

FLORIDA INSURANCE REPORT

Keeping You Informed About Florida
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New Year's Message



We are beginning our 15th year together as the Radey Law Firm and it is amazing to see how much has changed in that time. Just compare the snazzy Trio Phone we used in setting up our new offices to the iPhone X with all its mighty computing power, enough to make grown men and women cry and curse.

The fields of law and areas of consultation we practice in are changing just as fast. Data, a term seldom used in 2003, seems to dominate all now. No where is that more true than in insurance. The definition of terms like HIPAA, privacy disclosure, trademark, public records, and NDAs are fought

over by private parties and regulated by governmental bodies. Understanding when to use the data, how to protect it, when to protect it, are critical to your business practice and our legal advice.

Here is wishing you all the best in 2018. Thanks for letting us be your partner whenever we can help you navigate through the difficult challenges.

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DFS Notices Rulemaking to Implement New Anti-Fraud Law

By: Karen Asher-Cohen

The Division of Investigative and Forensic Services of the Department of Financial Services has published a notice of proposed rulemaking for Rules 69D-2.002-2.005, F.A.C. The new rules will implement the changes passed by the 2017 Legislature to section 626.9891, F.S., which requires all insurers to establish and maintain an anti-fraud investigation unit, or to contract with a third party for such services, and to submit an anti-fraud plan to DFS.

Among other things, the proposed rules add new definitions and adopt a new form that insurers can use to meet the anti-fraud plan requirements of section 626.9891. The form will be electronically filed by the insurer, and, when

contracting with a third party, the executed contract is to be filed as well. An insurer's anti-fraud plan must include an "acknowledgment that all reports of suspected insurance fraud shall contain information that clearly defines and supports the allegation of suspicious activity" and an "acknowledgment that the insurer or anti-fraud investigative unit shall record the date that suspected fraudulent activity is detected, and shall record the date that reports of such suspected insurance fraud are sent directly to the Division."

The Department advises that if requested, a public hearing will be held on February 5, 2018. If no request is received by January 31st, then there will be no public hearing.

Will Florida's Capital Move from Tallahassee?

By: Travis Miller

Probably not. But that doesn't keep legislators from periodically proposing the idea. This year, Representative Bill Hager has filed a bill to relocate the capital. According to reports, this is the sixth official attempt to move the capital, following proposals that were made in 1870, 1883, 1921 and 1967. Those efforts obviously were not successful, and in fact died in the legislature without an official vote. Another effort occurred in 1900, when voters overwhelmingly voted to keep Tallahassee as the capital.

Tallahassee was selected as Florida's capital in 1823. The territory's legislative council met in Pensacola in 1822 and in St. Augustine in 1823. At the time, those were the two major population centers of the state. When officials complained about the difficulty in traveling between those respective cities, the governor appointed two commissioners to identify a location at the halfway point for future meetings. The commissioners chose Tallahassee, and the territorial legislature met here in 1824.

Perhaps the best-known effort to move the capital took place in 1967. Senator Lee Weissenborn of Miami proposed a feasibility study for moving the

capital to Orlando. The effort failed, and ultimately the state built the new Capitol building solidifying the city's role as Florida's capital. Senator Weissenborn's effort led to a tongue-in-check plaque in his honor being placed in the new Capitol, recognizing his "valiant effort" leading to the construction of the new building.

Efforts to increase the attractiveness of Tallahassee as the capital also led to the creation of Springtime Tallahassee, a parade and community festival showcasing Tallahassee's



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Early Session Promises Fast Start to Year

By: Travis Miller

The holidays are only recently behind us as this year's legislative session gets underway. Insurance-related issues might not be as prominent from a statewide perspective as in some prior years—some pre-session lists didn't include insurance topics among the top five or ten issues to be addressed. Nonetheless, for members of the industry, the session will bring the usual anticipation and uncertainty.

