

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GUARANTEE TRUST LIFE )  
INSURANCE COMPANY, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-5827RU  
 )  
FINANCIAL SERVICES )  
COMMISSION AND OFFICE )  
OF INSURANCE REGULATION, )  
 )  
Respondents. )  
\_\_\_\_\_ )

FINAL ORDER

On December 12, 2011, a duly-noticed hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Stephen H. Thomas, Jr., Esquire  
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### STATEMENT OF THE ISSUE

Whether the Amended Notice and Order to Show Cause issued in DOAH Case Number 11-1150, with which this unadopted rule challenge is now consolidated, contains an agency statement that comes within the definition of a rule but has not been adopted through rulemaking procedures, in violation of section 120.54(1)(a), Florida Statutes, and if so, whether costs and attorney's fees should be awarded.

### PRELIMINARY STATEMENT

On January 12, 2011, the Office of Insurance Regulation (Office) filed an Administrative Complaint against Guarantee Trust Life Insurance Company (GTL) alleging violations of various provisions of the Florida Insurance Code, directing GTL to cease and desist, and ordering GTL to show cause as to why its certificate of authority should not be suspended or revoked and why penalties should not be imposed. GTL requested an administrative hearing and the matter was referred to the Division of Administrative Hearings on March 3, 2011. The case was assigned Case Number 11-1150 and assigned to Administrative Law Judge Lawrence P. Stevenson. On August 30, 2011, the case was transferred to the undersigned.

The Office filed a Motion for Protective Order on August 30, 2011, seeking to have any discovery as to the penalties being sought by the Office barred because discussions as to the

penalties to be sought were conducted between representatives of the Office and its legal counsel. The Motion for Protective Order was denied, on the ground that it was overly broad, as only communications from counsel to client or client to counsel are privileged, and upon representations from GTL that the privilege would be respected in further discovery.

The Office filed an Unopposed Motion to Amend Notice and Order to Show Cause on September 1, 2011, which was granted. Earlier counts alleging failure of GTL to offer converted policies were amended to allege that GTL issued the termination letter without offering conversion policies, as discussed further below, and new counts were added alleging that the termination letter sent out to covered persons was misrepresentative, deceptive, or misleading.

On November 2, 2011, the Office filed a Motion to Compel Discovery seeking the names and contact information for all persons covered under the group policy that had been issued by GTL to Consumer Benefits Association of America. The Motion to Compel was denied as not being reasonably calculated to lead to the discovery of evidence relevant to the amended charges of issuing the termination letter without offering conversion policies or issuing a termination letter that was misrepresentative, deceptive or misleading.

On November 15, 2011, GTL filed a Petition to Challenge Unadopted Rule against the Financial Services Commission and the Office of Insurance Regulation alleging that the Amended Notice and Order to Show Cause contained a policy statement of general applicability, which was assigned Case Number 11-5827RU. GTL's Motion to Consolidate was granted on December 7, 2011.

At hearing, Joint Exhibits J-1 through J-5 and J-7, J-8, and J-10 were admitted. Two pages of Exhibit J-9 were excluded as being beyond the scope of the agreement between the parties to admit communications regarding the market investigation, and on grounds of relevancy, but the remainder of Exhibit J-9 was admitted. The Office presented the testimony of Mr. Gary Edenfield for the Office and Mr. Allan Heindl of GTL, and offered Office Exhibit O-1, which was admitted over objection that it was unduly repetitious, and O-2, which was admitted without objection. Exhibit O-3 was late-filed by agreement, and was admitted without objection. GTL presented testimony from Mr. Heindl and offered two exhibits, G-2 and G-3, which were admitted without objection.

The Transcript was filed on January 12, 2012. After GTL's Unopposed Motion to Extend the Deadline to Submit Proposed Recommended and Final Orders was granted, proposed orders were timely submitted by both parties on February 17, 2012, and were considered. The Recommended Order for the Administrative Complaint and this Order were issued concurrently.

## FINDINGS OF FACT

1. The Financial Services Commission has responsibility over rules implementing provisions of the Florida Insurance Code conferring duties upon the Commission or its subunits.

