

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIFE INSURANCE SETTLEMENT)
ASSOCIATION,)
)
Petitioner,)
)
vs.) Case No. 08-1645RP
)
OFFICE OF INSURANCE REGULATION)
AND FINANCIAL SERVICES)
COMMISSION,)
)
Respondents.)
_____)

SUMMARY FINAL ORDER

This cause came before Carolyn S. Holifield, Administrative Law Judge of the Division Administrative Hearings, for disposition through summary final proceedings.

STATEMENT OF THE ISSUE

The issue for determination is whether Proposed Rule 690-204.101 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On November 30, 2007, in Volume 33, Number 48 of the Florida Administrative Weekly, the Office of Insurance Regulation, published the text of Proposed Rule 690-204.101 entitled, "Disclosures to Viator of Disbursement." Subsequently, Respondent, Office of Insurance Regulation, filed

a Notice of Change to the proposed rule on February 15, 2008, and, again, on February 22, 2008.

On April 4, 2008, Petitioner, Life Insurance Settlement Association, filed a Petition to Determine the Invalidity of a Proposed Rule (hereinafter referred to as "Petition") challenging the validity of Proposed Rule 690-204.101.

The case was assigned to the undersigned on April 8, 2008. In a Notice of Hearing issued April 8, 2008, the final hearing was scheduled for May 2, 2008.

On April 21, 2008, during a status conference, Petitioner and Respondent made an ore tenus Motion for Continuance of the final hearing. On April 22, 2008, the undersigned issued an Order Granting the Continuance and Requiring a Status Report.

On April 30, 2008, the parties filed a joint status report in which they indicated that the factual issues in the case had been resolved and required no action by the undersigned.¹ The parties further stipulated that the remaining issues of law in the case could be resolved through the filing of proposed summary final orders in lieu of a final hearing. On May 13, 2008, an Order was issued requiring the parties to file proposed summary final orders on June 6, 2008.

Both parties timely filed Proposed Summary Final Orders.

FINDINGS OF FACT

1. Respondent, Office of Insurance Regulation (hereinafter referred to as "OIR"), is an agency of the State of Florida, created within the Financial Services Commission (hereinafter referred to as "Commission"). § 20.121(3)(a)1., Fla. Stat. (2007).²

2. Pursuant to Subsection 21.121(3)(a), the OIR is responsible for all activities concerning insurers and other risk-bearing entities, including licensing, rates, policy forms, market conduct, claims, issuance of certificates of authority, solvency, viatical settlements, premium financing, and administrative supervision, as provided under the Florida Insurance Code or Chapter 636. The Florida Insurance Code includes Chapters 624 through 632.

3. The Commissioner of Insurance Regulation is the agency head of the OIR. However, the Commission is the agency head for purposes of rulemaking. § 20.121(3)(c).

4. The matter at issue in this proceeding is Respondent's Proposed Rule 690-204.101 entitled, "Disclosures to Viator of Disbursement" (the "Proposed Rule"). The Commission advertised the text of the Proposed Rule on November 30, 2007, in Volume 33, Number 48, of the Florida Administrative Weekly, and, subsequently, filed a Notice of Change to the Proposed Rule on February 15, 2008, and, again, on February 22, 2008. A final

public hearing regarding the Proposed Rule was conducted by the Commission on March 25, 2008, at which time the Commission approved the Proposed Rule for final adoption.

5. According to the published notice, the purpose and effect of Proposed Rule 690-204.101 is "to establish disclosures to viators of reconciliation of funds."

6. The text of the Proposed Rule, as noticed for final adoption, reads as follows:

690-204.101 Disclosures to Viator of Disbursement.

(1) Prior to or concurrently with a viator's execution of a viatical settlement contract, the viatical settlement provider shall provide to the viator, in duplicate, a disclosure statement in legible written form disclosing:

(a) The name of each viatical settlement broker who receives or is to receive compensation and the amount of each broker's compensation related to that transaction. For the purpose of this rule, compensation includes anything of value paid or given by or at the direction of a viatical settlement provider or person acquiring an interest in one or more life insurance policies to a viatical settlement broker in connection with the viatical settlement contract; and

(b) A complete reconciliation of the gross offer or bid by the viatical settlement provider to the net amount of proceeds or value to be received by the viator related to that transaction. For the purpose of this rule, gross offer or bid shall mean the total amount or value offered by the viatical settlement provider for the purchase of an interest in one or more life insurance policies, inclusive of

commissions, compensation, or other proceeds or value being deducted from the gross offer or bid.