From a property and casualty perspective, the "assignment of benefits" issue again will be one of the primary topics. Despite substantial debate in prior sessions, no law changes have been enacted. As a result, increased losses continue to affect insurers' rates and are producing rate increases, especially in areas that are most affected. Insurance Commissioner David Altmaier has advised prior legislative committees that on average, rates are likely to rise ten percent annually as they adjust the current loss levels in the

market. The House passed HB 7015 early in the session giving more reasons for hope than in past years.

The legislature also continues to explore options for replacing Florida's no-fault auto insurance system. The current Personal Injury Protection (PIP) laws have been riddled with fraud and abuse. Some legislators favor abandoning the PIP system in favor of bodily injury liability coverage, with or without medical payments coverage. This has proven to be a challenging issue as the legislature wrestles with whether law changes will help solve problems or simply will shift the problems elsewhere.

As usual, given the weight of the insurance-related issues to be discussed, we might not know the outcome of these proposals until the final days of the session.

House Moves Quickly on Workers' Compensation; Senate Future Uncertain

By: Travis Miller

The various parties affected by workers' compensation insurance have differing interpretations of recent rate activity and the extent to which changes are needed to maintain competitive workers' compensation rates in Florida. After the *Castellanos* and *Westphal* decisions two years ago, workers' compensation insurance rates increased and were thought by some to be trending higher. However, the Office of Insurance Regulation approved a rate reduction of nearly ten percent in 2017, and opponents of reform took the opportunity to claim that reforms are not needed—especially reforms that would limit attorneys' fees for lawyers representing claimants in workers' compensation cases.

The Florida House of Representatives came out of the gate quickly in the 2018 session, passing its workers' com-

penensation bill (HB 7009) by a 74-30 vote during the session's first week. House Speaker Richard Corcoran said that the high costs of healthcare in Florida's workers' compensation system needed to be addressed. The House bill takes the same approach that the House took last year, which did not gain approval in the Senate. Among other things, the House bill limits the fees hospital outpatient centers can charge for unscheduled care at 200 percent of the Medicare amount and limits reimbursements for scheduled surgeries at hospitals or ambulatory surgical centers to 160 percent of Medicare.

No companion bill exists in the Senate, although there are other Senate bills addressing workers' compensation issues.

Protecting Your Business Secrets

By: David Yon

Rasier-DC, LLC v. B&L Service, Inc and Broward County, No. 4D16-3070, 2018 WL 345447 (Fla. 4th DCA Jan. 10, 2018).

So much of business (and life in general for that matter) these days is about access to data, gaining access to the data you don't have and protecting what you do have. The issues just get more complicated when an entity subject to Florida's constitutional or statutory public records requirements is involved.

This battle played out recently in litigation in the 4th District Court of Appeal between Yellow Cab and Uber over access to data filed by Uber with Broward County. Uber and Broward County had the data and Yellow Cab wanted it. In a decision construing important parts of Florida's public records law, Justice Melanie May, writing on behalf of the 4th District Court of Appeal, stated:

Business competition and a battle between government transparency and entrepreneurial confidentiality lay the foundation for this appeal. Uber, the intervenor in a suit over a public records request, appeals an order that required Broward County to produce redacted reports in response to a broader request for records. Uber argues the trial court erred in granting a rehearing and ordering Broward County to produce redacted Uber reports to Yellow Cab. We disagree and affirm the order.

Uber entered into a license agreement with Broward County governing Uber's services at the airport and Port Everglades. Pursuant to the agreement Uber was required to meet monthly self-reporting requirements. The agreement required Broward County to maintain the confidentiality of Uber's trade secret information in response to a public records request. Uber's monthly reports contained both aggregate and granular data. (Two terms I heard a lot in defending an insurance company's right to keep trade secret information filed with OIR confidential.)

The opinion also noted: "The aggregate data is the number of pickups and drop-offs at the airport and seaport, 'multiplied by the fee in each of those zones.' The granular data is information on every pickup and drop-off, including a time stamp, the longitude and latitude, and the first three characters of the driver's license plate which identifies the individual. Uber marked the reports as containing trade secret information, exempt from the Public Records Act." Granular data has a better chance of receiving protection from public records laws.

