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Clerk of the Court
FIRST DISTRICT

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

ALLSTATE FLORIDIAN INSURANCE
COMPANY, et al.,

Appellants,

vs.

CASE NO. 1D08-275
LT CASE NO. 91774-07

OFFICE OF INSURANCE REGULATION,

Appellee.

**MOTION FOR REHEARING AND REHEARING EN BANC,
AND ALTERNATIVELY, FOR CERTIFICATION**

Appellants (the “Allstate Companies”) move pursuant to Florida Rules of Appellate Procedure 9.330 and 9.331 for rehearing and rehearing en banc, and alternatively, for certification.

INTRODUCTION

The Panel Opinion affirming the Office of Insurance Regulation’s Immediate Final Order suspending the Appellants’ licenses conflicts with key decisions of this Court, the Florida Supreme Court, and the United States Supreme Court. In particular, the Panel Opinion’s statement that “OIR was not required to pursue enforcement of its subpoenas in circuit court” (Op. at 16) departs from multiple prior First District decisions. It also contradicts clear United States Supreme Court precedent holding that the Constitution *requires* judicial review before subpoenas from an administrative agency can be enforced. The Panel

Opinion deviates from previously settled and undisputed law, and should be reheard so that an opinion consistent with constitutional law and Florida law may be issued.

Nor is the Panel Opinion consistent with prior First District decisions regarding emergency orders, which impose exacting standards so as to apply statutory requirements in accordance with state and federal due process commands. For example, this Court always has required specific allegations of harm to justify an emergency order. Yet the Panel Opinion finds that unspecified complaints and a hearsay article about a sales advertisement concerning a program from the early 1990s suffice for an immediate danger to the public health, safety, or welfare. Procedural fairness demands that an IFO provide “at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution.” § 120.60(6)(a).¹ The Panel Opinion, however, required no judicial review of the subpoenas to determine their enforceability and to rule on objections and asserted privileges, as dictated by Florida statutory and federal and state constitutional law.

The Panel Opinion also misapprehends a number of important factual and legal issues. Most significantly, the Panel Opinion states that the Allstate Companies can “determine the duration of the suspension.” (Op. at 14) That is

¹ Citations to Section and § are to the Florida Statutes (2007) unless otherwise indicated.

incorrect. Contrary to Florida Supreme Court and this Court's precedent, the OIR is demanding that the Allstate Companies produce all attorney-client privileged information – that is, according to the OIR, the Allstate Companies have no attorney-client privilege at all. (IFO ¶ 28, R. 1:12) Thus, in no meaningful way can the Allstate Companies determine how long the suspension lasts. Additionally, the Panel Opinion does not discuss the OIR Commissioner's plain statement in the January 15 hearing that "It's not a matter of time; we would happily grant you the time to produce documents," (Tr. 42) establishing that there was no emergency or threat of immediate harm. Finally, during the January 15 hearing, the Allstate Companies committed to produce documents to the OIR provided they received appropriate trade secret protection. (Tr. 43 - 46) To that end, the Allstate Companies' Motion to Supplement the Record demonstrates the lengths that the Allstate Companies have gone to comply with the subpoenas, with a production to date exceeding 400,000 pages of documents.

MOTION FOR REHEARING

A motion for rehearing should be granted where there are "points of law or fact" that "the court has overlooked or misapprehended." Fla. R. App. P. 9.330. The Panel Opinion here has overlooked or misapprehended cases from the United

States and Florida Supreme Courts, as well as this Court, that concern an agency's power and discretion to issue emergency orders.

First, the Panel Opinion did not address First District and United States Supreme Court cases requiring judicial review of administrative subpoenas *before* an agency can punish a subpoena recipient for alleged noncompliance. *Second*, the Panel Opinion overlooked that the Allstate Companies cannot "determine the duration of the suspension," because the OIR is demanding that the Allstate Companies produce attorney-client privileged documents, in violation of settled precedent that the attorney-client privilege applies to agency investigations. *Third*, the Panel Opinion misapprehended Section 120.60(6)(a)'s requirement that the procedure for an IFO "provide[] at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution," as the opinion did not require judicial review of the subpoenas prior to their enforcement as required by statute and the state and federal Constitutions. *Fourth*, the Panel Opinion conflicts with this Court's decisions holding that as a matter of statutory and constitutional dictates, an IFO must contain specific instances of immediate, serious danger to the public health safety and welfare, as the IFO here cites no specific incidents of harm. *Fifth*, the Panel Opinion did not follow a number of prior First District decisions requiring a tight nexus between the alleged harm and the remedy, instead allowing the OIR to impose a penalty with no connection to

the Allstate Companies' alleged non-compliance with the OIR's subpoenas. *Finally*, the Panel Opinion overlooked or misapprehended several critical facts showing the absence of any emergency or threat of harm.²

I. FIRST DISTRICT AND SUPREME COURT PRECEDENT REQUIRE JUDICIAL REVIEW BEFORE OIR CAN ENFORCE ITS SUBPOENAS.

The Panel Opinion concludes that "OIR was not required to pursue enforcement of its subpoenas in circuit court," but instead could enforce those subpoenas and immediately impose punishment by suspending the Allstate Companies' certificates, without prior judicial review of the subpoenas. (Op. at 16) This ruling is unprecedented. It also directly contradicts prior First District holdings, which give due regard to the United States Supreme Court decisions holding that the Fourth Amendment mandates judicial review *before* enforcement of an administrative subpoena over timely objections, and *before* punishment can be imposed to coerce compliance.

A. The First District Previously Has Required Judicial Review Before Agency Enforcement Of An Administrative Subpoena.³

This Court, consistent with the Florida Administrative Procedure Act ("APA"), the Insurance Code, and Constitutional requirements, previously has mandated judicial enforcement and a judicial determination of objections and

² These issues were all presented in the briefs, as shown throughout by citations.

