

# FLORIDA INSURANCE REPORT

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Florida's Capital Law Firm for Regulated Industries  
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## Interview With Commissioner Kevin McCarty On His Resignation Decision

By: Karen Asher-Cohen



I recently had the opportunity to sit down with Commissioner Kevin McCarty and talk to him about his recent decision to resign as Insurance Commissioner of Florida, effective May 2, 2016, a position he has held since 2003.

### Why are you leaving now?

I would like to pursue other, new opportunities and think this is the right time.

### What accomplishments are you most proud of as you reflect on your time thus far as commissioner?

I am most proud of the investigation of unclaimed property held by life insurance companies who were using the Social Security death lists to stop payments on annuities, but

didn't use them to notify beneficiaries of life insurance policies who were owed money. On a national basis, we succeeded in securing a total of \$7 billion for working class people. I was proud to serve as Chair of the Commissioners that investigated the life insurance companies and claims and ultimately achieved these settlements for consumers.

### How has the market changed over time?

The market has changed dramatically over the years and during my tenure as Insurance Commissioner. No one believed after the 2004-2005 hurricane years, when Citizens grew to more than 1.5 million policyholders, that we would see the depopulation of that market. Of course, the financial crisis played a big part in that and made it possible to significantly depopulate CPIC.

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## HAPPY NEW YEAR!

As we have closed the books on 2015, we want to take the opportunity to wish you all a very happy, healthy and successful new year. We hope that 2016 brings you all that you hope for. Enjoy the year with your family in peace and happiness with continued success.



We have enjoyed our relationship in the past and look forward to hearing from you soon. Thank you for your continued support of the firm.

## Financial Services Commission Responsible for New Commissioner Appointment

By: Travis Miller

Florida Insurance Commissioner Kevin McCarty's announcement that he is resigning effective May 2, 2016, puts Florida in a position it has been in only once before-- needing to appoint an insurance commissioner to lead the Florida Office of Insurance Regulation (OIR). McCarty is the first, and only, insurance commissioner appointed after the restructuring of the Florida Cabinet more than a dozen years ago, which included the creation of the OIR.

So, with Florida needing to fill the commissioner's position later this year, how does the process work? The Financial Services Commission of the State of Florida ultimately is responsible for appointing (and removing) the insurance commissioner. The Financial Services Commission is composed of the Governor (Republican Rick Scott), the Chief Financial Officer (Republican Jeff Atwater), the Attorney General (Republican Pam Bondi), and the Commissioner of Agriculture (Republican Adam Putnam). The Financial Services Commission must appoint an insurance commissioner by a majority vote consisting of the affirmative votes of at least three of its members. In addition, both the Governor and the Chief Financial Officer must be on the pre-

vailing side. Said differently, Governor Scott and CFO Atwater must agree on the next insurance commissioner, and either Attorney General Bondi or Commissioner Putnam must join them.

Also, with Commissioner McCarty's long tenure at the Office of Insurance Regulation, we haven't had to look at the statutory requirements for the position in many years. By law, the commissioner must have had, within the last ten years, at least five years of responsible private sector experience working full time in areas with the subject matter jurisdiction of the OIR, or alternatively must have had at least five years' experience as a senior examiner or other senior employee of a state or federal agency having regulatory responsibility over insurers or insurance agencies.

In the coming weeks the Financial Services Commission will advertise the position and begin to consider candidates. In the meantime, Florida will embark on the last regular legislative session of Commissioner McCarty's tenure.

## OIR Issues 2015 Workers' Compensation Annual Report

By: Karen Asher-Cohen

The Florida Office of Insurance Regulation (OIR) has released the [2015 Workers' Compensation Annual Report](#) to the Florida Legislature. The OIR is required by law to annually evaluate competition in the workers' compensation market and to investigate and use data in its review of such rate filings. The Report shows that Florida's market is still competitive with over 250 private insurance companies writing over \$2.5 billion in premium, well capitalized, and affordable for Florida businesses. In Florida, private insurance companies account for more than 95% of the workers' compensation coverage in the market.

A rate decrease of 4.7% became effective on January 1, 2016, which was the second decrease in two years, representing a 60.3% cumulative reduction in Florida's workers' compensation rates since the 2003 legislative reforms were passed. The OIR has viewed this as an indication that the legislative reform measures produced the desired result and lowered costs dramatically.

