STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE FLORIDA INSURANCE COUNCIL, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 05-2609RP
OFFICE OF INSURANCE REGULATION AND THE FINANCIAL SERVICES COMMISSION,	)	
Respondents.	)	

FINAL ORDER

Pursuant to Notice, this cause came on for formal hearing before Diane Cleavinger, a duly designated Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida, on October 31, 2005.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether proposed Rules 69O-175.003, 69O-170.005 through 007, 69O-170.013, 69O-170.0135, 69O-170.014, 69O-170.0141, 69O-170.0142, 69O-170.0143, and 69O-170.0155 (Proposed Rules) are invalid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On November 12, 2004, in volume 30, Number 46, of the Florida Administrative Weekly, the Office of Insurance Regulation ("OIR"), published two Notices of proposed rulemaking for Proposed Rules 69O-175.003, 69O-170.005 through 007, 69O-170.013, 69O-170.0135, 69O-170.014, 69O-170.0141, 69O-170.0142 and 69O-170.0155. The Proposed Rules variously deal with filing procedures for a variety of insurance rates. Thereafter, Petitioner, the Florida Insurance Council, Inc. ("FIC"), filed a Petition challenging the Proposed Rules as an invalid exercise of delegated legislative authority. (DOAH Case No. 04-4490RP).

On January 14, 2005, in Volume 31, Number 2, of the Florida Administrative Weekly, OIR published two Notices of Change to Proposed Rules 69O-175.003, 69O-170.005 through 007, 69O-170.013, 69O-170.0135, 69O-170.014, 69O-170.0141, 69O-170.0142, and 69O-170.0155. Thereafter, on March 2, 2005, Petitioner filed an amended Petition in DOAH Case No. 04-4490RP challenging the validity of the Proposed Rules.

On April 15, 2005, in Volume 31, Number 15, of the Florida Administrative Weekly, OIR published two Notices of Change to Proposed Rules 69O-175.003, 69O-170.005 through 007, 69O-170.013, 69O-170.0135, 69O-170-014, 69O-170.0141, 69O-170,0142, and 69O-170.0155.

Petitioner filed a Motion for Summary Recommended Order in DOAH Case No. 04-4490RP alleging that OIR did not have rulemaking authority and that the Financial Services Commission (Commission), which does have rulemaking authority, had not authorized the Proposed Rules as required by the Administrative Procedures Act (APA). This Motion was granted, and a Summary Final Order was issued on August 11, 2005, finding the Proposed Rules invalid under Section 120.52(8)(a), Florida Statutes, because they were noticed for adoption without being approved by the agency head, i.e., the Commission.

Prior to issuance of the Order, the Commission authorized the publication of the Proposed Rules which were again published in Volume 31, Number 26, July 1, 2005, Florida Administrative Weekly. Petitioner then filed the instant Petition challenging the validity of the Proposed Rules (DOAH Case No. 05-2609RP).

At the hearing, Petitioner presented the testimony of three witnesses and offered seven exhibits into evidence marked Petitioner's Exhibits 1-5, 7, and 9. Respondents presented the

testimony of two witnesses and offered 21 exhibits into evidence, marked Respondent's Exhibits 1 through 19, 21, and 22.

After the hearing Petitioner submitted a Proposed Final Order on February 10, 2006. Likewise, Respondents submitted a Proposed Final Order on February 10, 2006.

FINDINGS OF FACT

1. FIC is a multi-line insurance trade association. FIC's membership consists of 42 parent companies engaged in the business of writing insurance. These parent company members consist of approximately 250 subsidiary companies who write insurance in Florida. FIC members write approximately seventy percent of the total insurance written in Florida.

2. FIC was organized, and now operates, to represent its members in legislative and regulatory proceedings in Florida. FIC appeared on behalf of its members at the workshops and public hearing held on the Proposed Rules. A large number of FIC's members are substantially affected by the Proposed Rules because the Proposed Rules regulate the process by which insurance rates are approved in Florida and such members will be required to comply with these proposed rules. Clearly FIC has standing to challenge these proposed rules.

3. The Commission was created within the Department of Financial Services pursuant to Section 20.121, Florida Statutes. However, the Commission is not “subject to control, supervision

or direction by the Department of Financial Services in any manner." § 20.121(3), Fla. Stat. The Commission is composed of the Governor and Cabinet, who collectively serve as the agency head of the Commission. Action by the Commission can only be taken by majority vote "consisting of at least three affirmative votes." Id.

