Florida Insurance Report

Keeping You Informed About Florida
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OIR Seeks to Amend Holding Company Regulations

By: Travis Miller

The Florida Office of Insurance Regulation held a workshop at its office in Tallahassee to discuss potential amendments to key administrative rules governing insurance holding company systems and transactions between insurers and their affiliates. The workshop is the first step in the administrative rule-making process, which ultimately leads to formal revisions to regulations governing the industry.

The OIR intends to amend rule 69O-143.046 "Registration of Insurers," rule 69O-143.047 "Standards," and rule 69O-143.056 "Acquisition of Controlling Stock." The latter rule received little attention at the workshop because it is being amended only to increase the referenced 5% threshold for filing an acquisition to 10% in light of a statutory change. Industry representatives had more comments, however, on rules 69O-143.046 and 69O-143.047, which govern holding company registration statements and transactions among affiliates.

Continued at Bottom of Page 6

Eleventh Circuit to Hear PIP Overbilling Case

By: Karen Asher-Cohen and Laura Dennis

Recently, the Eleventh Circuit Court of Appeals granted a petition for a Rule 23(f) permissive appeal from the Middle District of Florida's Order striking class action allegations in a personal injury protection (PIP) action. The action, which was initially filed in state court, alleged that HCA Holdings, Inc. overcharged patients for emergency radiological services. Specifically, the plaintiffs alleged that they were treated at the defendants' hospital facilities, which charged PIP insurance carriers for radiological services at rates higher than the rates the hospitals received for Medicare and privately insured patients. The plaintiffs sought to bring a class action on behalf of other patients treated at defendants' hospital facilities. The action was removed to federal court in September, 2014.

Continued on Page 5

Inside this Issue

NCCI Asks for Overall Rate Level Decrease of 1.9%

By: David Yon

NCCI submitted its annual workers' compensation filing to the Office of Insurance Regulation on August 20, 2015. In its news release the NCCI stated:

> Based upon its review of the most recent data available, NCCI has proposed an overall average rate level decrease of 1.9%. With a reduction in the expense constant from $200 to $160 and changes to minimum premiums, the overall average premium decrease is 2.2%, effective January 1, 2016.

The release also identified several "key observations" related to the filing:

- Loss experience in the two most recently available policy years (2012 & 2013) shows overall improvement;
- Indemnity and medical trends have declined, driven in part by a decrease in frequency;
- Loss adjustment expenses have decreased slightly, but remain higher than the countrywide average; and,
- Interest rates have remained near historic lows for several years, which has prompted NCCI to request a higher profit and contingency provision of 4%.

If approved as filed, the overall average rate level change for each industry group will be as follows:

<u>Industry Group 1-1-2016</u>

Manufacturing -4.7%

Contracting +1.0%

Office and Clerical -5.1%

Goods and Services -1.6%

Miscellaneous -1.8%

Total -1.9%

The release ended with a warning:

> However, rates could increase, perhaps dramatically, depending on decisions issued in a couple of pending court cases: *Westphal v. City of St. Petersburg*; *Castellanos v. Next Door Company*; and *Florida Workers Advocates v. State of Florida* (if accepted by the Florida Supreme Court).

The Office of Insurance Regulation responded with its own release acknowledging the filing and promising:

> The Office will review the filing to ensure the proposed changes are not excessive, inadequate, or unfairly discriminatory and evaluate its potential effects on the insurance marketplace and employers, who are required by law to carry this insurance on their employees. A public rate hearing will be conducted in October.
>
> Florida's workers' compensation market remains one of the most competitive, efficient, and affordable, thanks in large part to the 2003 legislative reforms. Workers' compensation rates are currently 58% lower than they were in 2003.

Radey Strengthens State and Local Tax Practice with Addition of Rex Ware

Rex Ware

Radey is pleased to welcome Rex Ware to the firm. Rex practices in the areas of state and local taxation, government contracting, and civil and administrative litigation. Rex regularly represents clients before the Florida Department of Revenue, as well as in proceedings before the Florida Division of Administrative Hearings and civil courts.

