

# FLORIDA INSURANCE REPORT

Keeping You Informed About Florida  
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## Happy New Year!

By: Travis Miller

Radey wishes all of our friends a happy and prosperous new year. As 2019 begins, Florida's capital city will be embarking on a new era. Governor Ron DeSantis took office, succeeding Rick Scott who was Governor for eight years. Chief Financial Officer Jimmy Patronis returns, having been elected to the Cabinet office to which he initially was appointed by Governor Scott.

As with the Governor's office, the Attorney General and Commissioner of Agriculture will be new members of the Cabinet. Ashley Moody succeeds Pam Bondi as Attorney General, while Nikki Fried becomes the Commissioner of Agriculture following Adam Putman. Commissioner Fried is the only Democrat elected to statewide office this cycle.

Activity will heat up early in the new year as Florida's annual legislative session approaches. Many of the issues discussed in past legislative sessions will resurface this year. Among these, the legislature will be faced with continuing debate about how to curtail problems with "assignments of benefits" driving up insurance claims costs,

and ultimately rates. The legislature also will be presented with similar concerns in the auto insurance market relating to replacement auto glass.

Although workers' compensation rates were the subject of a recent rate reduction filing, some members of the legislature have indicated that workers' comp issues should be revisited in the upcoming session to stem potential problems that could lead to higher rates on the horizon.

Of course, the health insurance market also sees its share of annual issues, which are particularly complex due to the interplay between federal programs and state-based regulation.

Many of the issues arising in 2019 will be similar to those in prior sessions, but the key policymakers have changed. This leads to potentially differing priorities and viewpoints on potential solutions. Entering 2019, we are reminded of the old adage that the only thing constant is change....

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## FIRM NEWS



### *Ed Lombard Joins Radey as a Shareholder*

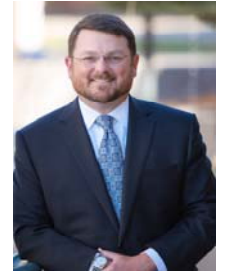
Radey is pleased to announce that Ed Lombard has joined the firm as a shareholder. Ed comes to the firm after spending the last 13 years at another Tallahassee-based firm, Vezina, Lawrence & Piscitelli. Ed represents regulated entities and other clients in government contracting and procurements, bid protests and administrative litigation. Ed also represents commercial clients in civil litigation, including contract disputes, deceptive and unfair trade practices, business torts, breach of fiduciary duties, Lanham Act claims, and theft of trade secrets. Ed also has served as counsel to independent litigation committees of boards of directors of publicly traded companies investigating shareholder derivative claims and whistle-blower claims.

Radey president Travis Miller said, “We are very pleased Ed decided to join our team of administrative and governmental lawyers. With our regulatory focus and presence in Florida’s capital, we strive to provide superior service to our clients with regulatory and transactional issues, as well as with administrative or civil litigation when it arises. We’ve worked with, and against, Ed in many cases over the years, so we know he’s one of the go-to lawyers in Tallahassee for administrative litigation, bid protests and procurements. This is an outstanding complement to our current strengths.”

Ed Lombard added, “I’m happy to join Radey at this exciting time for the firm. Radey’s regulatory and governmental emphasis matches my emphasis on governmental and administrative litigation and procurements. I look forward to adding my experience to the group as we continue to focus on being a premier capital firm for regulated industries.”

Please join us in welcoming Ed to the firm.

### *Drew Parker Becomes Radey Shareholder*



We are happy to say that Drew Parker, previously Of Counsel to the firm for the last two years, has accepted an offer to join the firm as a shareholder. Drew joined the firm in early 2017 after most recently serving as General Counsel to the Florida Department of Financial Services. Before his tenure with DFS, Drew had been General Counsel to the Florida Department of Children and Families. He also previously worked in private practice.

Radey president Travis Miller commented, “Drew has brought unique talents and perspective to the firm since joining us two years ago. He has been the top lawyer at more than one agency, so he has insights and instincts that help our clients with regulatory issues. Drew also is an experienced litigator and is able to assist clients in that way as well. Beyond that, Drew has been a great fit for the culture of the firm.”

Drew Parker added, “I appreciate the opportunity to become a shareholder of the firm. I have enjoyed the opportunity to assist clients on a range of regulatory, administrative and litigation issues. I also look forward to continuing to be a part of the firm as Florida enters this new era in our executive, legislative and judicial branches.”

Please join us in congratulating Drew on becoming a shareholder of the firm.

