



Insurance

Case Law & Insurance Regulation Update

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I. STATE APPELLATE DECISIONS

A. FLORIDA

- ***Advanced Chiropractic and Rehab. Center Corp. v. United Automobile Ins. Co., (Fla. 4th DCA)***. Insurance/second-tier certiorari review. Denial of petitioner's untimely request for appellate attorney's fees. On review under a petition for writ of certiorari, Florida Rule of Appellate Procedure 9.100, a request for attorney's fees must be included in the petition, response, or reply. Petitioner's motion for fees was held untimely, since the request was not included in any of those filings.
- ***Frisbee, Yankee Trailer Court, LLC, et al. v. Carolina Casualty Insurance Company, et al. (Fla. 5th DCA)***. Rescission/misrepresentations on application. Error to enter final summary judgment allowing insurer to rescind policy for material misrepresentations on policy renewal application where there were genuine issues of material fact as to whether waiver or estoppel barred rescission, given evidence from which jury could conclude that shortly after insured law firm was sued for malpractice in early 2006, the insurer was made aware of the facts it now claims justify rescission, but insurer did not assert rescission until late 2007, and during interim, insurer defended firm, settled another claim on the policy, and took other actions that were inconsistent with rescission upon which the insured firm relied to its detriment.
- ***Vaughan v. Broward General Medical Center, (Fla. 1st DCA)***. Workers' compensation. Judge of Compensation Claims (JCC) erred by admitting into evidence, and relying upon, unauthenticated post-treatment correspondence from claimant's treating physician to support denial of claim for physical therapy, costs, and attorney's fees where claimant objected to receiving the doctor's letter in evidence on authentication and hearsay grounds. The

correspondence was not a "medical report" under section 440.29(4), Fla. Stat. (2011), and the employer/carrier did not set forth an intent to rely on such a report as required by the statute. The correspondence was hearsay, and the employer/carrier established no hearsay exception applicable to the correspondence.

B. GEORGIA

- No Georgia state appellate cases reported.

II. FEDERAL APPELLATE DECISIONS

- ***Bond Safeguard Insurance Company, Lexon Insurance Company v. Wells Fargo, N.A., as successor in interest to Wachovia Bank, N.A. Keybank, N.A. (11th Cir Ga.)***. Sureties lacked standing to bring claims against lenders that could have been brought by the bankruptcy estate. Claims asserted by the sureties were general in nature and derived indirectly from harms directly suffered by the developers. Thus, the claims raised by the sureties belonged to the trustee of the bankruptcy estate of the developers.
- ***Allstate Property and Casualty Insurance Company v. Haslup, et al. (11th Cir. Ga.)***. Summary judgment in favor of insurer affirmed. Insured/killer's intentional acts in wife's death excluded him from coverage under intentional acts exclusion of homeowners' policy, which provided: "We do not cover any bodily injury . . . *intended by*, or which may reasonably be expected to result from the intentional act or acts [of the insured.]" The "intended by" language of the exclusion is measured by an objective test - what a reasonable person would expect - rather than a subjective test.

