



The Florida Senate

Interim Project Report 2007-201

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Committee on Banking and Insurance

SUNSET REVIEW OF SECTION 627.311(3)(K)2, F.S., NOTICE OF CIVIL REMEDY ACTIONS AGAINST THE FLORIDA AUTOMOBILE JOINT UNDERWRITING ASSOCIATION

SUMMARY

The Florida Automobile Joint Underwriting Association (FAJUA or Association) was created in 1973 as an “insurer of last resort” to provide motor vehicle insurance to applicants who are unable to procure such coverage through the voluntary market due to a variety of factors, including driving history or status as first-time drivers. Every insurer authorized to write automobile liability insurance or automobile physical damage insurance in Florida is required to be a member of the FAJUA. Expenses, losses or profits of the FAJUA are apportioned among its insurer members.

In 2004, legislation was enacted providing that before a person may bring a civil action for damages against the FAJUA, the Association and the Department of Financial Services (DFS) must be given 90 days’ written notice of the violation.¹ This provision represented a 30-day increase from the 60-day notice requirement for civil remedy actions brought against insurance companies under s. 624.155(3)(a), F.S. Unless the Legislature reenacts the 2004 provision, it will automatically expire on October 1, 2007.

Committee staff has found that the number of motor vehicle policies in the FAJUA has been in a steep decline for the last several years and its current policy count is only 1,471 motor vehicle policies, which represents a 0.09 percent statewide market share based on earned premiums. Its earned premiums have also been reduced to less than \$14 million.

The apparent rationale for enacting the 30-day notice extension was to allow more time for the FAJUA to investigate alleged violations under s. 624.155, F.S.

However, there have been only ten civil remedy notices filed with the FAJUA and the DFS since the effective date of the 2004 legislation (and just thirteen since 1999) and only one civil law suit was filed during this period, which was settled out of court by the Association for \$53,440.

Based upon Committee staff research and interviews conducted with representatives with the FAJUA, the FAJUA claims administrator (York Claims Service), the DFS and the Academy of Florida Trial Lawyers, staff recommends that the 90-day civil remedy notice provision for the FAJUA be allowed to expire. The effect of this action would bring the FAJUA, like all other insurers currently, under the 60-day civil remedy notice provision of s. 624.155(3)(a), F.S.

BACKGROUND

History of the Florida Automobile Joint Underwriting Association

Current Florida law provides for compulsory purchase of no-fault automobile insurance coverage, referred to as personal injury protection (PIP), which compensates the policyholder directly up to \$10,000 without regard to fault for bodily injury sustained in a motor vehicle accident.² Property damage liability coverage of \$10,000 is also required which pays for the physical damage expenses caused by the insured to third parties in the accident.³

² Sections 627.730-627.7405, F.S. This coverage also provides the policyholder with immunity from liability for economic damages up to the policy limits and for non-economic damages (pain and suffering) for most injuries.

³ Additionally, under Florida’s Financial Responsibility Law (ch. 324, F.S.), motorists must provide proof of ability to pay monetary damages for bodily injury and property damage liability at the time of motor vehicle accidents or when serious traffic violations occur.

¹ Chapter 2004-370, L.O.F.

The Florida Automobile Joint Underwriting Association (FAJUA or Association) was created in 1973 pursuant to an Order issued by the Insurance Commissioner with the announced purpose to be an “insurer of last resort” to provide motor vehicle insurance to applicants who were unable to procure such coverage through the voluntary or competitive market due to a variety of factors, including driving history or status as first-time drivers.⁴ Insurers authorized to write automobile liability insurance or automobile physical damage insurance in Florida are required to be a member of the FAJUA. As of 2005, there were 671 member companies in the Association. Expenses, losses, or profits of the Association are apportioned among the insurer members in the ratio to their premiums written in the voluntary Florida market.

