

FLORIDA INSURANCE REPORT

Keeping You Informed About Florida
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The Women of Radey Law

By: Karen Asher-Cohen

International Women's Day was recently celebrated around the globe and highlighted the social, economic, cultural, and political achievements of women. International Women's Day has been observed since the early 1900's and was celebrated for the first time by the United Nations in 1975. In December 1977, the General Assembly adopted a resolution proclaiming a United Nations Day for Women's Rights and International Peace to be observed by the Member States.

Here, at Radey, we are proud to highlight our women lawyers in honor of International Women's Day: founding shareholders Donna Blanton, Susan Clark, and myself; newer shareholders Angela Miles and Brittany Adams Long; associate Laura Dennis, and our two newest hires - Lauren Thompson and Jordann Allen, who currently work at the firm as law clerks and will join our team as associates upon their graduation from FSU College of Law in May.



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OIR Names Deputy Commissioners

By: Travis Miller

The Florida Office of Insurance Regulation has announced new deputy commissioners for property and casualty insurance and for life and health insurance. The OIR has named Susanne Murphy as the deputy commissioner for property and casualty insurance. Ms. Murphy has substantial experience in insurance regulation, as well as with Florida's residual property insurance market Citizens Property Insurance Corporation.

Commissioner David Altmaier praised Ms. Murphy's "understanding of the Florida property market, her ability to think through problems rationally and fairly, and most importantly, her steadfast devotion to the protection of Florida policyholders."

At the same time, OIR announced that Eric Johnson will be the deputy commissioner for life and health insurance. Mr. Johnson has served OIR both as an actuary and in management roles. Commissioner Altmaier pointed to Mr. Johnson's analytical ability and his ability to develop solutions to the complex and challenging conditions in the life and health market as key strengths.

The OIR also announced that Ms. Murphy will oversee a property and casualty market conduct unit, while Mr. Johnson will oversee the life and health market conduct section. Most recently, the market conduct units have been housed in a single section at OIR.

Appellate Court Upholds Trade Secret Claim for QUASR Data

By: Travis Miller

Florida's First District Court of Appeal has upheld a lower court ruling in favor of State Farm Florida Insurance Company in its claim that its QUASR data submissions constitute trade secrets. The Florida Office of Insurance Regulation collects information from insurers about where they are writing policies (or may be reducing policies). The information is collected through the Quarterly and Supplemental Reporting System, commonly known as QUASR. Historically, this information has been publicly available and can be viewed at the statewide level or at the county level.

The Florida Insurance Code allows an insurer to claim that information it provides to the OIR constitutes a trade secret if the information allows the insurer to maintain an economic advantage over others who do not know it, and if the

insurer takes steps to maintain the confidentiality of the information. State Farm Florida began to submit its QUASR information to the OIR under a claim of trade secret. When the insurer and the OIR did not agree on the viability of this claim, the case was heard by a Leon County circuit judge, who ruled in favor of State Farm Florida.

The OIR appealed the circuit court ruling to the First District Court of Appeal. The appellate court upheld the lower court ruling, finding that the insurer presented sufficient evidence, including expert evidence, to support the trial court's determination that State Farm Florida met its burden on the trade secret claim. The First District wrote, "The trial court's findings are supported by competent, substantial evidence, and so our job is to affirm."

Assignment of Benefit Bills Face Uncertain Future

By: Travis Miller

Concerns with “assignments of benefits” are among the highest profile issues confronting the property and casualty market in this legislative session. The Florida Office of Insurance Regulation and Citizens Property Insurance Corporation have made several presentations outlining the adverse impact of AOB’s on consumers. There’s a unanimously held view, at least from those willing to face market realities, that AOB’s will cause admitted market coverage to become less available and for rates to go up for consumers across the state. The OIR has pegged potential rate increases at 10% annually.

The OIR’s analysis also demonstrates that the explosion in AOB’s is not tied to a deterioration of insurer behavior—insurers are not subject to increased complaints for claims delays or claims denials suggesting that AOB’s have become necessary due to fault of the insurers. Instead, AOB’s have become prevalent as a small but growing number of vendors leverage Florida’s one-way attorneys’ fee statute to command higher-than-warranted settlements from insurers.

