STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PRIMERICA LIFE INSURANCE COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-2112RU
	)	
DEPARTMENT OF INSURANCE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on June 24, 2002, in Tallahassee, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Dennis K. Threadgill, Esquire
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STATEMENT OF THE ISSUE

This is a proceeding pursuant to Section 120.56(4), Florida Statutes, in which the Petitioner, Primerica Life Insurance

Company ("Primerica" or "Petitioner"), seeks a determination that five statements contained in letters issued by the Department of Insurance ("Department" or "Respondent") are violations of Section 120.54(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner filed a Petition challenging Agency Statements Defined as Rules on May 20, 2002. At the final hearing, Petitioner presented the deposition testimony of two witnesses, Richard A. Robleto and Jim Walker, which were marked as Petitioner's Exhibits 8 and 9, respectively. Petitioner also introduced seven other exhibits into evidence. Respondent presented the testimony of James Walker and Richard A. Robleto. Respondent did not introduce any exhibits.

The transcript of the final hearing was filed on June 27, 2002. The parties were ordered to file post-hearing submissions no more than 10 days after the filing of the transcript. Proposed Final Orders submitted by the parties have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. On or about March 21, 2002, Primerica filed four policies of life insurance with the Department for review and approval. Life insurance policies must be approved by the Department before an insurance company can sell the policies in

the State of Florida. Each of the four policies contained an identical arbitration provision.

2. On or about May 1, 2002, the Department disapproved each of the policies described above in four disapproval letters. In all material matters, the four disapproval letters were identical. Specifically, each of the disapproval letters gave identical reasons for the disapproval of the subject policies of life insurance. Those reasons read as follows, in pertinent part:[1]

> 1. The arbitration provision violates Section 627.411, F.S. The provision is too broad as it relates to the parties entitled to request arbitration. The provision not only permits Primerica Life, the issuer of the term policy, to invoke arbitration, but also Primerica Financial Services, Inc. and/or their respective corporate parents, subsidiaries, affiliates, predecessors, assignees, employees, agents, independent contractors, directors and officers. In order to be acceptable, the provisions must be restricted to Primerica Life and only those parties directly involved with the sale of the policy.
>
> 2. The arbitration provision violates Section 627.411, F.S. The provision is too broad as it relates to the issues which can be the subject of arbitration. The provision not only relates to matters relating to the application, but to any past, present or future sales relating to insurance between the parties, any fraud, misrepresentation or any matter arising from common law or any federal or state statute, including consumer protection laws or even the arbitration clause itself. The clause should be restricted to the sale of the policy or some provision of the policy.

> 3. The arbitration provision violates Section 627.428, F.S. Under that statute, if the court renders a finding in favor of the insured or beneficiary, the award of attorney's fees is mandatory. In a large percentage of arbitration awards, the finding of the arbitrators favors neither party, but is middle ground. In those situations, the arbitrators would not necessarily be obligated to award attorney's fees as the court is under the aforementioned statute.
>
> 4. The arbitration provision is inconsistent with the incontestability provision of the policy and Section 627.455, F.S., in that they both make the policy incontestable after the policy has been in force for two years during the lifetime of the insured. The arbitration provision has no time limitation.
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> * * *
>
> 6. The arbitration provision violates Section 627.411, F.S. The provision requires the arbitrator to decide any dispute in accordance with applicable law. It would be impossible for the arbitrator to apply applicable law, unless that individual was knowledgeable of Florida law. It is doubtful that every arbitrator eligible to serve in that capacity is learned in Florida law. (Emphasis in original.)

3. The five paragraphs quoted immediately above are the five agency statements that are challenged in this case. The reasons set forth in the five paragraphs quoted above have never been previously used by the Department as a basis for disapproval of a life insurance policy.

4. On or about February 22, 2002, Primerica had filed an earlier policy of life insurance with the Department for review

and approval. The policy filed in February contained an arbitration provision that was identical to the arbitration provision in the four policies filed on March 21, 2002. By a so-called "clarification" letter dated February 26, 2002, the Department advised Primerica that the policy filed on February 22, 2002, had the following deficiencies:

> 1. The arbitration clause in this policy is not acceptable. Companies may use arbitration provisions in life and health contracts but they must be voluntary per Section 682.02, F.S. Please modify the arbitration clause accordingly or remove it from the policy.