## Live from the OIR Insurance Summit...

By: Karen Asher-Cohen

Reporting **live** from the OIR Insurance Summit in (not-so-sunny, but better than up north) Tallahassee:

Commissioner Altmaier kicked off the Summit with his opening remarks. He emphasized that over 70 OIR staff members will be present for the two-day conference and his goal is to facilitate many opportunities for discussions between the OIR staff and the industry representatives present, so everyone is on the same page regarding OIR's regulation of the insurance industry in Florida. The two days are broken up into hourly sessions on two tracks – life & health, and property & casualty, with subjects such as: ABC's of an Effective P&C Form Filing; the Medicare Supplement Market; Florida's Regulatory Landscape and the AOB Crisis; Preview of the L&H Insurance Regulation Filing System; Flood Facts and Florida's Private Flood Insurance Market; Challenges in the Life Insurance Market; and How Reinsurance and Catastrophe Reporting Go Hand in Hand. Attendees are here from 19 states and Canada.

**NEWS** from P&C Product Review:

The long-awaited Personal Residential Property Worksheet is now available on OIR's website:

[www.flor.com/Sections/pandc/ProductReview/Bureau\\_PC\\_FormsRates.aspx](http://www.flor.com/Sections/pandc/ProductReview/Bureau_PC_FormsRates.aspx)

Sandra Starnes, Director of P&C Product Review, stressed that the worksheet is not mandatory; it is intended as a helpful tool for personal residential property filings. It does not include all the requirements for a filing, but does include statutes and rules as a guide to a filing. One caveat: the Legislature often changes statutes, so the worksheet may not be up-to-date once the 2019 session is over. Coming soon to a filing near you: the Personal Auto Worksheet is expected to hit the OIR website shortly. Also, they expect to release the Commercial Lines Worksheet in the 2d quarter of 2019.

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## Legislature to Consider Constitutional Revision Process

By: Travis Miller

Florida saw an unprecedented number of constitutional amendments in the 2018 election cycle, with all but one of them passing. This came as somewhat of a surprise because the 60% approval requirement resulted in approvals being hard to come by in prior elections.

Seven of the constitutional amendments were placed on the ballot by the Constitutional Revision Commission. The commission meets every 20 years for the purpose of reviewing and offering amendments to the Florida Constitu-

tion. The commissioner's proposals came under criticism because some of them wrapped unrelated topics into single proposals.

A Republican lawmaker wants to revisit the constitutional amendment process by eliminating the Florida Constitutional Revision Commission altogether. Representative Brad Drake has filed a proposed constitutional amendment and related bill (HB 251) that would repeal the commission. The proposal will be considered during the 2019 legislative session. If approved, the proposal would have to go before the public on the 2020 ballot.

## A Look at the Assignment of Benefits Issue

By: Travis Miller

### *Assignment of Benefits Gets its Day in Court*

Efforts to curb abuses with Assignments of Benefits (AOB) have failed over the last several years even as some policy-makers have pinpointed the AOB crisis as a cause for rising property insurance rates and decreased availability. It's too early to tell if any meaningful reform will take place in 2019 --given the results in recent years, a healthy dose of skepticism certain is understandable. Still, there are two avenues of potential relief this year:

### *Legislators Warming to Idea of AOB Reform*

Although the 2019 legislative session is still several weeks away, some legislators are already talking about AOB as an issue that should be addressed. In the Senate, new insurance committee chairman Doug Broxson has filed a bill aimed directly at the one-way attorneys' fee provision. Broxson believes the attorneys' fee statute always was intended to benefit named insureds and should not be subject to assignment to third parties. His short bill reflects that belief by limiting the opportunity to recover attorneys' fees to named insureds, beneficiaries and omnibus insureds.

Although other legislators might have different ideas about how to address the issue, several of them in the last couple of weeks have been vocal about finding a solution this year. The impetus for these most recent comments in part has been another annual rate increase for Citizens. The increase averages 8.3%, but that is only because rate indications that are much higher in some territories are statutorily capped at 10%. Also, there is a growing recognition that AOB abuses preclude Citizens from accumulating the surplus that is needed to buffer against losses from hurricanes such as Irma and Michael. Finally, some legislators want to



take matters into their own hands and to leave it to the Supreme Court (as discussed below).

The issues are well-defined.... the question is whether this is the year the legislature steps forward to address them.

### *Florida Supreme Court to Look at AOB Dispute*

The Florida Supreme Court has indicated it will hear a case regarding whether an insurer can impose certain conditions on an insurer's ability to assign benefits under an insurance policy. In *Restoration 1 Of Port St. Lucie, a/a/o John and Liza Squitieri v. Ark Royal Insurance Company*, the 4<sup>th</sup> DCA held that a homeowners' insurance company can require all insureds, as well as a mortgage company, to sign off on an AOB for it to be valid. The 4<sup>th</sup> DCA's ruling conflicts with a 5<sup>th</sup> DCA ruling rejecting an insurer's effort to specify in its policy that assignments are valid only when approved by all insureds and additional interests.

