

FLORIDA INSURANCE REPORT

Keeping You Informed About Florida
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OIR Issues Informational Memorandum on Principle-Based Reserving

By: Karen Asher-Cohen

The OIR issued Informational Memorandum #OIR-16-05M to all life and health insurers in Florida regarding the implementation of principle-based reserving in Florida, and the move to the use of the NAIC Valuation Manual in Florida, effective January 1, 2017. Section 625.1212, F.S., provides that this change to the valuation of policies and contracts for life insurance, accident and health insurance, and deposit-type contracts would be effective the first January 1st after the Commissioner's certification to the Financial Service Commission that all of the conditions listed in section 625.1212(2)(f), F.S., had been met, and such certification was made June 14, 2016.

The Memorandum advises insurers to review the Valuation Manual to determine how it will best implement and transition to the requirements of the Manual. "Valuation manual" is defined in section 625.1212(2)(k), F.S., as "the manual of valuation instructions adopted by the NAIC, or

as subsequently amended." The Memorandum also provides that the Manual "permits a deferral of up to three years" to achieve a smooth transition to the principle-based valuation approach, and for policies issued in the deferral period, a company is permitted to use the current formulaic approach found in the Manual.

However, every domestic life and health insurer subject to section 625.1212 must notify the OIR by September 1, 2016 of its choice from the following:

- Request a Companywide Exemption for 2017 per Section 6.A. of Chapter 20 of the Valuation Manual (VM-20); or
- Use Appendix A and C of the Valuation Manual and if so, provide the anticipated mortality basis (i.e., company experience, 2017 CSO, etc.); or
- Calculate reserves per the requirement of VM-20.

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Florida Supreme Court Holds Two Workers' Compensation Statutes Unconstitutional

By: Karen Asher-Cohen and Jordann Allen*

Recently, the Florida Supreme Court has held two workers' compensation statutes unconstitutional. In *Castellanos v. Next Door Co.*, Case No. SC13-2082 (Fla. April 28, 2016), the court evaluated the constitutionality of the mandatory fee schedule provided for in section 440.34, Florida Statutes, and found it unconstitutional as a violation of due process. Justice Pariente, writing for the majority, stated that the fee schedule may be resulting in unreasonable fees; however, the irrebuttable statutory presumption precluding every injured worker from challenging the reasonableness of the fee is the crux of the constitutionality issue.

Section 440.34, Florida Statutes, provides a mandatory fee schedule for attorney's fees when representing a claimant in a workers' compensation suit. The Legislature initially instituted the statute as a protection of workers' compensation awards, and to ensure quick and efficient delivery of disability and medical benefits to an injured worker. The fee schedule provides for a sliding scale in which attorney's fees are based on a percentage of workers' compensation benefits claimed. The fee awarded to Castellanos' attorney was a mere \$1.53 per hour for 107.2 hours of work due to a small award of benefits to the claimant, but section 440.34 precluded the lower courts from assessing whether this was a reasonable rate for attorney's fees. The mandatory fee schedule presumed the rate would be reasonable as long as there was strict compliance with the fee arrangement.

The Florida Supreme Court answered the following certified question from the First District Court of Appeal:

Whether section 440.34 Florida Statutes (2009), which mandates a conclusive fee schedule for awarding attorney's fees to the claimant in a workers' compensation case, is unconstitutional as a denial of due process under the Florida and United States Constitutions.

The court concluded the mandatory fee schedule is unconstitutional as a violation of due process both under the Florida and United States Constitutions.

Less than two months following the *Castellanos* decision, the Florida Supreme Court issued a decision holding section 440.15(2)(a), Florida Statutes, unconstitutional as well. In *Westphal v. City of St. Petersburg*, Case No. SC13-1976 (Fla. June 9, 2016), the majority held that section 440.15(2)(a) was unconstitutional due to a denial of access to the courts. Section 440.15(2)(a) provides that temporary total disability benefits for an injured worker is cut off after 104 weeks when a worker is totally disabled, even if she or he has not yet reached maximum medical improvement. The statute creates a statutory gap between workers who may still be disabled and unable to work but have not yet reached maximum medical improvement within the 104-week period. Workers disabled longer than the 104-week period are precluded from receiving additional benefits until a physician identifies them as permanently disabled.