## **Commissioner McCarty - Cont. from Page I**

### **What advice would you give yourself starting out as Commissioner, that you know now, but didn't know then?**

I would have been more aggressive in reviewing applications for new companies' certificates of authority. In looking at companies that had \$10-20m in capital and surplus and when I had qualms about their business plans, I approved them based on the statutory requirements and if they had good people and solid investors. In hindsight, I should have been more confident in my instincts and experience and been more challenging of their business plans before going forward.

### **Have you had any disappointments as Commissioner?**

Certainly. Every day I have to make hundreds of decisions that affect the people of Florida. In hindsight, I regret the companies that were in the property market that became insolvencies after the 2004-2005 hurricane season.

### **What are some of the issues you'd still like to address over the next four months?**

Over the next four months, I would like to continue to close out cases and negotiations with unclaimed property settlements with life insurance companies. In the Legisla-

ture [which started its 60-day session on Tuesday, January 13<sup>th</sup>], we have two key initiatives: passage of the ORSA (Own Risk and Solvency Assessment) corporate governance accreditation standards and reforming the HMO legislation to enhance solvency standards. Currently, there are no RBC requirements for single-state HMO's. Given the changes in Medicare and Medicaid and the Affordable Care Act, companies are in a better position but consumers and doctors can still get hurt. We need to make sure the infrastructure is in place so that doctors get paid and consumers receive proper services. Also, I am still working with capital markets and on modernization of the capital system and am working collaboratively with interested partners.

### **What advice would you give to the next person to sit in your chair?**

Florida is not for the faint of heart. It is very important to understand that this is a state of great diversity and it is important to understand that diversity. The new Commissioner should sit down and have a conversation with all the stakeholders in this market and remember that his/her decisions have an impact on all of Florida. Also, they need to remember that they are responsible for building markets and protecting consumers. They will wear many hats but protecting consumers should be their paramount concern.

## **Creditor-Placed Insurance Model Act Working Group Considers Work Plan**

By: Travis Miller

The Creditor-Placed Insurance Model Act Working Group of the NAIC will be convening by telephone conference on January 26, 2016, to discuss its work plan for the upcoming year. The working group is chaired by David Altmaier, Florida's deputy commissioner for property and casualty insurance.

According to a draft of the work plan, the working group would hold a series of calls in February, March and April to

discuss the current model act and potential revisions. This would culminate in release of a draft of proposed revisions in early May. The revisions would have a 45-day exposure period, allowing the committee to receive comments and discuss them in late June and July. By early August, the working group would receive final comments, consider adopting a revised model law, and determine whether to send the revisions to the NAIC's C Committee at the summer NAIC meeting.

## DFS Summarizes Agent in Charge Requirements

By: Travis Miller

The beginning of a new year is a good time to revisit the "agent in charge" requirement applicable to agency locations. The Department of Financial Services has helped facilitate this review with a recent summary of the agent in charge requirements and responsibilities.

**Designation of Agent in Charge**—Each person operating an insurance agency, and each location of a multiple location agency, must designate a licensed and appointed agent in charge for each location. An agent in charge is defined as the licensed and appointed agent responsible for the supervision of all individuals within an insurance agency.

Each business location established by an agent or insurance agency must be in the active full-time charge of a licensed and appointed agent holding the required licenses for the lines of insurance transacted at the location. The agent in charge of an insurance agency may be the agent in charge of additional branch locations if: (1) insurance activities requiring licensure as an insurance agent do not occur at the locations when either the agent in charge or another appropriately licensed agent is not physically present, and (2) unlicensed employees at the locations do not engage in insurance activities that require licensure as an insurance agent or customer representative.

Each insurance agency and branch office is required to designate an agent in charge and file the agent's name, li-

cense number, and physical address of the insurance agency location with DFS. This is done using the MyProfile function on the DFS website.

**Changes**—A change of the designated agent in charge must be reported to DFS within 30 days, and becomes effective upon notification to DFS. An insurance agency location is precluded from conducting the business of insurance unless an agent in charge is designated by, and providing services to, the agency at all times. When the agent in charge ends his or her affiliation with the agency, the agency must designate another agent in charge within 30 days. If the agency fails to make such designation within 90 days after the designated agent has ended his or her affiliation with the agency, the agency license will automatically expire.

**Responsibilities**—The agent in charge of an insurance agency is accountable for misconduct or violations committed by the licensee or agent or by any person under her or his supervision acting on behalf of the agency. However, the agent in charge is not criminally liable for the misconduct unless he or she personally committed the act or knew or should have known of the acts and of the facts that constitute the violation.