³ This issue was presented in the Initial Brief at 29-32 and the Reply Brief at 7-13.

privileges *before* an administrative agency can enforce its own subpoenas.⁴ The Panel Opinion does not address any of these prior decisions. Specifically, *Carrow v. Dep't of Professional Regulation*, 453 So. 2d 842 (Fla. 1st DCA 1984), involved an administrative subpoena duces tecum to a doctor for patient records, which the doctor claimed were privileged and protected from disclosure. This Court ruled that the circuit court had to address the doctor's assertion of privilege *before* the agency could seek to charge him with any penalties:

We think that under the facts of this case, the circuit court would be the exclusive forum for enforcement proceedings regarding this administrative subpoena. ... [T]he Department may not charge him by administrative complaint with failure to comply with the subpoena until it has first sought enforcement in the circuit court under Section 120.58(3), the court has ruled adversely to him, and he has failed to comply with the subpoena within a reasonable time thereafter.

453 So. 2d at 843.

The Court based its decision in *Carrow* on an earlier decision of this Court, *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974). In that case, this Court held that a party subject to an administrative subpoena

⁴ The Court cites to Section 624.418(2)(b), as an enforcement mechanism that justifies the IFO. (Op. at 14) The IFO does not rely upon or cite Section 624.418(2)(b), presumably because it does not apply. Since all components of fact and law relied on to justify an emergency order must appear on its face, this statute cannot be considered to justify the IFO. The Court should reconsider its mistaken reliance on a statute not invoked in the subject IFO.

... may not be held in contempt, and thereupon punished, upon failing or refusing to obey any subpoena, process or order of respondent or **any other administrative agency** until *after* he or she shall have first been afforded an opportunity for a hearing before a court of competent jurisdiction and until after that court shall have ordered obedience to such subpoena, process or order of such administrative agency, and such court order shall have been disobeyed.

Id. at 632 (emphasis supplied).

More recently, in *Florida Dep't of Insurance v. Bankers Insurance Co.*, 694 So. 2d 70 (Fla. 1st DCA 1997) ("*Bankers I*"), the First District applied these principles to an insurance investigatory subpoena issued by OIR's predecessor:

[T]he circuit court must also determine, in a case where a resisting party properly raises such issues, whether an agency's investigatory subpoena is overly broad or otherwise unduly burdensome, and whether enforcement would violate some privilege or constitutional right. It is incumbent on any party opposing enforcement of an investigatory subpoena on such grounds to file in timely fashion a motion for protective order or some equivalent pleading **in circuit court**.

694 So. 2d at 73 (emphasis supplied).

These same principles have been followed in other cases by this Court, including in a case involving a Department of Insurance administrative subpoena, *A AAAH Auto Cash Register Auto Insurance of Jax, Inc. v. Dep't of Insurance*, 625 So. 2d 139 (Fla. 1st DCA 1993) (following *Carrow*; issues properly addressed in appeal from circuit court action to enforce insurance administrative subpoenas); *Nathanson v. Dep't of Labor and Emp. Sec.*, 620 So. 2d 1066 (Fla. 1st DCA 1993) (following *Carrow*; circuit court is exclusive forum for an enforcement proceeding

of administrative subpoena). The Panel Opinion is at odds with this Court's longstanding precedent.

B. The United States Supreme Court Has Held That The Fourth Amendment Requires Judicial Review Before An Administrative Subpoena Can Be Enforced.

The Panel Opinion's conclusion that the OIR need not seek judicial review of its subpoenas is also contrary to the Fourth Amendment of the federal Constitution. The previous decisions of this Court give due regard to these principles, but the Panel Opinion gives no regard to them.⁵

In *See v. City of Seattle*, 387 U.S. 541, 544-45, 87 S.Ct. 1737, 1740 (1967), the United States Supreme Court held that as a matter of Fourth Amendment safeguard against unreasonable administrative subpoenas, "the subpoenaed party may obtain judicial review of the reasonableness of the demand⁶ prior to suffering penalties for refusing to comply." *Id.* Many federal cases follow *See* and confirm that the procedural safeguards provided by this separation of powers are a matter of constitutional mandate. *See, e.g., Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) ("Thus although our cases make it clear that the Secretary of Labor may issue an administrative subpoena without a warrant, they nonetheless provide

⁵ This issue was addressed in the Allstate Reply Brief, p. 11.

⁶ Judicial review of the reasonableness of a subpoena includes an opportunity by the subject of the subpoena to challenge the subpoena on appropriate grounds, including assertion of attorney-client privilege. *See, e.g., Securities and Exchange Comm'n v. ESM Govt. Securities, Inc.*, 645 F.2d 310, 314 (5th Cir., Unit B, 1981).

protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.”); *United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 3 (1st Cir. 1996) (“Thus, unlike the subject of an actual search, the subject of an administrative subpoena has an opportunity to challenge the subpoena before yielding the information. In the course of that resistance, the Fourth Amendment is available to the challenger as a defense against enforcement of the subpoena.”).⁷

At bottom, the authorities from this Court and the United States Supreme Court plainly require judicial review of an administrative subpoena before an agency can levy any penalties against a corporation for its alleged noncompliance with a subpoena. The Panel Opinion’s statement – that the “OIR was not required to pursue enforcement of its subpoenas in circuit court” (Op. at 16), but could instead engage in self-enforcement – both misapprehends and departs from established law. A rehearing is necessary to bring the Panel Opinion into conformity with settled precedent and the Constitution.

⁷ The Insurance Code itself codifies the constitutional principles elucidated in these First District and federal cases, by providing the following for OIR investigative subpoenas: “If any person refuses to comply with any such subpoena ... the Circuit Court ... may, on application of the department or office, issue an order requiring such person to comply with the subpoena and to testify.” § 624.321(2). Under First District and Supreme Court precedents, the OIR must follow this procedure and apply to have a court enforce its subpoenas.

