Florida Insurance Report

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New Law Clarifies FIGA Recoupment Receivables are Admitted Assets

By: Travis Miller

The legislature passed HB 189 in the 2015 regular session relating to the admissibility of receivables arising from the recoupment of Florida Insurance Guaranty Association (FIGA) assessments. Upon now being approved by the Governor, the new law takes effect July 1, 2015.

The new law relates to FIGA assessments that are paid by an insurer before being collected from policyholders and therefore result in a receivable for the amount the insurer expects to collect in the future. Under the new law, this receivable will be considered an admitted asset as long as the amount of the receivable is likely to be realized. The asset must be established and recorded separately from the assessment liability.

In some situations, an insurer will not be likely to realize the amount of a receivable. For example, if an insurer is significantly reducing its writings or withdrawing from the state, it likely would not be able to recover the amount it paid in assessments. In that case, the insurer would be required to reevaluate the amount of the receivable and reduce it to a level the insurer believes is likely to be collected.

Walk Away? Not so Fast – A Look at Rate Filing Issues

By: David Yon

Historically, rate and form filings in Florida have resulted in a lot of back and forth between an insurer's employees and their representatives and employees at the Office of Insurance Regulation. Often this results in an approved form or rate. In other cases, insurers most often withdraw a filing before it is disapproved and then refile with changes. In a limited number of cases, the clock runs out and an insurer either fails to withdraw the filing or is not given the opportunity to do so and the OIR issues a disapproval letter and notifies the insurer of its opportunity for a hearing.

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Omnibus Bill Gains Approval

By: Travis Miller

Governor Scott has signed House Bill 165 into law. This is the so-called omnibus bill that makes a variety of changes to the Florida Insurance Code. These changes, which take effect July 1, include:

- Eliminating the requirement for insurers to certify rate filings for the types of commercial filings that have become exempt from the rating law. The legislature in recent years has eliminated the filing and approval requirements for many types of commercial property and casualty insurance. However, a separate statute relating to the certification of filings remained unchanged and therefore out-of-step with the rating law. The legislature fixed this with the 2015 law change.
- Allowing an insurer to use a hurricane loss projection model for up to 120 days following expiration of the model's acceptability. Under current law, when the Florida Commission on Hurricane Loss Projection Methodology determines a newer version of a model to be acceptable, insurers may use the prior version for only 60 days. The longer 120-day period taking effect this year will create a smoother transition period for insurers.
- Clarifying that the annual rate filing requirement at section 627.0645 does not apply to commercial property and casualty insurance except for commercial residential insurance. This is designed to be consistent with the reduced filing requirements for commercial property and casualty insurance under Florida's rating law (section 627.062).
- Providing a uniform 120-day period for residential property insurance cancellations and nonrenewals under section 627.4133. Current law contains a complicated combination of notice periods including 100 days' notices for most policies but 120 days' notice for policies in effect for five years and a requirement to send notices by June 1 for any effective date between June 1 and November 30. As of July 1, the notice period will be a more straightforward 120 days.
- Rewording provisions relating to the cancellation or nonrenewal of residential property insurance policies after the first 90 days of the policy period. The revised provision clarifies that an insurer may cancel a policy based upon an insured's failure to comply, within 90 days after effectuation of coverage, with underwriting requirements established by the insurer before the date of effectuation of coverage.
- Clarifying that a policyholder's opportunity to request neutral evaluation of sinkhole claims does not apply if sinkhole coverage is not available under the policy or if the claim is filed outside of the statutorily established window for filing sinkhole claims.
- Specifying that the Medicare fee schedule used in connection with PIP policies is effective from March 1 of a given year through the end of the following February.
- Adding leased vehicles to the exemption from pre-insurance inspections applicable to private passenger auto policies; and
- Eliminating the prohibition under current law against an insurer's advertising the existence of the Florida Insurance Guaranty Association, provided that any reference to FIGA must explain the coverage limits that apply to the type of insurance for which FIGA is mentioned.

Insurers affected by these changes should be prepared to incorporate them into their procedures as of the July 1, 2015, effective date of the new law.

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In trying to evaluate filings in this last category, I am usually weighing several factors before giving a client advice. First, it is important to understand the impact of waiving those rights and letting the disapproval become final. In most cases, that remains the fastest way to get an approval. Once waived, there is usually an opportunity to discuss the filing with an analyst and obtain an understanding of what is needed to secure an approval. Analysts, understandably, become much less willing to discuss a filing if a hearing has been requested. And hearings tend to be much more expensive than conversations. Cheaper, faster, what is the issue?