(2) The disclosure statement shall be signed and dated by the viator prior to or concurrently with the viator's execution of a viatical settlement contract with the duplicate copy of the disclosure statement to be retained by the viator.

(3) If a viatical settlement contract has been entered into and the contract is subsequently amended or if there is any change in the viatical settlement provider's gross offer or bid amount or change in the net amount of proceeds or value to be received by the viator or change in the information provided in the disclosure statement to the viator the viatical settlement provider shall provide, in duplicate, an amended disclosure statement to the viator, containing the information in paragraphs (1)(a) and (b). The amended disclosure statement shall be signed and dated by the viator with the duplicate copy of the amended disclosure statement to be retained by the viator. The viatical settlement provider shall obtain the signed and dated amended disclosure statement.

(4) Prior to a viatical settlement provider's execution of a viatical settlement contract, the viatical settlement provider must have obtained the signed and dated disclosure statement and any amended disclosure statement required by this rule. In transactions where no broker is used the viatical settlement provider must have obtained the signed and dated disclosure statement from the viator.

(5) The documentation required in this rule shall be maintained by the viatical settlement provider pursuant to the provisions set forth in Subsection 626.9922(2), Florida Statutes, and shall be available to the office at any time for

copying and inspection upon reasonable notice to the viatical settlement provider.

7. The Proposed Rule cites Subsection 624.308(1) and Section 626.9925 as specific authority for the Proposed Rule.

8. The Proposed Rule cites Sections 626.9923, 626.9924, and 626.9925 as the law implemented by the Proposed Rule.

9. The Proposed Rule involves regulation of viatical settlement providers pursuant to Florida's Viatical Settlement Act, Part X, Chapter 626 (hereinafter referred to as the "Act"). The Act regulates both viatical settlements and life settlements.

10. The Act does not define "viatical settlement" or "life settlement." However, both types of transactions involve the sale of the ownership interest in life insurance policies. A "viatical settlement" involves the sale of an ownership interest in a life insurance policy by a person who is expected to live for less than two years. A "life settlement" involves the sale of the ownership interest in a life insurance policy by a person who is expected to live longer than two years after the date of the sale.

11. Viatical settlements and life settlements are regulated in essentially the same manner and each of the foregoing transactions are included in the definition of "viatical settlement contract" as defined in the Act.

Therefore, references to "viatical settlements" under Florida law refer to both life settlements and viatical settlements.

12. Subsection 626.9911(10) defines "viatical settlement contract" as follows:

(10) "Viatical settlement contract" means a written agreement entered into between a viatical settlement provider, or its related provider trust, and a viator. The viatical settlement contract includes an agreement to transfer ownership or change the beneficiary designation of a life insurance policy at a later date, regardless of the date that compensation is paid to the viator. The agreement must establish the terms under which the viatical settlement provider will pay compensation or anything of value, which compensation or value is less than the expected death benefit of the insurance policy or certificate, in return for the viator's assignment, transfer, sale, devise, or bequest of the death benefit or ownership of all or a portion of the insurance policy or certificate of insurance to the viatical settlement provider. A viatical settlement contract also includes a contract for a loan or other financial transaction secured primarily by an individual or group life insurance policy, other than a loan by a life insurance company pursuant to the terms of the life insurance contract, or a loan secured by the cash value of a policy.

13. In a viatical settlement transaction, the "viatical settlement provider" is the purchaser of the ownership interest in a life insurance policy, including the right to receive the policy proceeds upon the death of the insured. Also see § 626.9911(12).³

14. The "viator" is the owner of an insurance policy who sells the ownership interest in the policy. Also see § 626.9911(14).⁴

15. The term "viatical settlement broker" is defined in Subsection 626.9911(9), as follows:

(9) "Viatical settlement broker" means a person who, on behalf of a viator and for a fee, commission, or other valuable consideration, offers or attempts to negotiate viatical settlement contracts between a viator resident in this state and one or more viatical settlement providers. Notwithstanding the manner in which the viatical settlement broker is compensated, a viatical settlement broker is deemed to represent only the viator and owes a fiduciary duty to the viator to act according to the viator's instructions and in the best interest of the viator. The term does not include an attorney, licensed Certified Public Accountant, or investment adviser lawfully registered under chapter 517, who is retained to represent the viator and whose compensation is paid directly by or at the direction and on behalf of the viator.