II. THE PANEL OPINION OVERLOOKED THAT THE OIR IS FORCING THE ALLSTATE COMPANIES TO WAIVE THEIR ATTORNEY-CLIENT PRIVILEGE.

Contrary to Florida Supreme Court precedent, the OIR is demanding that the Allstate Companies produce attorney-client privileged documents. This means that the Allstate Companies *do not* have the ability to “lift the suspension at any time.” (Op. at 14) Rather, the OIR is imposing a Hobson’s choice: The Allstate Companies must either relinquish one of the most sacrosanct protections under the law, the attorney-client privilege, or have their licenses suspended indefinitely. The Panel Opinion upholds this Hobson’s choice and, in the process, misapprehends settled law.⁸

Florida courts have declared that the “oldest and most revered principles of Anglo American law is the attorney-client privilege and the sacred duty of a lawyer to not reveal the secrets and communications of a client.” *Horning-Keating v. State*, 777 So. 2d 438, 445 (Fla. 5th DCA 2001). “The attorney-client privilege arises in the context of a relationship having great significance for the protection of fundamental personal rights.” *Mills v. State*, 476 So. 2d 172, 176 (Fla. 1985). Similarly, the United States Supreme Court has recognized that the “attorney-client privilege is one of the oldest recognized privileges for confidential communications. The privilege is intended to encourage full and frank

⁸ This issue was raised in the Initial Brief at 32-35 and Reply Brief at 7-10.

communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.” *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998).

Consistent with its importance to the legal system, the Florida Supreme Court has enforced the attorney-client privilege against state agencies seeking records of the entities they regulate. In *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (1994), the Florida Public Service Commission issued orders in requiring a regulated telephone company to produce privileged documents or information. *Id.* at 1380. Like the OIR here, the PSC argued that its “investigatory and regulatory powers permit it to inspect Southern Bell’s documents.” *Id.* at 1382. The Florida Supreme Court rejected the PSC’s arguments, holding that even though the “PSC is specifically empowered with broad authority to regulate” and “has a statutory duty to ensure Southern Bell’s compliance with the law, the PSC cannot exercise its regulatory power at the expense of destroying the corporate attorney-client privilege.” *Id.* “Southern Bell’s status as a regulated company does not entitle the regulating body to unfettered access to Southern Bell’s confidential communications.” *Id.*

There is no meaningful distinction between the powers of the OIR and the PSC, and no reason to allow the OIR to “destroy[] the corporate attorney-client

privilege” – the bedrock of both our adversary system of justice and the legal profession – while other Florida agencies cannot.⁹

Indeed, this Court and other Florida appellate courts have applied the attorney-client privilege to subpoenas and orders from the OIR and its predecessor the Department of Insurance (“DOI”). For example, in *Prudential Ins. Co. of America v. Florida Dep’t of Insurance*, 694 So. 2d 772 (Fla. 2d DCA 1997), in administrative action against an agent, DOI issued an administrative order requiring Prudential, a third party to the case, to turn over documents Prudential asserted were work product. *Id.* at 773. The Court applied standard privilege rules and quashed DOI’s administrative order. *Id.* at 774. Similarly, in *Bankers I, supra*, 694 So. 2d 70, DOI issued investigatory subpoenas to which the insurer did not respond, and then moved for enforcement in the circuit court. *Id.* at 71. The appellate court held that although the subpoenas were “presumptively entitled to be given effect judicially,” “the circuit court must also determine, in a case where a resisting party properly raises such issues ... whether enforcement would violate some privilege or constitutional right.” *Id.* at 73. In a later summary opinion, the First District upheld a claim of privilege by Bankers Insurance, while rejecting

⁹ Similarly, the Uniform Rules of Procedure adopted pursuant to the APA also preserve the attorney-client privilege. In hearings involving disputed issues of fact, “the rules of privilege apply to the same extent as in civil actions under Florida law.” Fla. Admin. Code Rule 28-106.213(4). This provision would be rendered useless if agencies such as the OIR could use their investigative powers to obtain privileged materials before initiating a hearing.

other privilege claims on factual grounds. *Bankers Ins. Co. v. Florida Dep't of Insurance*, 755 So. 2d 729 (Fla. 1st DCA 2000) ("*Bankers II*") ("We also AFFIRM the trial court's finding that an attorney-client relationship exists between the appellant and attorney Cheryl Gentry, so that the work-product privilege attaches to the letter written to Gentry by a polygraph examiner.").

Federal law and the law of other states likewise recognize and apply the attorney-client privilege to administrative subpoenas. Under federal law, the Supreme Court has enforced the attorney-client privilege against an IRS investigative summons demanding production of documents. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). States including California and West Virginia likewise have upheld the privilege against administrative agencies. See *Southern Cal. Gas Co. v. Public Utilities Comm.*, 784 P.2d 1373, 1376 n.8 (Cal. 1990) (explaining that attorney-client privilege under California law applies to "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law)"); *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W.Va. 1996) ("In the course of that resistance [to an administrative subpoena], privileges, privacy rights and the unreasonableness of an administrative subpoena are available defenses against enforcement of the subpoena.").

There is nothing in Section 624.318(2), relied on by OIR and apparently accepted in the opinion without discussion, that indicates a legislative intent to override this fundamental right if that would even be possible or constitutional. A statement that the “accounts, records, documents, files, information, assets, and matters in [the] possession” of an insurance company and its agents and attorneys must be “freely available” when OIR examines a company does not even remotely signal an intent to require insurers to waive their attorney-client privilege let alone do so in the clear concise way that would be necessary for a Court to ignore clear precedent and construe this language in such a way. The only reasonable interpretation of the statutory language is that an insurance company could not shield its own documents from inspection by sending them to its attorney’s office. *See, e.g., Gibson v. Florida Legislative Investigation Committee*, 108 So. 2d 729, 746 (Fla. 1958) (acknowledging applicability of attorney-client privilege but holding that “documents belonging to the client which should be produced if they were in the custody of the client” were not subject to attorney-client privilege because they were transferred to the attorney to place in custody elsewhere).

