

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT STATE OF FLORIDA

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FIRST DISTRICT

Allstate Floridian Insurance
Company, et al.,

Appellants,

v.

Case No.: 1D08-275
Lower Case No.: 91774-07

Office of Insurance Regulation,

Appellee.

OFFICE'S RESPONSE TO SHOW CAUSE ORDER
ISSUED BY THE COURT ON JANUARY 18, 2008¹

The Office of Insurance Regulation ("the Office") opposes the order staying the Office's Immediate Final Order ("IFO") (Office's Appendix Tab 1), suspending the Certificates of Authority for Allstate Floridian Insurance Company, Allstate Indemnity Company, Allstate Property and Casualty Insurance Company, Allstate Insurance Company, Allstate Floridian Indemnity Company, Allstate Fire and Casualty Insurance Company, Encompass Insurance Company of America, Encompass Indemnity Company, Encompass Floridian Insurance Company, and

¹ The Office has not been served with the Appellants' Emergency Motion for Immediate Relief from Immediate Final Order Suspending Licenses that was filed with this Court on January 17, 2008 and which the Court relied upon in staying the Office's IFO on January 18, 2008. The Office received Appellants' Corrected Emergency Motion for Immediate Relief from Immediate Final Order Suspending Licenses ("Corrected Motion") on January 18, 2008. The Office, in responding to this Court's Show Cause Order, will be referring to the Corrected Motion.

Encompass Floridian Indemnity Company (“Allstate” or “Appellants”) for the following reasons:

1. The standard for reviewing a request for stay, requires the Office to state facts sufficient to demonstrate that allowing Appellants to continue operating as licensees “would constitute a probable danger to the health, safety, or welfare of the state”². (Emphasis added).

2. Appellants’ Corrected Motion fails to address the Office’s finding in the IFO that Allstate’s unlawful conduct and willful disobedience of the Florida Insurance Code is a threat to the health, safety and welfare of Florida citizens. (Office’s Appendix Tab 2). By failing to freely produce documents to the Office as required by §624.318(2), Fla. Stat. (2007), the Appellants are engaged in an on-going violation of the Florida Insurance Code and thus an on-going crime³ that in and of itself threatens safety and welfare of Florida citizens that is sufficient grounds for issuance of the IFO. The IFO seeks to bring Appellant into compliance with the Florida Insurance Code and to put an end to Allstate’s continuing unlawful conduct without injuring current policyholders.

3. Contrary to Appellants’ claim that they had no hearing or opportunity to address this matter, the Agency Head⁴ presided over an Investigative Hearing

² §120.68, Fla. Stat. (2007) and Fla. R. App. P. 9.190(e)(2)(B).

³ §624.15, Fla. Stat. (2007).

⁴ §20.121(3)(a)1 and (c), Fla. Stat. (2007).

(“Hearing”) on January 15, 2008 at which Allstate was directed to produce the documents set out in attachment “A” of the Office’s subpoena duces tecum. (Office’s Appendix Tab 3). At that Hearing, Appellants had the opportunity to comply with Florida law by producing competent knowledgeable witnesses on the subpoenaed topics and by freely producing subpoenaed documents. Allstate had the opportunity under oath, before the Agency Head, to respond to the Office’s concerns regarding their failure to produce the documents requested. Instead, it became abundantly clear that Allstate’s corporate representatives were unaware of what documents, if any, had been produced to the Office, had no reasonable explanation for their failure to make the requested documents freely available, and were otherwise unprepared to answer questions as directed by the Office’s subpoenas. The Office noted that Appellants failed to produce any of the subpoenaed documents at the Hearing. (Office’s Appendix Tab 4 including page 24, line 24 through page 25, line 6, and page 41, line 1 through 9).

4. Based upon the failure of Allstate to produce the requested documents and the testimony given at the Hearing regarding that failure, the Office issued the IFO finding that Appellants’ purposeful failure to freely produce documents to the Office, constituted a willful violation of the Florida Insurance Code⁵ and therefore

⁵ §624.318(2), Fla. Stat. (2007).

a crime⁶, the continuing nature of which is in and of itself a threat to the health, safety and welfare of Florida citizens.

5. Despite Appellants' mischaracterizations of the Office's IFO, the IFO does state with particularity the facts underlying the Office's decision to suspend the Certificates of Authority of the Appellants. Those facts demonstrate a willful violation of the Florida Insurance Code by Allstate. (Office's Appendix Tab 4, for example see paragraphs 9, 11, 12, 13, 16, 17, 18, 19, 21, 22, 24, 25, 26 and 29).

6. Appellants misconstrue their failure to comply with the Florida Insurance Code as nothing more than a discovery dispute; however, it is much more than that. It is an on-going crime, an on-going violation of Florida law⁷ and harmful to Florida consumers. The Office is not engaged in discovery.

