



# Insurance

## Case Law & Insurance Regulation Update

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**Week Ending January 4, 2013**

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### I. STATE APPELLATE DECISIONS

#### A. FLORIDA

- ***State Farm Insurance Company v. Desai (Fla 3<sup>rd</sup> DCA)***. Homeowners' insurance/discovery. Prior to determination of coverage, trial court entered discovery order requiring insurer to produce claim manuals and/or guidelines relating to certain policy language and provide a representative to testify as to the claims manual, guidelines, and insurance policy. Insurer filed Petition for Writ of Certiorari ("Petition") to quash trial court discovery order. Third District Court of Appeal granted insurer's Petition and quashed trial court's discovery order because the trial court order prematurely ordered discovery into insurer's claims files and claims handling materials before coverage and extent of loss were determined.
- ***Citizens Property Insurance Corporation v. Casar (Fla. 3<sup>rd</sup> DCA)***. Homeowners' insurance/appraisal. Appeal of non-final order compelling appraisal by insurer. Trial court had no basis to compel insurer to appraisal. Appraisal provision in policy unambiguously required a written request for appraisal and a written agreement between the parties in order for appraisal to take place. If the parties did not agree to the terms of the written agreement, appraisal would not take place. Insurer and insured disagreed as to which items of property were damaged by the water leak, leading to disagreement as to which items would be valued at appraisal. The insurer and insured did not consummate the insurer's proposed Agreement for Appraisal. Therefore, under the policy, there was no written agreement between the parties and the insurer was not required to participate in appraisal. What is appraised and whether a party can be compelled to appraisal depend on the contract provisions.

## B. GEORGIA

- No Georgia state appellate decisions reported.

## II. FEDERAL APPELLATE DECISIONS

- **Granite State Insurance Company, New Hampshire Insurance Company v. American Building Materials, Inc. et al. (11<sup>th</sup> Cir.)**. Commercial general liability/exclusion. Chinese drywall claims excluded by pollution exclusions in CGL policies. Summary judgment for insurers affirmed. The policies' pollution exclusions exclude coverage for damages associated with the supply and installation of defective Chinese drywall, whether analyzed under Florida law or Massachusetts law. Under Florida law, the damages from the Chinese drywall would be excluded from coverage under the plain language of the pollution exclusions. The sulfide gas released by the Chinese drywall falls within the definition of "pollutant" because it is a "gaseous . . . irritant or contaminant." Under Massachusetts law, the damage caused by the defective Chinese drywall falls within the scope of the pollution exclusion because the defective drywall cannot be considered an "everyday activit[y] gone slightly, but not surprisingly, awry" and the unexpected emission of sulfuric gas is the kind of release that a reasonable insured would understand as pollution.
- **International Ship Repair & Marine Services, Inc. v. Northern Assurance Company of America (11<sup>th</sup> Cir.)**. International Ship sued Northern Assurance for refusing to defend and indemnify International Ship in a wrongful death. Northern Assurance appealed from a judgment in favor of International Ship. Northern Assurance asserted that the district court committed error in refusing to allow it to assert several affirmative defenses in an amended answer, and in denying Northern Assurance's motion to stay pending the resolution of a related case in the Eastern District of Virginia, in which the insurer sought rescission of the policy against the named insured, which was not affiliated with International Ship. The 11<sup>th</sup> Circuit affirmed. It held the trial court did not abuse its discretion in denying leave to amend, since Northern Assurance knew the facts supporting most of its proposed affirmative defenses long before the amended pleading deadline passed. The trial court did not abuse its discretion by denying a stay pending the outcome of the Virginia case, since International Ship was not a party to the Virginia case, and therefore would not be bound by any judgment rendered in the Virginia action.

## III. ADMINISTRATIVE LAW/AGENCY DECISIONS

- No agency decisions reported.

## IV. NOTICES OF ADMINISTRATIVE RULEMAKING PROCEEDINGS

### A. FLORIDA

- **Rule 59G-4.070, F.A.C. – Agency for Health Care Administration – Durable Medical Equipment and Medical Supplies**. The purpose of the amendment to Rule 59G-4.070, F.A.C., is to incorporate by reference the Florida Medicaid Durable Medical Equipment and Supply Services Coverage and Limitations Handbook, March 2013. A revision to the handbook is needed to update the prior authorization requirements for durable medical equipment. This revision will clarify policy regarding 1) how to submit prior authorization requests and 2) the circumstances and qualifications under which Florida Medicaid will allow reimbursement for covered services. Other policies have been added and updated since the last promulgated handbook revision. The revised Florida Medicaid Durable Medical Equipment and Medical Supply Services Coverage and Limitations Handbook also provide guidelines for reimbursement of services performed by durable medical equipment providers. A rule development workshop will be held **January 22, 2013**, 3:00 p.m. - 4:00 p.m., Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL.
- **Rule No.: 59G-4.140, F.A.C. - Agency for Health Care Administration/Medicaid**. The proposed amendment to Rule 59G-4.140, F.A.C., will incorporate by reference the new Medicaid Hospice Services Coverage and Limitations Handbook, March 2013. This update includes: 1) corrections to the fiscal agent contact information; 2) policy changes and forms necessary to