These controlling, uniform authorities holding that the attorney-client privilege applies to investigatory subpoenas cannot be ignored. “The confidential relationship of attorney and client is a sacred one, and one that is indispensable to the administration of justice. It cannot so lightly be brushed aside.” *Seaboard Air*

Line R. Co. v. Timmons, 61 So. 2d 426, 428 (Fla. 1952). The OIR's actions highlight the importance of the judiciary in enforcing the rights of citizens against the government. Without pre-enforcement judicial review, the OIR will be free to make whatever arbitrary or unconstitutional demands it desires, backed by the threat of immediate license suspension, to deprive corporations of their legal rights to assert privilege and obey only properly drawn subpoenas.¹⁰ Rehearing is necessary to bring the Panel's decision in line with this uniform case law and prevent the undermining of the role of the court in enforcing the law.

III. THE COURT MISAPPREHENDED THE PROCEDURAL FAIRNESS TEST REQUIRED BY SECTIONS 120.60(6) AND 120.60(6)(a).

Procedural fairness under Section 120.60(6)(a) requires that the "procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution."¹¹ *Bio-Med Plus, Inc. v. State, Dep't of Health*, 915 So. 2d 669, 671 (Fla. 1st DCA 2005). Section 624.321(2), quoted above at page 9, n. 7, is just the sort of statute contemplated by

¹⁰ While OIR's attempt to abrogate privilege is the most obvious problem with the subpoenas, there are many other requests that the Allstate Companies believe are overbroad. For example, Request 39 asks for related to the Allstate Companies' "claims valuation procedures and formulas" over a 14-year period, which is both vague and could potentially encompass millions of documents. As the precedents recognize, pre-enforcement judicial review is as necessary to protect companies from the undue burden of responding to overbroad subpoenas as it is for privileges.

¹¹ This issue was presented in the Initial Brief at 29 - 35 and Reply Brief at 7 - 13.

Section 120.60(6)(a), providing a procedure that is available for OIR subpoena enforcement. Section 120.60(6)(a) mandates an inquiry into whether the IFO provides “at least” the same procedural protection as the procedure in Section 624.321(2). The Panel Opinion overlooked the protections provided by Section 624.321(2), and thus misapprehended whether the IFO provides “at least” the minimum amount of procedural due process required under Florida law.

Section 624.321(2), clearly one of the “other statutes” that establishes the minimum “procedural protection” that an emergency order must provide, requires that the OIR seek to enforce its subpoenas in circuit court. § 120.60(6)(a). The procedural protections in Section 624.321(2) that were described by this Court in *Bankers I, supra*, 694 So. 2d at 73, were subsequently applied by the Court in a second appeal after remand. There, the Court reviewed the insurer’s entitlement to withhold specific documents based on attorney-client privilege, and confirmed the asserted privilege as to some documents and rejected it as to others. *Bankers II, supra*, 755 So. 2d at 729.

The “Procedural Fairness” section of the Panel Opinion does not reference Section 120.60(6)(a), Section 624.321 or any other statute, nor does it mention the constitutional separation of powers and Fourth Amendment safeguards underlying the requirement for circuit court enforcement. Instead, the Panel Opinion states that “OIR’s decision to forgo futile attempts to enforce its subpoenas in circuit

court ... met the statutory 'procedural fairness under the circumstances' requirement." (Op. at 16) That conclusion contradicts Section 120.60(6)(a). As discussed above, the principle reason for judicial review is to allow the company an opportunity to assert objections and privileges to the subpoena. That is not a futile exercise; it is a statutorily and Constitutionally-mandated due process right.

IV. THE PANEL OPINION MISAPPREHENDS PRIOR FIRST DISTRICT DECISIONS REQUIRING SPECIFIC INCIDENTS OF HARM TO SUPPORT AN IMMEDIATE DANGER FOR AN EMERGENCY ORDER.¹²

Section 120.60(6)(c) requires that the IFO list "specific facts and reasons for finding an immediate danger to the public health, safety, or welfare." Consistent with this statutory language, the First District has demanded that IFO factual allegations be "particularized." *Bio-Med Plus, supra*, 915 So. 2d at 673; *see also United Ins. Co. of Am., v. Dep't of Insurance*, 793 So. 2d 1182, 1184 (Fla. 1st DCA 2001); *Witmer v. Dep't of Bus. and Prof. Reg., Div. of Pari-Mutuel Wagering*, 631 So. 2d 338, 341 (Fla. 4th DCA 1994). These particularized allegations must identify "specific incidents" of irreparable harm. *See Commercial Consultants Corp. v. Dep't of Bus. Reg., Div. of Land Sales & Condo.*, 363 So. 2d 1162, 1164 (Fla. 1st DCA 1978). The IFO must also "demonstrate the level of urgency that would make the orders necessary." *Premier Travel Int'l v. Dep't of Agric. & Cons.*

¹² This issue is raised in the Initial Brief at p. 16-25 and in the Reply Brief at p. 2-6.

Servs., 849 So. 2d 1132, 1136 (Fla. 1st DCA 2003). The Panel Opinion does not hold the IFO to the standards of previous First District cases.