The court addressed the constitutional issue after finding the statute was plainly written, and therefore, the court could not look to rules of statutory construction and avoid the constitutional issue as the First District Court of Appeal had tried. Applying the test established in *Kluger v. White*, 281 So.2d 1 (Fla. 1973), the court assessed whether the temporary total disability benefits scheme continues to provide "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job."

The court found the statute unconstitutional only as applied in temporary total disability benefits and as applied to Westphal and similarly situated workers—the issue is remedied by returning the statute to the previous construction from pre-1994 and provides for 260 weeks of temporary

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Supreme Court - Continued

total disability benefits.

Justice Lewis concurred in the result, but stated the Legislature should be required to provide a more comprehensive, constitutional workers' compensation scheme, rather than the courts rewriting the existing law. "Florida needs a valid Workers' Compensation program, but the charade is over.

Enough is enough, and Florida workers deserve better."

With two findings of unconstitutionality in Florida's workers' compensation law in the past two months, perhaps Justice Lewis' suggestion of creating a more comprehensive, and constitutional, workers' compensation scheme is on the horizon.

**Jordann Allen was a 2016 Summer Law Clerk at Radey Law.*

OIR Conducts Multiple Public Rate Hearings

By: Karen Asher-Cohen

Long Term Care

On August 12, 2016, the OIR will conduct two public rate hearings of Metropolitan Life Insurance Company ("Metlife") and Unum Life Insurance Company of America ("Unum"), regarding each company's proposed statewide average rate increases for long-term care insurance products in Florida. The OIR's website states:

Nationally, long-term care insurance premiums have been rising dramatically for more than a decade. The premium increases are driven by incorrect assumptions regarding how many people would decide to cancel their coverage, the number of policyholders with cognitive issues such as Alzheimer's, and longer life expectancy. The Office closely monitors the financial health of the long-term care insurance market and strives to strike a balance between financial stability of the insurers and the cost to consumers.

Metlife is the largest life insurer in Florida and one of the largest long-term care insurers in Florida with approximately 22,000 policyholders. At the public hearing, the OIR will question the company about its proposed statewide average rate increases for its long-term care products, which range from 20.09% to 95.44%. A list detailing the number of policyholders by county is available on the OIR website.

Unum is the largest provider of disability insurance prod-

ucts in the country and one of the largest long-term care insurers in Florida with approximately 44,000 policyholders. At the public hearing, the OIR will question the company about its proposed statewide average rate increases for its long-term care products, which range from 0% to 114%. A list detailing the number of policyholders by county is available on the OIR website.

Workers' Compensation

Pursuant to recent changes in the law, NCCI has proposed an average increase in workers' compensation rates of 19.6% for the voluntary market for all new, renewal, and in-force workers' comp policies in Florida, effective October 1, 2016. On August 16, 2016, the OIR will conduct a public hearing to question the company, which is a licensed rating organization authorized to make rate filings on behalf of workers' compensation insurance companies in Florida, about its proposed rate changes.

The projected rate increase includes: a 2.2% increase for the effect of the Florida Supreme Court decision in *Westphal v. City of St. Petersburg*, a 15% increase for the effect of the Florida Supreme Court case of *Castellanos v. Next Door Company*¹, and a 1.8% increase pursuant to SB 1402, which caused updates to the Florida Worker's Compensation Health Care Provider Reimbursement Manual.

¹ For a complete discussion of these Florida Supreme Court cases, please see the article on page 2.

Commissioner Seeks Reliability, Availability and Affordability in Product Regulation

By: Travis Miller

Speaking at an industry conference, Insurance Commissioner David Altmaier highlighted reliability, availability and affordability as the cornerstones of product regulation. Commissioner Altmaier briefly discussed these areas as they currently relate to the Florida insurance market. In the area of reliability, the Commissioner noted that the Office of Insurance Regulation's financial oversight role seeks to ensure companies are able to pay their claims when the need arises. He also commented on the OIR's role in monitoring market conduct to ensure that companies are providing benefits consistently with the policies.