*Restoration 1 v. Ark Royal* does not deal directly with the one-way attorneys' fee issue. Requiring vendors to obtain consents from multiple parties might slow down the use of AOBs, at least in some instances. However, even a ruling that insurers may impose conditions on AOBs would continue to subject insurers to increased costs and one-way attorneys' fees when policies do not involve multiple parties or when all of the parties consent. The 2019 legislature therefore might see a need to act even with the possibility of a favorable ruling from the Supreme Court.

## Florida Supreme Court Rules on Timing of PIP Deductible in Hospital Case

By: Karen Asher-Cohen

In *Progressive Select Ins. Co. v. Florida Hospital Medical Center*, Case No. SC18-278, the Florida Supreme Court issued a unanimous decision to resolve a conflict between the Fifth and the Fourth DCA's, and upheld the 5th DCA's opinion that section 627.739(2), F.S., requires that the deductible be subtracted from the total amount of medical charges before the reimbursement limitation in section 637.736 is applied.

The case turned on the statutory construction of the following sentence in section 627.739(2): "The deductible amount must be applied to 100 percent of the expenses and losses described in s. 627.736." (emphasis added). Complicating the interpretation was the fact that the phrase "expenses and losses" is not expressly defined. However, in its analysis, the Court contrasted the "expenses and losses" with the "benefits" to be paid to the insured after the deductible is met. The Court then held:

A plain reading of the statutory provisions makes

clear that the deductible must be subtracted from the provider's charges before the reimbursement limitation is applied. In the context of section 627.736(1), "expenses and losses" refers to something different from "benefits." "Benefits are the amount paid by the insurer - determined by the 60% and 80% methodologies, and governed by the fee schedule, when applicable. "Expenses and losses," on the other hand, refers to the total charges submitted to the insured - not only those which may be recovered as benefits. And section 627.739(2) provides that the deductible must be applied to 100% of such "expenses and losses." Subtracting the deductible from the reduced fee schedule amount would violate this requirement.

In reaching its decision, the Court also looked at the history of the statute itself. In 2003, the Florida Legislature amended section 627.729(2) and replaced the phrase "benefits otherwise due" with the current wording, "100 percent of the expenses and losses." Therefore, "when calculating the PIP benefits due an insured, the deductible must be subtracted from the total medical charges before applying the reimbursement limitation ...." The effect was to provide a higher reimbursement to the provider.

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## DFS Adopts Changes to Penalty Guidelines

By: David Yon

The Division of Agent and Agency Services published notice that it filed the final versions of rule chapter 69B-231, entitled Penalty Guidelines for Insurance Representatives. The rule chapter applies to all resident and nonresident insurance agents, title insurance agents and agencies, surplus lines agents, managing general agents, customer representatives, adjusters, navigators and service representatives licensed or appointed under chapter 626, F.S., who are subject to discipline under sections 626.611, 626.621, 626.8437, 626.844, and 626.9957, F.S. The changes to the rules will take effect January 30, 2019.

The Division states that the purpose of rule chapter 69B-231 is to implement the Department's duties under sections 624.307(1), 626.207(8), and 626.9954, F.S., and to enforce sections 626.611, 626.621, 626.631, 626.641, 626.681, 626.691, 626.8437, 626.844, 626.8443, and 626.9954, F.S., by establishing standards for imposing penalties described in those statutory sections, and interpreting provisions in those sections as they relate to penalties imposed upon licensees specified in rule 69B-231.020, F.A.C.

## OIR Reminds Insurers Regarding Cancellations or Nonrenewals

By: David Yon

The Office of Insurance Regulation issued its first Informational Memorandum on January 8, 2019. The purpose of the memo appears to be to remind authorized insurers doing business in Florida that even though Emergency Order 234790-18-EO expired on January 7, 2019, section 627.4133(2)(d), Florida Statutes, remains in effect and generally protects policyholders from policy cancellations or nonrenewals.

The Emergency Order, of course, limited insurance companies' ability to cancel policies of policyholders who suffered damage from Hurricane Michael.

OIR specifically pointed out the following statutory language:

“ ... Upon a declaration of an emergency pursuant to s. 252.36 and the filing of an order by the Commissioner of Insurance Regulation, an insurer may not cancel or nonrenew a personal residential or commercial residential property insurance policy covering a dwelling or residential property located in this state which has been damaged as a result of a hurricane or wind loss that is the subject of the declaration of emergency for a period of 90 days after the dwelling or residential property has been repaired. A structure is deemed to be repaired when substantially completed

and restored to the extent that it is insurable by another authorized insurer that is writing policies in this state.”