7. Unlike the agencies in many of the cases cited by Appellants, the Office has specific statutory authority, requiring regulated entities to freely make available all documents sought by the Office regarding its investigation. That authority is not limited to those documents which are not privileged, not confidential or not subject to a claim of a trade secret. *See* §624.318(2), Fla. Stat. (2007). Absent assertions of a privilege against self-incrimination by a natural

⁶ §624.15, Fla. Stat. (2007).

⁷ Section 624.11(1), Fla. Stat. (2007), provides that: "No person shall transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, without complying with the applicable provisions of this code."

person, the only privilege recognized by the legislature in the Florida Insurance Code, insurers, including their attorneys, are required to make documents freely available to the Office for its investigation. *See* §§624.318(2) and 624.322(1), Fla Stat. (2007).

8. Appellants state that the “Allstate Companies have attempted and are continuing in good faith to respond to the subpoenas and produce as best they can and as quickly as is practicable the huge volumes of documents requested by the OIR.” (Office’s Appendix Tab 2 page 3). Nothing could be further from the truth. Over the three (3) month period since the Office issued its subpoenas to Appellants, they have produced sixteen (16) boxes of documents to the Office that included prior rate filings already in the possession of the Office and documents with missing pages. (Office’s Appendix Tab 1). Moreover, Allstate falsely marked as “Trade Secret” many documents, including prior rate filings, which were already in the Office’s possession and available on the internet.⁸

9. Despite multiple representations over the last three (3) months and again at the Hearing by both Appellants’ counsel and corporate representatives that they intend to fully cooperate and provide the Office with the requested

⁸ The Respondents labeled documents as trade secret here, even though they had knowledge that some of the documents were already documents in the public domain. The Respondents’ representatives admitted during the public hearing that the Respondents’ claim of trade secret was not appropriately raised. (Office’s Appendix Tab 4, pages 44 through 45).

documents, they have not. (Office's Appendix Tab 4 page 10, lines 5 through 20 and page 37 lines 6 through 11).

10. The Affidavit of Maria S. Doughty, Managing Counsel of Allstate Insurance Company, states that: "Since October 16, 2007 Allstate employees have expended over 2000 personnel hours in searching for documents, preparing documents for production and in producing the documents to OIR." In proper context, 2000 personnel hours is equivalent to 285 days. The Office finds it remarkable that it has taken Allstate the equivalent of 285 days to produce 16 boxes of documents to the Office. The question remains, how many boxes of responsive documents have Appellants withheld in reliance on their improper objections. (Office's Appendix Tab 5).

11. Contrary to Appellants' statement that it "would produce documents responsive to categories 1-38 in the subpoenas...", Allstate's objections actually state that it "will produce certain documents responsive to" the Office's subpoenas. (Emphasis added to "certain") (Office's Appendix Tab 2 page 6 and Tab 6). Such qualified production is unacceptable and in violation of Florida law. Allstate is a regulated entity and cannot be allowed to dictate to the Office what it will produce in response to the Office's subpoenas.

12. Allstate's corporate spokesman, Adam Shores, while discussing this Court's imposition of the Stay, stated that Allstate would "continue" to comply

with McCarty's subpoena, to a point." (Emphasis added) This statement reflects that contrary to their earlier promises at the Hearing, Allstate has no intention of fully complying with the Office's subpoenas. (Office's Appendix Tab 7).

13. In issuance of its IFO, the Office concluded that in order to prevent public harm, time is of the essence in ensuring the prompt and full compliance with the Florida Insurance Code. (Office's Appendix Tab 1 paragraphs 23 through 25).

14. Appellants rely on *UNIMED v. Office of Insurance Regulation*, 884 So.2d 963 (Fla. 1st DCA 2004), and similar cases for the proposition that it is not sufficient to support the issuance of an immediate final order for an agency merely to allege a statutory violation. Similar to the IFO herein, the Office in *UNIMED* found that *UNIMED's* failure to be licensed, a violation of the Florida Insurance Code, by itself constituted an immediate danger to the public health, safety and welfare to the people of Florida. This Court, in setting aside the Office's order, held that "the order must contain a factual recitation sufficient to demonstrate the existence of an imminent threat of 'specific incidents of irreparable harm to the public interest' requiring the use of the extraordinary device afforded by section 120.569(2)(n)" *Id* at 964.

