STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INSTITUTIONAL LIFE SERVICES (FLORIDA), LLC, AND DAVID MATTHEW JANECEK,	)	
Petitioners,	)	
vs.	)	Case No. 09-0385RP
FINANCIAL SERVICE COMMISSION AND OFFICE OF INSURANCE REGULATION,	)	
Respondents.	)	

FINAL ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on February 19, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Brian A. Newman, Esquire
Steven M. Malono, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

For Respondents: S. Marc Herskovitz, Esquire
Office of Insurance Regulation
612 Larson Building
Tallahassee, Florida 32399-4206

STATEMENT OF THE ISSUE

The issue is whether Proposed Rule 69O-204.040 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On January 23, 2009, Petitioners filed a Petition to Determine the Invalidity of a Proposed Rule with the Division of Administrative Hearings (DOAH). The petition alleged that Proposed Rule 69O-204.040 (hereafter "the proposed rule") is an invalid exercise of delegated legislative authority. The case was initially assigned to Administrative Law Judge Suzanne F. Hood, but it was subsequently transferred to the undersigned.

The final hearing was scheduled for and held on February 19, 2009, in compliance with the expedited timeframes in Section 120.56, Florida Statutes.[1/] At the hearing, Petitioners presented the testimony of Eleanor Kitzman, Stancil Barton, Jr., and Robert Prentiss, and the deposition testimony of Matthew Janecek, and Respondents presented the testimony of Mr. Prentiss and the deposition testimony of Mr. Prentiss and Ms. Kitzman. Exhibits P-1 through P-8, R2 through R6, and R9 through R11, were received into evidence.[2/] Official recognition was taken of the Viatical Settlement Act codified in Part X of Chapter 626, Florida Statutes.

The Transcript of the final hearing was filed with DOAH on March 5, 2009. The parties were given ten days from that date to file proposed final orders (PFOs). The PFOs were timely filed and have been given due consideration.

On March 23, 2009, Petitioners filed a Motion to Reopen Case. Respondents filed a response to the motion on that same date. The response states that Respondents oppose reopening the case, but that they have no objection to the undersigned "taking judicial recognition or otherwise acknowledging the licensing status of Petitioner, Institutional Life Services (Florida) LLC . . . as a viatical settlement provider." The request to reopen the case is denied, but based upon the documents attached to Petitioners' motion, official recognition is taken of the fact that on March 20, 2009, the Office of Insurance Regulation (OIR) approved the application for licensure filed by Institutional Life Services (Florida), LLC (hereafter "ILS-Florida"), and that ILS-Florida is now a licensed viatical settlement provider, No. 09-800257957.

FINDINGS OF FACT

1. The Viatical Settlement Act codified in Part X of Chapter 626, Florida Statutes, is one of several statutes that provide for the regulation of viatical settlements in Florida.

2. A viatical settlement is the sale of a life insurance policy by its owner on the secondary market.[3/] The parties involved in the transaction are the viator, the viatical settlement broker, the viatical settlement provider, and the investor who purchases the policy.

3. The viator is the owner of the policy being sold. The viator is typically, but not always, the insured under the policy.

4. The viatical settlement broker is the person who solicits bids and negotiates the sale of the policy on behalf of the viator. In order to perform the services of a viatical settlement broker in Florida, a person must be a licensed life insurance agent, self-appoint him/herself with the Department of Financial Services (DFS), and pay the applicable fees to DFS.

5. The viatical settlement provider is the intermediary between the viatical settlement broker and the investor who purchases the policy. The viatical settlement provider presents the policy to potential investors; conveys the investors' bids to the viatical settlement broker; and, after a bid is accepted by the viator, performs the administrative functions necessary to complete the transaction.

6. Viatical settlement providers are licensed and regulated by OIR. Viatical settlement brokers are licensed and regulated by DFS, not OIR.

7. Petitioner ILS-Florida is a Delaware limited liability company owned by NFP Life Services, LLC (45.5 percent), Genworth Institutional Life Services, Inc. (45.5 percent), and GS Re Holdings, Inc. (nine percent).

8. NFP Life Services, LLC, is a wholly-owned subsidiary of National Financial Partners Corporation (NFP).

9. NFP Brokerage Agency is also a wholly-owned subsidiary of NFP. NFP Brokerage Agency employs licensed viatical settlement brokers in a number of states, including Florida.