The Panel Opinion relied on two bases to find an immediate danger. The first were “complaints regarding Allstate’s claims handling practices, and information indicating Allstate’s claims handling practices arbitrarily reduced bodily injury claim payments to its policyholders and beneficiaries by up to 20%.” (Op. at 11) But the IFO provides no description of these unspecified complaints beyond “complaints received by the Office,” (IFO ¶ 17) which is neither particularized nor specific. It does not describe how many complaints the office received, who made them, what they were about, or any other fact about them.

The “information indicating” a reduction in claims payments is based on a report by a consumer federation in July 2007 that is attached to the IFO. This report talks about computer programming acquired by Allstate in the early 1990s, and according to the report, this same programming is in use by most major insurance companies today. No credentials or information are provided to establish the reliability or basis for the report. Indeed, according to the IFO, the 20% number cited in the Court’s opinion is based on advertising literature from the computer program’s creator, not anything from Allstate. (IFO ¶ 18)

In contrast, OIR has always had the power, and routinely exercises it, to go to insurers’ offices for market conduct examinations, to review claims files and

audit insurers' books and records. §§ 624.316, 624.3161. OIR's website reports the results of completed market conduct examinations if there are issues regarding claims or other insurance practices requiring correction and/or disciplinary action, at http://www.flair.com/pc/is_pc_exams.aspx. This public information includes reports on a few market conduct examinations of several Allstate Companies, with resolution of some specific claims issues via consent orders. Thus, OIR has had and continues to have every opportunity to review and audit actual claims files involving Florida policyholders and there is absolutely no suggestion in the IFO of specific information about actual monetary loss to any Florida policyholder by reason of the general claims practices described in the report attached to the IFO.¹³

Neither these "complaints," the report, or the IFO identifies a single insured in Florida who has suffered a monetary loss. Thus, there are no particularized

¹³ A number of reported decisions involving actual claims by individual Allstate policyholders demonstrate the danger of crediting the attached report with its conclusory accusations. When considered objectively, the generic speculation offered by the attached report has been rejected, as not demonstrating "anything other than sound business and claim-handling practices." *Young v. Allstate Ins. Co.*, 296 F. Supp. 2d 1111, 1123 (D. Ariz. 2003); *see also Miller v. Allstate Ins. Co.*, 1998 WL 937400 (C.D. Cal. 1998) (rejecting plaintiff's argument that CCPR program created to 'maximize profits' as highly conjectural, and finding facts related to plaintiff's claim show claim handled reasonably throughout); *Dauro v. Allstate Ins. Co.*, 2003 WL 22225579, *6 (S.D. Miss 2003) (no proof that Colossus program used in Dauro's case, and even if used, no evidence that claim handled unreasonably); *Kosierowski v. Allstate Insurance Co.*, 51 F. Supp. 2d 583, 594-95 (E.D. Pa. 1999) (no evidence that Colossus program had any effect on claim handling; instead evidence showed reasonable independent judgment used).

allegations of “immediate danger,” much less specific allegations that any harm will continue in the future, as required by this Court’s precedent. *Premier Travel*, 849 So. 2d at 1132 (noting that “[p]ersonal monetary losses can be the sort of danger addressed by section 120.60,” but only if “the pattern of conduct is likely to continue”); *see id.* at 1136 (rejecting emergency order even though it detailed misconduct harming nine individuals where the order contained only conclusory allegations that the company was engaged in a systematic course of conduct). The Panel Opinion misapprehends the law by upholding such an unspecific IFO.

The Panel Opinion’s second basis for finding immediate harm was the IFO’s allegation of “ongoing criminal activity.”¹⁴ (Op. at 11) First District precedent, however, rejects the notion that *all* violations of the law can justify the extraordinary device of an emergency order. In *Commercial Consultants supra*, 363 So. 2d at 1164, for example, this Court addressed an alleged violation of the Land Sale Practices Law. There, as here (and as is common in many regulatory schemes administered by Florida’s administrative agencies), the Land Sale Practices Law also had an alternative criminal penalty statute for violations, although there the penalty was a felony, not a misdemeanor. *See* § 498.059. Nonetheless, this Court found the emergency order’s allegations insufficient:

¹⁴ The IFO resorts to a generic blanket penalty statute providing that any willful violation of any provision in the Insurance Code or of any OIR rule constitutes a second degree misdemeanor in addition to being grounds for disciplinary action against insurers. § 624.15(1).

If we accepted the general, conclusory prediction of harm quoted above as sufficient justification for summary agency action, the legislature's provision for notice and a hearing before a cease and desist order may issue could be avoided in every case. We cannot approve such a result. To satisfy the statute, the Division's order must allege facts showing that specific incidents of irreparable harm to the public interest will occur without an immediate cease and desist order.

Even if we could construe [the Land Sales Law] to uphold the Division's cease and desist order, we could not so construe the Administrative Procedure Act, Chapter 120. The APA requires specific findings of fact to support summary agency action. ... In each case the agency is allowed to act before according basic due process rights to the parties. Because fundamental rights are abridged, the agency's statement of reasons for acting "must be factually explicit and persuasive concerning the existence of a genuine emergency."

Id. at 1164-1165 (citations omitted); see also *Unimed v. State, Office of Insurance Regulation*, 884 So. 2d 963, 964 (Fla. 1st DCA 2004) ("As all of those decisions emphasize, it is not sufficient merely to allege a statutory violation; instead, 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 use of the extraordinary device afforded by section 120.569(2)(n).") The Panel Opinion does not address the holding in *Commercial Consultants* or *Unimed*. Moreover, in this case the weakness of these allegations against the Allstate Companies is illustrated by the OIR Commissioner's statement at the January hearing that "[w]e are not here to suggest of any wrongdoing," even though he knew the status of the document production. (Tr. at 8) Alleged violations of

blanket criminal penalties in regulatory statutes are not *ipso facto* an immediate serious danger.

