FEDERATION OF REGULATORY COUNSEL, INC.

PROTECTING TRADE SECRETS:

Problems at the Intersection of Florida's Public Records Laws and Regulatory Document Demands under the Florida Insurance Code

(FORC Journal: Vol. 21 Edition 3 - Fall 2010)

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Florida has expansive public records disclosure laws, which emanate from the Florida Constitution.**1** It has become doctrinal in Florida that virtually any document delivered to a state agency's possession in the course of its official business becomes a public record upon delivery and may be examined and copied by any person, unless exempted by a specific statutory provision.**2**

At the same time, as is true in most states, Florida's insurance regulators have broad powers to compel regulated parties to produce all manner of documents in the course of regulatory activity.**3** Florida regulators exercise those powers with vigor. Among other things, they routinely demand copies of documents containing regulated parties' sensitive trade secret information. They also often demand documents possessed by the regulated party, but belonging to and containing the trade secrets of third parties with whom regulated parties have contracted, and to whom they may owe a duty of confidentiality.

The tension between Florida's broad public records disclosure laws and insurance regulators' document demands presents thorny problems for insurers and other regulated parties when it comes to protecting the confidentiality of trade secret information in documents that must be provided to the regulators. Florida recognizes a trade secret exemption from public records disclosure, but the party who gives trade secret documents to an agency must mark and identify each page as trade secret, and must take several other specific procedural steps, in order to perfect its claim of trade secret exemption.**4**

Failing to fulfill each of those procedural steps can result in waiver of the trade secret exemption from public records disclosure.**5** Yet, it is not uncommon in examinations or investigations for the regulator to demand unsupervised access to records and immediate delivery of large quantities of documents to its possession. This situation presents a knotty dilemma to the regulated party. It can insist on the time necessary to review the documents demanded and to take the procedural steps necessary to perfect trade secret protection, and risk the displeasure of the regulator, or regulatory sanctions for allegedly interfering with the progress of the examination or investigation. Or, it can comply, and risk the prospect of being found to have waived trade secret protection under Florida law. Neither choice is pleasant.

Until October 1, 2007, this Hobson's choice was alleviated to some extent. Until then, documents demanded and received by insurance regulators during examinations and investigations were classified as investigative "work papers." Such "work papers" were statutorily exempt from disclosure under Florida's public records laws without time limit.**6** Thus, the failure to perfect the specific protection for trade secrets in such documents was of less consequence historically because of the overlapping protection afforded by the investigative "work papers" exemption.

However, beginning October 1, 2007, section 624.319 was amended to place a time limit on the confidential and exempt status of "work papers," extending such status only "until the examination report is filed, or until

the investigation is complete or ceases to be active."**7** The 2007 amendment further provides that it "applies to work papers and such information held by [the regulator] before, on, or after the effective date of this exemption." The passage of this 2007 time limit on the investigative "work papers" public records exemption resurrected the tension between regulators' investigatory demands and the public records laws and revived uncertainties over how best to protect trade secrets in the regulatory context.

A. Florida Cases

Two recent decisions, one from the Florida First District Court of Appeal and an unreported decision of a Florida trial court, provide some measure of clarification and guidance: *Coventry First, LLC v. Florida Office of Insurance Regulation*, 2010 WL 478289 (Fla. 1st DCA) ("*Coventry*") and *In re: the Receivership of Southern Family Insurance Co., et al.,* Case No. 06-CA-001060 (Fla. 2d Jud. Cir., Slip Order, Apr. 13, 2010) ("*Southern Family*"). But, Florida law in this area is not well developed, and many questions remain unanswered by the courts.

In *Coventry*, the Office of Insurance Regulation ("OIR") commenced a market conduct investigation of Coventry. OIR's on-site investigators demanded that a large number of Coventry's internal documents be turned over virtually immediately, without a meaningful opportunity for Coventry to cull the documents and review them for trade secret information.**8** When Coventry turned the documents over, the pre-2007 investigative "work papers" public records exemption was in effect, without time limit. By the time the investigation concluded, however, the 2007 amendment of the "work papers" exemption had taken effect, which exempted "work papers" only until the investigation was completed. OIR received several demands from third parties, under Florida's public records laws, to examine the documents Coventry had turned over. When Coventry became aware that OIR intended to allow inspection and copying of the documents, Coventry sought and obtained a temporary injunction to prevent the disclosure of trade secret information contained in them. While the injunction was in effect, and before the trial on permanent injunctive relief, OIR lodged an administrative complaint against Coventry and made it public. The allegations in the administrative complaint published a significant amount of information that Coventry claimed to be trade secret.