Well, some of those rights you waive may leave you in a very bad place. The Doctors Company may provide a very unpleasant example. The company submitted a mandatory annual rate filing for its medical malpractice line of business requesting a zero rate change. After considerable discussions back and forth, the OIR issued a Notice of Intent to Disapprove with a notice of rights. The notice also informed The Doctors that "[t]he trend rate in the filing appears to be excessive" and that "[t]he loading in the filing for accrual of death, disability, and retirement benefits provided at no additional charge is not supported to be not excessive." The Doctors did not file a request for hearing or otherwise object. On April 21, 2015 the OIR issued a letter advising the filing was "hereby disapproved."

That was the end of the "good news." On June 2, 2015, relying on the Notice of Intent to Disapprove and the Disapproval letter, the OIR issued an Order directing The Doctors to make a new filing "reflecting reductions of fifteen percent (15%) from the current rate" for a number of lines. The filing is due within 60 days of the order. The Order does provide The Doctors with hearing rights, but it is unclear what is still subject to challenge and what is closed out by the disapproved filing. It should be a fascinating proceeding to track. And it should make us all think just a little harder about just walking away.

Analytical Underwriting Models

By: David Yon

In underwriting certain types of business many insurers have reached out to analytical underwriting models which evaluate the profitability of an individual risk, i.e. what happens to the overall company profitability of a particular risk when a policy is issued at the approved rate.

On May 19, 2015, OIR issued an Order in Federated National Insurance Company (case no. 172246-15), which "finds and alleges" as follows:

> 3. On or about April 1, 2013, Federated began using an underwriting process that included the use of an unfiled model in its underwriting and premium determination.

The Order finds Federated to be in violation of sections 627.062 and 627.0651(13), Florida Statutes, and states it intends to issue an order directing the company to cease and desist from using it. Federated was provided notice of rights regarding contesting the Order.

It is not clear what gave rise to the findings and allegations. The order references an "investigation ...of the insurance related activities of Federated National Insurance Company." What is clear however, is that if you rely on models for underwriting or pricing that have not been filed and approved, you should review your procedures carefully with counsel to be sure you are not vulnerable.

First District Court of Appeal Denies Insurer's Right to Require Consent for Assignment of Benefits

By: Karen Asher-Cohen

In *Security First Insurance Company v. OIR,* Case No. 1D14-1864 (Fla. 1st DCA 2015), the 1st DCA denied Security First the right to amend its homeowner's policy forms to restrict a policyholder's ability to assign post-loss rights without the company's consent. The company's proposed language was: "Assignment of this policy or any benefit or post-loss right will not be valid unless we give our written consent." The OIR had disapproved the proposed form change and the Company appealed the final order.

In its decision, the Court noted that there is "an unbroken string of Florida cases over the past century holding that policyholders have the right to assign such claims without insurer consent." The Court acknowledged the Company's concerns which supported the form change, such as inflated or fraudulent post-loss claims filed by remediation companies, homeowners not understanding their rights when signing AOB's, and a "cottage industry" of "vendors, contractors, and attorneys" that use AOB's to force insurance companies to pay more money in claims. However, the Court ultimately held that those concerns would be better addressed by the Legislature.

Law Change Authorizes Electronic Delivery of Personal Lines Policies

By: Travis Miller

The Florida legislature passed House Bill 273 in the 2015 regular session allowing the electronic delivery of personal lines insurance documents. The bill has been approved by the Governor and is now reflected in Chapter Law 2015-170.

The new law amends section 627.421, Florida Statutes, to provide that personal lines policyholders may affirmatively elect to receive documents electronically, including but not limited to policies, endorsements, notices and other documents.

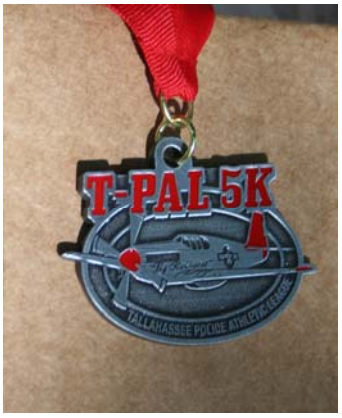
The new law takes effect July 1, 2015.

