Florida Insurance Report

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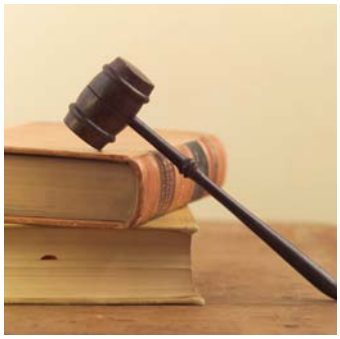
RADEY

Happy Holidays From the Radey Law Firm

As 2014 winds down, we reflect on the past year and look forward to 2015. Here at the Radey Law Firm, we have had a productive and successful year. We could not have achieved it without the support and friendship of our clients. We look forward to continuing to work with our clients and friends in the insurance industry as they pursue new opportunities in 2015. We hope you have a happy holiday season and we wish you the best in the coming New Year.

At the Intersection of Class Action Litigation and State Regulatory Matters

By: Karen Asher-Cohen and Laura Dennis



Insurance companies in Florida may have a possible avenue for dismissal of claims brought against them, most notably in defending themselves against class action complaints, when those claims involve the rates, premiums, or discounts charged by the insurance company. We were recently successful in persuading a state court to grant our motion to dismiss a class action brought against a Florida insurance company, on the grounds that the plaintiff had failed to exhaust his administrative remedies. Specifically, the court relied on the doctrine of primary jurisdiction, finding that the Florida Office of Insurance Regulation (the "OIR"), and not the Court, had jurisdiction to consider the claims raised in the class action complaint. Although the plaintiff brought common law claims against the insurer, the Court found that the requested relief pertained to policy benefits and rates, and therefore held that primary jurisdiction over the claims rested with the OIR.

Soon thereafter, a federal court in Florida granted another insurance company the same relief on the same grounds, citing to the state court order.

Typically, state and federal judges are not familiar with the Florida Insurance Code, the Administrative Procedure Act, or the complexities of insurance regulation in Florida, including the avenues of appeal and relief already available to consumers under the Florida Insurance Code.

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Intersection - Continued

Consequently, when faced with defending a class action or first-party complaint, it is important for the insurance company's advocate to be able to convincingly educate the court in a litigation setting.

The doctrine of primary jurisdiction counsels judicial abstention when claims otherwise cognizable in the courts have been placed within the special competence of an administrative body. In Florida, the OIR has been exclusively charged with reviewing and approving forms and applications and approving insurance rates, as well as being charged with enforcing every part of the Florida Insurance Code (the "Code"), including prohibitions against unfair discrimination and excessive premiums. The Code governs insurance rates and rate-making, and establishes the administrative and regulatory schemes for the insurance industry. Notably, insurance companies may only use those insurance policy forms, including applications, which have been filed and approved by the OIR, or else they are subject to administrative penalties and possible suspension or revocation of their licenses.

Additionally, the Code vests the OIR with the authority and duty to enforce the Code's provisions, and provides alleged injured parties with more than ample avenues of relief. Interested parties may file written complaints with the OIR, and the OIR may conduct investigations as it deems necessary. Specifically, the OIR can conduct investigations of an insurance carrier's rates at any time and find the carrier liable to its policyholders. The OIR can review the rating structure and determine if the rates charged are excessive, inadequate, or unfairly discriminatory. Further, the OIR may initiate legal proceedings, hold hearings, and order corrective action by insurers to remedy past improper conduct, including the payment of restitution and the issuance of cease and desist orders.

Under this framework, carriers faced with litigation may seek dismissal on the grounds that the OIR has primary jurisdiction over the claims. Importantly, Plaintiffs may not avoid the doctrine of primary jurisdiction by dressing up their claims as common law causes of action. Instead, plaintiffs asserting claims based on a carrier's rates, discounts, or premiums must first seek relief from the OIR, as Courts should not put themselves in the shoes of the OIR for purposes of regulating and reviewing an insurer's rates.