16. Pursuant to Subsection 626.9911(9), the "viatical settlement broker" is an agent of the viator and, as such, owes a fiduciary duty to the viator to obtain the best price for the insurance policy. Thus, typically, the viatical settlement broker solicits bids from multiple viatical settlement providers on behalf of the viator.

17. The Proposed Rule requires viatical settlement providers to furnish viators with a detailed accounting of all

funds involved in viatical settlement transactions and to ensure that viators are aware of the accounting.

18. The issues of disclosures required for viatical settlement contracts and transactions are addressed in two provisions of the Act, Sections 626.99181 and 626.9923.

19. Section 626.99181, Florida Statutes, requires a viatical settlement broker to disclose its compensation and states, "[a] viatical settlement broker shall disclose to a prospective viator the amount and method of calculating the broker's compensation." That provision states the "compensation" includes "anything of value paid or given to a viatical settlement broker for the placement of a policy."

20. Section 626.9923 addresses viatical settlement contracts and required disclosures to viators and states that:

Viatical settlement contracts; required disclosures.--The viatical settlement broker, or the viatical settlement provider in transactions in which no broker is used, must inform the viator by the date of application for a viatical settlement contract:

(1) That there are possible alternatives to viatical settlement contracts for persons who have a catastrophic or life-threatening illness, including, but not limited to, accelerated benefits offered by the issuer of a life insurance policy.

(2) That proceeds of the viatical settlement could be taxable, and assistance should be sought from a personal tax advisor.

(3) That viatical settlement proceeds could be subject to the claims of creditors.

(4) That receipt of viatical settlement proceeds could adversely affect the recipient's eligibility for Medicaid or other government benefits or entitlements, and advice should be obtained from the appropriate agencies.

(5) That all viatical settlement contracts entered into in this state must contain an unconditional rescission provision which allows the viator to rescind the contract within 15 days after the viator receives the viatical settlement proceeds, conditioned on the return of such proceeds.

(6) The name, business address, and telephone number of the independent third-party escrow agent, and the fact that the viator may inspect or receive copies of the relevant escrow or trust agreements or documents.

21. Petitioner is an established trade association in the life settlement industry and is comprised of over 175 member companies, some of which include Florida-licensed viatical settlement providers who would be subject to the Proposed Rule. Petitioner's members would be substantially affected by the Proposed Rule because it would require them to make disclosures to viators in addition to the disclosures required by the Act.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.56.

23. Any person substantially affected by a proposed rule may seek an administrative determination of the invalidity of the rule on the grounds that the rule is an invalid exercise of delegated legislative authority. § 120.56(1)(a). Petitioner has standing under Subsection 120.56(1)(a) to challenge the Proposed Rules as a trade association, because some of its members would be substantially affected by the Proposed Rule.

24. The issue in this case is whether the Proposed Rule is an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8)(b) and (c).

25. Subsection 120.52(8) states, in relevant part, as following:

"Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

* * *

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.]

26. According to Subsection 120.52(8), in addition to having a grant of rulemaking authority, an agency may adopt rules "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." See Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001).

27. The Proposed Rule cites Subsection 624.308(1) and Section 626.9925 as the Commission's specific authority to promulgate the Proposed Rule.

28. Subsection 624.308(1) provides:

(1) The department and the commission may each adopt rules pursuant to ss. 120.536(1)

and 120.54 to implement provisions of law conferring duties upon the department or the commission, respectively.

29. Section 626.9925 provides the following:

626.9925 Rules.--The commission may adopt rules to administer this act, including rules establishing standards for evaluating advertising by licensees; rules providing for the collection of data, for disclosures to viators, for the reporting of life expectancies, and for the registration of life expectancy providers; and rules defining terms used in this act and prescribing recordkeeping requirements relating to executed viatical settlement contracts.^[5] [Emphasis supplied.]

30. Clearly, Subsection 624.308(1) provides the Commission with the authority to adopt rules "to implement provisions of law conferring duties upon the . . . commission." However, that provision does not refer to or confer on the Commission any rulemaking authority relative to disclosure to viators or to any other provisions under the Act.

31. Section 626.9925 authorizes the Commission to adopt rules to administer the Act, including rules . . . for disclosure to viators."

32. Although Section 626.9925 is a "grant of rulemaking authority" within the meaning of Subsection 120.52(8)(b), the Commission's authority to adopt such rules is limited to implementing the particular disclosure requirements contained elsewhere in the Act.