A proposal pending in the legislature would address the AOB concerns by eliminating the one-way attorneys’ fees in AOB settings, as well as by establishing criteria for what constitutes a valid AOB. Eliminating attorneys’ fees, however, is a highly contentious issue and could jeopardize the legislature’s ability to pass any meaningful AOB reform. In light of this concern, a compromise proposal emerged in the House of Representatives that would not do away with attorneys’ fees in AOB situations. Instead, the House version would allow an assignee to recover fees if it goes to court and wins an amount greater than or equal to a settlement amount it offered. Conversely, the insurer would be awarded its fees if the assignee recovers an amount less than or equal to the insurer’s offer. If a judgment comes in between the parties’ settlement proposals, neither side is awarded fees.

The adverse consumer impact of AOB’s has been well-established before this year’s legislature. However, we expect this issue to be debated throughout the session, and it is far from a certainty that the legislature will act to alleviate the abuses currently seen in the market.

Repeal of Salary Tax Credit for Insurance Premium Taxes Gains Momentum in Senate

By: David Yon

Efforts in the Senate to repeal insurance premium tax credit for payroll for employees hired in Florida by insurance companies gained momentum on Tuesday, March 21, when a late filed amendment, by Senate Finance & Tax Chairman Kelli Stargel, provided for a reduction in the state tax rate on commercial property leases from 6 percent to 5 percent and maintained the repeal of the insurance salary tax credit. The revised bill, CS/SB 378, passed the subcommittee (officially the Senate Appropriations Subcommittee on Finance & Tax) and next goes to the Senate Appropriations Committee.

As Travis Miller points out in his excellent analysis on page 6, there is no related bill in the House.

DFS Discusses Interpretations of Surplus Lines Export Requirements

By: Travis Miller

Over the years, questions relating to agents' ability to export risks to the surplus lines market have been complex and fact-intensive. The Florida Department of Financial Services likewise receives numerous questions regarding whether risks can be exported. DFS recently published some Q&A scenarios shedding light in its interpretations of the export requirements. Those scenarios are:

Question 1

*Agent A has a condominium association client with a commercial residential policy that Agent A has placed with an admitted insurer. Upon renewal, the client asks Agent A to move its commercial residential policy to a surplus lines insurer, but Agent A refuses and states that he cannot move the policy from an admitted insurer to a surplus lines insurer because he is not able to legally complete a diligent effort form. The client then contacts Agent B and asks Agent B to place its commercial residential policy (at renewal) with a surplus lines insurer. Agent B does not have access to an admitted insurer that is willing to write this risk, and despite Agent B's knowledge that the risk is currently insured with an admitted insurer, Agent B does not have access to the admitted insurer that currently insures the risk. Thus, Agent B properly completes a diligent effort form (he gets declinations from 3 admitted insurers that he **does** have access to but who are not willing to write the risk) and then Agent B places this risk with a surplus lines insurer at renewal. Has Agent B followed the law by properly completing a diligent effort form, despite the fact that he has moved a commercial residential policy from the admitted market to the surplus lines market at renewal?*

Response

Agent B has followed the law by properly completing and documenting diligent effort, despite the fact that the policy

was moved from the admitted market to the surplus lines market. The law does not compel an agent to seek quotes from companies they are not affiliated with. To meet the requirements of the law, the writing agent must seek the required coverage in the admitted market from insurers "actually writing that kind and class of insurance in this state," and properly document those efforts in accordance with s.626.916, F. S. Failure by Agent B to make the required diligent effort or to properly document that effort could lead to administrative action being taken against the agent.

Question 2

Agent A has a condominium association client with a commercial residential policy (\$70 million total insured value) that Agent A has placed with an admitted insurer. The policy is coming up for renewal and the admitted insurer currently insuring the risk will renew the policy but will not offer full law and ordinance coverage, which for this risk, the agent and client both believe is a necessary coverage since the condominium association buildings were built in the 1970's and do not comply with current building codes. Agent A cannot find stand-alone law and ordinance coverage for this risk either in the admitted market, or in the non-admitted market. Other than the current admitted insurer that will renew the risk without full law and ordinance coverage, Agent A does not have access to any other admitted insurers that are willing to write this risk at all given the age of the buildings. Agent A completes a diligent effort form listing the current insurer as declining to write the risk with full law and ordinance coverage, and listing two other admitted insurers that are not willing to write the risk due to the age of the buildings. Agent A then places the risk, with full law and ordinance coverage, with a surplus lines insurer. Has Agent A properly complied with the export law?