If you have any questions or are interested in more information on this subject, please do not hesitate to contact us.

Paper or E-Mail?

We always appreciate the positive feedback we receive on our Florida Insurance Report. Whether at a meeting, by email or on the phone, many of our readers over the years have commented on how much they enjoy receiving the updates. We offer the Report both electronically and by mail. If you have co-workers or colleagues that would like to receive the Report, or if you are receiving a copy from someone else and would like to have it delivered directly to you, please email Kendria Ellis at kellis@radeylaw.com to let her know.

Storm-Free Years, Stronger Private Market Improve Citizens' Financial Position

By: Travis Miller

After the devastating series of storms in 2004 and 2005, Florida has enjoyed a run of essentially storm-free years. This has led to improved conditions in the private insurance market, and consequently to reductions in the policy count of Citizens Property Insurance Corporation ("Citizens"). Citizens therefore expects that in 2015 it will be able to pay claims from a 100-year event without having to assess Floridians. This alleviates a potential financial burden on Floridians throughout the state, even those who do not have policies with Citizens.

Just three years ago, Citizens projected that it might have to assess more than $11 billion in a 100-year storm scenario. However, Citizens had more than 1.4 million policies at that time, its rates were still gradually increasing under a legislatively mandated glide path, and it had not accumulated much surplus. Fast forwarding to the present, Citizens' policy count is down to about 727,000 and is likely to drop below 700,000 in the coming months. Citizens also has been able to add to its surplus, and it has been able to take advantage of favorable reinsurance market conditions to transfer some of its risk. Citizens' Board recently approved a recommendation for staff to secure the reinsurance coverage necessary to handle a 100-year event without assessments.

"Thanks to the hard work of dedicated Citizens employees and a steadily improving private market, we are on the verge of eliminating, in the event of the 1-in-100 year storm, the need for the dreaded 'hurricane tax' that has hung over heads of Floridians for far too long," Barry Gilway said. "This is incredibly good news for Citizens policyholders and all Floridians who have been on the hook."

National Hurricane Center Advisories to Address Storm Surge

By: Travis Miller

Beginning in 2015, the National Hurricane Center will be experimenting with a new weather advisory system that it intends will become fully operational by 2017. The new system will include publishing storm surge watches and warnings independently of those associated with wind damage. The advisories will include maps in which areas marked in red are those where a danger of life-threatening rising water exists, generally over the ensuing 36 hours. Areas marked in yellow will be those where life-threatening rising water is possible, generally in the following 48 hours.

Two primary factors contribute to the National Hurricane Center's desire to provide storm surge information separately from wind warnings and watches. First, areas that are susceptible to storm surge and flooding might not always align with those where wind damage is expected. This can lead to a false sense of security among citizens who are not faced with substantial wind risk but who later experience flooding. Second, there is often a time lag between the threat of wind and the flooding that follows. Citizens in affected areas sometimes perceive that the threat is over when the wind event passes, and the new system is designed to highlight the continuing risk that might exist in the following days.

Florida Supreme Court Rules Workers' Compensation Policy Exclusion and Waiver Prevent Estate's Recovery of $9.525 Million

By: Ted Prekop

In a newly published opinion, the Florida Supreme Court held in *Morales v. Zenith Ins. Co.*, 2014 WL 6836320 (Fla. 2014), that a workers' compensation exclusion and a settlement agreement and release prevented recovery of $9.525 million for wrongful death from the insurer.

The facts are short, but tragic. Santana Morales, Jr. was crushed to death by a palm tree in 1997 while working for his employer, Lawns Nursery and Irrigation Designs, Inc. ("Lawns"). Morales' Estate (the "Estate") subsequently brought a wrongful death suit alleging that Lawns' negligence caused Morales' death. The jury returned a verdict of $9.525 million in favor of the Estate.