Finally, First District decisions are clear that emergency orders such as the IFO here can only be issued to address true emergencies. *E.g.*, *Commercial Consultants*, 363 So. 2d at 1165 (holding that agency's reasons for acting "must be factually explicit and persuasive concerning the existence of a genuine emergency"); *Premier Travel*, 849 So. 2d at 1136 (holding that the IFO could not justify an emergency where it did not "demonstrate the level of urgency that would make the orders necessary"). Here, the OIR Commissioner stated unequivocally at the public hearing that "It's not a matter of time; we would happily grant you the time to produce documents." (Tr. 42) This statement from the agency head decisively refutes any claim of a genuine emergency or the level of urgency necessary for an IFO. The Panel Opinion does not address this statement in the context of the requirement that there be a genuine emergency, and thus misapprehended the law and facts.

V. THE PANEL OPINION MISAPPREHENDED THE LEGAL REQUIREMENT THAT THE IFO BE NARROWLY TAILORED TO PROTECT AGAINST AN IMMEDIATE SERIOUS DANGER.

Under First District precedent, not only must there be particularized factual allegations of specific incidents of irreparable harm to the public without an immediate order, but there also must be explicit findings that the emergency action

taken is “necessary.”¹⁵ § 120.60(6)(b); *Premier Travel International, Inc. v. State of Florida, Department of Agriculture and Consumer Services*, 849 So. 2d 1132, 1136 (Fla. 1st DCA 2003). In explaining why emergency action is necessary, an agency must also explain why less harsh or more narrowly tailored remedies would be insufficient to stop the alleged harm. *Id.*; see also *Preferred RV, Inc. v. Department of Highway Safety and Motor Vehicles, Div. of Motor Vehicles*, 869 So. 2d 713, 714 n.3 (Fla. 1st DCA 2004) (“Absent factual allegations concerning what actions the Department has taken prior to the issuance of the emergency order, however, it is not readily apparent that immediate suspension of appellant’s business license is the only adequate remedy available.”).

Indeed, this Court regularly rejects IFOs that suspend licenses by finding that more narrowly tailored orders would address any alleged harm. *Id.* at 1137 (rejecting emergency order suspending license for allegedly defrauding senior citizens where “the Department could have issued an order enjoining Appellants from advertising that customer could find better prices with them than through other sources, or enjoining them from ignoring the three-day contract review period.”); *Cunningham v. Agency For Health Care Admin.*, 677 So. 2d 61, 62 (Fla. 1st DCA 1996) (rejecting emergency order suspending license of doctor who had prescribed excessive amounts of narcotic medications to three patients because this

¹⁵ This issue was raised in the Initial Brief at 25-28 and in the Reply Brief at 6-7.

Court found that the order suspending his license was overbroad and could have been more narrowly tailored to prevent him from prescribing narcotics or treating the three patients). In these cases, the First District carefully considered the harm alleged in the emergency order, and limited the scope of any remedy to address only that harm.

The Panel Opinion's finding that the IFO is tailored to address the alleged "harm" (and as explained above, the IFO fails the First District's standards for alleging an immediate danger) is inconsistent with and misapprehends these cases. There simply is no logical connection between the alleged problem that the IFO is intended to address and the action taken. Prohibiting the Allstate Companies from writing new policies simply has no connection to the OIR's allegations that the Allstate Companies did not comply with the subpoenas. The IFO also speculates that additional document production might reveal problems with the Allstate Companies' insurance practices (IFO ¶ 17, R. 1:8), but the action taken bears no nexus to this purported concern. As cases such as *Cunningham* suggest, if OIR had a concern about insurance practices, it could have conducted a market conduct examination (*see supra* at 19), or issued an order directed to those practices.

The three reasons in the Panel Opinion for finding the remedy tailored to the alleged harm all misapprehend the law or facts. The first reason is that the OIR could have imposed an even broader penalty. But that does not establish that the

penalty it chose is tailored to the harm that it alleges. If, for example, the agency in *Cunningham* decided to disallow the doctor from seeing any new patients, that remedy still would have been overbroad even though it was narrower than a complete suspension of the doctor's license.

The Panel's second reason is that the Allstate Companies objected to the subpoenas. The OIR's narrowly tailored remedy for this – the one required under First District precedent and the Fourth Amendment – is to apply to the circuit court to have its subpoenas enforced and obtain a judicial determination of the asserted objections and privileges.

The opinion states that “competent, substantial evidence from the hearing supports OIR's conclusion that ... utilizing the circuit court option to enforce the subpoenas would have been futile.” (Op. p. 14) There was no such evidence and it is curious that the Court would use such a phrase in the context of what it describes as a review of the facial validity of the IFO.¹⁶ (Op. p. 11, 16). Moreover, the Panel Opinion overlooks the point that there are fundamental rights at issue that only a circuit court can adjudicate.

In the IFO, OIR attached a single Missouri court order to create its futility argument. Yes, it is a contempt order, but there is absolutely no evidence as to

¹⁶ It is statements such as “competent substantial evidence” that have prompted the Allstate Companies to file a motion to supplement the appellate record. Given that there has been no evidentiary hearing, if the Court intends to look at evidence, it should look at all of the evidence.

whether and how the Allstate Companies contested or complied with this order. And no one at OIR has suggested that OIR has any firsthand knowledge of the Missouri case. The IFO merely refers to an OIR “understanding” of the current status of that case. (IFO ¶ 24, R. 1:12) This Court overlooked the absence of specific facts showing the context of the Missouri litigation and the absence of any specific facts accurately stating or documenting the current status (as opposed to loosely describing an understanding). As asserted in the briefs, a lawful IFO must be based upon particularized facts, not loose understandings, and as such, this IFO statement of understanding of the current status cannot be credited. (Init. Brf., p. 11, 24-25)