"I look forward to being part of the Radey team," said Ware. "My tax practice and experience with administrative and governmental law fit well with Radey's strengths."

Firm president Travis Miller added, "We're happy Rex decided to join us. He is widely regarded as one of the top state and local tax lawyers in Florida. Tax issues are important to the regulated industries we represent, so Rex's experience in this area complements our existing practices."

In recent years, Rex has been representing private clients in tax issues, government contracting and litigation. Prior to entering private practice, Rex was Deputy General Counsel at the Florida Department of Revenue. He is regularly noted for his work in publications such as Chambers USA and SuperLawyers.

Susan Clark and Brittany Adams Long Become Board Certified

Susan F. Clark

The Radey Law Firm is pleased to announce that Susan F. Clark and Brittany Adams Long have become Board Certified by The Florida Bar in State and Federal Governmental and Administrative Practice.

Board Certification requires a lawyer to be favorably evaluated by his or her peers and by judges or agency heads the lawyer appears before as to competency and professionalism. Additionally, the lawyer must pass a written examination. Susan and Brittany join Travis Miller and Donna Blanton, who are also Board Certified in State and Federal Government and Administrative Practice.

Brittany Adams Long

Florida First District Court of Appeal Upholds Validity of 2013 Amendments to Medical Malpractice Presuit Notice Requirements

By: Karen Asher-Cohen and Laura Dennis

The First District Court of Appeal in *Weaver v. Myers et al.,* Case No. 1D14-03178 (Fla. 1st DCA July 21, 2015), recently upheld the validity of amendments to Florida's medical malpractice presuit notice requirements found in sections 766.106 and 766.1065, Florida Statutes. The 2013 amendments permit a potential defendant to interview the potential claimant's treating health care provider without the presence of the potential claimant's attorney, after providing notice. The amendments also require that a potential claimant sign a written waiver of federal privacy protection concerning the claimant's relevant medical information, before bringing the action.

The appellant in *Weaver* challenged the validity of these amendments, arguing that they: (1) violated the separation of powers; (2) violated the constitutional limitation on special legislation; (3) impermissibly burdened the right of free access to the courts; (4) violated the constitutional right to privacy; and (5) were preempted by the Health Insurance Portability and Accountability Act (HIPAA). The court found that appellant's arguments were without merit.

First, the court concluded that the statutes did not intrude on the Supreme Court's procedural rule-making power because they were integral to other substantive portions of the statute and did not conflict with the Florida Rule of Civil Procedure concerning informal discovery. Second, the court concluded the law did not violate the limitation on special legislation because the statutes were general laws that applied to an open class of claimants and potential defendants. Third, the court disagreed with appellant's argument that the statutes burdened access to courts. Specifically, the court noted that the requirement of a claimant to sign and serve the waiver does not abolish or eliminate the claimant's substantive rights, but is only a precondition to bringing suit. Fourth, the court held that the statutes do not violate a claimant's right to privacy, noting that the privacy rights to medical information are waived once that information is placed at issue by filing a medical malpractice claim. Lastly, adopting the reasoning in *Murphy v. Dulay,* 768 F.3d 1360 (11th Cir. 2014), the court held that the amendments were not preempted by HIPAA. Accordingly, the First District Court of Appeal concluded that the medical malpractice presuit notice statutes and amendments are constitutional and valid.

Radey Named to Florida Trend "Best Companies" for 5th Consecutive Year

For the fifth consecutive year, Florida Trend magazine has named Radey one of the Top 100 places to work in Florida. "We are pleased to again be named one of Florida's best places to work," said firm president Travis Miller. "Florida Trend's review process relies heavily on feedback from our employees, so being named to the Best Companies list is an indication that we are achieving good balance between working hard on behalf of our clients and allowing our employees to pursue interests outside of work."