Meanwhile, Morales' wife, Leticia, entered into a workers' compensation settlement agreement with Lawns and Lawns' workers' compensation and employment liability insurance carrier, Zenith Insurance Company ("Zenith"). The workers' compensation settlement agreement contained a release, which provided that Leticia would be paid $100,000, and that this amount would be the sole remedy with respect to insurance coverage available to the Estate.

Due to the settlement and release, Zenith refused to pay the $9.525 million verdict obtained in the wrongful death suit. The Estate sued Zenith in state court under Lawns' employer liability policy, alleging breach of contract. Zenith removed to federal court, and the federal district court held that the policy's workers' compensation exclusion barred the suit. Therefore, the federal district court entered summary judgment in favor of Zenith. The Estate appealed.

On appeal, the Eleventh Circuit Court of Appeals found several issues of Florida law unclear. Specifically, it certified three questions to the Florida Supreme Court:

1. Did the Estate have standing to bring a claim against Zenith under the employer liability policy?
2. Did the workers' compensation exclusion operate to exclude coverage of the Estate's claim against Zenith for the wrongful death judgment?
3. Did the release in the workers' compensation settlement agreement allow Zenith to refuse payment to the Estate?

The Florida Supreme Court began by analyzing the standing question. The Court noted that in Florida, "a judgment creditor has standing to bring suit against a liability insurer that may have coverage for the judgment." Importantly, the Court also noted that Florida's nonjoinder statute, section 627.4136, Florida Statutes, specifically provides for standing in situations such as the instant case. Accordingly, the Court held that the Estate had standing to bring an action against Zenith to recover the $9.525 million.

Having found that the Estate had standing to bring the claim against Zenith, the Court then examined whether the workers' compensation exclusion in the employer's policy excluded coverage for the wrongful death judgment. Examining the policy, the Court noted that through the workers' compensation exclusion, the employer's policy excluded coverage for "any obligation imposed by a workers compensation ... law." The Court explained that employer liability insurance fills in the gaps in situations where Florida's workers' compensation scheme allows for a tort suit in addition to recovery under workers' compensation law.

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Supreme Court - Continued

The Estate argued that Zenith could not avoid coverage of the $9.525 million judgment because the judgment was obtained via tort law, and is not an "obligation imposed by workers' compensation law." In support of its position, the Estate cited *Wright v. Hartford Underwriters Ins. Co.*, which held that an insurance company cannot rely on a workers' compensation exclusion to avoid paying a settlement judgment in an injured employee's civil suit because the settlement judgment is not an "obligation imposed by workers compensation law."

The Court found *Wright* inapplicable to the instant case. In *Wright*, the plaintiff alleged that his injuries were due to a fellow employee's gross negligence, as opposed to his employer's negligence. This allegation, which was not found in the Estate's complaint, allowed the *Wright* plaintiff to pursue a civil remedy pursuant to section 440.11, Florida Statutes. Since there was no such allegation in the Estate's complaint, the Court found this case inapplicable. The Court noted that the Estate's judgment fell clearly within the exclusivity of Florida's workers' compensation scheme. Therefore, the Court held that Zenith was under no obligation to pay the wrongful death judgment due to the exclusion.

Finally, the Court examined the release obtained by Zenith in the workers' compensation settlement agreement. The Estate argued that the release was not binding on Morales' widow because she signed the settlement agreement in her capacity as a parent and guardian of her 4 children (as opposed to her capacity as an individual or as personal representative of the estate). The Court rejected this argument, and reiterated that in cases involving an employee's death as a result of employer negligence, the employer's statutory workers' compensation liability is the sole and exclusive form of employer liability. Furthermore, Florida's workers' compensation scheme fixes the amount of compensation that is available as a result of an employee's death, and this amount includes the claims of spouses and children. The Court also noted that neither party disputed that the settlement agreement and release complied with Florida law. Therefore, the Court held that the release precluded the Estate from collecting the $9.525 million judgment from Zenith.