This Court’s willingness to credit an inaccurate understanding of civil litigation in Missouri to conclude that a circuit court enforcement action would be futile is unfair given the absence of notice or opportunity to present actual facts that would refute the OIR’s understanding.¹⁷ In any case, the Allstate Companies

¹⁷ Prompted by the Court’s apparent willingness to credit OIR’s understanding as a fact relied on to conclude that circuit court enforcement would be futile, the Allstate Companies moved to supplement the record to request judicial notice of the Missouri Supreme Court order dated October 30, 2007, that confirmed Allstate’s right to appeal the circuit court order imposing a fine for violating discovery orders, and determining that an appeal was premature because there has been no attempt to execute on the fine, which under Missouri law is a prerequisite to judicial relief. Thus, contrary to OIR’s understanding on January 17, 2008, Allstate was pursuing appropriate legal avenues, not ignoring them.

have the statutory and constitutional right to judicial review of the OIR's subpoenas before any penalty can be imposed.

The Panel Opinion's third reason is that the Allstate Companies can determine the duration of the suspension, which as described in Point II above misapprehends the fact that the OIR is demanding the Allstate Companies' attorney-client privileged documents. The OIR thus is placing an "extra burden" on the Allstate Companies (Op. at 14), since under Florida Supreme Court precedent an agency cannot abrogate the attorney-client privilege.

VI. THE PANEL OPINION MISAPPREHENDS THE FACTS SURROUNDING THE ALLSTATE COMPANIES' PRODUCTION AND THE OIR HEARING.

The Allstate Companies have addressed certain factual misunderstandings in the Panel Opinion in its discussion of the foregoing legal issues. Several additional factual inaccuracies appear to have influenced the Panel Opinion. In particular, the opinion states that the Allstate Companies were "informed of the [OIR] charges," had a "reasonable opportunity to defend," did not request continuation of OIR's informal January 15, hearing, and had a "history of choosing to incur millions of dollars in fines rather than comply with court-ordered production." Op., p. 15-16. The Allstate Companies correct those factual assertions below.

First, the Panel Opinion stated that "OIR found the 30,000 pages of documents produced 'non-responsive'" (Op. p. 13), but the IFO nowhere makes

that finding. Instead, the IFO only notes that these first two loads of documents were not produced in compliance with the subpoena's instructions. (IFO ¶ 12, R. 1:6). The Panel apparently was under a misapprehension as to the Allstate Companies' efforts to comply with the document production requests, as no doubt would follow from believing that all 30,000 documents produced in November and December had in fact been "non-responsive."¹⁸

Second, the Panel Opinion repeatedly states that the Allstate Companies did not ask for an extension of time to produce the documents. This is contrary to hearing transcript itself, attached to the IFO. The OIR Commissioner confirmed then that there "was a request for a continuation of this hearing so that this hearing would not occur today." (Tr. at 42).¹⁹ Thus, any implication that the Allstate

¹⁸ The opinion refers to the Appellants allegedly inappropriately stamping some documents "trade secret," but submittal of such documents could not have impeded the OIR investigation. The Allstate Companies provided the documents to the OIR, and the OIR was free to review those documents and rely on them as part of its investigation regardless of whether they were stamped "trade secret." "Trade secret" designations restrict whether the OIR can provide documents to third parties, not whether the OIR itself can conduct an investigation. (Tr. at 43-44)

¹⁹ Mr. Antonacci explained that there had been discussions with OIR counsel about the Allstate Companies' need for more time, and that they would proceed with production in installments. (Tr. at 41) As shown by correspondence between counsel before the January 15 hearing, the Allstate Companies made clear as of the November 30 initial production date that it was impossible to meet OIR's tight timetable for production, but that the Allstate Companies would continue to produce. The Allstate Companies have filed a motion to supplement the record with these letters, which, although they are in the court file in the appendix to the Emergency Motion for Immediate Relief, are not in the formal record.

Companies did not request more time before the hearing or believed their production was complete on January 15, 2008, is incorrect.

Third, the Panel Opinion implies that the Allstate Companies were “informed of the [OIR] charges” and had a “reasonable opportunity to defend.” (Op. at 15) But there were no charges by OIR filed against the Allstate Companies before the January 15 hearing. Indeed, at the beginning of the hearing, the OIR Commissioner stated that “[w]e are here not to suggest of any wrongdoing.” (Tr. at 8.) Instead, OIR was conducting a confidential investigation and the Allstate Companies were instructed to appear on January 15 to testify as follows:

be prepared to testify as to the following areas: Allstate’s Reinsurance Program, relationships to Risk Modeling Companies, Insurance Rating Organizations or Companies, and Insurance Trade Associations.

(See, e.g., Subpoena Duces Tecum, R. 1:205). The Allstate Companies produced witnesses to testify regarding the specific designated areas. (Tr. at 17-18, 47-99) The Allstate Companies had no notice or reason to believe that the hearing, which the Allstate Companies believed was purely investigative, would be the predicate to punish the Companies for alleged noncompliance with OIR’s subpoenas.

Fourth, the Allstate Companies planned to continue their production after the hearing, which they have done. The January 15 investigative hearing transcript includes several discussions regarding the intention of the Allstate Companies to continue its production, so long as they had OIR’s assurance that documents

labeled “trade secret” would be treated in accordance with OIR’s stated “practice” – that when the investigation concluded, the Allstate Companies would be given an opportunity to challenge any public release of the documents. (Tr. at 43-46)

As explained in the Allstate Companies’ Motion to Supplement the Record, the Company has produced over 400,000 documents to the OIR since the hearing. Thus, any claim that the Allstate Companies “hoped to define the scope of OIR’s investigation” (Op. at 14) misapprehends the record. The Allstate Companies have sought to cooperate with the OIR’s subpoenas. Any questions regarding the Allstate Companies’ compliance, objections, or assertion of privilege are properly decided by a court, not the unfettered discretion of the OIR.