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Surplus Lines - Continued

Response

Agent A has properly complied with the export law. In this scenario, the full amount of required insurance was not procurable based on a diligent effort by the agent. Technically the agent went beyond the requirements of the law in obtaining 3 declinations as s.626.914, F. S. only requires 1 declination for risk where the residential structure has a dwelling replacement cost of \$1 million or more. The agent also attempted to layer the risk as required by law and the diligent effort also established that layering was not an option. Since full law and ordinance coverage was established as a requirement by the client, the agent was obligated to attempt to procure that coverage. Given that the documented diligent effort did not result in identifying an admitted insurer willing to write the required coverage, the policy is eligible for export.

Question 3

Agent A has a condominium association client with a commercial residential policy renewal coming up in about 30 days (\$40 million total insured value) that Agent A has placed with an E & S insurer. The board is very savvy and has some members who are very familiar and comfortable with the E&S market. The board insists on coverage only from an AM Best "A" rated company with large financial size (policyholder surplus). It is nonnegotiable. They have no problem with E&S and want to stay with current carrier which is offering a renewal. There is no admitted AM Best A rated carrier that will write this risk.

Even though the board has no interest in admitted carriers that do not have an AM Best rating, the admitted carriers are quoting for Agent A and other agents. Hence Agent A is not able to complete a diligent effort search because he has an admitted market willing to write the required coverage. Agent A asks DFS if he should follow the customer's instructions and renew the coverage in the E & S market?

Or alternatively, does the DFS force the client to insure with a non AM Best rated company against their wishes.

Response

In this scenario the insured has expressed a requirement as to the type of insurer they are willing to accept. The statute provides for export only to obtain the full amount of insurance required. The rating of the carrier is a preference of the insured, and is unrelated to the amount of insurance required. A consumer cannot be compelled to enter into or continue a contract with an insurer they do not wish to do business with. However, the agent is still bound by the requirements of the law. The law does not provide an exception for wishes of the consumer. Given the information provided, it would not appear this agent could legally export this policy.

The above responses suggest that eligibility for export is determined with reference to the specific markets to which an agent has access, without regard to whether other agents may have access to admitted markets willing to write the risk. In addition, an insurer's willingness (or lack thereof) to write the full extent of coverage desired by the insured is a key factor. However, an insured's subjective desire to do business only with certain types of insurers does not absolve the agent of his or her obligations to comply with export requirements.

DFS has advised that it will not provide guidance or pre-approve specific transactions. However, it will periodically gather and publish information such as these Q&A's indicating how it views export issues.

Senate Considers Swapping Premium Tax Credit for Reduction in Commercial Lease Tax

By: Travis Miller

The Florida Senate is considering a proposal (SB 378) that would repeal the salary credit against the insurance premium tax, and instead cut the tax on commercial leases. The idea is to give small businesses broad-based tax relief through small reductions on occupancy costs, while also removing a credit that arguably picks “winners and losers” among industries—that is, the insurance industry benefits from the salary credit, while other types of industries do not have a similar incentive for hiring Florida employees.

Upon closer review, however, this does not seem like a logical trade. In its simplest form, the legislature would be giving with one hand and taking with the other. Businesses might enjoy the small break on their leases. On the other hand, eliminating a tax credit for insurers effectively increases the tax, so insurers’ taxes would go up, in turn causing a commensurate increase in rates. In effect, the legislature would be trying to persuade us that businesses would be happy paying a little less for leases while paying a roughly equivalent amount more for insurance.

Further, the salary credit directly relates to job creation. Unlike some types of economic incentives that governments adopt in hopes that the recipients will create jobs, the salary credit kicks in only when an insurer has actually

hired and paid salaries to Florida employees. Those employees, in turn, buy homes, purchase goods and services, pay taxes, and otherwise contribute to our communities—economically speaking, this creates a multiplier effect from the salary credit. It doesn’t make sense to kill off the incentive for insurers to hire Florida employees so the legislature can tell businesses it did them a favor by shaving a few bucks off their leases that they ultimately will end up paying in insurance taxes.