Workers' Compensation Reimbursement Manual for Hospitals Replaced

By: Ted Prekop

The Florida Department of Financial Services, Division of Workers' Compensation, has adopted rule 69L-7.501, F.A.C., relating to the Florida Workers' Compensation Manual for Hospitals. The new rule replaces the 2006 edition of the Florida Workers' Compensation Reimbursement Manual for Hospitals with the current 2014 edition. The 2014 manual "establishes policy, procedures, principles and standards for implementing statutory provisions regarding reimbursement for medically necessary services and supplies provided to injured workers in a hospital setting." The new rule goes into effect January 1, 2015. Copies of the new rule, as well as the 2014 edition of the Florida Workers' Compensation Manual for Hospitals, are available at https://www.flrules.org/.

New Rules for Insurance Representative Licensing Go Into Effect

By: Ted Prekop

On November 26, 2014, new rules regarding the procedures for insurance representative licensing went into effect. The new rules are found in Chapter 69B-211, Part I, of the Florida Administrative Code. Specifically, the new rules provide additional requirements and procedures for "navigator" applicants. A navigator is a new category of insurance professional created to assist health insurance consumers to find insurance coverage through insurance exchanges created to fulfill mandates imposed by the Patient Protection and Affordable Care Act.

Navigator applicants must complete and submit Form DFS-H2-2126 to the Florida Department of Financial Services. Newly added rule 69B-211.0025, entitled "Additional Rule Specific to Navigators," provides additional rules specific to navigator applicants. In order to be registered as a navigator, applicants must provide an official certificate from the U.S. Department of Health and Human Services demonstrating certification as a marketplace navigator. This requirement is in addition to the requirements found in section 626.9953(3)(f), Fla. Stat., which requires that an applicant successfully complete all navigator training mandated by Florida or Federal law.

The new rules also deleted a provision which required applicants to comply with Part II of Chapter 69B-211 regarding photo identification licenses. Copies of the rules can be found at https://www.flrules.org/.

Legislative Committee Changes Affecting Insurance

By: Karen Asher-Cohen

House Insurance and Banking

House Speaker Steve Crisafulli appointed Rep. John Wood to chair the 2015 House Banking & Insurance Subcommittee, which will be larger than before and will contain many new faces. There will now be 13 subcommittee members, compared to nine the last couple of sessions. This subcommittee will be under the House Regulatory Affairs Committee, chaired by Rep. Jose Diaz, R-Miami. Rep. Wood, R-Winter Haven, will succeed Bryan Nelson, R-Apopka, who could not seek reelection to the House because of term limits. Other returning members are: Rep. Tom Goodson, R-Titusville; Larry Lee, Jr., D-Fort Pierce, a State Farm agent; David Santiago, R-Deltona; John Tobia, R-Melbourne Beach; and Duayne Taylor, D-Daytona Beach. New members include: Wood; Ben Albritton, R-Bartow; Bobby DuBose, D-Broward County; Jay Fant, R-Jacksonville; Evan Jenne, D-Fort Lauderdale; Kathleen Passidomo, R-Naples; and Scott Plakon, R-Seminole County.

Senate Banking and Insurance

Sen. Lizbeth Benacquisto, R-Fort Myers, was recently appointed chair of the Senate Banking & Insurance Committee by Senate President Andy Gardiner, R-Orlando, succeeding David Simmons, who is the new Rules Committee chair. Sen. Benacquisto has not recently served on the Banking & Insurance Committee. While other committees are involved in insurance matters, the Banking & Insurance Committee is the primary committee in the Senate for substantive insurance issues. Sen. Garrett Richter, R -Naples, was appointed Banking & Insurance Committee vice chair. Richter is also President Pro Tempore. The other members of the Senate Banking & Insurance Committee are: Lizbeth Benacquisto, Chair; Garrett Richter, Vice Chair; Jeff Clemens, D-Brandon; Nancy Detert, R-Venice; Dorothy Hukill, R-New Smyrna Beach; Tom Lee, R-Brandon; Gwen Margolis, D-Miami Beach; Bill Montford, D-Tallahassee; Joe Negron, R-Stuart; David Simmons, R-Altamonte Springs; and Christopher Smith, D-Fort Lauderdale.