2. The Office of Insurance Regulation (the Office) is a subunit of the Financial Services Commission responsible for enforcing the provisions of the Florida Insurance Code with respect to licensees of the Office.

3. Guarantee Trust Life Insurance Company (GTL) is a foreign insurer, domiciled in Illinois, which holds a certificate of authority to transact business as a life and health insurer in Florida. GTL offers insurance products nationwide, except for New York, including Medicare long-term care, supplemental, cancer, college student, accident, and sickness policies.

4. GTL is subject to the jurisdiction of the Office under the Florida Insurance Code, including fines and disciplinary actions. It is substantially affected by the Office's action and is entitled to a hearing to determine if the Administrative Complaint filed against it constitutes an unadopted rule.

5. On or about May 5, 2010, GTL sent a Termination Letter to at least 216 Florida residents (Members) covered under an out-of-state group major medical policy (Policy), as well as to about 70 Florida residents who held individual policies offered by GTL.<sup>1/</sup> The Termination Letter advised

that major medical coverage would not be renewed and that GTL would no longer be offering major medical type coverage.

6. On January 12, 2011, the Office served GTL with a Notice and Order to Show Cause alleging that GTL had violated the Florida Insurance Code by continuing to non-renew policies and failing to offer converted policies.

7. A conversion policy is a form of replacement insurance coverage for which certificate holders in a group policy may be eligible when their coverage under a group policy is terminated.

8. On January 28, 2011, GTL filed a Petition for Administrative Hearing with the Office. It amended that Petition on February 1, 2011, still maintaining that it was not required to offer conversion policies.

9. On September 2, 2011, an Order was issued granting the Office's Unopposed Motion to Amend Notice and Order to Show Cause. Counts I and II of the earlier complaint were amended. The earlier complaint had charged in these counts that "Guarantee Trust violated the Florida Insurance Code by failing to offer converted policies as required by Section 627.6675, Florida Statutes." Amended counts I and II alleged that "Guarantee Trust violated the Florida Insurance Code by issuing the Termination Letter without offering converted policies required by the Florida Insurance Code and Section 627.6675, Florida Statutes."

10. On November 15, 2011, GTL filed a Petition to Challenge Unadopted Rule. The Petition was served on the Office more than 30 days before it was filed with the Division of Administrative Hearings, as stipulated at hearing.

11. The Financial Services Commission has not adopted the statement that it was a violation of provisions of the Florida Insurance Code for GTL to "issue a termination letter without offering converted policies as required by Section 627.6675," or any similar statement, by rulemaking procedures.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this proceeding pursuant to sections 120.56(4), 120.569 and 120.57(1), Florida Statutes (2011).<sup>2/</sup>

13. Sections 20.121(3)(c) and 624.308(1), Florida Statutes, grant rulemaking authority to the members of the Financial Services Commission as agency head to implement provisions of law conferring duties upon the Commission or its subunits. Under sections 20.121(3)(a)1. and 624.307, the Office is a subunit of the Commission responsible for enforcing the provisions of the Florida Insurance Code and implementing rules that have been adopted by the Commission with respect to licensees of the Office.

14. GTL is a "person" within the meaning of section 626.9511, Florida Statutes, and is subject to the jurisdiction and regulation of the Office pursuant to the Florida Insurance Code.

15. An agency statement that comes within the definition of a rule must be adopted according to rulemaking procedures. Envtl. Trust, Inc. v. Dep't of Env'tl. Prot., 714 So. 2d 493 (Fla. 1st DCA 1998); Christo v. Dep't of Banking & Fin., 649 So. 2d 318 (Fla. 1st DCA 1995). Section 120.54(1)(a) provides in relevant part:

Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

16. Subsection 120.56(4) provides that a person substantially affected by an agency statement that comes within the definition of a rule, but which has not been adopted by rulemaking procedures, may challenge that statement.

17. In order to prove that it has standing, GTL must show that 1) the agency statement of policy will result in a real or immediate injury in fact; and 2) the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Medicine, 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

18. GTL has standing to bring this proceeding pursuant to paragraph 120.56(4)(a). The statement at issue appeared in the Amended Notice and Order to Show Cause directed at GTL by the Office pursuant to its regulatory authority. GTL could suffer



suspension or revocation of its certificate of authority or the imposition of fines.

