte* interviews could result in an invasion of his privacy, so Mr. Murphy filed a complaint against Dr. Dulay in the Northern District of Florida seeking a declaration that section 766.1065, Florida Statutes, violated his rights under HIPAA and was expressly preempted by HIPAA. Mr. Murphy also requested an injunction against forced compliance with section 766.1065 in the event he decided to sue Dr. Dulay. Thereafter, the State of Florida intervened to defend the statute.

The trial court granted Mr. Murphy's request for relief, finding that the authorization under section 766.1065 was not voluntary and would result in the disclosure of Mr. Murphy's HIPAA-protected health information without his consent. Thus, the trial court held that section 766.1065

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HIPAA Suit

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was contrary to HIPAA and its regulations and was expressly preempted by federal law. Dr. Dulay and the State of Florida appealed.

On appeal, the Eleventh Circuit Court of Appeals vacated the trial court's decision in favor of Mr. Murphy. In reaching its decision, the Eleventh Circuit reasoned that section 766.1065, Florida Statutes, did not make it impossible for a covered entity to comply with both HIPAA and state law. The court explained that while the HIPAA regulations generally prohibit covered entities from disclosing protected health information, HIPAA does permit disclosure through a valid, express authorization. The authorization must contain certain requirements, including a description of the information to be disclosed, an expiration date, notice of the individual's right to revoke the authorization, and notice that the covered entity may not condition treatment or payment on whether the individual signs the authorization. After a thorough examination of section 766.1065, the court found that the Florida Statute is consistent with HIPAA's requirements for disclosure. The court also noted that section 766.1065 requires the authorizations be construed in accordance with HIPAA's Privacy Rule.

Additionally, the Eleventh Circuit Court of Appeals held that section 766.1065 does not stand as an obstacle to fulfilling the purpose and objectives of HIPAA. Consistent with one of HIPAA's stated objectives, the Florida Statute allows health care providers to investigate and possibly settle claims before litigation begins. The court reasoned this could reduce the overall costs that medical negligence litigation imposes on Florida's health care system.

The Eleventh Circuit Court of Appeals rejected Mr. Murphy's argument that section 766.1065 impermissibly imposes a mandatory pre-condition to filing a medical negligence claim in Florida. The court recognized that HIPAA does not expressly require authorizations to be voluntary. Relying on case law from the Texas and Tennessee Supreme Courts, the court found that plaintiffs seeking to bring medical negligence claims do so voluntarily, and therefore, retain the choice whether to sign the authorization form. The court also reasoned that the HIPAA regulations contemplate that authorizations may be based on certain conditions, except for the condition of providing medical treatment. Specifically, the court stated that the condition imposed by section 766.1065 was not "categorically different" from other conditions permitted under HIPAA and "[h]ad the drafters of the HIPAA regulations wished to preclude a state legislature from conditioning a public benefit—such as filing a lawsuit—on signing a HIPAA authorization, they could have easily done so."

Ultimately, the Eleventh Circuit Court of Appeals reasoned that "absent clear intent in the HIPAA regulations to prohibit conditioning the filing of a medical negligence action on executing a valid authorization, we must observe the strong presumption against preemption in areas traditionally regulated by the states." Therefore, the court held that section 766.1065, Florida Statutes, was not preempted by HIPAA, but instead is "fully compliant with the HIPAA statute and its regulations."

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