There are of course a number of exceptions to this mandate in the statute. Section 627.4133(2)(d)2 provides:

2. However, an insurer or agent may cancel or nonrenew such a policy prior to the repair of the dwelling or residential property:

- a. Upon 10 days' notice for nonpayment of premium; or
- b. Upon 45 days' notice:

(I) For a material misstatement or fraud related to the claim;

(II) If the insurer determines that the insured has unreasonably caused a delay in the repair of the dwelling; or

(III) If the insurer has paid policy limits.

It may also be argued by some insurers that if the OIR's emergency order is no longer in place and the declaration of an emergency under 252.36, Florida Statutes, is no longer in effect that section 627.4133(2)(d) is no longer applicable.

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## Governor DeSantis Names Second Supreme Court Justice

By: Karen Asher-Cohen

For his second of three vacancies on the Florida Supreme Court, Governor DeSantis has chosen another Miami judge from the Third DCA – Robert J. Luck. Judge Luck is a graduate of the University of Florida Law School, and will be the youngest member of the Florida Supreme Court, at 39. He is also the first Jewish justice to be appointed to Florida's highest court in over 20 years. Luck is a former federal prosecutor, who sat on the Miami circuit bench from 2013 until 2017, when then-Governor Scott appointed him to the Third DCA.

## Governor DeSantis Starts Term at Fast Pace

By: David Yon

Governor Ron DeSantis started his term as Governor at a fast pace, and in some areas seems ready to take a different approach to problems than his predecessor, Rick Scott.

On January 8, Governor DeSantis issued Executive Orders 19-10 and 19-11, affirming his commitments to diversity, non-discrimination, open government and preventing sexual harassment in state agencies. He followed those with orders suspending Beth Jackson, Superintendent of schools in Okaloosa County and Scott Israel from the Office of Sheriff for Broward County. Ms. Jackson was suspended primarily for failing to maintain and enforce adequate training, rules and protections to prevent and report child abuse cases. Sheriff Israel was suspended for failure to follow proper procedures that may have prevented the shooting at Marjorie Stoneman Douglas High School.

In between the suspensions and the open government orders, Executive Order Number 19-12 was issued. This order, called “Achieving More Now For Florida’s Environment” contains three directives for environmental policy:

1. Focus on rapid improvement for water quality, quantity and supply;
2. Restructuring to focus on accountability, transparency, and science to achieve more now for Florida’s environment; and
3. Ensure Florida’s valuable and vulnerable coastlines and natural resources are protected.

These major policy directives are followed by many specific actions. Among other things:

1. Find 2.5 Billion over the next 4 years to invest in Everglades restoration
2. Create Blue-Green Algae Task Force
3. Update restoration plans
4. Expedite key Everglades projects
5. Take steps necessary to “adamantly oppose all offshore oil and gas activities off every coast of Florida and hydraulic fracturing in Florida.”

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## Governor DeSantis Names Barbara Lagoa to Florida Supreme Court

By: Travis Miller

In addition to leading Florida’s executive branch, Governor Ron DeSantis has an immediate opportunity to reshape the Florida Supreme Court. Three of Florida’s Supreme Court Justices-- Barbara Pariente, Peggy Quince, and Fred Lewis, reached mandatory retirement coinciding with Governor DeSantis becoming Florida’s next Governor. Although sometimes it is difficult or even unfair to apply labels to judges’ philosophies, most observers in Florida would characterize the retiring justices as liberal. In contrast, Governor DeSantis has repeatedly indicated he will appoint Justices who follow the strict rule of law and have a philosophy of judicial restraint. (Note that Governor DeSantis is a graduate of Harvard Law School, so he certainly is familiar with the judicial system.)

Governor DeSantis moved quickly to appoint the first of three Justices he will name to the positions vacated by the

retiring Justices. He named Barbara Lagoa to one of the open positions. Judge Lagoa’s philosophy matches Governor DeSantis’ view of the legal system. Judge Lagoa commented, “I am particularly mindful of the fact that under our constitutional system it is for the Legislature, not the courts, to make the law. It is the role of judges to apply, not to alter, the work of the people’s representatives.”

Judge Lagoa previously has been the Chief Judge of Florida’s Third District Court of Appeal (3<sup>rd</sup> DCA). Judge Lagoa becomes the first Hispanic woman appointed to the Florida Supreme Court. She was appointed to the 3<sup>rd</sup> DCA in 2006 by then-Governor Jeb Bush. Judge Lagoa graduated from Florida International University and Columbia Law School, where she was editor of the Law Review.

## 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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