The affairs of the Association are managed and controlled by a Board of Governors composed of 11 members: five are appointed by the Chief Financial Officer (two of whom must be chosen from the insurance industry) and six are appointed by the participating insurers (two of whom must be selected from the insurance agents’ associations). The FAJUA has a staff of four people and, under the direction of the Board of Governors, contracts with one servicing carrier (Trumbull) which issues policies and underwrites risks. The FAJUA contracts with York Claims Service to process claims and to adjust losses. Both Trumbull and York maintain data on the FAJUA and report it to the Automobile Insurance Plans Service Office (AIPSO). The AIPSO, also under contract with the FAJUA, assembles the data obtained from Trumbull and York and develops financial and rate making information for the Association.⁵ Additionally, the AIPSO, utilizing data collected from all insurers, determines the participation percentage of each insurer member of the FAJUA. It then allocates to each member its share of premium, losses, expenses and service fees.

⁴ Order dated February 9, 1973, in Case No. 73-RR-03H, by Insurance Commissioner and Treasurer Thomas D. O’Malley. The Order establishing the automobile joint underwriting association replaced the existing Florida Automobile Insurance Facility Plan based upon the recommendations of the Florida Automobile Insurance Facility Reform Committee. Ch. 59-205, L.O.F., mandated that joint underwriting associations be subject to regulation by the Insurance Commissioner and authorized the Commissioner to issue orders relating to the activities of such associations.

⁵ AIPSO also provides administrative services to the FAJUA, including data processing, personnel, preparation of tax forms, and statistical analysis.

The Florida Office of Insurance Regulation (OIR) regulates FAJUA activity in that rate filings, form content, and plan of operations changes are subject to prior approval by the OIR before they become effective.

METHODOLOGY

To complete this review, staff researched the law and committee files for the applicable statutory provisions. Staff interviewed representatives with the Florida Automobile Joint Underwriting Association, its claims administrator (York Claims Service), the Department of Financial Services and the Academy of Florida Trial Lawyers concerning the civil remedy notice provision.

FINDINGS

Decline of Premiums and Policies of the Florida Automobile Joint Underwriting Association

The Association’s earned premiums (as compared with earned premiums of motor vehicle insurers statewide), market share, and the number of policies in force have been in a steady decline in recent years. As of September 30, 2005, its earned premium was \$13,951,453 as compared to \$61,175,771 in 2002 and \$37,860,875 in 2004. As of August 31, 2006, there were only 1,471 motor vehicle policies insured by the FAJUA as compared to 40,482 in 2002 and 6,696 in 2004. Of the Association’s current policies, 134 are private passenger and 1,337 are commercial policies. Presently, the FAJUA has just a 0.09 percent statewide market share of earned premiums, insuring less than 1 percent of vehicles registered in the state.

Due in part to the sharp decline in premium volume, it was necessary for the FAJUA to begin assessing member companies in September 2004. The association had not assessed their membership for almost twenty years prior to that time. Total assessments to member companies since 2004 are \$44,439,000. However, the net assessment, excluding distributions to member companies, is \$28,712,816.

The next member assessment will be tendered in January, 2007, as the Board of Governors of the FAJUA has determined that semi-annual assessments will be more cost effective. The Association membership fees have been increased (from \$25 to \$2500) and the additional revenue will be used to partially offset the need for future assessments.

Civil Remedy Statute

Section 624.155, F.S., commonly known as the “civil remedy statute,” authorizes a person to bring a civil action against an insurer when such person is damaged by the insurer based on a violation of specified statutory provisions.⁶ In addition, a person may bring a civil action against an insurer when such person is damaged by the insurer for:

- not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests;
- making claims payments to insureds not accompanied by a statement setting forth the coverage under which payments are being made; or
- failing to promptly settle claims, when the obligation to do so has become reasonably clear.

If an insurer is found to violate the above provisions, it will be liable for damages, together with court costs and reasonable attorney’s fees. Additionally, a damage award may exceed the limits of the policy. Punitive damages may be awarded if the acts giving rise to the violation occur with such frequency to indicate a general business practice and the acts are:

- willful, wanton, and malicious;
- in reckless disregard for the rights of any insurer; or
- in reckless disregard for the rights of a beneficiary under a life insurance contract.