comply with new federal regulations regarding hospice services for children (*i.e.*, Section 1905 (o)(1) of the Social Security Act which allows children on hospice to continue to receive curative care); 3) changes in policy and forms regarding how hospice services may be coordinated with home and community based services waivers; 4) information regarding three new revenue codes which were implemented October 1, 2010; and 5) changes to the process for submitting hospice enrollment and dis-enrollment forms to the Department of Children and Families, including changes to the distribution lists on the bottom of required forms. A rule development workshop will be held on **January 24, 2013**, 2:00 p.m. - 3:00 p.m., Agency for Health Care Administration, 2727 Mahan Drive, Building 3, Conference Room D, Tallahassee, FL.

- **Rule 59G-13.014, F.A.C. - Agency for Health Care Administration/Medicaid.** Proposed Rule 59G-13.014, F.A.C., will incorporate by reference the Adult Cystic Fibrosis Waiver Services Coverage and Limitations Handbook, October 2012. The handbook for the Adult Cystic Fibrosis (ACF) waiver provides information on services covered under the waiver, provider qualifications and responsibilities, provider enrollment documentation requirements, service coverage and limitations, provider reimbursement, and recipient appeal rights. A rule development workshop will be held on **January 22, 2013**, 1:00 p.m. - 2:00 p.m., Agency for Health Care Administration, 2727 Mahan Drive, Building 3, Conference Room D, Tallahassee, FL.
- **Rule 59G-13.015, F.A.C. - Agency for Health Care Administration/Medicaid.** Purpose: The proposed amendment to Rule 59G-13.015, F.A.C., will incorporate by reference the Florida Medicaid Adult Cystic Fibrosis Procedure Codes and Fee Schedule, March 2013. The amendment updates services and procedure codes. The fee schedule will reflect the services currently being provided and the procedure code, modifier, code description, billable unit, fee, and limits for each service. Procedure codes related to acupuncture, exercise therapy, nutritional consultation, and transportation are being deleted. The procedure code name for case management is being changed to community support coordination. A procedure code for home delivered meals is being added. A rule development workshop will be held on **January 23, 2013**, 10:30 a.m. - 11:30 a.m., Agency for Health Care Administration, 2727 Mahan Drive, Building 3, Conference Room D, Tallahassee, FL.
- **Rule No.: 59G-13.131, F.A.C. - Agency for Health Care Administration/Medicaid.** The proposed amendment to Rule 59G-13.131, F.A.C., will incorporate by reference the Florida Medicaid Traumatic Brain and Spinal Cord Injury Waiver Services Fee Schedule, March 2013. The amendment updates services and procedure codes. The fee schedule will reflect services currently being provided and the procedure code, modifier, reimbursement per unit, and limits for each service. The procedure code for adaptive health and wellness is being deleted. The following procedure codes are being added: emergency alert response system installation; emergency alert response system monitoring and maintenance; occupational therapy; physical therapy; and residential habilitation. A rule development workshop will be held on **January 29, 2013**, 3:00 p.m. - 4:00 p.m., Agency for Health Care Administration, 2727 Mahan Drive, Building 3, Conference Room D, Tallahassee, FL.

## **B. GEORGIA**

- **Rule Chapter 120-2-54 – Hazardous Financial Condition Regulation.** Adopted by Order on January 3, 2013. The amendments to Rule Chapter 120-2-54 provide the Commissioner with additional standards to consider when determining whether an insurer is in a hazardous financial condition under Georgia law. Moreover, the proposed regulatory changes clarify the Commissioner's authority to issue a corrective order when such hazardous financial conditions exist. Finally, the amendments enable the Office of the Insurance Commissioner ("OCI") to remain in compliance with National Association of Insurance Commissioners ("NAIC") accreditation standards. The amendments to Rule Chapter 120-2-54 are effective **January 23, 2013**.

## **V. MEETING NOTICES OF INTEREST/MISCELLANEOUS**

- **Florida Agency for Health Care Administration and Florida Attorney General 2011-2012 Medicaid Fraud and Abuse Report.** The report documents the effectiveness of the state's efforts to control Medicaid fraud and abuse and to recover Medicaid overpayments during the

previous fiscal year.