III. ADMINISTRATIVE LAW/AGENCY DECISIONS

- ***Order Approving Florida Surplus Lines Service Office Budget and Change to Service Fee***. The service fee charged by the Florida Surplus Lines Service Office ("FSLSO") will increase from 0.1% to 0.2% effective **April 1, 2013**. All new and renewal policies/certificates with an effective date on or after April 1, 2013 will incur a service fee of 0.2% of the total gross premium as defined in section 626.9325, Fla. Stat. All new and renewal policies/certificates with an effective date prior to April 1, 2013 will incur a service fee of 0.1% of the total gross premium. The service fee percentage charged on the premium is based on the effective date of the policy; the FSLSO service fee is applicable to single state Florida policies only. The service fee for all endorsements, audits, installments, cancellations or return of premium transactions applicable to policies/certificates effective prior to April 1, 2013 will be the same percentage as the inception date of the policy/certificate being endorsed.
- ***Bayfront Med. Center, Inc., etc. v. Agency for Health Care Administration, (Fla. Division of Administrative Hearings, Final Order, Case No. 12-2757RU)***. Medicaid unadopted rule. The practice of the Agency for Health Care Administration ("AHCA"), to decline Medicaid-funded compensation for emergency medical services provided to undocumented aliens once the patients have reached a point of stabilization, and uniformly applying a stabilization criterion to enforce that practice constitutes an unpromulgated rule. AHCA's statements about and application of the "stabilization" standard meet the definition of a rule that has not been adopted pursuant to section 120.54(1). AHCA must immediately discontinue all reliance upon the "stabilization" standard or any substantially similar statement as a basis for agency action.
- ***Premier Group Insurance Company v. Office of Insurance Regulation (Fla. Division of Administrative Hearings, Recommended Order, Case No. 12-0439)***. Case involving amount of federal income tax expense is properly included as an expense in insurer's excessive profits filings for the years 2005-2007, and in light of that deduction, the refund amount due as excessive profits pursuant to section 627.215, Fla. Stat. (2009). The Florida Office of Insurance Regulation ("OIR") may not automatically reject deductions for federal income tax expenses; however, Rule 69O-189.007, F.A.C., still requires the insurer to provide an explanation of the methodology used in deriving the expenses, including supporting data. The OIR must then review the methodology and supporting data and determine whether it is reasonable. The Administrative Law Judge determined that the insurer's methodology used was reasonable because it was dictated by the

Legislature for insurers in determining an insurer's allocation of federal income tax for purposes of paying Florida corporate income tax. Taxes apportioned to Florida for purposes of section 220.151, Fla. Stat., are also allocated to Florida, and as such can be deducted as expenses incurred in or allocated to Florida for purposes of section 627.215, Fla. Stat. The Administrative Law Judge recommended that the OIR enter a Final Order finding that \$2,406,312.10 may be deducted for federal income tax expense incurred or allocated to Florida for purposes of section 627.215, Fla. Stat., and that the insurer must return \$660,907.90 in excessive profits to its policyholders.

IV. NOTICES OF ADMINISTRATIVE RULEMAKING PROCEEDINGS

A. FLORIDA

- **Rule 61G7-10.001, F.A.C. - Department of Business and Professional Regulation/Board of Employee Leasing Companies - Quarterly Reporting Regarding Working Capital Requirements.** Notice of change to proposed Rule 61G7-10.001, F.A.C. to change subsection (1)'s last two sentences to read: All required submissions and examinations shall be made in furtherance of a licensure renewal application and shall be submitted to the department within 75 days of the end of each quarter. The department will accept a timely filed annual financial report in lieu of a quarterly report for the last quarter in an employee leasing company's fiscal year.
- **Rule Nos. 69L-29.001, 69L-29.002, 69L-29.003, 69L-29.004, 69L-29.005, 69L-29.006, 69L-29.007, 69L-29.008, 69L-29.009, 69L-29.010, 69L-29.011, F.A.C. – Florida Department of Financial Services/Division of Workers' Compensation.** Notice of changes to the above-referenced proposed rules to address concerns raised by the Joint Administrative Procedures Committee. The changes proposed are made to the Health Care Providers Certification Tutorial, material that is incorporated by reference in Rule Chapter 69L-29, F.A.C. Changes were made to certain statutory references to ensure both accuracy and greater specificity and to correct a series of rule sections that were misidentified as rule chapters. Additionally, a statement that listed a number of medical professionals is amended to more closely follow section 440.15(3)(b), Fla. Stat.
- **Rule 69O-170.0155, F.A.C. – Florida Office of Insurance Regulation/Personal Injury Protection.** The purpose of this rule amendment is to update and revise Form OIR-B1-1809 "Health Care Provider Certification of Eligibility" for Personal Injury Protection Benefits (PIP) due to statutory revisions as the result of House Bill 119 (Chapter 2012-197, Laws of Florida). The changes are technical edits to conform the form with the statute.
- **Rule 69O-176.013, F.A.C. – Florida Office of Insurance Regulation/Personal Injury Protection.** The purpose of this rule amendment is to update and revise Form OIR-B1-1149 "Notification of Personal Injury Protection Benefits" in accordance with revisions to the PIP law as amended by House Bill 119 (Chapter 2012-197, Laws of Florida). The form was revised to reflect that PIP benefits are now allocated for emergency medical treatment and a flat \$5,000 death benefit. The form was also revised to incorporate technical edits regarding fraud reporting and billing disclosures.