In the trial court, OIR took the position that Coventry's trade secret claims were waived because Coventry did not mark the documents as trade secrets, or were moot because a significant amount of the information had already been made public through the agency's administrative complaint. In granting temporary injunctive relief, the trial court found that Coventry had not waived its right to trade secret protection, because OIR had demanded surrender of the documents without time to perfect that protection under threat of regulatory sanction. At trial on Coventry's claim for permanent injunctive relief, however, the trial court ruled that Coventry's claim of entitlement to trade secret exemption from public records disclosure was rendered moot by the public disclosures in the published administrative complaint. At trial, OIR also took the position that the pre-2007 "work papers" exemption did not protect Coventry's documents because it was then only a time-limited exemption, and the time limit (completion of the investigation) had expired. The trial court agreed.

The Florida First District Court of Appeal reversed in an opinion that is noteworthy in several respects. First, at least as to documents containing trade secrets delivered before October 1, 2007 (and perhaps more broadly), the appeals court concluded that Coventry had a vested property interest created by the pre-2007 "work papers" exemption in the continuing confidentiality of the documents, an interest protectable under the Due Process of Law clause in Florida's constitution. The court held that the "retroactive application of the 2007 [investigative "work papers"] amendment improperly deprived Coventry of vested property rights in the continuing confidentiality and exemption of its trade secrets and other work papers already submitted to the OIR pursuant to the agency's regulatory duties" and was unconstitutional.**9** Moreover, regarding the claim of trade secret exemption asserted by Coventry, the court held that OIR was estopped to assert mootness, since OIR had been enjoined from disclosing such information when it acted unilaterally to publish it in the

administrative complaint.

Coventry is instructive on several points. At least as to documents containing trade secrets, and perhaps more broadly, documents given to Florida insurance regulators in the course of market conduct investigations and examinations before October 1, 2007 remain exempt from disclosure as investigative "work papers" without time limit, notwithstanding the time limit later placed on the "work papers" exemption commencing in 2007. However, as to documents delivered after October 1, 2007, regulated parties may no longer take comfort in a continuous "work papers" exemption to shield trade secret information in documents they turn over. Documents turned over to the regulator after October 1, 2007 enjoy only the time-limited "work papers" exemption contained in the 2007 version of the statute. Once the investigation or examination is complete, the present "work papers" exemption expires. Regulated parties therefore now should pay close attention to following the steps required under Florida law to perfect trade secret protection for such documents or face a claim of waiver. There are good arguments to support the proposition that waiver does not occur in the context of regulatory pressure of the sort found by the trial court to have existed in Coventry. However, such claims are fact-specific to each case, and these arguments have not yet been weighed by the appellate courts in Florida.

The second case, Southern Family, may be of help to reinsurers, when faced with investigative document demands by the Florida Department of Financial Services ("DFS"), as the receiver of insolvent insurers. Section 631.156, Florida Statutes, empowers the receiver to demand the books and records of a wide range of entities in the course of investigations authorized by that statute. DFS historically has taken the view that its investigative authority under this law empowers it to demand the internal records of virtually any person or organization that did business with the insolvent insurer, which DFS equates with anyone who exercised "any control over any segment of the affairs of the insurer or affiliate."See § 631.156(1), Fla. Stat. Furthermore, DFS believes this power extends to reinsurers of the insolvent direct insurer although the law provides that "[c]ontracts of reinsurance between an insurer and a reinsurer do not constitute the exercise of control by the reinsurer over the [insolvent] insurer."Id.

In Southern Family, DFS asserted that section 631.156, Florida Statutes, applied to a document demand requesting extensive production of internal documents belonging to a reinsurer of the liquidated insurers. The documents contained the reinsurer's internal risk evaluations and a wide variety of other internal assessments, which the reinsurer regarded as trade secrets. When the reinsurer sought relief in the receivership court, the court reviewed the scope of investigative authority granted to DFS under section 631.156 Florida Statutes, noting that DFS's authority to demand documents is circumscribed by the scope of subjects into which DFS is authorized to inquire. The court concluded that the reinsurer's internal evaluative documents concerning its reinsurance treaties with Southern Family were not relevant to the legitimate subjects of DFS's investigation because they were not directed to subjects DFS is authorized to investigate: the "causes of the insolvency," "false statements filed with the department" or other governmental bodies, or ascertaining the existence of "assets for recovery." Accordingly, the receivership court denied the receiver's demand for production of the reinsurer's

Southern Family therefore may be helpful to reinsurers faced with similar demands in the future, since the court recognized the scope of the receiver's document demand authority is not boundless, but is constrained by the investigative subject matters set out in the statute.