15. However, in the very next legislative session the legislature made it very clear that a statutory violation of the Florida Insurance Code, the failure to be licensed, is sufficient for the issuance of an immediate final order by enacting

§626.901(5), Fla. Stat. (2007). Section 626.901(5), Florida Statutes, provides in part that “(t)he Legislature finds that a violation of this section constitutes an imminent and immediate threat to the health, safety and welfare of the residents of this state.” The facts set out in the IFO clearly demonstrate Allstate’s continuing unlawful conduct in violation of the Florida Insurance Code similar to the prohibited conduct set out in §626.901, Fla. Stat. (2007). There can be no more clearer threat to the safety and welfare of the public than a continuing willful violation of the law.

16. Appellants also rely on *Carrow v. Department of Professional Regulation*, 453 So2d 842, (1 DCA 1984), to support its assertion that the only remedy for the failure of Allstate to freely provide the requested documents is to seek enforcement of its subpoenas pursuant to §624.321(2), Florida Statutes. *Carrow*, however, was specifically limited to its facts when this Court stated “(w)e think that under the facts of this case” and is otherwise inapplicable. *Id* at 843. The statutes that governed the proceedings in *Carrow* did not, unlike here, require Dr. Carrow, a licensed medical doctor, to freely make available the documents sought by the Department of Professional Regulation. The failure of Dr. Carrow, unlike here, to make the requested documents freely available did not violate Florida law. Nor was Dr. Carrow subject to suspension for failing to make the documents freely available because it violated the governing law as is Allstate.

The Office is clearly not limited by the Florida Insurance Code to one remedy if an insurer fails to comply with its subpoenas and in doing so is in violation of the Florida Insurance Code.

17. Appellants also cite to cases⁹ in which agencies chose to go to circuit court to enforce their subpoenas. The case before us is therefore in an altogether different posture from the circumstances presented in those cases relied on by Allstate. None of those entities were required to make freely available to the agencies all of their books, records and documents as insurers are required pursuant to §624.318(2), Fla Stat. (2007).

18. Appellants criticize the Office's IFO, citing cases for the proposition that public interest concerns weigh heavily in favor of staying the Office's suspension of Appellant's Certificates of Authority. Essentially, Appellants rely on these cases as authority for seeking a ruling from this Court that during the pendency of their appeal, they should be permitted to operate as usual while engaging in unlawful conduct. Such an illogical conclusion is not supported by public policy or the law.

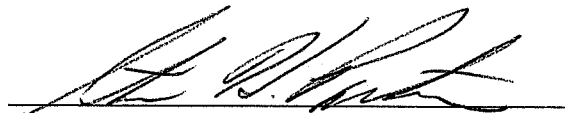
19. Section 624.418(2), Florida Statutes, gives the Office the discretion to suspend or revoke an insurer's Certificate of Authority when the insurer violates the

⁹ *Check 'N Go of Florida, Inc. v. State*, 790 So.2d 454 (Fla. 5th DCA 2001); *Advance America v. State*, 801 So.2d 310 (Fla. 1st DCA 2001); and *Bayfront Medical Center, Inc. v. State, Agency for Healthcare Administration*, 741 So.2d 1226 (Fla. 2d DCA 1999).

Florida Insurance Code. This power is not taken lightly by the Office. The Office is mindful of the impact the suspensions have on Allstate and its agents, however, the length of the suspension imposed by the Office is in Appellants' hands. The Office narrowly tailored the IFO so as to not unnecessarily disrupt the marketplace and to bring Appellants into compliance with Florida law and to stop Allstate's ongoing unlawful conduct.

WHEREFORE, the Office moves this Court for entry of an Order lifting the stay of the Office's Immediate Final Order.

Respectfully submitted this 23rd day of January, 2008.

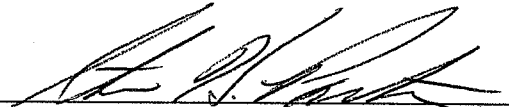


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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the Office's Response to Show Cause Order and Appendix thereto has been furnished by hand delivery to David A. Yon, Esq., Radey, Thomas, Yon & Clark, P.A., 301 S. Bronough Street, Suite 200, Tallahassee, Florida 32301-1722; Harry O. Thomas, Esq., Radey, Thomas, Yon & Clark, P.A., 301 S. Bronough Street, Suite 200, Tallahassee, Florida 32301-1722; and Elizabeth McArthur, Esq., Radey, Thomas, Yon & Clark, P.A., 301 S. Bronough Street, Suite 200, Tallahassee, Florida 32301-1722 on this 23rd day of January, 2008.

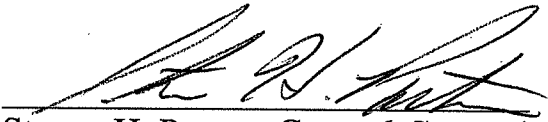


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CERTIFICATE OF COMPLIANCE

I CERTIFY THAT this response has been submitted in Times New Roman
14-point font and is in compliance with Florida Rule of Appellate Procedure
9.100(1).



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