Florida Trend goes through a detailed process each year to establish its list of the Best Companies to Work For in Florida. The process begins with an extensive survey inquiring about companies' hiring practices, benefits, work environment, and community involvement. Florida Trend then sends individual inquiries to each company's employees asking a wide range of questions about their experiences with the employer.

PIP Overbilling - Continued from Page 1

In federal court, the defendants filed a motion to dismiss the complaint, arguing that the complaint did not state valid claims for relief, and a motion to strike, arguing that the individualized nature of the claims predominated such that the claims were not proper for a class action. The defendants argued that a determination of the amount of PIP benefits and reimbursements was unsuitable for class treatment. The Middle District of Florida agreed. The court issued an order dismissing plaintiff's breach of covenant of good faith and fair dealing claim and granting the defendants' motion to strike the class action allegations. Judge Moody stated that "[i]f this case were to proceed, the most important issue to settle, the reasonableness of the charge for the specific radiological service and the damages incurred by each putative plaintiff, would be highly individualized in nature." For example, courts would need to analyze whether each plaintiff had co-insurance to cover other expenses, and whether medical services for each plaintiff were reasonable and necessary and related to the motor vehicle accident so that PIP coverage would apply. Thus, Judge Moody concluded that "[g]iven the nature of the claims and individual factual inquiries required, it is clear the individualized issues predominate and this suit cannot proceed as a class action."

Plaintiffs then filed a petition for a Rule 23(f) permissive appeal to review the district court's Order granting the motion to strike. The Eleventh Circuit Court of Appeal granted the petition on July 22, 2015. At this time, no ruling has been made by the Eleventh Circuit.

Commissioner McCarty Says National Flood Rates are "Unfairly Discriminatory"

By: Karen Asher-Cohen

In response to a letter from Sen. Jeff Brandes, R-St. Petersburg, asking OIR to analyze the national flood insurance rates for Floridians, Commissioner McCarty stated:

> Without data and further analysis [to determine whether the rates being charged Floridians are excessive, inadequate, or unfairly discriminatory] though, we can say that the rates are unfairly discriminatory. NFIP has developed its rating based on multiple zones that are combined to determine rates, with 30 different A zones and separately 30 different V zones. ... These are averaged together to charge one rate across the country. The averaging together of different costs and charging one rate would be considered unfairly discriminatory from an actuarial perspective which would not pass scrutiny under Florida law.

McCarty added that OIR would request from the National Flood Insurance Program ("NFIP") the actuarial study used to create the most recent rates, including the data and models used. He also suggested that their "primary focus should be on the future flood projections now being developed." However, the Florida Hurricane Loss Projection Methodology has not yet adopted any models for flood, and is not required to do so until July 1, 2017, pursuant to section 627.0628(3)(e), F.S. An OIR actuary is a member of the Commission.

The Commissioner thanked Brandes for his leadership on this issue and said he shared the Senator's concerns about transparency in the ratemaking process used by the Federal Emergency Management Agency for the NFIP.

People on the Move at DFS

By: Karen Asher-Cohen

CFO Jeff Atwater has appointed Sha'Ron James as the new Insurance Consumer Advocate for Florida. "Sha'Ron's experience holding insurance companies accountable and her in-depth understanding of the insurance industry raises the bar for Florida's advocacy efforts," said CFO Atwater. "Sha'Ron has fought to ensure that the interests of consumers come before profit and special interests, and I am confident she will carry her passion for the people of Florida into this role."

Most recently, James served as the Director of the Division of Rehabilitation and Liquidation at DFS. James received her bachelor's degree in economics from Florida A&M University, her master's degree in public administration from Syracuse University, and her juris doctor from the University of Florida. She holds an advance project management certificate from Stanford University, and carries an extensive list of professional awards and accomplishments.