OIR Issues Memorandum Prohibiting the Use of Price Optimization in Premium Determination

By: Karen Asher-Cohen

OIR has issued a memorandum to all Florida property and casualty insurers to emphasize the requirements of the Florida Insurance Code in connection with insurers' potential use of Price Optimization in determining policyholders' premiums. In very clear terms, the OIR has concluded that the use of price optimization in rate filings results in rates that are unfairly discriminatory, and is therefore prohibited and in violation of the Florida Insurance Code. The OIR is directing, through this memorandum, that any insurer that has used price optimization in rates that are currently in effect must now submit a filing to the OIR to remove its use from its rate determination. Moreover, OIR directs insurers to not use price optimization "in any manner" in future filings.

Companies are advised to consult with counsel about any questions they may have.



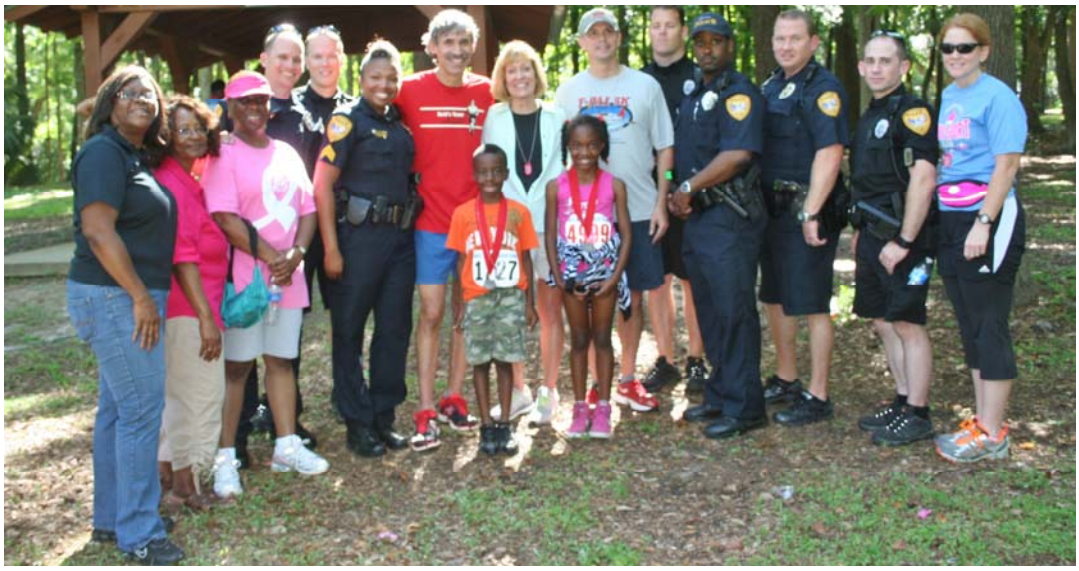
Radey, Tallahassee Police Athletic League Join Forces to Create Community Running Event

By: Travis Miller

Radey and the Tallahassee Police Athletic League teamed up to create a new 5K and one-mile run on May 30 at Tallahassee's Jack McLean Park. The origins of the event date back to an email Sergeant Anitra Highland of TPD sent to Radey's David Yon seeking assistance with putting together a 5K. David is the longtime director of Tallahassee's largest running event, the Turkey Trot (which has grown to more than 5,000 participants), and other races like the Potluck Bash. David quickly approached me when I was fresh off of serving on the race committee for the Trailblazer 5K in January, which this year drew the largest crowd in its history. Soon, the "TPAL" 5K was born.

Aside from lack of good sense, why would David and I agree to take on another race and commit the firm's support? The decision was easy considering the mission of the Police Athletic League and current headlines across the country about the deteriorating relationships between law enforcement and the communities they serve. While there is no single or easy solution to the unrest we have seen in the news, creating positive interactions between the community and the police force is a significant start. This is the mission of the Tallahassee Police Athletic League—to build relationships between law enforcement and the community, focusing on youth athletic and fitness programs.

Many Radey employees and their families participated in or volunteered for the event. In addition, the event had the strong support of the local Police Athletic League and Gulf Winds Track Club. With this support, the Police Athletic League was able to surpass its fundraising goal, which will allow it to expand its vision of offering low-cost or free youth athletic programs in the city. We also established the foundation for a good race that we hope will grow in the future. On behalf of the firm, we thank our friends locally who supported this race and look forward to seeing you again next year at Jack McLean Park.