Yellow Cab made a public records request to Broward County for: "All reports or documents reflecting pick-ups by ... Uber at the [airport], and the sums of money paid or owing to [the county] for those trips, beginning in October, 2015 and through the present." When the county produced documents marked trade secrets only after redacting them, Yellow Cab then filed a complaint against Broward County for violating Florida's Public Records Act, seeking unredacted monthly reports on Uber's pickups at the airport. Uber intervened as the owner of the trade secret information and real party in interest.

After an in camera inspection of the unredacted documents, the circuit court judge found

that the aggregate number of pick-ups and the sum of money paid by [Uber] to the County as a usage fee at the [airport] does not constitute trade secret information such that it would be exempt from public disclosure. The remaining information in the reports, however, including the longitude and latitude and the specific dates and times of pick-ups and drop-offs, and the first three characters of license plates of [Uber]'s drivers . . . does constitute trade secret information that is exempt from public disclosure.

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Protecting Secrets—cont.

The 4th DCA relied in part on *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2016 WL 3654454, at *2 (N.D. Cal. June 23, 2016). The court in that case found:

While the algorithms and “proprietary price models” that Lyft uses to set its fares and the rate of PrimeTime premiums and, in turn, its commissions from those moneys *are* trade secrets, the bare *output* of those algorithms and price models (i.e., the total amount of commissions taken) is not. Though the manner in which Lyft determines its pricing is an important part of its competitive strategy, its revenue is not strategy but rather the *result* of that strategy.

The court in *Raiser-DC, LLC v B&L Service, Inc. and Broward County*, finished its opinion by stating: “A public record cannot be transformed into a private record merely because an agent of the government has promised that it

will be kept private.” *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1208 (Fla. 1st DCA 2009) (citing *Browning v. Walton*, 351 So. 2d 380, 381 (Fla. 4th DCA 1977)). The right to examine public records belongs to the public. *Nat'l Collegiate Athletic Ass'n*, 18 So. 3d at 1209.

In short, the total number of pickups and the fees paid to Broward County do not meet the definition of trade secrets under sections 688.002(4) or 812.081(1)(c), Florida Statutes (2016). Nothing indicates the fees or total pickups provide an advantage to Yellow Cab or that Uber derives independent economic value from keeping that information secret. The trial court carefully reviewed the documents and complied with Florida's Public Records law in requiring production of redacted records that were not exempt.

If you need help in deciding the best strategies for protecting your data or to gain access to data you do not have, the attorneys at The Radey Law Firm have excellent experience in this area and are happy to assist.

FSU Online Master's Program in Insurance Ranked 6th in the U.S.

The Master's degree in risk management and insurance (RMI) is becoming increasingly popular for professionals seeking to advance their careers in the insurance industry. Often, professionals join the industry from other disciplines or majored in other areas during their undergraduate work. The RMI master's degree offers an opportunity for professionals to add credentials and position themselves for the future. This is especially the case with online programs, in which professionals typically can continue to work, earning money and progressing in their jobs while they complete the degree.

Florida State University is pleased to announce that its online RMI Master's program recently was named the 6th-ranked program in the country by U.S. News & World Report. This is an improvement of three positions compared

to the 2017 rankings. Among public universities, the program is 5th in the nation. This puts the Master's degree program on par with FSU's undergraduate program in risk management and insurance, which also is ranked 6th in the country. Dean Mike Hartline commented that FSU takes great pride in having online degree programs that are taught by the same faculty members who teach on campus, which contributes to the quality of the programs.

Radey president Travis Miller is the chairman of the executive council supporting the Risk Management and Insurance program. The goal of the executive council is to assist in enhancing FSU's RMI programs, including educating undecided business school majors about potential careers in the insurance industry.

Florida's Salary Credit Against the Premium Tax Remains a Valuable Jobs Incentive

By: Travis Miller

In recent years, insurers have monitored each legislative session to see if the current salary credit against the premium tax will survive. Logic would suggest that a Republican-majority would not increase taxes through the repeal of a tax credit, particularly when that tax credit incentivizes actual job creation. This has turned out to be the case over the last few years, although the debate has been closer than one might anticipate.