When I spoke to Sha'Ron about her new role, she said: "I am very focused on changing the conversation so that insurance consumers are engaged and valued as equal partners in all aspects of the industry. One of my major priorities is to actively listen to consumers so that I can deliver an effective and pro-active message to the industry, regulators, and stakeholders. We are currently organizing a series of consumer forums that will take place in Orlando, Jacksonville, Tallahassee, as well as, Palm Beach and Broward Counties." We will look for those dates in the near future.

Toma Wilkerson, who currently serves as Assistant Director of the Division of Rehabilitation & Liquidation, has been named Director. Prior to that role, Toma served as a regulator for many years at OIR.

Holding Company - Continued from Page 1

In many instances, the revisions proposed by the OIR bring the rules into better alignment with NAIC model regulations. Although some differences remain, most of the rules and underlying forms are either identical to NAIC models or contain content that the OIR believes is substantially similar such that insurers domiciled in Florida likely will find that forms submitted to Florida satisfy the informational requirements of other states.

Along with the amended rules, the OIR would adopt an updated version of its Holding Company Registration Statement. The version of the form currently in effect was adopted in 1997. The overall format of the draft form is similar to the current version, but several requirements are either added or amended to better track information required in the NAIC model. Florida also plans to adopt a form entitled "Summary of Changes to Registration Statement" following the format of Form C in the NAIC model. Florida currently does not use this form. Additionally, the OIR proposes to adopt a "Prior Notice of a Transaction" form, which follows the familiar Form D. Florida currently requires prior notice of affiliated transactions but does not mandate use of the Form D format.

Finally, the OIR is looking to adopt Form F for the "Enterprise Risk Report." Again, Florida requires the submission of an enterprise risk report, but it has not adopted a specific format for doing so. Many insurers looked to the standard Form F format for guidance when preparing their enterprise risk reports this year, and the OIR's rule would formalize the use of that format.

OIR Recognizes Medicare Supplement Policies With New or Innovative Benefits

By: Karen Asher-Cohen

OIR has issued a new Informational Memorandum #OIR-15-06M, entitled "Medicare Supplement Policies in Florida." In the Memorandum, OIR reviews the filing requirements for a Medicare Supplement policy, but also informs insurers of additional options available for products in this marketplace.

Under section 627.672, F.S., a "Medicare supplement policy" is defined as "a health insurance policy or other health benefit plan offered by a private entity to individuals who are entitled to have payments for health care costs made under Medicare, Title XVIII of the Social Security Act ("Medicare"), ... which provides reimbursement for expenses incurred for services and items for which payment may be made under Medicare but which expenses are not reimbursable by reason of the applicability of deductibles, coinsurance amounts, or other limitations imposed by Medicare." A policy does not need to be called a "Medicare supplement policy" for Part VIII of Chapter 627 to apply. Also, Medicare supplement policies in Florida must provide for the minimum standards outlined in Part VIII and in Rule Chapter 69O-156, F.A.C.

However, under Florida law, a Medicare supplement policy can provide additional benefits which are not inconsistent with those minimum standards. Rule 69O-156.0085 (6) provides:

(6) New or Innovative Benefits: An issuer may, with the prior approval of the Office, offer policies or certificates with new or innovative benefits, in addition to the standardized benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new or innovative benefits shall include only benefits that are appropriate to Medicare supplement insurance, are new or innovative, are not otherwise available, and are cost-effective. Approval of new or innovative benefits must not adversely impact the goal of Medicare supplement simplification. New or innovative benefits shall not include an outpatient prescription drug benefit. New or innovative benefits shall not be used to change or reduce benefits, including a change of any cost-sharing provision, in any standardized plan.

Additionally, OIR reminds insurers that the out-of-state group exemption in section 627.6515, F.S., does not apply to Medicare supplement insurance policies. Out-of-state group policies that provide Medicare supplement benefits to Florida residents must be filed with the Office for approval.

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