As a condition precedent to bringing such a civil action, the Department of Financial Services (DFS or department) and the insurer must be given 60-days’ written notice of the violation. The statute authorizes the DFS to develop a form for the notice and sets forth five criteria which must be provided in the notice form. These criteria include the statutory provision which the

⁶ These include unfair claim settling practices, illegal dealings in premiums, and refusal to insure provisions under s. 626.9541, F.S.; favored agent or insurer and coercion of debtors provisions under s. 626.9551, F.S.; illegal dealings of life or disability insurance under s. 626.9705, F.S.; life insurance discrimination on the basis of sickle-cell traits under s. 626.9706, F.S.; disability insurance discrimination on the basis of sickle-cell traits under s. 626.9707, F.S.; or the cancellation or return of premium provisions under s. 627.7283, F.S.

authorized insurer allegedly violated; the facts and circumstances giving rise to the violation; names of persons involved in the violation; reference to specific policy language; and, a statement that notice is given in order to perfect the right to pursue the civil remedy authorized under the statute. The DFS may return a notice (within 20 days of receipt), if it does not contain the requisite information. If the DFS does return the notice for lack of specificity, the 60-day time period does not begin until a proper notice is filed. No action will lie if, within the 60 days after filing the notice, damages are paid or the circumstances giving rise to the violation are corrected.

Thirty day Extension of Civil Remedy Notice for the Florida Automobile Joint Underwriting Association

In 2004, legislation was enacted providing that before a person may bring a civil action for damages against the FAJUA, the FAJUA and the DFS must be given 90 days’ written notice of the violation. This provision represented a 30-day increase from the 60-day notice requirement for civil remedy actions brought against insurance companies under s. 624.155(3)(a), F.S. Unless the Legislature reenacts the 2004 provision, it will automatically expire on October 1, 2007.

The apparent rationale for enacting the 30-day notice extension was to allow more time for the FAJUA to investigate alleged violations under s. 624.155, F.S. There was also a back log of claims according to representatives with the Association.⁷ Officials with the DFS and York, the Association’s claims administrator, state that there have been only ten civil remedy notices filed since the effective date of the 2004 legislation.⁸ Of those ten, three of the notices were related to one claim, thus reducing to eight the total number of notices pertaining to separate auto policies within the FAJUA. One civil law suit was filed against the Association during this same period, but was settled out of court for \$53,440. The subject matter of the notices ranged from improper claims cancellation or unsatisfactory settlement offers to claims delay or claims denial.⁹

⁷ In 2004, the representatives with the FAJUA had wanted total immunity from law suits but reached a compromise with the trial bar and settled on the 30-day notice extension.

⁸ July 1, 2004. According to DFS officials, the department receives and reviews approximately 11,000 notices a year which are filed against insurance companies.

⁹ There have been a total of thirteen civil remedy notices filed since 1999 (including the ten noted above).

As noted above, the number of motor vehicle policies in the FAJUA has been steadily declining over the past several years to the current policy count of 1,471, with earned premiums just under \$14 million. Given the small number of civil remedy notices filed (and the one subsequent law suit), it would be appropriate for the FAJUA to be treated in a fashion similar to every other insurer as to the 60-day notice provision under the civil remedy statute. However, the FAJUA Board of Governors believes that retaining the 30-day notice extension is important because it allows the Association more time to thoroughly investigate alleged violations.

RECOMMENDATIONS

Based upon Committee staff research and interviews conducted with representatives with the FAJUA, the Association's claims administrator, the DFS and the Academy of Florida Trial Lawyers, staff recommends that the 90-day civil remedy notice provision for the FAJUA be allowed to expire. The effect of this action would bring the FAJUA, like all other insurers currently, under the 60-day civil remedy notice provision of s. 624.155(3)(a), F.S.