4. OIR is a structural unit of the Commission. Section 20.121(3), Florida Statutes, states in relevant part, as follows:

> (a) Structure.--The major structural unit of the commission is the office. Each office shall be headed by a director. The following offices are established:
>
> 1. The Office of Insurance Regulation, which shall be responsible for all activities concerning insurers and other risk-bearing entities . . .
>
> * * *
>
> (b) Organization.--The commission shall establish by rule any additional organizational structure of the offices. It is the intent of the legislature to provide the commission with the flexibility to organize the offices in any manner they determine appropriate to promote both efficiency and accountability.
>
> (c) Powers.--Commission members shall serve as the agency head for purposes of rulemaking . . . by the commission and all subunits of the commission. . . . (emphasis supplied)

5. Clearly, under the Commission's and OIR's organizational structure, only the Commission may promulgate rules for both itself and OIR. The Commission also has control of internal management of OIR and the relationship between OIR and the Commission. Thus, for reasons of efficiency to better utilize staff expertise, the Commission may delegate certain procedural rulemaking steps to its subordinate units such as OIR, as long as, the ultimate product of that process is approved by the Commission prior to publication of a Notice of Rulemaking under Chapter 120. There was no evidence that demonstrated any impact such internal management decisions might have on any interests FIC or its members may have. Therefore, such internal management policies are exempt from required rulemaking under Chapter 120. See § 120.52(15)(a), Fla. Stat.

6. In this case the Commission authorized the Proposed Rules on June 16, 2005, and authorized the re-publication of the Proposed Rules. The Proposed Rules were re-published on July 1, 2005. The Commission's action occurred during the time FIC's rule challenge was on-going and the statutory stay of rulemaking under Chapter 120 was in effect. However, Chapter 120's stay does not divest any agency of jurisdiction to act in areas over which it has been given authority. The stay simply stops a Proposed Rule from taking effect while the rule challenge is pending. An agency may correct any defect that might have

occurred during rulemaking or take other rulemaking steps at any time during the pendency of a rule challenge. See § 120.56 (2)(b), Fla. Stat. In this instance, the agency corrected its failure to authorize the language of the proposed rules by approving those proposed rules and re-publishing them. Finally, there was no evidence that the Commission's post-stay action was in any way detrimental, prejudicial or unfair to FIC or any other person that might be effected by these Proposed Rules. Given these facts, the Commission has complied with the procedural aspects of rulemaking and these Proposed Rules are not invalid for failing to comply with essential rulemaking procedure.

7. As indicated, the Proposed Rules variously deal with electronic filing for a variety of insurance rates through OIR's I-file system and I-file workbook. The authority listed in the Notices for promulgating the Proposed Rules was Section 624.308(1), Florida Statutes. Section 624.308(1) grants the Department of Financial Services (Department) and the Commission the general authority to adopt rules, pursuant to Sections 120.536(1) and 120.54 in order to implement laws that confer duties upon them. One such grant of authority is contained in Section 624.424(1)(c), Florida Statutes dealing with annual statements and other information, as well as, electronic filing. That Section provides that the Commission may adopt rules that

require, “reports or filings . . . . to be submitted by electronic means in a computer-readable form compatible with the electronic data processing equipment specified by the commission.” These proposed rules, in fact, attempt to implement an electronic system of filing known as “I-file.” The evidence demonstrated that the I-file workbook is essentially the format for submitting rate filing data to OIR in electronic form. The workbook provides various sections where an insurer may explain any alternative methods or techniques used by an insurer in developing a rate. The intent of the rules was not to establish additional standards that an insurer must meet to justify a proposed rate. Specifically, Proposed Rule 69O-175.003(2)(a)3, states that accurate information in the I-file workbook will result in an aggregate average statewide rate indication. A statewide aggregate is used for analytical purposes when an individual insurer submits rates based on territorial considerations. The aggregate is a generally accepted actuarial technique and is used only for analytical purposes. The development of such data, by itself, does not constitute an attempt by OIR to establish rates for an insurer. Additionally, Proposed Rule 69O-170.0135(2)(c), states that an insurer may provide an explanation to OIR as to why “the methodology or technique used in the filing is more appropriate for the filing than the methodology or technique used in the I-

file system indications." The rule clearly states that "use of different data or methods does not create a presumption of . . . inappropriateness . . ." Moreover, OIR is required to analyze the reasonableness of the judgment reflected in the rate filing. § 627.062(2)(b)5, Fla. Stat. To the extent that the Rules and specifically Proposed Rules 690-170.0135(2)(c) and 690-175.003(2)(a)3, implement the I-file system through the I-file workbook the Proposed Rules fall well within the authority granted to the Commission to establish an electronic filing system.

