

FEDERATION OF REGULATORY COUNSEL, INC.

**FLORIDA'S FIRST DCA UPHOLDS BROAD STATUTORY AUTHORITY
FOR DEPARTMENT OF FINANCIAL SERVICES TO INVESTIGATE
CAUSE OF INSURER'S INSOLVENCY**

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On April 24, 2009 the First District Court of Appeal in Florida issued an opinion in the matter of *Everest Re Group, LTD. v. Department of Financial Services*, as receiver for Southern Family Insurance Company, Atlantic Preferred Insurance Company, and Florida Preferred Insurance Company ("Poe Companies").¹ The opinion upheld the broad authority delegated to the Department of Financial Services ("DFS") by section 631.156, *Florida Statutes* (2008), with regard to insurer liquidation proceedings. Everest Re Group, LTD. ("Everest"), a Bermuda holding company, had petitioned the appellate court for a writ of certiorari to review a trial court order compelling disclosure of documents and information in this liquidation proceeding.

The Poe Companies were ordered into liquidation in 2008 as a result of their collective inability to pay claims which related to the 2004 and 2005 Florida hurricane seasons. These proceedings were filed in Leon County, Florida by the DFS and are currently pending. As the receiver, the DFS is in the process of collecting assets and administering the estates of the insolvent insurers. It also has filed an action against the various owners, management, and affiliates of the Poe Companies to recover funds disbursed, despite the losses incurred during the 2004 and 2005 hurricane seasons. The DFS alleged that the named parties had taken certain actions that ultimately contributed to the insolvency of the insurance companies.

As part of its investigation, the DFS served an investigative demand on Everest to obtain information it believed relevant to the insolvency of the insurance companies. Everest refused to comply with the demand, and after motions by both parties, the trial court ordered Everest to comply with the demand.

In its petition for certiorari, Everest argued that it is not subject to regulation under Florida's liquidation laws, since it is not authorized to do business in Florida. However, the court held that Florida law confers broad investigatory power upon the DFS and does not contain an exemption for foreign corporations. Section 631.156, *Florida Statutes*, provides:

The department may take statements under oath and examine and review the books, records, and documents of the insurer or any affiliate, controlling person, officer, director, manager, trustee, agent, adjuster, employee, or independent contractor of any insurer or affiliate and any other person possessing any executive authority over, or exercising or having exercised any control over any segment of the affairs of the insurer or affiliate.

The court held that the possession of assets or records of an insolvent insurance company qualifies as exercising control over a particular aspect of its business. Since the DFS had alleged (and Everest had not denied) that Everest possessed assets or records relating to the Poe Companies, it was subject to the investigative powers established by Florida law.

Additionally, the court rejected Everest's argument that the statute does not provide a basis for the exercise of long-arm jurisdiction, which is the legal concept under which a court may exercise in certain circumstances jurisdiction over a foreign or alien person or entity in connection with pending litigation. The court pointed out that since Everest is merely a witness, and not a party to a lawsuit, jurisdictional issues are not applicable under section 631.156. The court did not discuss the constitutional principles that form the basis and

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circumscribe the application of long-arm jurisdiction and the exercise of other extra- territorial authority over a foreign or alien person or entity.

A Motion for Rehearing was filed by Everest with the First District Court of Appeal on May 11, 2009. The motion was denied on June 11, 2009.

In essence, this case interprets Florida law to authorize the broad investigative power of DFS in insurance company liquidation proceedings. This authority even extends to foreign and alien entities that do not do business in Florida, but who have exercised control over any segment of the affairs of the insurer or an affiliate. This extends to a Bermuda holding company, which apparently did business with the insolvent insurer(s).

Endnotes

1. 10 So. 3d 1120 (Fla. 1st DCA 2009).