

2009 Florida Legislative Changes and Recent Court Decision Generate Changes for the Insurance Industry

DENVER
FT. LAUDERDALE
JACKSONVILLE
LOS ANGELES
MADISON
MIAMI
NEW YORK
ORLANDO
TALLAHASSEE
TAMPA
TYSONS CORNER
WASHINGTON, D.C.
WEST PALM BEACH

May 2009

akerman.com



ADVERTISEMENT

Contents

Property Insurance Bills Ease
Restrictions on Residential Property Insurers
2

New Public Records Exemptions and
Changes Enacted
4

Cost of Doing Business in Florida
Increases for Auto Insurers
5

Changes Result in More Access to
Healthy Kids Program
5

Patient Records Disclosure Clarified and
Electronic Health Records Promoted
6

Direct Payment to Non-Preferred Provider
for Health Services Allowed
6

Professional Liability Claims
7

Court Decision Offers Guidance on
Recoup of Defense Costs
8

Property Insurance Bills Ease Restrictions on Residential Property Insurers

Donvan Brown, Associate
donovan.brown@akerman.com

Maria Henderson, Consultant*
maria.henderson@akerman

Three major property bills, HB1495 which was signed by Governor Crist on May 27, 2009, HB1171 and SB 742, were passed in the 2009 Florida legislative session. These bills, if signed into law, will ease restrictions for companies writing homeowner insurance in Florida. The provisions with the exception of the items related to sinkhole coverage are effective upon the signing by Governor Crist. The sinkhole bill has an effective date of January 1, 2010. Some of the significant changes in these bills include:

- Changes to the Hurricane Catastrophe Fund related to retention by participating carriers, including the addition of cash build up factor of 5% for 2009-2010 contracts and increasing to 25% by 2013 and subsequent years. Expands option to purchase temporary increased coverage limits (TICL) with other changes to TICL.
- Eliminates no interest loan for hurricane mitigation measures.
- Allows insurers to make separate rate filings, with restrictions on timing related to other rate filings, to reflect costs incurred for the purchase of reinsurance or for the financing for TICL purchases. Premium increases are capped at 10% as to reinsurance and 3% as to liquidity. The OIR has 45 days to approve or not.
- Strikes requirements, set to begin January 1, 2010, for owners to disclose windstorm mitigation rating based on a uniform home grading scale to buyers if the residential property located in wind borne debris region with value greater than \$500,000.
- Rate freeze for Citizens Property Insurance expires but rate increases are capped at 10% per year for any single policyholder, excluding coverage changes.

“Creation of a new residential property insurance option whereby property rates may be ‘in excess of the otherwise applicable filed rate.’”

- Confirms legislative intent that assessments paid by an insurer can be fully recouped. Changes provisions to allow insurers to file statement “for information only” to the Office of Insurance Regulation (OIR) when assessments extend beyond an initial 12 month period. 90 days after an insurer has made a full recoupment, it is to file a report with the final accounting to the OIR.
- Creation of a new residential property insurance option whereby property rates may be “in excess of the otherwise applicable filed rate.” The OIR can evaluate rates for adequacy only. The rate filing is not subject to determination by the OIR that a rate is excessive or unfairly discriminatory. Insurers offering coverage related to this new option must have surplus requirements and may not purchase TICL coverage from the Florida Hurricane Catastrophe Fund. Consumer disclosure language is spelled out in the bill.
- Modifies the My Safe Florida Home (“MSFH”) Program by: clarifying that MSFH provides grants rather than participate in no-interest loan programs; revising the threshold for grant and contract review by the Legislative Budget Commission, and adding mitigation improvements relating to roof hardening to help facilitate acquisition of federal “weatherization” stimulus money and FEMA grant money.
- Alters the laws applied to Public Adjusters by: prohibiting public adjusters and public adjuster apprentices from accepting referrals of business from any person with whom the public adjuster or apprentice conducts business; requiring public adjuster apprentices to pass a written examination prior to licensure; limiting the number of public adjuster apprentices that are maintained by public adjusting firms; and requiring the Office of Program Policy Analysis and Government Accountability to review the practices and laws relating to public adjusters and submit a report to the Governor, Senate President, Speaker, the Chief Financial Officer, and the Insurance Commissioner by February, 2010.
- Allows insurance agents to explain the applicability of FIGA to consumers.
- Repeals the statute that prevents OIR attorneys from asserting attorney-client privilege or work-product confidentiality on certain communications with other OIR personnel.
- Insures have the option of non-renewing policies of policyholders with sinkhole coverage in Pasco County or Hernando County and provide instead catastrophic ground cover collapse, excluding sinkhole coverage. Insurers must also make available to policyholders an endorsement providing sinkhole coverage subject to an inspection of the property.