5. And after considering Primerica's response to the language quoted above, by means of a letter dated March 22, 2002, the Department disapproved Primerica's February filing for the following reason:[2]

> The arbitration provisions contained in the captioned application do not comply with the Florida Insurance Code in that Section 627.413(1)(f), Florida Statutes requires that conditions pertaining to the insurance shall be specified in the policy. Your filing includes such provisions in the application, not the policy. Therefore, an application containing such provisions cannot be approved. According to the legal sources reviewed by the Department, the purpose of a life insurance application is to provide the company with sufficient information to underwrite or consider a specific individual for life insurance. Provisions of the application, which serve other than an underwriting purpose, must be deleted. Since it is the company's intent to make the arbitration provisions

applicable to all policyholders, those provisions should be made general provisions of the policy.

6. Very few life insurance policies containing an arbitration provision have been filed with the Department. The Department has no policy as to the approval or disapproval of such life insurance policies. Each such life insurance policy is analyzed on a case-by-case basis.

7. Due to the limited number of policies containing an arbitration provision that are submitted to the Department for review, the Department does not have enough information to publish proposed rules on the subject of arbitration provisions in life insurance policies. The Department is presently investigating the development of such a rule.[3]

8. The binding arbitration provisions in the policies filed on March 21, 2002, contained some unusual provisions. Those provisions were referred to the Department's Legal Services Division to determine if they complied with the Florida Insurance Code.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.56 and 120.57, Florida Statutes.

10. With certain exceptions that are not pertinent to the issues in this case, Section 120.52(a)(15), Florida Statutes, defines the term "rule" as follows:

> (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

11. Section 120.54(1)(a), Florida Statutes, reads as follows in pertinent part:

> (1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--
> (a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.
>
> 1. Rulemaking shall be presumed feasible unless the agency proves that:
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or
> c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.
>
> 2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable

principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

12. And Section 120.56(4), Florida Statutes, provides, in pertinent part, that:

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.--

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee.

The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e) Prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e). If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

(f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under any other section of this chapter. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

13. As noted in The Environmental Trust v. State of Florida, Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998), at page 498:

> An agency statement that is the equivalent of a rule must be adopted in the rulemaking process. See, e.g., Christo v. State Department of Banking and Fin., 649 So. 2d 318 (Fla. 1st DCA 1995); Florida League of Cities v. Administration Comm'n, 586 So. 2d 397 (Fla. 1st DCA 1991). This requirement carried forward in section 120.54(1), Florida Statutes (Supp. 1996), prevents an administrative agency from relying on general policies that are not tested in the rulemaking process, but it does not apply to every kind of statement an agency may make. Rulemaking is required only for an agency statement that is the equivalent of a rule, which is defined in section 120.52(15), Florida Statutes (1996), as a statement of "general applicability."
>
> An agency statement explaining how an existing rule of general applicability will be applied in a particular set of facts is not itself a rule. If that were true, the agency would be forced to adopt a rule for every possible variation on a theme, and private entities could continuously attack the government for its failure to have a rule that precisely addresses the facts at issue. Instead these matters are left for the adjudication process under section 120.57, Florida Statutes.

14. The Department's first defense to the challenge in this case is that the statements at issue here do not meet the definition of a rule because they are not statements of "general applicability." On the facts in this case, the Department's argument appears to be well-taken. The reasoning in each of the

challenged statements has never been previously applied to another applicant. See Legal Club of America Corporation, f/k/a And Justice for All, Inc., d/b/a Legal Club of America v. Department of Insurance, 1999 WL 1286508 (DOAH FO, July 13, 1999). Specifically, when this same Petitioner filed an earlier policy containing an arbitration provision identical to the ones at issue here, the earlier policy was disapproved for different reasons. Further, the facts in this case demonstrate that the Department has not yet developed any policy of general applicability to address the issue of arbitration provisions in life insurance policies.

15. The Department also defends against the challenge in this case on the ground that rulemaking is not feasible at this time. The facts demonstrate that issues regarding the inclusion of arbitration provisions in life insurance policies are rather rare and infrequent. Due to this infrequency, the Department "has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking." Section 120.54(1)(a)1a, Florida Statutes. Accordingly, rulemaking is not feasible at this time.

CONCLUSION

In view of all of the foregoing, it is ORDERED:

That the petition in this case is hereby dismissed and all relief sought by the Petitioner is hereby denied.

DONE AND ORDERED this 30th day of July, 2002, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of July, 2002.

ENDNOTES

1/ The disapproval letters contained six reasons for disapproval. Only five of those reasons are at issue here. See Petitioner's Exhibit 2.

2/ Although the arbitration provisions were identical, the reasons for disapproval given on March 22, 2002, are obviously different from the reasons for disapproval given on May 1, 2002.

3/ The Department presented very little evidence about its rulemaking efforts in this regard. This dearth of evidence supports an inference that the Department has not accomplished very much in its rulemaking. In any event, the Department's rulemaking efforts are insufficient for it to reap the benefits of Section 120.56(4)(e), Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.