19. Under subsection 120.56(4), a Petitioner has the burden to prove that the statement constitutes a rule and that the agency has not adopted the statement by rulemaking procedures. S.W. Fla. Water Mgmt. Dist. v. Charlotte Co., 774 So. 2d 903, 908 (Fla. 2d DCA 2001). Under section 120.56(4)(b), the burden to prove that rulemaking is not feasible or not practicable then falls upon the agency.

20. The Financial Services Commission has not adopted the statement contained in Counts I and II, or any similar statement, by rulemaking procedures, as it stipulated. The issue here, then, is whether or not the statement constitutes a rule.

21. Subsection 120.52(16) defines "rule" in relevant part as follows:

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

22. An agency statement is "generally applicable" if it is intended by its own effect to create rights, or to require compliance, or otherwise have the direct and consistent effect of law. Coventry First, LLC v. Office of Ins. Reg., 38 So. 3d 200

(Fla. 1st DCA 2010)(quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 581 (Fla. 1st DCA 1977)).

23. The language "Guarantee Trust violated the Florida Insurance Code by issuing the Termination Letter without offering converted policies required by the Florida Insurance Code and Section 627.6675, Florida Statutes" asserts that the alleged facts constitute a facial violation of a statute by GTL.

24. Whether or not the Office is able to prove that GTL in fact issued the Termination Letter without offering converted policies, and if so, that this is a violation of the statute<sup>3/</sup> has no bearing on whether or not the language in Counts I and II constitutes an unadopted rule.

25. The language used in Counts I and II does not contain any "interpretations" or "explanations" that could reasonably be construed as a statement of the Office intended to have its own direct and consistent effect. The language instead simply attempts to apply a policy statement enacted into law by the Florida Legislature to a set of facts in the context of a specific adjudication. An Administrative Complaint alleging a facial violation of a statute or existing rule is not a statement of agency policy that constitutes an unadopted rule. United Wis. Life Ins. Co. v. Fla. Dep't of Ins., 831 So. 2d 239, 240 (Fla. 1st DCA 2002). The language of section 120.57(1)(e), which provides that the prohibition on basing agency action on an unadopted rule

"does not preclude application of adopted rules and applicable provisions of law to the facts," is in harmony.

26. GTL proved that the Financial Services Commission has not adopted the statement pursuant to rulemaking procedures, but failed to prove that the statement meets the definition of a rule. GTL thus failed to prove any violation of paragraph 120.54(1)(a).

27. Paragraph 120.595(4)(a) provides for the award of reasonable costs and reasonable attorney's fees only upon a determination that all or part of an agency statement violates paragraph 120.54(1)(a). No unadopted rule was found in this case.

FINAL ORDER

Upon consideration of the above findings of fact and conclusions of law, it is

ORDERED:

That Guarantee Trust Life Insurance Company's Petition to Challenge Unadopted Rule is dismissed.

DONE AND ORDERED this 16th day of March, 2012, in Tallahassee, Leon County, Florida.

*F. Scott Boyd*

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Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of March, 2012.

ENDNOTES

<sup>1/</sup> Many facts leading up to, and following, the Letter of Termination are set forth in detail in the Recommended Order. They were not deemed relevant to this Order and so are not reiterated here, but for purposes of appeal, are hereby incorporated and made a part of this Order by reference.

<sup>2/</sup> All references to statutes and rules are to the versions in effect in 2011, the time the statement alleged to be an unadopted rule was issued as part of the Amended Notice and Order to Show Cause, except as otherwise indicated.

<sup>3/</sup> As discussed in detail in the Recommended Order entered in this consolidated case, GTL contends that its failure to notify Members of their conversion rights does not violate section 627.6675, because the only notification required by that statute is the notification contained in the Policy itself. The Office contends that section 627.6675 requires GTL to offer a conversion policy and that the Termination Letter illegally revoked this offer, in violation of the statute. No matter how these legal issues are resolved, they concern only the legal requirements of the statute, not "requirements" contained in any agency statement.

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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 one copy of a Notice of Administrative 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.