First DCA Holds Insurance Company has Duty to Defend Doctors on Defamation Claim

By: Ted Prekop

In *Khatib v. Old Dominion Ins. Co.*, 2014 WL 6851418 (Fla. 1st DCA 2014), the First District Court of Appeal ruled that an insurance company had a duty to defend third-party defendant doctors on a defamation claim despite an exclusion for "Employment-related practices, ... such as ... defamation."

The case arose out of a dispute between doctor directors and officers of First Coast Cardiovascular Institute ("FCCI"). Dr. Majdi Ashchi was the president and founder of FCCI. The Appellants were officers and directors of FCCI. A dispute arose between Dr. Ashchi and the Appellants, leading Appellants to seize control of FCCI. After taking control, the Appellants, acting within their authority as officers and directors, used FCCI to sue Dr. Ashchi and others on a number of claims, including fraud, breach of contract, and unjust enrichment. Dr. Ashchi responded by filing a third-party defamation complaint against the Appellants. The defamation complaint alleged that Dr. Khatib, one of the Appellants, told other doctors that Dr. Ashchi had embezzled money from FCCI, ordered unnecessary procedures, and was going to be prosecuted. The defamation complaint also alleged that the other Appellants had published defamatory statements to third parties.

An issue arose with respect to coverage under the liability policy issued by Old Dominion Insurance Company ("Old Dominion") to FCCI. The insurance policy stated that Old Dominion would pay to defend damages as a result of "personal injury." "Personal injury" was defined as "injury, other than 'bodily injury,' arising out of one or more of the following offenses: ... (d) *Oral or written publication of material that slanders or libels a person* or organization or disparages a person's or organization's goods, products or services." (emphasis added). However, the exclusions section of the policy contained the following language: "*This insurance does not apply to: "Personal injury" to*: (1) A person arising out of any ... (c) Employment-related practices, policies, acts or omissions, such as coercion demotion, evaluation, reassignment, discipline, *defamation*, harassment, humiliation or discrimination directed at that person..." (emphasis added). Based on the language of this exclusion, the trial court ruled that Old Dominion had no duty to defend the Appellants. As a result, the Appellants appealed to the First DCA.

The First DCA began its analysis by stating the general rule that an insurance policy cannot grant coverage in one paragraph, then take away the same coverage in an exclusion. It also reiterated the principle that if a complaint alleges some facts that come within the scope of an insurance policy and others that do not, the insurer is obligated to defend the entire suit. Importantly, it noted that defamation could "arise out of [FCCI's] business," but at the same time not be "employment related." The First DCA cited with approval to several out-of-state decisions interpreting the phrase "employment related" narrowly. The First DCA gave the following example: defamatory statements made at a business-related social gathering. In this context, the defamatory statements would arise out of FCCI's business, but they would not be employment related. Finally, the First DCA noted that questions as to an insurer's duty to defend must be resolved in favor of the insured when ambiguity in the policy is present.

Based on the above, the First DCA held that Old Dominion owed the Appellants a duty to defend on the defamation claims. However, the First DCA remanded the case to the trial court for more discovery on the issue of whether Old Dominion had a duty to indemnify the Appellants as well.

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.

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

Travis L. Miller
tmiller@radeylaw.com

Ted Prekop
tprekop@radeylaw.com

Harry O. Thomas
hthomas@radeylaw.com

David A. Yon
david@radeylaw.com

Nick Iarossi and Ron LaFace, Jr. are of counsel to the firm and principals in Capital City Consulting, LLC, a Tallahassee government relations and advocacy firm.

Florida's 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