As we enter the 2018 legislative session, insurers again are wondering whether the legislature will look to eliminate the salary credit to raise money for other priorities (or to claim victory in passing other tax cuts). No matter how they present the issue, eliminating a tax credit effectively increases the tax, which ultimately is passed through to consumers. In doing so, eliminating the tax credit for actual job creation also has a doubly-bad effect for Floridians. 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. Repealing the salary credit would kill off the incentive for insurers to hire Florida employees when jobs increasingly can be located anywhere in the country or world, while simultaneously increasing costs passed through to consumers.

Finally, we sometimes hear that eliminating the salary credit levels the playing field among industries because other industries don't receive similar benefits for hiring employees. This argument also 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.



Florida Tops Judicial Hellhole Report

By: Travis Miller

Florida earned the dubious distinction of being named the #1 "Judicial Hellhole" in the nation according to a 2017-18 report of the American Tort Reform Association.

The report cites the Florida Supreme Court's "liability-expanding decisions" and "barely contained contempt for the lawmaking authority of legislators and the governor" as primary reasons for Florida topping the list. The report also refers to an aggressive personal injury bar's fraudulent and abusive practices in South Flor-

ida and elsewhere as tarnishing the state's reputation. This will sound familiar to the insurance industry, which has been battling the "assignment of benefits" issue in south Florida and increasingly in other areas of the state.

This marks the first time in the 16-year history of the report that Florida has topped the list.

House Looks at Assignment of Benefits Issue

By: David Yon

Not only are they on an early schedule this year, but the Florida Legislature is moving fast. In something almost unheard of, the House is actually passing substantive bills before the first week is over. The House passed HB 7015 on Friday, January 12th, in an effort to help reduce the excessive costs arising from AOB provisions. At the time of this publication, there are three bills on this subject filed in the Senate.

In its press release, the Office provided the following quote from Commissioner David Altmaier:

“I am thankful for the support of the Cabinet, bill sponsors, and all House members who have been working hard to address AOB reform. The results of my Office’s newest report is a clear sign that Florida is seeing an aggressive rise in the number of water loss claims associated with an AOB and this impact is being felt statewide. Without a legislative remedy, this problem will lead to an increase in homeowners insurance premiums and lack of consumer choice as insurers stop writing or renewing policies in areas with high water losses. I look forward to working with the Florida Legislature and other stakeholders on a proactive solution to address this issue in the 2018 Session.”

House Bill 7015

Earlier in the day, the Office released the “2017 Review of Assignment of Benefits (AOB) Data Call Report.” The report contained aggregated results of information the Office received by the top 25 personal residential insurance companies. The report also states:

The findings of this report show a larger progression in the geographic spread, frequency, and average severity of water loss claims across the state; however, this occurred in half the time it took to develop when compared to the nearly six-year analysis of the February 2016 report on this same issue. Since 2015, results indicate the frequency of water claims has risen by 44% with all regions of the state experiencing double-digit increases. Likewise, the average severity of water claims has increased by 18%. The total combined impact of these changes reflect an average 42.1% annual increase in water losses, which is nearly triple the 14.2% average annual increase shown in the previous report.

A copy of the report can be accessed on the Office’s “AOB Resources” webpage.

Capitol - Cont. from Pg. 2

spring weather. Springtime Tallahassee has become one of the city’s largest and most anticipated annual events. In fact, other Tallahassee buildings or amenities attributed to rebuffing efforts to move the capital include the Governor’s Mansion, Capital City Country Club, the paving of Highway 90, and, in a by-gone era, the adoption of street lights.

Over the last two centuries, other efforts have focused on moving the capital to Jacksonville, Ocala, St. Augustine, and Palatka. Will this latest effort lead to the relocation of Florida’s capital? It’s doubtful, but maybe we’ll see a new festival on the schedule. Or at least a new plaque in the Capitol.

Experience.Service.Success.

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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