- **Florida Department of Financial Services Notice to All Title Agencies Regarding 2013 Title Administrative Surcharge Update.** Payment of the 2013 Title Administrative Surcharge must be paid online via the title agency's [MyProfile account](#). Failure to pay the surcharge on or before January 30, 2013 may result in administrative action and/or a fine of \$500 over the original surcharge amount.
- **Florida Office of Insurance Regulation (FOIR) publishes the 2012 Workers' Compensation Annual Report ("Report") to the Florida Legislature.** The [2012 Report](#) highlights information about the state of Florida's workers' compensation insurance market.
- **Agency for Health Care Administration Medicaid Reform Technical Advisory Panel.** On **January 30, 2013**, 1:00 p.m. - 4:00 p.m., Agency for Health Care Administration AHCA Conference Room B 2727 Mahan Drive Tallahassee, Florida 32308 Conference Dial-in Number: 1-877-809-7263 Passcode: 925-284-63#.
- **Florida Health Choices Board Meetings Noticed for 2013-2014.** On **January 22, 2013**, 11:00 a.m. (Orlando, FL); **March 12, 2013**, 11:00 a.m. (Tallahassee, FL); **March 20, 2013**, 11:00 a.m. (Tallahassee, FL); **May 10, 2013**, 11:00 a.m. (St. Petersburg, FL); **July 16, 2013**, 2:00 p.m. (Orlando, FL); **September 11, 2013**, 11:30 a.m. (Orlando, FL); **November 21, 2013**, 11:00 a.m., Tallahassee, Florida, **December 6, 2013**, 11:00 a.m. (Ft. Lauderdale, FL); **December 13, 2013**, 11:00 a.m. (Tallahassee, FL); **January 10, 2014**, 11:00 a.m. (Jacksonville, FL). Updated meeting information and materials may be located at [www.myfloridachchoices.org](http://www.myfloridachchoices.org).
- **Florida Hurricane Catastrophe Fund Advisory Council Call.** On **January 8, 2013**, 1 p.m., Dial-in Number (888) 670-3525, Conference Code 7135858151. Matters to be addressed during the call: obtain approval for the filing of a Notice of Proposed Rule for 19-8.029, F.A.C., Insurer Reporting Requirements and Rule 19-8.030, Insurer Responsibilities, and for the filing of these two rules for adoption if no member of the public timely requests a rule hearing or if a hearing is requested but no Notice of Change is needed. In addition, other general business of the Council may be addressed. A copy of the agenda available [here](#).
- **Florida Medical Malpractice Joint Underwriting Association Compensation Committee Meeting.** On **January 31, 2013**, 3:00 p.m., Westin Hotel, Key West, FL. General subject matter to be considered: the Compensation Committee will receive and consider business properly brought before the Committee. A copy of the agenda may be obtained by contacting: FMMJUA, 1836 Hermitage Blvd., Suite 201, Tallahassee, FL.
- **Florida Medical Malpractice Joint Underwriting Association Audit Committee.** On **January 31, 2013**, 3:30 p.m., Westin Hotel, Key West, FL. The Audit Committee will receive and consider business properly brought before the Committee. A copy of the agenda may be obtained by contacting: FMMJUA, 1836 Hermitage Blvd., Suite 201, Tallahassee, FL.
- **Florida Medical Malpractice Joint Underwriting Association Claims & Underwriting Committee.** On **January 31, 2013**, 4:00 p.m., Westin Hotel, Key West, FL. Matters to be considered: The Claims & Underwriting Committee will receive and consider reports from the Association's General Counsel, General Manager, Servicing Carrier, and such other business properly brought before the Committee. A copy of the agenda may be obtained by contacting: FMMJUA, 1836 Hermitage Blvd., Suite 201, Tallahassee, FL.
- **Florida Medical Malpractice Joint Underwriting Association Board of Governors Meeting.** On **February 1, 2013**, 9:00 a.m., Westin Hotel, Key West, FL. General subject matter to be considered: the Board of Governors will receive and consider quarterly reports from the Association's Investment Counsel, General Counsel, Servicing Carrier, Claims Committee, Audit Committee, General Manager, and such other business properly brought before the Board. A copy of the agenda may be obtained by contacting: FMMJUA, 1836 Hermitage Blvd., Suite 201, Tallahassee, FL 32308.
- **Florida Medical Malpractice Joint Underwriting Association Annual Meeting.** On **February**

**1, 2013**, immediately following the Board of Governors meeting, Westin Hotel, Key West, FL 33040. General subject matter to be considered: The Board will receive and consider yearly reports from the Association's Chairman, Servicing Carrier, General Manager, and such other business properly brought before the Board. A copy of the agenda may be obtained by contacting: FMMJUA, 1836 Hermitage Blvd., Suite 201, Tallahassee, FL.



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