Commissioner Altmaier commented that the availability of insurance can be measured by product lines and coverage options, as well as by geographic areas. The Commissioner intends to maintain a regulatory process that favors making products available in the private market rather than government insurance mechanisms. He pointed to the challenge of regional dislocations in the market based on specific types of perils or risks. He noted that the OIR tries to work with insurers, agents, consumers and others to ad-

dress situations that limit insurers' ability or willingness to offer products in particular areas.

Finally, the Commissioner stressed that affordability in the insurance market requires a balanced view. The key consideration is to ensure that products are priced commensurately with risk, and to ensure that consumers understand the pricing of their products in relation to the coverages they are obtaining. In this regard, affordability isn't solely a function of rate levels, but instead requires consideration of rate levels in relation to policy coverages and options.

In terms of allowing insurers to bring products to the market as expeditiously as possible, the OIR strives to review filings as promptly as possible and is sensitive to insurers' goals of pursuing product approvals as efficiently as they can. Commissioner Altmaier noted that perhaps the primary challenge from the OIR's standpoint is reviewing filings that are amendments to previously certified filings in which certified provisions do not conform to statutory or regulatory requirements.

Save the Date - OIR Announces 2016 Industry Conference

By: David Yon

The OIR has announced the dates for its 2016 Industry Conference at the Florida State University Conference Center in Tallahassee, Florida. Registration will open August 22 and the Conference will be held October 25-26, 2016.

The announcement states that insurance professionals will hear the latest on submitting form and rate filings, applications, and disaster reporting forms. In addition, there will be presentations and Q&A sessions on various lines of insurance business including legislative and regulatory updates. The conference is day and a half event that will also include a Welcome Reception with the opportunity to meet many members of the OIR team.



NCCI Filings Available Through I-File

By: Travis Miller

The Florida Office of Insurance Regulation (OIR) announced this week that filings of the National Council on Compensation Insurance (NCCI) are now available through the OIR's I-File system. This includes prior filings dating back to the 2001 implementation of the electronic filing system.

NCCI wrote to the OIR acknowledging that both the OIR and NCCI have received significant interest in NCCI's pending workers' compensation rate filing following the two Florida Supreme Court decisions earlier this year, putting upward pressure on rates. NCCI noted that when the i-File system was first implemented, NCCI had concerns with electronic access to its filing, but understood the filings would remain available for public inspection through prior means. Since then, however, electronic filing systems have become commonplace countrywide, and NCCI no longer has the same degree of concern with electronic access to its filings.

Even so, NCCI manuals and its rate, rule and form filings are copyright protected. The OIR's release on the subject reminds readers that copyright materials cannot be copied, reproduced, or adapted without the permission of the copyright owner. Section 119.01(2)(d), Florida Statutes, indicates that copyright laws must be considered when providing access to public records.

Further Reduction in Citizens Coverage A Coming January 1

By: Travis Miller

As required by a law passed in 2013, the maximum Coverage A amounts for Citizens Property Insurance Corporation's personal residential coverage will be reduced again effective January 1, 2017. Effective at the beginning of next year, the following new business and renewals for personal residential risks are no longer eligible for coverage in Citizens:

- A structure that has a dwelling replacement cost (Coverage A) of \$700,000 or more;
- A single condominium unit with a combined dwelling and contents replacement cost (Coverage A and C) of \$700,000 or more; or
- A tenant contents policy with a Coverage C limit of \$700,000 or more.

The maximum coverage limit changes reflected above will not affect policy forms where lower maximum coverage limits already exist.

Also, the Florida Office of Insurance Regulation has determined there is not a reasonable degree of competition in Miami-Dade and Monroe counties. Therefore, risks in those two counties are exempt from the reduction in eligible limits. A maximum coverage limit of up to \$1 million continues to apply in those counties.

Citizens will be sending nonrenewal notices to existing policyholders who are affected by the change. The nonrenewals will be effective at the end of the policies' current terms.