8. Proposed Rule 69O-170.013(2), attempts to define the general content of a rate filing and re-start the review period should any additional information be submitted after OIR has made its decision. Proposed Rule 690-170.013(2) provides as follows:

> (a) A "rate filing" contains all the information submitted in the filing made by the insurer, plus any supplemental information received during the course of the Office's review, for all purposes of the filing made under Sections 627.062(2)(a) or 627.0651, F.S. and shall be the sole basis for determination of final agency action.
>
> (b) Any information provided subsequent to the Office's issuance of a notice of intent to disapprove pursuant to Section 627.062 or 627.0651, F.S. will be a new filing subject to the filing requirements of this rule and chapter and applicable statutes. (Emphasis added.)

9. Sections 627.062 and 627.0651, Florida Statutes, provide a mechanism whereby insurers submit proposed premium rates for OIR's review in the form of rate filings. Filings are required both at the initial use of a policy form and annually. OIR is charged under Sections 627.062(2)(b) and 627.0651(2) with reviewing rate filings to determine whether the rate changes requested are excessive, inadequate, or unfairly discriminatory. In reviewing a rate filing OIR may require an insurer to provide all information necessary to evaluate the condition of the company and the reasonableness of the filing according to the criteria enumerated in Section 627.062, Florida Statutes, dealing with rate standards. OIR must review the rate in accordance with generally accepted and reasonable actuarial techniques. Some of the criteria reviewed by OIR include past and prospective losses and expenses, expected investment income, adequacy of loss reserves, trend factors and “the reasonableness of the judgment reflected in the filing.” § 627.062, Fla. Stat. Because these factors generally involve future predictions based on past information or data, complex mathematical formulas and models are used to support any given rate. Additionally, various categories of data may be combined to demonstrate different trends or factors. It is the validity of this data processing that is governed by a variety of actuarial techniques that hopefully yield reasonably accurate future predictions.

Included in this actuarial process is the exercise of judgment, on both OIR's and the insurer's part, as to how to process a wide variety of data. Whether a rate filing is adequately supported is often a matter of debate among qualified, credentialed actuaries who can disagree. Indeed, applicable actuarial standards contemplate and recognize the exchange of supplemental information during the rate filing review process. Inherent in OIR's review of a rate filing is the same application of actuarial techniques or methods utilized by the insurer.

10. Ultimately, OIR is required to notify an insurer of its intent to either approve or disapprove a rate filing within the time prescribed by statute (i.e. within ninety days for property and casualty insurance and sixty days for motor vehicle insurance). §§ 627.062(2)(a)1. and 627.0651(1)(a), Fla. Stat. OIR may, but is not required by statute or rule, to notify an insurer of any perceived deficiency in a rate filing before a notice of intent to deny is issued. However, even though not required, OIR and its predecessor agency, the Department of Insurance, have generally requested explanation of rate filings or additional supporting information prior to issuing notices of intent to deny a rate filing. Importantly, the statutory review period is not tolled if OIR requests supporting information.

11. If the insurer proposing the rate disagrees with OIR's determination, the insurer may request a hearing under Chapter 120, Florida Statutes, or proceed to arbitration. § 627.062(6), Fla. Stat. In any administrative hearing Section 627.0651(1), Florida Statutes, states that the insurer has the burden to prove the rate is not excessive, inadequate or unfairly discriminatory." The issue is not, as OIR contends, whether the rate filing, as reviewed by it, demonstrates that it is not excessive, inadequate or unfairly discriminatory. To this end, the insurer is entitled to present any relevant evidence that supports the rate.

12. In this case, Proposed Rule 690-170.013(2) does not simply define the contents of a rate filing, but operates to exclude all evidence offered by the insurer in an administrative hearing on insurance rates that was not previously provided to OIR prior to its notice of intent. Additionally the Rule extends the statutory review period beyond that provided in the relevant statute. The rationale for the Rule was based on OIR's experience that insurer's do not willingly provide everything OIR may desire to support its rate filing and the relatively short statutory review period. However, the statute contemplates that OIR may request such information if the desired information is necessary to review the rate, and, if the information is not forthcoming within the statutory review

period, OIR may issue a notice of intent to deny. The statute is very clear that the review time period is not tolled and the issue to be resolved in an administrative proceeding. To that extent the Rule contravenes the statute and is an invalid exercise of statutory authority.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat.

14. FIC has standing under Section 120.56(1), Florida Statutes, to challenge the Proposed Rules as a trade association because it has demonstrated that a substantial number of its members are substantially affected by the Proposed Rules. NAACP v. Florida Board of Regents, 863 So. 2d 294, 298 (Fla. 2003).