New Public Records Exemptions and Changes Enacted

Thomas Range, Associate
tom.range@akerman.com

The Florida Legislature enacted several insurance related bills creating some new public records exemptions and creation of an insurance data match system. Each of the results of the bills is set forth below.

The Florida Insurance Guaranty Association (FIGA) is a corporation that was created by the Florida Legislature to service claims for insolvent property and casualty insurers that have been ordered to be liquidated. Senate Bill 2158 creates exemptions from Florida's public records laws for the following records held by FIGA: (1) claims files, until the end of litigation or settlement of all claims, although information contained in the claims file can remain exempt if it is otherwise covered by another exemption; (2) medical records and medical information that are part of a claims file; and (3) records relating to matters that are "reasonably encompassed in privileged attorney-client communications." This law becomes effective July 1, 2009 and is subject to automatic repeal on October 2, 2014 unless reenacted by the Florida Legislature.

In 2008, a Florida court ordered a school board to respond to a public records

request for documents regarding the school board's health insurance policy and personal identifying information (name, age, address, gender, etc.) for employees and dependents covered by the policy. In an apparent response to this decision, the Florida Legislature enacted House Bill 135, which creates a public records exemption for personal identifying information for a dependent child who is insured by a state agency group insurance plan. The law becomes effective July 1, 2009 and is subject to automatic repeal on October 2, 2014 unless reenacted by the Florida Legislature.

Under current Florida law, the Department of Revenue is authorized to create a data match system to determine if noncustodial parents who owe past due child support also have a claim with an insurer. An insurer can voluntarily provide this claims information, which is exempt from disclosure under Florida's public records laws unless and until there is a match, at which point the information becomes available for public viewing. If there is no match, the information is destroyed.

The Department of Revenue has not yet implemented the data match system

and is instead monitoring the results of a federal workgroup responsible for implementing a nationwide insurance data match system. To allow the Department sufficient time to assess the success of the federal program, House Bill 7039, which becomes effective upon signing by the Governor, extends the public records exemption until October 2, 2010.

Both House Bills 135 and 7039 were sent to Governor Crist on May 19. He has until June 3 to act on these bills.

"The Department of Revenue is authorized to create a data match system to determine if noncustodial parents who owe past due child support also have a claim with an insurer"

Cost of Doing Business in Florida Increases for Auto Insurers

Maria Henderson, Consultant *
maria.henderson@akerman.com

In an effort to generate income to patch the gaping hole in the Florida budgetary needs, a number of fees were increased with the passage of SB 1778. Several of those fee increases will significantly increase automobile insurers' underwriting and claims expenses. On the underwriting side, motor vehicle

reports for driving records will increase from \$2.10 to \$8.00 for a three year report and from \$3.10 to \$10.00 for a seven year report. On the claims side, expenses will increase since a crash report fee will increase from \$2 to \$10. Also, while it is not frequently needed, it is important to note that original certificates

of title costs are increasing from \$24 to \$70. Governor Crist signed this bill into law on May 27, 2009 and the fee increases will be effective September 1, 2009. Auto insurers will want to include these increases in rate setting to ensure adequacy.

Changes Result in More Access to Healthy Kids Program

Bruce Platt, Shareholder
bruce.platt@akerman.com

New legislation in Senate Bill 918 contained a number of measures intended to improve the Florida Healthy Kids program and stream-line the Florida Healthy Kids enrollment process as follows:

- Reducing the disenrollment penalty for non-payment of premiums from 60 days to 30 days
- Reducing the waiting period for voluntary cancellation of insurance coverage from 6 months to 60 days
- Providing good cause exceptions to the waiting period for subsidized coverage for cancellation of other coverage
- Allowing electronic verification of income
- Adds the DCF Secretary or his/her designee to the FHKC Board of Directors

Patient Records Disclosure Clarified and Electronic Health Records Promoted

Bruce Platt, Shareholder
bruce.platt@akerman.com

Since 2004, there has been an on-going effort to create a statewide health information exchange in Florida. With the passage of Senate Bill 162, this has been accomplished and following are the key provisions in the legislation.