33. Subsection 626.9923 of the Act addresses "viatical settlement contracts" and "disclosure requirements".

34. The Proposed Rule identifies the laws to be implemented as Sections 626.9923, 626.9924, and 626.9925.

35. Section 626.9923, quoted in paragraph 20 above, requires that the enumerated disclosures be made to viators by viatical settlement brokers. That provision requires viatical settlement providers to make the specified disclosures only in transactions in which no broker is used.

36. The Proposed Rule requires additional disclosures not required or contemplated in Section 626.9923. Moreover, while Section 626.9923 imposes disclosure obligations only on the viatical settlement providers in transactions where a broker is not used, the Proposed Rule imposes disclosure obligations on viatical settlement providers in every transaction, even if a broker is involved.

37. For these reasons, the Proposed Rule does not implement the provisions of Section 626.9923.

38. Section 626.9924 is the second statute cited as the law implemented by the Proposed Rule. That section states:

(1) A viatical settlement provider entering into a viatical settlement contract with any viator must first obtain a witnessed document in which the viator consents to the viatical settlement contract, represents that he or she has a full and complete understanding of the

viatical settlement contract and the benefits of the life insurance policy, releases his or her medical records, and acknowledges that he or she has entered into the viatical settlement contract freely and voluntarily.

(2) All viatical settlement contracts subject to this act must contain an unconditional rescission provision which allows the viator to rescind the contract within 15 days after the viator receives the viatical settlement proceeds, conditioned on the return of such proceeds.

(3) A viatical settlement transaction may be completed only through the use of an independent third-party trustee or escrow agent. Immediately upon receipt by the independent third-party trustee or escrow agent of documents from the viator to effect the transfer of the insurance policy, the viatical settlement provider must pay the proceeds of the settlement to an escrow or trust account managed by the independent third-party trustee or escrow agent in a financial institution licensed under Florida law or a federally chartered financial institution that is a member of the Federal Reserve System, pending acknowledgment of the transfer by the issuer of the policy. An advance or partial payment of the proceeds due under a viatical settlement contract may not be used to effect transfer of the subject policy; any such advance or partial payment is made at the sole discretion and risk of the viatical settlement provider.

(4) Upon receipt of all viatical settlement contract proceeds, the independent third-party trustee or escrow agent must release to the viatical settlement provider all documents necessary to complete the transfer of the insurance policy or certificate of insurance so that

the transfer, assignment, sale, bequest, or devise may be effected.

(5) The independent third-party trustee or escrow agent must transfer all proceeds of the viatical settlement contract within 3 business days after receiving from the issuer of the subject policy acknowledgment of the transfer, assignment, bequest, sale, or devise. Failure to transfer proceeds as required by this subsection renders the viatical settlement contract and the transfer, assignment, bequest, sale, or devise voidable.

(6) A viatical settlement provider may not negotiate or enter into a viatical settlement contract with a viator if the subject policy contains an accelerated benefits provision allowing benefits to be paid for a period in advance of the expected death which is equal to or exceeds the time period available under the viatical settlement contract, and at an amount which is equal to or exceeds the amount available under the viatical settlement contract, unless the issuer of the policy, in writing, denies, declines, or refuses to provide such accelerated benefits. If the insurer does not respond to a request to effectuate an accelerated benefits provision sent by certified mail within 30 days after receiving the request, the insurer shall be deemed to have denied, declined, or refused to provide such accelerated benefits.

(7) At any time during the contestable period, within 20 days after a viator executes documents necessary to transfer rights under an insurance policy or within 20 days of any agreement, option, promise, or any other form of understanding, express or implied, to viaticate the policy, the provider must give notice to the insurer of the policy that the policy has or will become a viaticated policy. The notice must

be accompanied by the documents required by s. 626.99287(5)(a) in their entirety.

(8) If the owner of the insurance policy is not the insured, the provider shall notify the insured that the policy has become the subject of a viatical settlement contract within 20 days after the transfer of rights under the contract.

(9) If the provider transfers ownership or changes the beneficiary of the insurance policy, the provider must communicate the initial change in ownership or beneficiary to the insured within 20 days after the change.

(10) The viatical settlement provider who effectuated the viatical settlement contract with the viator (the "initial provider") is responsible for tracking the insured, including, but not limited to, keeping track of the insured's whereabouts and health status, submission of death claims or assisting the beneficiary in the submission of death claims, and the status of the payment of premiums until the death of the insured. This responsibility may be contracted out to a third party; however, the ultimate responsibility remains with the initial provider. This responsibility continues with the initial provider, notwithstanding any transfers of the viaticated policy in the secondary market. This subsection applies only to those viaticated policies that are or are to become the subject of viatical settlement purchase agreements.