15. The ultimate question in a proposed rule challenge is whether the rule is "an invalid exercise of delegated legislative authority." § 120.56(1), Fla. Stat. (2005). Section 120.52(8), Florida Statutes (2005), defines the term as an "action which goes beyond the powers, functions, and duties delegated by the Legislature."

16. In 1999, the Legislature revised the closing paragraph of Section 120.52(8), Florida Statutes, after the decision in St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 80 (Fla. 1st DCA 1998) which held that:

> [a] rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented.

The language of Section 120.52(8), Florida Statutes, was amended to read:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute. (Emphasis added.)

§ 120.52(8), Fla. Stat. (2005). See Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association Inc., 794 So. 2d 696 (Fla. 1st DCA 2001); See also Southwest Florida

Water Management District v. Save the Manatee Club Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).

17. Thus for a Rule to be valid it must be developed pursuant to a valid grant of general rulemaking authority, but also pursuant to a "specific law to be implemented" and implements or interprets "specific powers and duties." Day Cruise, 794 So. 2d at 704. The court in Day Cruise discussed the importance of the 1999 Administrative Procedures Act (the "APA") amendments as follows:

> Under the 1996 and 1999 amendments to the APA, it is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the proposed rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency. (Emphasis added.)

Day Cruise, 794 So. 2d at 700. See generally Save the Manatee Club Inc., 773 So. 2d 598-599 (interpreting Section 120.52(8), Florida Statutes (1999), as removing an agency of the authority to adopt a rule merely because it is within the agency's class of powers and duties). On the other hand, statutes need not specify the content of a rule, within a given subject area. Such specificity is generally left for rulemaking since rules by definition interpret statutes. See Florida Board of Medicine v.

Florida Academy of Cosmetic Surgery, 808 So. 2d 243 (Fla. 1st DCA 2002); and Board of Podiatric Medicine v. Florida Medical Association, 779 So. 2d 658 (Fla. 1st DCA 2001). The limit to such interpretation is that they may not contravene, enlarge or modify the governing statutes. Id. § 120.52, Fla. Stat.

18. The Commission is one integrated agency, as that term is defined in Chapter 120, Florida Statutes, and is composed of at least two Offices. The general rulemaking authority cited in all of the Proposed Rules is Section 624.308(1), Florida Statutes . . ." That statute grants the Commission general rulemaking authority. A reasonable interpretation of that statute extends the purview of such authority to the duties of the Offices, such as OIR, within the Commission. This view is supported by the fact that the legislature provided that the old Rules of the Commission's and Department's predecessor agencies would remain in effect. § 20.121(4), Fla. Stat.

19. In this case, OIR's duty is to review rate filings and notify an insurer of its intent to either approve or disapprove the filing within the time prescribed by statute. §§ 627.062 (2)(a)1. and 627.0651(1)(a), Fla. Stat. To that end, OIR has the power to require the insurer to provide data and information necessary to that review. The statute also provides that the insurer has the right to establish in an administrative hearing that its rate is not excessive, etc. Likewise, the Commission

may adopt a system for electronic submission of information required by OIR. § 624.524(1)(c), Fla. Stat.

20. As discussed previously, these provisions provide an adequate statutory basis for the Proposed Rules except Rule 690-170.013(2). In regards to Rule 690-170.013(2), the Rule contravenes the required statutory review period and violates the insurer's right to an administrative hearing to establish its rate.

21. Section 626.062 is consistent with the APA which affords a party the right to a hearing whenever the substantial interests of a party are determined by an agency. § 120.569(1), Fla. Stat. (2005). When the hearing involves disputed issues of material fact (such as whether any insurer's proposed rate is excessive, inadequate, or unfairly discriminatory) the party is entitled to a hearing conducted pursuant to Section 120.57(1). § 120.569(1), Fla. Stat. (2005).

22. Section 120.57(1)(k) provides that all proceedings conducted pursuant to Section 120.57(1) "shall be de novo." Further, OIR is specifically prohibited from overturning findings of fact in a recommended order without complying with Section 120.57(1). According to Section 627.0612:

> In any proceeding to determine whether rates, rating plans, or other matters governed by this part comply with the law, the appellate court shall set aside a final order of the office if the office has

> violated s. 120.57(1)(k) by substituting its findings of fact for findings of an administrative law judge which were supported by competent substantial evidence.