First DCA Limits Scope of Enforcement Provision Available to Insurers Under PIP

By: Karen Asher-Cohen

In *Shands Jacksonville Medical Center, Inc. v. State Farm Mutual Automobile Ins. Co.*, Case No. 2D14-2001 (Fla. 1st DCA 2015), the 1st DCA overturned the trial court's discovery order, because it was an abuse of discretion and exceeded the scope of discovery allowable under sections 627.736(6)(b) and (c), F.S., which is part of the PIP law. State Farm had paid Shands for medical services provided to 29 insureds, after which, State Farm requested information regarding the treatment invoices. Shands sent State Farm a variety of documents. However, Shands did not comply with State Farm's request for confidential contracts between Shands and 37 health insurers, which contain negotiated discount rates from its regular charges with those third parties. In the case below, State Farm requested those contracts, and the right to depose certain Shands employees. The trial court ordered Shands to produce the contracts and a corporate representative for deposition.

The appellate court held, in reversing the order:

> [W]e disagree with the trial court's conclusion that the "discovery of facts" referred to in section 627.736(6)(c), ... allows discovery under the entirety of section 627.736, including the types of evidence that may be considered when determining the reasonable reimbursement rate for medical bills presented for treatment referred to in section 627.736(5)9a). Rather, we hold that this reference to discovery applies only to the types of information a healthcare provider is required to provide as delineated in section 627.736(6).

Also, the 1st DCA certified conflict with *Kaminester v. State Farm Mutual Automobile Ins. Co.*, 775 So.2d 981 (Fla. 4th DCA 2000), to the extent that "it holds that the 'discovery of facts' referred to in section 627.736(6)(c), Florida Statutes, means that the discovery methods provided for in the Florida Rules of Civil Procedure are available to insurers that institute proceedings pursuant to that statute."

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Department of Revenue Issues Guidance on FIGA Recoupments

By: Travis Miller

The Florida Department of Revenue has issued guidance to insurers relating to their recoupments of Florida Insurance Guaranty Association (FIGA) assessments. Due to a law change passed in the 2015 regular session, recoupments of both regular and emergency FIGA assessments will not be subject to the insurance premium tax. The Department of Revenue's guidance notes, however, that the property insurance portion of any assessment will continue to be included on the Florida side of the retaliatory tax computation. The full text of the Department of Revenue's TIP is set forth below:

TIP #15B8-02
DATE ISSUED: June 17, 2015

Florida Guaranty Association Assessment Recoupment No Longer Reportable as Taxable Premiums

Amounts recouped from policyholders as a result of a Florida Insurance Guaranty Association (FIGA) assessment under subsection 631.57(3), F.S., levied on or after July 1, 2015, are no longer considered taxable premiums. Recouped regular and emergency assessments are specifically excluded from taxable premiums and, therefore, are not subject to the Insurance Premium Tax or to the State Fire Marshal Regulatory Assessment.

Since FIGA assessments are specifically stated to be imposed on the insurer, the property insurance portion of the assessment will continue to be included as a burden of the insurer on the Florida side of the retaliatory tax computation, even if recouped from the policyholder.

To the extent a recoupment of FIGA assessments imposed on or after July 1, 2015, is included in direct written premiums on the insurer's Annual Statement, the recouped assessments should be subtracted in the computation of taxable premiums on the *Insurance Premium Taxes and Fees Return* (Form DR-908). Insurers must maintain records of their recouped assessment amounts and must document the proper amount of premiums subject to Insurance Premium Tax.

DFS Proposes Changes to Licensee Penalty Rules

By: Travis Miller

The Florida Department of Financial Services has proposed changes to rule 69B-231.020, which establishes the scope of licensees subject to the penalty provisions of rule chapter 69B-231. The rule currently specifies that the chapter applies to insurance agents, customer representatives, adjusters, navigators and service representatives licensed under Chapter 626 of the Florida Insurance Code. The rule also specifically provides that it does not apply to insurance agencies, title insurance agencies, title insurance agents, insurance administrators, surplus lines agents, bail bond agents or managing general agents.

DFS is proposing an amendment to the rule that would eliminate the provisions listing licensees that are not subject to chapter 69B-231. The proposed changes also would specifically add surplus lines agents and managing general agents to the list of licensees that are governed by the rule chapter.

If requested, DFS will hold a hearing on the proposed changes on July 9.

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