Section 1. of this bill clarifies who has the ability to allow disclosure of patient records and adds practitioners or providers who are involved in the treatment of the patient as entities who can be provided patient records without explicit consent. This section also deletes the exemption

allowing long-term care ombudsman councils access to certain nursing home patient records.

Section 2. creates the “Florida Electronic Health Records Exchange Act.” This is intended to promote the development of electronic health records and promote electronic sharing among appropriate entities. It allows appropriate release of such records in an emergency situation and requires the development of a universal patient authorization form for the use or release of an identifiable health record.

Sections 3. and 4. create the Electronic Health Records System Adoption Loan Program which is based upon federal stimulus legislation and is intended to allow Florida to distribute federal loans to providers for the development of electronic health records systems.

Section 5. allows clinical laboratories to disclose laboratory results to practitioners and providers involved in the treatment or care of the patient.

Direct Payment to Non-Preferred Provider for Health Services Allowed

Steven Grigas, Shareholder
steven.grigas@akerman.com

Senate Bill 1122 allows for the direct payment of health services to non-preferred provider organization practitioners or institutions providing care. The bill passed overwhelmingly in both the House and Senate despite vocal opposition by some health insurers and the public employee union of the state. Senate Bill 1122 requires that an insurer make payment directly to the provider of service upon authorization by the service recipient. The bill’s sponsors, Representative Marco Llorente and Senator Don Gaetz argue that by allowing this direct assignment of payment, the consumer will ultimately benefit through a more efficient payment mechanism with

no additional cost. They point to successful use of such assignments by some health insurance companies.

However, other insurance companies see the matter very differently. They indicate that the effects of this bill will cause confusion to the consumers, significantly increase costs to the industry, and undermine the very foundation of preferred provider networks statewide. A coalition of organizations opposing the bill has asked Governor Crist to veto this controversial legislation.

Professional Liability Claims

Steven Grigas, Shareholder
steven.grigas@akerman.com

Senator Clary Baker sponsored Senate Bill 2252 which allows for simplified claims reporting by professional liability insurers of the state. The bill amends the language of section 627.912, Florida Statutes, offers a definition of “claim”, and clarifies when and under what circumstances a claim may be considered “closed”. “Claim” is defined as being the receipt of any notice of written intent to initiate litigation, a summons and complaint, or a written demand from a person or legal representative stating an intention to pursue an action for damages against those insured listed under paragraph (a) of the statute. It further creates a new set of reporting criteria for businesses required to report claims activities to the Florida Office of Insurance Regulation (“OIR”).

Specifically the language of Senate Bill 2252 requires reporting of claims under certain circumstances relating to 1) entries of judgment; 2) executions of settlement; 3) final payments of indemnification; and 4) final dispositions of claims with loss adjustment in excess of \$5,000. Such reports must be filed with the OIR within 30 days of the event. This bill further provides reporting requirements for time periods in which no claims are received by a provider, and for the re-opening of claims previously closed without payment. Senate Bill 2252 becomes effective July 1, 2009.

Court Decision Offers Guidance on Recoup of Defense Costs

Gideon Reitblat
gideon.reitblat@akerman.com

A recent decision from a federal district court in the Middle District of Florida provides guidance on what an insurer defending its insured under a reservation of rights should do to preserve its right to recoup defense costs from the insured, if it is later determined that there was no coverage under the policy.

In *Nationwide Mutual Fire Insurance Company v. Royall*, 588 F. Supp. 2d 1306 (M.D. Fla. 2008), Nationwide filed a declaratory judgment action against its insureds to determine whether it had the duty to defend them. Nationwide initially assumed the defense of the insureds, after issuing a reservation of rights letter. A few months later, Nationwide issued another reservation of rights letter, advising the insureds that it had retained counsel to represent them. Subsequently, Nationwide issued a third reservation of rights letter. In the last letter, Nationwide informed the insureds for the first time that it was reserving the right to recoup defense costs. The insureds never responded to Nationwide's last letter.