Finally, the notion that eliminating the salary credit somehow levels the playing field when other industries don’t receive similar benefits for hiring employees rings hollow. Keep in mind that insurers are subject to both the premium tax and the corporate income tax, with the corporate income tax serving as only a partial offset against the premium tax. The end result is that insurers (and ultimately consumers) pay higher effective tax rates in Florida than other businesses. Compounding this issue in a way that further removes an incentive for job creation doesn’t seem like a fair trade for Florida consumers.

Thus far, the Senate proposal does not have a companion in the House.



Is Florida’s 2017 Legislative Session Anti-Business?

By: Drew Parker

Since Governor Rick Scott took office in 2011, the point the Governor has emphasized most consistently is a pro-jobs and pro-business message. In 2013, the State of Florida affixed “Welcome to Florida” signs on major highways announcing Florida is “Open for Business,” yet this message and the Governor’s agenda appear to be in jeopardy in the 2017 legislative session.

The 2017 Florida Legislative session should cause some concerns for Florida’s businesses. A number of pro-business bills, e.g., AOB reform (HB 1421) and Workers’ Compensation reform (HB 7085), stand only a slight chance of passage this legislative session, while a couple of

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Anti-Business? - Continued

bills perceived as being anti-business by the Governor and others appear to be gathering steam, e.g., elimination of Enterprise Florida (HB 7005), severe cuts to Visit Florida (HB 9), a lawyer-friendly bill which would require courts to add interest payments to cases won by plaintiffs (CS/SB 334), and abolishment of the salary credit against the insurance premium tax (SB 378).

While Republicans enjoy a majority in both chambers, a number of those Republicans appear friendly to a trial bar

agenda. Both Senate President Joe Negron and House Speaker Richard Corcoran are attorneys who appear to have taken a more moderate position on economic issues as compared to previous positions taken by Republicans. Moreover, some of their positions are at odds with key pieces of the Governor's legislative agenda. Without agreement between Governor Scott, President Negron, and Speaker Corcoran, any issue would appear ill-fated.

This legislative session Florida will likely see a shift in policy that will impact Florida's economy for a long period to come. Whether the impact is positive or negative will only be known with time.

Are Administrative Law Judges Appointed by a Governor a Good Idea for Regulated Industries?

By: Drew Parker

In Florida, Administrative Law Judges (ALJs) are appointed by the chief administrative law judge and become part of Florida's career service system. Thus, ALJs are effectively appointed to lifetime terms, and as such, they are shielded from political pressure from the other two branches of government. However, the Chief ALJ is appointed by the Governor and Cabinet and serves at their pleasure. However, House Bill 1225 would create a new appointment process, as well as change the terms of employment and limit the years of service for ALJs. House Bill 1225 provides for the Governor to appoint ALJs, who could serve a maximum of eight years (two terms of four years). Under House Bill 1225 the Governor would appoint ALJs from a list of three nominees offered by a commission. The commission would be comprised of three members selected by the Governor and one member appointed by each of the other three cabinet members (the attorney general, the chief financial officer, and the agricultural commissioner). Additionally, the bill would allow the Governor to remove ALJs "for cause" during the term of appointment.

Many in the business community believe passage of House

Bill 1225 could have an adverse impact on regulated industries in Florida. Under such a system, ALJs arguably could become susceptible to undue influence from the Governor or other executive branch members. Appointed ALJs would be reviewing decisions of executive agencies knowing how they rule could jeopardize their reappointment chances, which in turn, could lead to decisions that are more favorable to the agencies and perhaps detrimental to regulated private party litigants. Additionally, many administrative cases involve highly technical and complex regulatory issues. An ALJ's proficiency grows through experience. Term-limited ALJs could reduce the institutional knowledge and expertise within the Division of Administrative Hearings, which ultimately could affect the quality of the ALJs and their decisions. In addition, there is some concern that by limiting the terms of ALJs to eight years, some qualified candidates might not be interested in becoming ALJs because they would be faced with the certainty of having to make another career change in eight years. Regulated industries in Florida should pay attention to House Bill 1225 and the potential consequences of its passage.

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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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