39. Subsection 626.9924(1) requires a viatical settlement provider to obtain a witnessed document in which the viator:

(1) consents to the viatical settlement contract; (2) represents that he or she has a full and complete understanding of the

viatical settlement contract and benefits of the life insurance policy; (3) releases his or her medical records; and (4) acknowledges that he or she has entered into the viatical settlement contract freely and voluntarily. The remainder of Section 626.9924 provides rescission rights to the viator, procedures for releasing proceeds of the transaction, restrictions regarding accelerated benefits, procedures for providing notice to the insured, and tracking requirements.

40. The disclosures required in the Proposed Rules are not mandated or contemplated by Section 626.9924, but instead are additional disclosures. For the foregoing reason, the Proposed Rule does not implement any provisions of Section 626.9923.

41. Section 626.9925 is the third statutory provision cited as the law implemented by the Proposed Rule. That provision is quoted in paragraph 29 above.

42. Section 626.9925 authorizes the Commission to adopt rules to administer the Act, including rules "establishing standards" for, among other things, "disclosures to viators." In adopting rules establishing standards for such disclosures, the Commission is not given unbridled discretion. The Legislature enumerated the specific viator disclosures required in Section 626.9923 of the Act. Thus, the Commission's rulemaking authority with regard to "disclosures to viators" in Section 626.9925 must be interpreted in conjunction with Section

626.9923. As noted above, Section 626.9923 imposes disclosure requirements on the brokers and these requirements apply to viatical settlement providers only when no broker is involved in the transaction.

43. The Proposed Rule imposes the broker's duty of disclosure on viatical settlement providers. However, Section 626.9925, standing alone or when read in conjunction with Section 626.9923, does not authorize the Commission to impose the broker's duty of disclosure on the viatical settlement providers.

44. To the extent the Proposed Rule requires disclosures which are not required by Section 626.9923, the Proposed Rule constitutes an invalid exercise of delegated legislative authority by exceeding the Commission's grant of rulemaking authority.

45. The Commission's Proposed Rule constitutes an invalid exercise of delegated legislative authority within the meaning of Subsections 120.52(8)(b) and (c), because it (1) exceeds the Commission's rulemaking authority granted in Section 626.9925; and (2) enlarges the specific laws to be implemented.

ORDER

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

ORDERED that the Proposed Rule is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 12th day of September, 2008, in Tallahassee, Leon County, Florida.

Carolyn S. Holifield

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of September, 2008.

ENDNOTES

^{1/} The Status Report indicated that these factual issues included those in paragraphs 24 and 26(c), both of which allege that the Proposed Rule is invalid because it is vague, arbitrary, or capricious.

^{2/} Unless otherwise indicated, all references are to 2007 Florida Statutes.

^{3/} Section 626.9911(12) defines "viator settlement provider" as follows:

"Viatical settlement provider" means a person who, in this state, from this state, or with a resident of this state, effectuates a viatical settlement contract.

^{4/} Section 626.9911(14) defines "viator" as follows:

"Viator" means the owner of a life insurance policy or a certificateholder under a group policy, which policy is not a previously viaticated policy, who enters or seeks to enter into a viatical settlement contract. This term does not include a viatical settlement provider or any person acquiring a policy or interest in a policy from a viatical settlement provider, nor does it include an independent third-party trustee or escrow agent.

^{5/} Each of the other areas, including Section 626.9925, in which the Commission may adopt rules, are specifically addressed in various provisions in the Act. For example, Subsection 626.9913(2) addresses reporting and collection of data; Section 626.9923 addresses disclosures to viators; Subsection 626.9913(2) addresses reporting of life expectancies; Section 626.99175 addresses registration of life expectancy providers; and Section 626.9922 addresses recordkeeping requirements.

COPIES FURNISHED:

Kevin M. McCarty, Commissioner
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0305

Steve Parton, General Counsel
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0305

James A. McKee, Esquire
Foley & Lardner LLP
106 East College Avenue, Suite 900
Tallahassee, Florida 32301

Stephen H. Thomas, Esquire
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399

Scott Boyd, Executive Director
and General Counsel
Joint Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Liz Cloud, Program Administrator
Bureau of Administrative Code
Department of State
R.A. Gray Building, Suite 101
Tallahassee, Florida 32399-0250

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.