In the declaratory judgment action, the court determined that there was no

duty to defend, and Nationwide sought to recover defense costs from the insureds. The court acknowledged that Florida law permits insurers to recoup defense costs. However, the court noted that when the policy is silent on the matter, the right to recoup defense costs cannot be asserted unilaterally, and an insurer cannot recover such costs retroactively. Rather, the right to recoup must be based on the formation of a separate agreement between the insurer and the insured – generally in a reservation of rights letter. Because Nationwide's insureds never responded to Nationwide's third reservation of rights letter (where Nationwide for the first time brought up the issue of recouping defense costs), the court examined whether the insureds' acquiescence constituted an acceptance of the insurer's conditional offer to defend.

The court held that in the limited circumstances in which acquiescence may constitute acceptance, Florida law requires that there be at least some reasonable time for the insureds to reject an offer before their acquiescence would be deemed an acceptance. As a result,

the court stated that if an insurer wants to preserve its right to recoup defense costs in the event there is no coverage, it should give the insured a specific, reasonable time (e.g., fifteen days) within which to accept or reject a written offer of a defense conditioned upon the reimbursement of fees and costs. The court noted that where such a written offer clearly and expressly states that the failure to reject the offered defense within the stated period will constitute an acceptance, the insurer will be entitled to reimbursement in the event the insured fails to object, and it is later determined that there is no coverage under the policy.

“Florida law requires that there be at least some reasonable time for the insureds to reject an offer before their acquiescence would be deemed an acceptance.”

Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal* *NLJ 250* (2008) in number of lawyers and is one of the largest law firms in Florida. Our team serves clients worldwide from the major commercial centers in Florida and international business centers in the United States, including Los Angeles, Miami, New York, and Washington, D.C. Akerman is a member of Lex Mundi, the world's leading association of independent law firms with a presence in more than 100 countries.

Akerman Senterfitt's Insurance Practice Group has been providing legal and regulatory services to the insurance industry for more than 30 years. With more than forty-five attorneys and consultants, our Group represents every major U.S. and many foreign insurance companies, as well as regional carriers and start-ups. Additionally, our clients include health-related entities, insurance trade associations, brokers, intermediaries, agents, claim adjusters, risk managers and self-insured clients.

For more information about our Insurance practice, please contact:

Marcy Aldrich, Chair Insurance Practice Group 305.982.5576
 Bruce Platt, Insurance – Insurance Regulatory 850.425.1634
 Edward Kutter, Insurance – Insurance Regulatory 850.425.1602

Denver

511 Sixteenth Street, Suite 420
 Denver, CO 80202
 303.260.7712

Ft. Lauderdale

Las Olas Centre II
 350 East Las Olas Boulevard
 Suite 1600
 Ft. Lauderdale, FL 33301-2229
 954.463.2700

Jacksonville

50 North Laura Street, Suite 2500
 Jacksonville, FL 32202-3646
 904.798.3700

Los Angeles

725 South Figueroa Street, 38th Floor
 Los Angeles, CA 90017-5438
 213.688.9500

Madison

222 West Washington Avenue, Suite 380
 Madison, WI 53703
 608.257.5335

Miami

One Southeast Third Avenue
 25th Floor
 Miami, FL 33131-1714
 305.374.5600

New York

335 Madison Avenue, Suite 2600
 New York, NY 10017-4636
 212.880.3800

Orlando

CNL Center II at City Commons
 420 South Orange Avenue, Suite 1200
 Orlando, FL 32801-3336
 407.423.4000

Tallahassee

Highpoint Center, 12th Floor
 106 East College Avenue
 Tallahassee, FL 32301
 850.224.9634

Tampa

SunTrust Financial Centre
 401 East Jackson Street, Suite 1700
 Tampa, FL 33602-5250
 813.223.7333

Tysons Corner

8100 Boone Boulevard, Suite 700
 Vienna, VA 22182-2683
 703.790.8750

Washington, D.C.

801 Pennsylvania Avenue N.W., Suite 600
 Washington, DC 20004
 202.393.6222

West Palm Beach

Esperante Building
 222 Lakeview Avenue, Suite 400
 West Palm Beach, FL 33401-6183
 561.653.5000

akerman.com