DFS Reminds Industry of Scope of "Transacting" Insurance

By: Travis Miller

One of the questions we receive from time to time is whether certain activities require an individual or business to obtain an agents' license in Florida. The Florida Department of Financial Services recently addressed this in a short article describing what it means to "transact" insurance in Florida. In general, a person must obtain an insurance agent's license before holding himself or herself out as transacting insurance. In Florida, the scope of "transacting" implicates a couple of definitions in the Insurance Code.

Section 624.10 defines transacting insurance to mean any of the following activities or actions:

- Solicitation or inducement
- Preliminary negotiations
- Effectuation of a contract of insurance
- Transaction of matters subsequent to effectuation of a contract of insurance and arising out of it.

"Solicitation" in turn is defined at section 626.112, Florida Statutes. Solicitation means the attempt to persuade any

person to purchase an insurance product by:

- Describing the benefits or terms of insurance coverage, including premiums or rates of return;
- Distributing an invitation to contract to prospective purchasers;
- Making general or specific recommendations as to insurance products;
- Completing orders or applications for insurance products;
- Comparing insurance products, advising as to insurance matters, or interpreting policies or coverages; or
- Offering or attempting to negotiate on behalf of another person a viatical settlement contract as defined in section 626.9911.

Thus, when evaluating whether an agent's license is required in particular situations, a person should consider whether he or she will be transacting insurance, which in part entails also determining whether the person's actions fall within the statutory scope of solicitation.

Limitations on Agents' Fees

By: Travis Miller

The Florida Department of Financial Services from time to time takes enforcement actions against agents who charge unauthorized fees to policyholders. In these situations, the agents typically are receiving their commissions from the insurers and separately are telling consumers they also must pay add-on charges by various names—document fees, notary fees, etc. In a periodic reminder to the industry, DFS recently noted that agents may only add certain statutorily authorized fees when appropriate under the circumstances, including:

MVR Fee

An agent or agency may charge a consumer the actual cost of the motor vehicle report (MVR) for each licensed driver. However, the agent or agency may not include subscription or access fees associated with obtaining the MVR in the cost to the consumer. (See section 627.7295, Florida Statutes)



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Agent's Fees - Continued

Policy Fee

A licensed general lines agent may charge a per-policy fee not to exceed \$10 to cover the administrative costs of the agent associated with selling the motor vehicle insurance policy if the policy covers only personal injury protection coverage as provided by s. 627.736 and property damage liability coverage as provided by s. 627.7275 and if no other insurance is sold or issued in conjunction with or collateral to the policy. The fee is not considered part of the premium.

Credit Card Fee

If a credit card company charges a fee for payments of policies/premiums, then in accordance with section 626.9541(1)(o)2, a licensed agent may charge “. . . the *exact amount* of any discount or other such fee charged by a credit card facility in connection with the use of a credit card, as authorized by subparagraph (q)3., in addi-

tion to the premium required by the insurer.” Regarding credit card transactions, section 626.9541(1)(q) provides, “A licensed agent or insurer may solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders if:

- a. The insurance or policy which is the subject of the transaction is noncancelable by any person other than the named insured, the policyholder, or the insurer;
- b. Any refund of unearned premium is made to the credit card holder by mail or electronic transfer; and
- c. The credit card transaction is authorized by the signature of the credit card holder or other person authorized to sign on the credit card account.”

Trailblazer 5K Run for Literacy Receives Department of Education Award

Firm Shareholder Travis Miller and Wife Karena Direct Race to District and Regional Awards

Desoto Trail Elementary School's Trailblazer 5K Run for Literacy was recognized as one of the Florida Department of Education's Family and Community Involvement award winners at the 2016 Florida Parent Teacher Association (PTA) Leadership Convention in Palm Harbor, Florida. Travis and Karena Miller received the award on behalf of Desoto Trail and also participated a breakout session in which the award winners shared their experiences, successes and challenges with other elementary school representatives from across the state.

Earlier this year, the Trailblazer 5K was named a district-level award winner at a ceremony in Tallahassee. The Florida Department of Education then named the race as a regional winner, leading to the recognition at the state PTA conference. The Family and Community Involvement Award recognizes exemplary school practices that focus on increasing family involvement, welcoming families into the local school system, providing effective communication, supporting student success, and promoting collaboration with the community.

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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.

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