For more information about the duties and responsibilities of the agent in charge, see section 626.9428, Florida Statutes.

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## Legislative Proposals Would Adopt ORSA and Corporate Governance Requirements

By: Travis Miller

We are asked from time to time whether Florida has adopted the Own-Risk and Solvency Assessment (ORSA) reporting requirements. The answer thus far is no, but that might change if newly filed bills SB 1422 and HB 1163 gain traction in the legislative session. These proposals would adopt ORSA and corporate governance requirements similar to those in effect in other states.

An own-risk and solvency assessment is an internal assessment, appropriate to the nature and scope of an insurer or group, of the material and relevant risks associated with the insurer or group's business plan and capital resources. The bills would require an insurer or group to conduct an

*Continued on Next Page*

## **DFS Publishes Notice of Change Pertaining to Title Insurance Unlawful Inducements**

By: David Yon

The Florida Department of Financial Services (DFS) has published proposed changes to Rule 69B-186.010, Florida Administrative Code, “Unlawful Inducements Related to Title Insurance Transactions.” The changes seek to provide specific guidance to agents, agencies and others engaged in the business of title insurance transactions as to what DFS considers an illegal inducement in the marketing of title insurance. The proposed rule also identifies unfair methods of competition and unfair or deceptive acts or practices prohibited by section 626.9541, Florida Statutes. A public hearing was held on October 23, 2015 to discuss the rule and on December 11, 2015, DFS published a notice of change based on the comments received at the public hearing.

A significant change replaces the term “interested party” with “referrer of settlement service business.” The new term is defined as “any person who is in a position to refer title insurance business incident to or part of a real estate transaction, or as associate of such person.” A referrer of settlement service business may be a title insurance agent, title insurance agency, title insurance company, attorney, real estate broker, real estate agent, real estate licensee, broker associate, sales associate, mortgage banker, mortgage

broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any employee, officer, director, or representative of such a person or entity. In addition, the definitions of “real estate professional” and “real estate salesperson” have been replaced with the following: “real estate broker, real estate agent, and real estate licensee.” The list of activities “whether performed directly or indirectly, for or by any referrer of settlement service business, are inducements for the sale, placement or referral of title insurance business in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S” have been changed to reflect these new titles and entities.

Finally, a new subsection, (n), has been added to the list of illegal activities:

“Providing an endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or real estate sales associates.”

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### **Corporate Governance—*Continued***

ORSA annually, and at other times when there are significant changes to the risk profile of the insurer or group.

If the bills pass, each domestic insurer and each group for which Florida is the lead state, will be required to notify the OIR by December 1, 2016, of its proposed annual submission date. The first submission would be due no later than December 31, 2017. The bills provide certain exemptions based on premium volume or other factors.

The bills also provide for a corporate governance annual disclosure in which insurers or groups outline their systems and plans for corporate oversight and governance.

We will be monitoring these bills as the session progresses.

## **DFS Kicks Off New Year With Compliance Reminders**

By: Travis Miller



The Florida Department of Financial Services is reminding licensees about key compliance issues as we ring in 2016. According to DFS, advertising issues are among the most commonly investigated. The insurance code generally prohibits advertising that is untrue, deceptive, or misleading. With respect to life and health advertising, DFS reminds licensees that advertising materials must have the approval of the benefitting company (insurer, health plan, etc.) and should be used exactly as approved. DFS advises that when questions arise about life and health advertising, their first step is to contact the

benefitting company to see if the agent was using approved materials. If not, DFS is likely to assert that the agent failed to comply with rule 69B-150.013 and section 626.9541, Florida Statutes.

DFS also reminds licensees that advertising materials should clearly indicate that they relate to insurance products. On a related note, an agent must clearly indicate to prospective customers that he or she is acting as an insurance agent with respect to insurance products. Failure to do so may constitute a violation of section 626.9531.

## **DFS Cautions Against Aiding and Abetting Unlicensed Persons**

By: Travis Miller

The Florida Department of Financial Services cautions licensees against assisting companies and individuals in the unauthorized transaction of insurance. DFS reminds agents that the insurance code prohibits representing or aiding any insurer not authorized to transact insurance in this state. As an example, DFS points to an agent's representing an unauthorized company that offers health insurance coverage to residents of Florida and claims to have exemption from state regulation under the Federal ERISA ACT of 1974. DFS points licensees to section 626.901(1)(a)-(h) for further discussion of the statutory prohibition. DFS also acknowledges that transacting surplus lines

insurance in accordance with the Surplus Lines Law is an exception to the prohibition against representing unauthorized insurers.