B. Electronic Formats - Special Considerations

Protecting trade secrets in documents produced in electronic spreadsheet form and similar electronic formats requires exceptional caution in Florida. In the course of examinations or investigations, the regulators often demand data containing trade secrets in electronic spreadsheet format. Section 624.4213(1)(a), Florida Statutes, requires that, to perfect a claim of trade secret confidentiality for documents delivered to insurance regulators, "[e]ach page of such document or specific portion of a document claimed to be a trade secret must

be clearly marked as 'trade secret'."

Certainly, most spreadsheet programs have functions that make it possible to produce data in a spreadsheet in a way that complies with Florida's "mark every page" requirement. For instance, most programs allow the placement of a "trade secret" legend in a header or footer on each page of data. However, producing a spreadsheet in its native format, even with such a legend inserted on every page, provides no real assurance that a producing party's right to trade secret protection can and will be honored by the agency when it receives a public record inspection demand.

Also, regulators prefer to receive information in electronic spreadsheets because they make it easy to copy, edit, sort, and rearrange the data in a variety of ways to facilitate analysis. But, it is this very feature - the ease of copying, editing, and rearranging - that also presents serious problems with assuring trade secret protection in practice.

It should be expected that the regulatory agency will copy data from the original spreadsheet into other, agency-generated spreadsheets, or will extract and place portions of it in the agency's other internal work papers. In practice, that regularly happens. When such extraction occurs, the trade secret legends on each page of the original spreadsheet will be lost, unless the agency is extremely careful in the process. Providing the original spreadsheet in "read only" format does not solve the problem. If agency personnel simply select and copy the data from the "read only" version and paste it into a new spreadsheet (as often happens), the trade secret legend will not be transported to the newly-created spreadsheet.

This creates serious practical problems for implementing meaningful trade secret protection. Such activities make it extremely difficult to later identify the copied information as being part of what the producing party originally marked as trade secret, if agency personnel can do so at all.

In fact, one of the greatest dangers is this: when confronted with a public records inspection demand, the agency may not recognize the copied information residing in agency-generated work papers as being information originally marked as trade secret by the producing party. The agency therefore may inadvertently allow public inspection. Similarly, it may inadvertently fail to notify the producing party that release is intended, as required by section 624.4213(2), Florida Statutes, and thereby compromise the producing party's ability to timely avail itself of the judicial remedies to protect its trade secrets. In this regard, it should be noted that section 624.4213(2), Florida Statutes, requires the producing party to file a judicial proceeding within 30 days after agency notice of a public record inspection demand for information marked as trade secret. Failure to timely file the judicial proceeding within 30 days after agency notice of the public record inspection constitutes a waiver of any claim of confidentiality.**10**

When confronted with an agency demand to produce data in spreadsheet form, the most prudent mode of production may be to print the spreadsheet in paper form or convert the spreadsheet file to an image file that does not allow piecemeal copying and extraction. This will likely encounter resistance from the regulator, but it is presently the only production format that, under Florida law, substantially guards against these all-too-real risks that trade secret protection may be lost through inadvertence.

In sum, when responding to regulatory document demands under the Florida Insurance Code, careful analysis and planning is essential to effectively assert trade secret rights and preserve those rights in practice. Especially in this context, the old saw is true: An ounce of prevention is worth a pound of cure. In fact, in this context an ounce of prevention is nearly all that counts. Without it, there likely is no cure.

Endnotes

1. *See* art. I, § 24, FLA. CONST., Ch. 119, Fla. Stat.

2. *E.g.,* § 119.01, Fla. Stat; *Sepro Corp. v Department of Env. Reg.,* 839 So. 2d 781 (Fla. 1st DCA 2003); *News-Press Pub. Co., Inc. v. Gadd*, 388 So. 2d 276 (Fla. 2d DCA 1980).

3. *E.g*., §§ 624.316 - 624.324, 626.9561, Fla. Stat. (market conduct examination and investigative powers); §§ 624.307, 624.413, Fla. Stat. (general investigative powers and license application investigative powers); § 631.156, Fla. Stat. (receiver's investigative powers under the Florida Insurers Rehabilitation and Liquidation Act).

4. §§ 624.4213, 812.081, 815.045, Fla. Stat.

5. *Sepro*, 839 So. 2d at 783-784.

6. § 624.319(3)(b), Fla. Stat. (2006).

7. *See* Ch. 2007-249, § 1, Laws of Fla.

8. *Coventry*, 2010 WL 478289 at *1.

9. *Coventry*, 2010 WL 478289 at *6.

10. *See* § 624.4213(2), Fla. Stat.