10. The viatical settlement brokers working for NFP Brokerage Agency are considered to be "affiliated brokers" of ILS-Florida by virtue of NFP's ownership interest in both companies.

11. ILS-Florida was formed on September 8, 2008, "specifically for the purpose of doing business as a viatical settlement provider . . . in the State of Florida."

12. On or about October 29, 2008, ILS-Florida submitted to OIR an application for licensure as a viatical settlement provider. The application was still "pending" as of the date of the final hearing, but on March 20, 2009, OIR approved the application, and ILS-Florida is now a licensed viatical settlement provider, No. 09-800257957.

13. ILS-Florida's parent companies have another subsidiary -- ILS-Florida's "sister company" -- that is currently licensed as a viatical settlement provider in a number of states.

14. ILS-Florida intends to use a similar business plan in Florida that its sister company uses in the states where it is licensed. The business plan contemplates using only brokers

working for NFP Brokerage Agency for at least the first year of operation, although it is possible that ILS-Florida may use both affiliated and non-affiliated brokers from the outset.

15. ILS-Florida wants to be able to use brokers working for NFP Brokerage Agency because it considers them to be "higher-quality brokers" because they "have already agreed to a higher standard of compliance than is generally seen . . . in the industry." Also, because NFP Brokerage Agency already has a number of brokers involved in the viatical settlement business in Florida, its brokers represent a significant source of potential business for ILS-Florida.

16. The proposed rule will more likely than not preclude ILS-Florida from using affiliated brokers working for NFP Brokerage Agency because NFP has significant ownership interests in both companies.

17. Petitioner David Matthew Janecek is a resident of Texas. He works for a brokerage in Texas that is owned by NFP Brokerage Agency.

18. Mr. Janecek is licensed in Florida as a non-resident life insurance agent. His license, No. P161957, was issued on September 9, 2008.

19. Mr. Janecek is not, and never has been, a licensed viatical settlement broker in any state. He has not self-appointed himself as a viatical settlement broker with DFS, and

he has no present intention of acting as a viatical settlement broker in Florida.[4/]

20. Respondent Financial Services Commission (Commission) is the agency head responsible for the promulgation of the proposed rule. The Commission, which is comprised of the Governor and Cabinet, was created within DFS, but it is not subject to the control of DFS and it is effectively a separate agency from DFS.

21. Respondent OIR is an office under the Commission. OIR developed the proposed rule and will be responsible for implementing the rule.

22. Respondents published the proposed rule in the Florida Administrative Weekly (FAW) on September 26, 2008. A notice of change to the proposed rule was published in the FAW on December 24, 2008.

23. The parties stipulated that Respondents met all applicable rulemaking publication and notice requirements, and that the petition challenging the proposed rule was timely filed.

24. The proposed rule is titled "Prohibited Practices and Conflicts of Interest," and states:

> With respect to any viatical settlement contract or insurance policy, no viatical settlement provider knowingly may enter into a viatical settlement contract with a viator, if, in connection with such viatical

> settlement contract, anything of value will be paid to a viatical settlement broker that is controlling, controlled by, or under common control with such viatical settlement provider, financing entity or related provider trust that is involved in such viatical settlement contract.

25. The "specific authority" listed in the FAW notice for the proposed rule is Section 626.9925, Florida Statutes.

26. That statute authorizes the Commission to:

> 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. (Emphasis supplied).

27. The only language in the statute that Respondents are relying on as authorization for the proposed rule is the underlined language.

28. The FAW notice states that the "law implemented" by the proposed rule is Sections 626.9911(9), 626.9916(1), and 626.9916(5), Florida Statutes.

29. Section 626.9911(9), Florida Statutes, defines "viatical settlement broker" for purposes of the Viatical Settlement Act.

30. The definition includes the following language, which is also contained in Section 626.9916(5), Florida Statutes:

> 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.

31. Section 626.9916(1), Florida Statutes, prohibits any person other than a licensed life agent from performing the functions of a viatical settlement broker.

32. The text of the proposed rule was derived almost verbatim from Section 12.B. of the Viatical Settlements Model Act developed by the National Association of Insurance Commissioners (NAIC).

33. The “model acts” developed by NAIC are intended to be used by state legislatures in drafting statutes. NAIC also develops “model regulations” that are intended to be used by state regulatory agencies in drafting rules to implement the statutes.