23. Proposed Rule 690-170.013(2) contravenes the provisions of the Rating Law and the APA that guarantee an insurer a de novo hearing. Under Proposed Rule 690-170.013(2):

> (a) A "rate filing" contains all the information submitted in the filing made by the insurer, plus any supplemental information received during the course of the Office's review, for all purposes of the filing made under Sections 627.062(2)(a) or 627.0651, F.S. and shall be the sole basis for determination of final agency action.
>
> (b) Any information provided subsequent to the Office's issuance of a notice of intent to disapprove pursuant to Section 627.062 or 627.0651, F.S. will be a new filing subject to the filing requirements of this rule and chapter and applicable statute. (Emphasis added.)

The underlined parts of these paragraphs would prevent an insurer from supplementing its rate filing with any information after the agency's notice of preliminary or intended action is issued, even though final agency action has not yet been taken. "A request for formal administrative hearing commences a de novo proceeding intended to formulate agency action, and not to review action taken earlier or preliminarily." Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services, 573 So. 2d 19 (Fla. 1st DCA 1990); citing Florida Department of Transportation v. J.W.C. Co., Inc.,

396 So. 2d 778 (Fla. 1st DCA 1981). The APA clearly authorizes the presentation of additional information at a de novo hearing to provide the agency an opportunity to change its intended/ preliminary agency action as part of the formulation of final agency action. As the Florida Supreme Court stated in Young v. Department of Community Affairs, 625 So. 2d 831, 838 (Fla. 1993):

> . . . by stating that the hearing should be held pursuant to chapter 120, the Legislature also had indicated that the hearing should encompass more than just the record below. Specifically, new evidence can be presented, and the hearing officer has the opportunity to issue a recommended order based upon the consideration of all of the issues.

24. In Hamilton County Board of County Commissioners v. Department of Environmental Regulation, 587 So. 2d 1378, 1387-88 (Fla. 1st DCA 1991) the First District Court of Appeal affirmed a hearing officer's consideration of new information supporting the applicant's air emissions permit at a Section 120.57(1) hearing, stating:

> Any additional information necessary to provide reasonable assurance that the proposed facility would comply with the applicable air emission standards could be properly provided at the hearing. See McDonald v. Department and Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977) (a petition for a formal 120.57 hearing commences a de novo proceeding, and because the proceeding is intended to formulate final agency action and not to

> review action taken earlier and preliminary, the hearing officer may consider changes or other circumstances external to the application. See also Florida Department of Transportation v. J.W.C. Co. Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). At the hearing, TSI presented additional information to provide reasonable assurances that the incinerator facility would comply with the applicable rules on the specific points raised by Hamilton County.

25. The de novo review of preliminary agency action at a Section 120.57(1) hearing does not place OIR at a disadvantage. To the contrary, OIR may present evidence or information that it did not consider during its initial review of the rate filing as grounds for denial. Further, the rules governing discovery during the pre-hearing phase of a Section 120.57(1) hearing prevent unfair surprise of new information. As the final order issued in Hughes Supply, Inc. v. Department of Environmental Protection, DOAH Case No. 91-8334, 1992 WL 881056 (Fla.Div.Admin.Hrgs. 1992) states:

> The administrative hearing held June 10, 1992, under Section 120.57, Florida Statutes, was a de novo proceeding that had as its purpose the formulation of agency action, not the review of agency action previously taken. Florida Department of Transportation v. J.W.C. Co., Inc. 396 So. 2d 778 (Fla. 1st DCA 1981). As such, evidence considered by the Department in making is preliminary determination that the necessary conditions for coverage were not met could be supplemented by additional evidence offered by either party that related to the presence or absence of other violations or instances of noncompliance at

> the facility. Obviously, an exception might apply on grounds of fundamental fairness or unfair surprise if a party wrongfully failed to disclose evidence in its possession in response to a discovery request, but no such issue has been raised in the instant case. The Hearing Officer could lawfully base findings of fact and conclusions of law on such additional evidence, provided it was competent, substantial and credible.

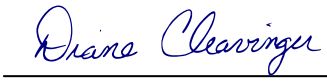
26. Finally, Section 627.062 establishes the burden of proof on the insurer once OIR has made its determination. The burden is on the insurer to establish its rate is not excessive, etc. Therefore, the underlined portions of Proposed Rule 690-170.013(2) are invalid under Section 120.52(8)(b), (c), (d) and (e) because they contravene the provisions of the agency's statutes and the APA which entitle insurers to a de novo hearing to challenge OIR's intended denial of rates.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

The Proposed Rules are valid exercises of delegated legislative authority except for the underlined portions of Rule 69O-170.013(2) which are invalid exercises of delegated legislative authority.

DONE AND ORDERED this 17th day of May, 2006, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.