B. GEORGIA

- No rulemaking proceedings noticed.

V. MEETING NOTICES OF INTEREST/MISCELLANEOUS

- **Florida Agency for Health Care Administration – Medicaid.** On **January 8, 2013**, 9:00 a.m.-12:00 p.m., 2727 Mahan Drive Building 3, Conference Room A Tallahassee, FL. To participate by phone, call 1-888-670-3525, participant passcode 8074710718#. Matters to be discussed: Diagnosis Related Group ("DRG") based reimbursement payment system for hospital inpatient services.
- **Florida Dept. of Financial Services, Division of Workers' Compensation Offering Seminars to Explain Changes to Sections 440.02 and 440.05, Fla. Stat.** The Florida Legislature passed and the Governor signed into law Committee Substitute to House Bill 941, which amended sections 440.02(9) and 440.05, Fla. Stat. All Certificates of Elections to be Exempt issued on or

after **January 1, 2013**, are valid for 2 years after the effective date and, beginning **July 1, 2013**, non-construction limited liability members will be treated as corporate officers, and will be eligible to apply for an exemption. During January and February 2013, the Division of Workers' Compensation will host seminars open to the public designed to explain the changes to the law. For dates and times of the seminars check www.MyFloridaCFO.com/wc/employer/index.html or contact the Division at BocSeminars@MyFloridaCFO.com or call (813) 221-6518.

- **Florida Health Insurance Advisory Board (FHIAB) Adopts Annual Report and Appoints Permanent Executive Director.** The Board adopted the FHIAB Annual Report, entitled "**2012 Florida Health Insurance Market Report**". This report is completed as an annual requirement by the Florida Legislature. The Board also approved the Audit Committee's recommendation to appoint Acting Executive Director, Michelle Newell, to the permanent position of FHIAB Executive Director. Ms. Newell is currently the President & CEO of Innovative Edge Consulting, Inc., and has also served as Vice President of the American Guaranty Fund Group, Inc.
- **Florida Office of Insurance Regulation ("OIR") Requirements for Life, Annuity and Health Form Filings Submitted on I-File.** The OIR is now enforcing a requirement in the forms checklists contained in the I-File system. Effective **December 19, 2012**, whenever a filer selects "yes" to a provision on a checklist, the filer will be required to enter the page number location of the *provision within* the form. The checklist forms, as adopted by Rule 69O-149.022, F.A.C., contain this field. For Health filings, contact Robin Hall at (850) 413-5198 or Robin.Hall@flor.com and for Life and Annuity filings, James Walker at (850) 661-9017 or James.Walker@flor.com.
- **Georgia Office of the Insurance Commissioner Notices Hearing Regarding Proposed Acquisition of Control of Safeway Insurance Company of Georgia.** On **January 8, 2013**, at 9:00 a.m., Hearing Room, 7th Floor, West Tower, Floyd Building, 2 Martin Luther King, Jr. Drive, Atlanta, GA.
- **Special Alert to Georgia Licensees Regarding Processing of Renewal Licenses.** Recent legislative changes involving citizenship verification now required for all licensees at renewal has resulted in a backlog for processing renewal licenses. The Georgia Office of Commissioner of Insurance ("OCI") is working to ensure all renewals are processed before December 31st. If renewals submitted are not processed by December 31st, the OCI will continue processing these renewals until all have been updated. The Citizen Affidavit and ID should be uploaded at <http://www.oci.ga.gov/iform/>.



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