34. The proposed rule prohibits a viatical settlement provider from entering into a viatical settlement contract involving a viatical settlement broker over which the provider has direct or indirect control.

35. The determination as to whether the viatical settlement provider has control over a viatical settlement broker will be made on a case-by-case basis applying the

definition of “control” contained in Proposed Rule 69O-204.020(1).

36. According to OIR, the proposed rule is intended to protect the viator by preventing the viatical settlement provider from using its control over the viatical settlement broker to induce or encourage the broker to breach his or her fiduciary duty to the viator.

37. It is undisputed that Florida law does not currently prohibit the practice prescribed by the proposed rule so long as the broker satisfies his or her fiduciary duty to the viator.

38. The proposed rule will prohibit transactions between affiliated viatical settlement providers and brokers, irrespective of whether the broker’s fiduciary duty to the viator has been breached. For example, if a broker recommends that a viator accept a bid for the policy from an affiliated provider that was not the highest bid, such action would constitute both a breach of the broker’s fiduciary duty and a violation of the proposed rule; however, if the bid from the affiliated broker was the highest bid for the policy, the broker’s recommendation to accept the bid would not constitute a violation of the broker’s fiduciary duty, but it would violate the proposed rule.

39. During the rulemaking process, OIR staff considered adding language to the proposed rule that would have allowed

affiliated providers and brokers to enter into viatical settlement contracts so long as certain disclosure requirements and other safeguards were met. The record does not reflect why this language was not included in the proposed rule published in the FAW, although it can be inferred from the e-mails received into evidence on this issue that OIR and/or the Commission did not feel compelled to add the language suggested by staff.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.56(2), Florida Statutes.

41. Petitioners have the burden to prove their standing to challenge the proposed rule. See Dept. of Health & Rehab. Servs. v. Alice P., 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979) ("The burden is . . . upon the challenger, when standing is resisted, to prove standing.").

42. To have standing, Petitioners must prove that they are "substantially affected" by the proposed rule, meaning that the application of the rule will result in a real and sufficient immediate injury in fact to Petitioners and that the interest affected is within the zone of interest to be protected or regulated by the proposed rule and the statute being implemented. See § 120.56(1)(a), Fla. Stat.; Board of Medicine

v. Fla. Academy of Cosmetic Surgery, Inc., 808 So. 2d 243, 250 (Fla. 1st DCA 2002).

43. ILS-Florida has standing because it will be directly regulated by the proposed rule. See Fla. League of Cities, Inc. v. Dept. of Environmental Reg., 603 So. 2d 1363, 1367 (Fla. 1st DCA 1992) ("It is not necessary for the League to elaborate how each member would be personally affected by the proposed rule, because a substantial portion of the League's members will be regulated by the rule.") (emphasis in original); Coalition of Mental Health Professions v. Dept. of Professional Reg., 546 So. 2d 27, 28 (Fla. 1st DCA 1989) ("The fact that appellant's members will be regulated by the proposed rules is alone sufficient to establish that their substantial interests will be affected and there is no need for further factual elaboration of how each member will be personally affected."). Also, the more persuasive evidence establishes that ILS-Florida will be substantially affected by the proposed rule in that the likely effect of the rule will be to preclude ILS-Florida from using affiliated brokers working for NFP Brokerage Agency, which, among other things, will deny ILS-Florida access to a potentially significant source of business in Florida.

44. The fact that ILS-Florida was at the time of the final hearing a license applicant, rather than a licensed viatical settlement provider does not undermine its standing. See, e.g.,

Jacoby v. Bd. of Medicine, 917 So. 2d 358, 360 (Fla. 1st DCA 2005) (potential future license applicant has standing to challenge agency rule that will affect his ability to work in Florida); Professional Firefighters of Fla., Inc. v. Dept. of Health & Rehab. Servs., 396 So. 2d 1194, 1195 (Fla. 1st DCA 1981) ("The APA permits prospective challenges to agency rulemaking and does not require that an affected party comply with the rule at his peril in order to obtain standing to challenge the rule.").

45. Likewise, the fact that Mr. Janecek is not a licensed viatical settlement provider (or an applicant for such a license) does not necessarily preclude him from having standing to challenge the proposed rule because the rule also affects the interests of viatical settlement brokers by limiting the providers with whom they can transact business. See Board of Medicine, 808 So. 2d at 251 ("A challenger to a rule may be 'substantially affected' by a rule, and thus, have standing to challenge it, even where the rule or promulgating statute does not regulate the challenger's profession per se."); Ward v. Bd. of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) (engineer had standing to challenge a proposed environmental permitting rule that did not directly regulate him but that would encroach on his engineering practice).