Although the prohibition against assisting unauthorized insurers is well understood, DFS also reminds agents and others that it is unlawful under the insurance code to knowingly authorize, assist or allow an unlicensed person to transact insurance. Doing so is considered aiding and abetting that unlicensed individual to violate the insurance code pursuant to section 626.621(12), Florida Statutes.



## **Paper or E-mail?**

Do you still enjoy reading a book by turning the page or have you embraced the electronic age of readers? We offer the Florida Insurance Report in both formats. If you would like to receive your issue electronically just send an e-mail to Kendria Ellis at [kellis@radeylaw.com](mailto:kellis@radeylaw.com) and you will receive your next issue in your inbox. If not, continue to flip the pages on your paper version.

## Insurance Agency Names are Subject to Regulatory Restrictions

By: Travis Miller

The Florida Department of Financial Services reminds agents that it may disapprove the name of any agency (whether the agency's actual name or a fictitious name) if the name violates certain guidelines. An agency name cannot:

- mislead the public in any respect;
- interfere with or be too similar to another name already being used by another agency or insurance company;

- state or imply the agency is an insurer, motor club, hospital service plan, state or federal agency, charitable organization, or entity that primarily provides advice and counsel rather than selling or soliciting insurance, or is entitled to engage in insurance activities not permitted under the license held.

According to DFS, the word "state" or "states" in the name of an agency is not expressly prohibited because the word does not, by itself, imply that the agency is a state entity.

## 2016 Starts Faster Than Most

By: Travis Miller

Each year seems to go by quickly, and the holidays always seem too short. The ball has barely dropped in Times Square before we are back to work thinking about what is in store for the next year. If it seems like this is taking place faster than usual in 2016, it is not our imaginations--2016 indeed will get off to a faster start than most years.

Observers of the Florida insurance market will recognize that our annual legislative session begins in March in most years and extends until early May. However, 2016 is one of those unique years in which the session actually starts in January and will run 60 days until the latter part of March. We are not kidding when we say that it seems like session is arriving quickly-- it really is.

As always, the 2016 session will see a number of insurance issues affecting most lines of business. In the property insurance arena, the legislature will need to consider the explosion of water damage cases and the closely related "assignment of benefits" epidemic. There's no doubt that the increased prevalence of these types of claims is affecting the price policyholders as a whole pay for insurance, and it is serving as a significant counter-weight to the reduc-

tions in reinsurance costs many insurers have seen in recent years.

Also, we've seen several recent suggestions that perhaps the PIP system should be discarded. Lawmakers attempted to address abuses in the no-fault system a couple of years ago, but between court cases and continuing abuses in the market, some policymakers question whether the time has come to do away with PIP entirely.

The workers' compensation system also warrants watching in 2016. The Florida Supreme Court is expected to issue key rulings that may go to the heart of the system. Workers' compensation rates have gone down significantly since legislative reforms were adopted in 2003. However, this will quickly begin to reverse itself if court decisions significantly impact the current workers' compensation laws.

We hope everyone was able to relax and unwind at the end of 2015 because 2016 will get off to a fast start, and some of the state's most complex insurance markets will be the center of attention.

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### Our Insurance Team



**Karen Asher-Cohen**  
Shareholder  
[karen@radeylaw.com](mailto:karen@radeylaw.com)



**Donna Blanton**  
Shareholder  
[dblanton@radeylaw.com](mailto:dblanton@radeylaw.com)



**Bert Combs**  
Shareholder  
[bcombs@radeylaw.com](mailto:bcombs@radeylaw.com)



**Tom Crabb**  
Shareholder  
[tcrabb@radeylaw.com](mailto:tcrabb@radeylaw.com)



**Laura Dennis**  
Associate  
[ldennis@radeylaw.com](mailto:ldennis@radeylaw.com)



**Angela Miles**  
Associate  
[amiles@radeylaw.com](mailto:amiles@radeylaw.com)



**Travis Miller**  
Shareholder  
[tmiller@radeylaw.com](mailto:tmiller@radeylaw.com)



**Harry Thomas**  
Of Counsel  
[hthomas@radeylaw.com](mailto:hthomas@radeylaw.com)



**David Yon**  
Shareholder  
[david@radeylaw.com](mailto:david@radeylaw.com)

### 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](http://www.radeylaw.com)