46. The fact that Mr. Janecek is a licensed life agent is not enough to give him standing. A life agent may only perform the functions of a viatical settlement broker by appointing himself or herself as such and by paying the applicable fees. See § 626.9916(2), Fla. Stat. Mr. Janecek has done neither of these things, and, therefore, the determination as to his standing turns on his intentions concerning licensure as a viatical settlement broker.

47. On this issue, the more persuasive evidence establishes that Mr. Janecek does not have any present intention to act as a viatical settlement broker in Florida. As a result, the impact of the proposed rule on Mr. Janecek is speculative, rather than immediate, and he, therefore, lacks standing to challenge the proposed rule. See generally Dept. of Offender Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978); Alice P., supra.

48. On the merits, Petitioners have the burden of going forward with respect to their objections to the proposed rule, but Respondents have the ultimate burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. See § 120.56(2)(a), Fla. Stat.; Southwest Fla. Water Mgmt Dist. v. Charlotte County, 774 So. 2d 903, 908 (Fla. 2d DCA 2001); St. Johns River Water Mgmt. Dist. v.

Consolidated-Tomoka Land Co., 717 So. 2d 72, 76-77 (Fla. 1st DCA 1998), superseded on other grounds by Ch. 99-379, Laws of Fla.

49. The proposed rule is not presumed to be valid or invalid. See § 120.56(2)(c), Fla. Stat.

50. Petitioners contend that the proposed rule is an invalid exercise of delegated legislative authority under paragraphs (b), (c), (d), (e), and (f)[5/] of Section 120.52(8), Florida Statutes. The undersigned agrees that the proposed rule is invalid under paragraphs (b) and (c), as discussed below.

51. A proposed rule is invalid under Section 120.52(8)(b), Florida Statutes, if the agency "exceeded its grant of rulemaking authority."

52. "Rulemaking authority" is the statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create the proposed rule. See § 120.52(17), Fla. Stat. The purported rulemaking authority for the proposed rule must be listed in the rulemaking notice published in the FAW. See §§ 120.52(8)(b), 120.54(3)(a)1., Fla. Stat.

53. Section 120.52(8)(b), Florida Statutes, "pertains to the adequacy of the grant of rulemaking authority." See Consolidated-Tomoka, 717 So. 2d at 81. In essence, it prohibits an agency from adopting rules on a subject that the Legislature

has not given the agency specific statutory authority to regulate.

54. Statutory language granting rulemaking authority is to be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute, and an agency may only adopt rules that implement or interpret the specific powers and duties granted by the enabling statute. See §§ 120.52(8), 120.536(1), Fla. Stat. An agency does not have the authority to implement statutory provisions setting forth general legislative intent or policy. Id.

55. As stated in Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000):

> the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. [T]his question is one that must be determined on a case-by-case basis.

Id. at 599 (emphasis in original).

56. Similarly, in Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), the court explained that:

> 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 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.

Id. at 700 (emphasis supplied).

57. The general authority provided to the Commission in Section 626.9925, Florida Statutes, to "adopt rules to administer [the Viatical Settlement Act]" is insufficient to meet the requirements of Sections 120.52(8)(b) and 120.536(1), Florida Statutes. See Dept. of Highway Safety & Motor Vehicles v. JM Autos, Inc., 977 So. 2d 733, 734 (Fla. 1st DCA 2008) (affirming final order invalidating an agency rule based upon similarly non-specific statutory language). Accord Life Ins. Settlement Ass'n v. Office of Ins. Regulation, Case No. 08-1645RP, at ¶ 32 (DOAH Sep. 12, 2008) ("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.").

58. Nothing else in Section 626.9925, Florida Statutes -- including the authority to "adopt rules . . . defining terms used in [the Viatical Settlement Act]" -- specifically authorizes Respondents to adopt rules governing the relationship

between viatical settlement providers and brokers. Therefore, the proposed rule exceeds the grant of rulemaking authority in Section 626.9925, Florida Statutes.

59. On this point, it is noteworthy that the model act from which the language of the proposed rule was derived contained specific authority to adopt rules "governing the relationship and responsibilities of both insurers and viatical settlement providers, viatical settlement brokers and viatical settlement investment agents during the viatication of a life insurance policy or certificate." See Exhibit R-11, at page 697-38, § 17.E. The Viatical Settlement Act codified in Part X of Chapter 626, Florida Statutes, does not contain this language or anything similar to it.

60. The proposed rule also exceeds Respondents' rulemaking authority because it seeks to prohibit practices that are currently allowed by Florida law, which is something that only the Legislature can do in the first instance. See B.H. v. State, 645 So. 2d 987 (Fla. 1994) (separation of powers doctrine prohibits the delegation of authority to an agency to "say what the law is" because such fundamental policy decisions must be made by the Legislature). And cf. Day Cruise Ass'n, 794 So. 2d at 705-06 (Browning, J., concurring) (explaining that the agency's authority to regulate certain activities did not include the authority to prohibit otherwise lawful activities).

61. A rule is invalid under Section 120.52(8)(c), Florida Statutes, if it "enlarges, modifies, or contravenes the specific provision of law implemented."

62. The "law implemented" is the language of the enabling statute being carried out or interpreted by an agency through rulemaking. See § 120.52(9), Fla. Stat. The law purportedly being implemented by the proposed rule must be listed in the rulemaking notice published in the FAW. See §§ 120.52(8)(c), 120.54(3)(a)1., Fla. Stat.

63. Section 120.52(8)(c), Florida Statutes, "relates to the limitations imposed by the grant of rulemaking authority." See Consolidated-Tomoka, 717 So. 2d at 81. In essence, it prohibits an agency from adopting rules that go beyond -- "enlarges" -- or conflict with -- "modifies or contravenes" -- the statute being implemented.

64. The statutes purportedly being implemented by the proposed rule impose a fiduciary duty on viatical settlement brokers; the statutes do not impose any requirements or restrictions on viatical settlement providers. See §§ 626.9911(9), 626.9916(5), Fla. Stat. The proposed rule modifies and enlarges these statutes by prohibiting viatical settlement providers from engaging in viatical settlement transactions with certain brokers, even if the transaction would not violate the broker's fiduciary duty.

65. A proposed rule is invalid under Section 120.52(8)(d), Florida Statutes, if it is "vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency."

66. A rule is vague if it "requires performance of an act in terms that are so vague that men of common intelligence must guess at its meaning." Southwest Fla. Water Management Dist., 774 So. 2d at 915. See also Cole Vision Corp. v. Dept. of Business & Professional Reg., 688 So. 2d 404 (Fla. 1st DCA 1997).

67. The proposed rule is not vague. The operative terms -- "controlling, controlled by, or under common control" -- are sufficiently clear and provide adequate guidance to those regulated by the rule as to the type of transactions that are prohibited. Indeed, the term "control" is specifically defined in Proposed Rule 69O-204.020(1).

68. The proposed rule does not fail to establish adequate standards for agency decisions or vest unbridled discretion in the agency. The determination as to whether a viatical settlement broker is controlled by or under common control with the viatical settlement provider is necessarily a fact-based determination, and the definition of "control" in Proposed Rule 69O-204.020(1) provides sufficient standards for that determination to be made and reviewed. Cf. Environmental Trust

v. Dept. of Environmental Protection, 714 So. 2d 493, 498 (Fla. 1st DCA 1998) (recognizing that rules cannot possibly address every possible factual situation and that the application of a rule to a particular set of facts is a matter best left to the adjudication process under Section 120.57, Florida Statutes).

69. A rule is invalid under Section 120.52(8)(e), Florida Statutes, if it is "arbitrary or capricious."

70. "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." § 120.52(8)(e), Fla. Stat. See also Board of Medicine, 808 So. 2d at 255; Board of Clinical Laboratory Personnel v. Fla. Ass'n of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); Agrico Chemical Co. v. Dept. of Environmental Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1979).

71. The proposed rule is not arbitrary or capricious simply because it has the effect of prohibiting transactions between affiliated providers and brokers in circumstances where the broker has satisfied his or her fiduciary duty to the viator. Section 120.52(8)(e), Florida Statutes, does not preclude an agency from "over-regulating" to address a real or perceived problem that the agency has authority to address through rulemaking. Rather, it is Section 120.52(8)(f), Florida Statutes, that effectively precludes an agency from imposing

more extensive and more costly regulatory restrictions than are necessary to accomplish its objectives.

72. Thus, the mere fact that the proposed rule will preclude transactions that would not constitute a breach of the viatical settlement broker's fiduciary duty does not make the rule irrational or illogical. Indeed, it is not at all unreasonable for Respondents to be concerned that a viatical settlement broker who is directly or indirectly subject to the control of the provider might have a greater possibility of being influenced to breach his or her fiduciary duty to the viator. The increased possibility that a broker might breach his or her fiduciary duty based upon the affiliation with the provider is what the proposed rule was intended to prohibit, and is a legitimate and sufficient rationale to prohibit all transactions between affiliated brokers and providers.

73. Therefore, the proposed rule is not invalid under Section 120.52(8)(e), Florida Statutes.

74. A rule is invalid under Section 120.52(8)(f), Florida Statutes, if it "imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives."

75. A rule cannot be declared invalid under Section 120.52(8)(f), Florida Statutes, unless a good faith written

proposal for a lower cost regulatory alternative to the proposed rule is submitted to the agency in accordance with Section 120.541(1)(a), Florida Statutes. See § 120.541(1)(c), Fla. Stat.

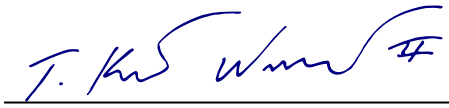
76. There is no evidence that Petitioners or anyone else submitted such a proposal to Respondents, and as a result, the proposed rule cannot be declared invalid under Section 120.52(8)(f), Florida Statutes.

ORDER

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

ORDERED that Proposed Rule 690-204.040 is an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 30th day of March, 2009, in Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of March, 2009.

ENDNOTES

[1/] All statutory references are to the 2008 version of the Florida Statutes.

[2/] Exhibit R5, Mr. Prentiss' deposition, was received subject to Respondents designating those portions of the deposition that are not duplicative of Mr. Prentiss' testimony at the final hearing. See Transcript, at 142-46; § 120.569(2)(g), Fla. Stat. (providing for the exclusion of "unduly repetitious evidence"). No designation was filed by Respondents, and neither party cited to Mr. Prentiss' deposition in their PFO. Therefore, Exhibit R5 has not been considered.

[3/] Technically, in the viatical settlement industry, the term "viatical settlement" refers to the sale of a life insurance policy insuring a person who is expected to live less than two years after the sale, whereas the term "life settlement" refers to the sale of a life insurance policy insuring a person who is expected to live more than two years after the sale. This distinction is not reflected in the Viatical Settlement Act; the definition of "viatical settlement contract" in Section 626.9911(10), Florida Statutes, broadly encompasses both types of transactions.

[4/] See Exhibit P-7, at 15, 16. Mr. Janecek testified that his plans could change, but that testimony was equivocal and not persuasive. For example, when asked by his attorney whether his intent to act as a viatical settlement broker in Florida "would . . . change" if ILS-Florida was licensed in Florida as a viatical settlement provider, he testified only that "it could at that time." Id. at 22 (emphasis supplied).

[5/] The petition did not allege that the proposed rule was invalid under Section 120.52(8)(f), Florida Statutes, but that paragraph was referenced by Petitioners in the Joint Pre-hearing Stipulation and at the final hearing. Petitioners did not mention Section 120.52(8)(f), Florida Statutes, in their PFO and, therefore, are deemed to have abandoned this issue to the extent it may have been tried by consent. Nevertheless, in an abundance of caution, the proposed rule's validity under Section 120.52(8)(f), Florida Statutes, is addressed in this Final Order.

COPIES FURNISHED:

Brian A. Newman, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 South Monroe Street, Second Floor
Post Office Box 10095
Tallahassee, Florida 32302-2095

Steven H. Parton, General Counsel
Office of Insurance Regulation
Financial Services Commission
200 East Gaines Street
Tallahassee, Florida 32399-4206

S. Marc Herskovitz, Esquire
Office of Insurance Regulation
Legal Services Office
200 East Gaines Street
Tallahassee, Florida 32399-0333

Kevin M. McCarty, Commissioner
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-0305
Honorable Alex Sink
Chief Financial Officer
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

Benjamin Diamond, General Counsel
Department of Financial Services
The Capitol, Plaza Level 11
Tallahassee, Florida 32399-0300

F. Scott Boyd, Esquire
Executive Director and General Counsel
Joint Administrative Procedure Committee
120 Holland Building
Tallahassee, Florida 32399-1300

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

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 one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second 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.