MOTION FOR REHEARING EN BANC

The Allstate Companies move, pursuant to Florida Rule of Appellate Procedure 9.331(d), for rehearing en banc. Both grounds for rehearing en banc are present here: this case is of uniquely exceptional importance, and en banc consideration is necessary to maintain uniformity of this Court’s decisions.

This case presents at least three grounds of exceptional importance. *First*, the decision gives agencies the power to self-enforce administrative subpoenas prior to judicial review. Under the Panel Opinion, an agency can use the harshest of penalties – including license suspension – to coerce compliance with its

subpoenas, all without the oversight of a court. This ruling violates state and federal constitutional law as well as Florida statutory law, violates constitutional separation of powers, and would substantially expand the unfettered power and discretion of agencies.

Second, the Panel Opinion allows the OIR to suspend the Allstate Companies' licenses for refusing to produce attorney-client privileged documents. The Florida Supreme Court has specifically held that companies need not produce attorney-client privileged documents in response to agency investigations. The Panel Opinion contradicts the Florida Supreme Court and would expose any regulated company operating in Florida to the threat of a broad waiver of the attorney-client privilege by forcing it to produce such documents to an agency such as the OIR.

Third, the Panel Opinion significantly lowers the standard for emergency orders by accepting unspecific and speculative allegations of harm, allowing a penalty that has no relation to the alleged harm, and not enforcing constitutional dictates and Florida laws necessary for a fair process.

In addition, the Panel Opinion contradicts several First District precedents. For example, this Court previously has held that administrative subpoenas must be judicially reviewed before they can be enforced, which the Panel Opinion contradicts. Additionally, prior First District decisions require that an emergency

order's allegations of immediate serious harm be specific, particular, and persuasive as to a genuine emergency, but the Panel Opinion accepts generalized allegations that do not refer to a single specific incident of harm to *any* Florida policyholder. Conflicts such as these, among others, warrant rehearing en banc to bring the Panel Opinion into conformity with established law.

I. THE PANEL OPINION PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE.

A. The Panel Opinion Strips Insurers Of Their Fundamental, Constitutional Right to Have a Court Review Administrative Subpoenas Prior to Enforcement.

Never before in Florida (or to our knowledge, anywhere else) has an agency been given the power to issue emergency orders that not only immediately "enforce" its administrative subpoenas, but does so without regard to objections and assertions of privilege. Nor have decisions allowed the agency unilaterally to impose drastic punishments to coerce compliance, with the only way to purge the punishment being "compliance" as defined entirely by the agency, including a forced waiver of the attorney-client privilege.

These are judicial powers, not administrative powers. As discussed in the Motion for Rehearing, Points I and II above at pages 5 - 15, under basic legal principles only courts have the power to enforce administrative subpoenas and impose contempt punishment to coerce compliance. Parties subject to administrative subpoenas are entitled as a matter of state and federal constitutional

right to defend against enforcement of administrative subpoenas by asserting objections to the scope or burden of a subpoena's demands and by asserting other constitutional rights and privileges. Private parties dealing with state agencies cannot lawfully be forced to a Hobson's choice of either punishment or giving up fundamental rights.

The panel decision changes the balance between the executive branch and private parties. To have an administrative agency ruling upon objections and privileges provides no protection from forbidden governmental intrusion. OIR's investigative power has limits, and private parties, including insurers like the Allstate Companies, have rights. When the rights of agencies and private parties collide, it is not for the agency to decide what rights prevail. That is a judicial function. § 624.321(2).

The Panel Opinion says that OIR has the "option" of ignoring the exclusive enforcement procedure set forth in its subpoena statute and "choosing" to self-enforce its own investigatory subpoenas, to rule or not rule on objections to relevancy and burden, and to rule or not rule on asserted privileges (even when its ruling contradicts Florida Supreme Court precedent), instead of going to circuit court for a judicial determination on the enforceability of its subpoenas. Under the Panel Opinion, it is difficult to imagine any administrative agency not choosing to retain control over its investigatory subpoenas and force compliance however the

agency chooses to define compliance. Agencies would have no incentive to do anything else. Indeed, the Panel Opinion would fundamentally rework the relationship between Florida courts and administrative agencies and violate the separation of powers between the two branches. “[A]lthough the legislature has the power to create administrative agencies with quasi-judicial powers, the legislature cannot authorize these agencies to exercise powers that are fundamentally judicial in nature.” *Broward County v. La Rosa*, 505 So. 2d 422, 423 (Fla. 1987). Florida and federal courts long have held that determining whether objections and assertion of privilege in response to an administrative subpoena are judicial functions – not administrative or executive ones. *See v. City of Seattle*, 387 U.S. 541, 544-45 (1967); *Carrow v. Dep’t of Professional Regulation*, 453 So. 2d 842, 843 (Fla. 1st DCA 1984); *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628, 632 (Fla. 1st DCA 1974).

As explained in *See*, pre-enforcement judicial review of administrative subpoenas is required by the Fourth Amendment’s guarantee of freedom from unreasonable searches and seizures. “Questions of constitutional import” such as these must be decided by a court, and cannot be left to an administrative agency. *Myers v. Hawkins*, 362 So. 2d 926, 928 n.4 (Fla. 1978) (“Generally speaking, administrative agencies are not the appropriate forum in which to consider questions of constitutional import.”). The Panel Opinion would effectively

abdicate enforcement of the constitutional prohibition on unreasonable searches and seizures to administrative agencies acting on emergency, summary procedures, in violation of *Myers*. Indeed, because few companies would be willing to risk suspension of their authority to do business, the Panel Opinion would effectively insulate those subpoenas from judicial review. The OIR would be allowed to arrogate unto itself the power to adjudicate the validity of its subpoenas, objections to the scope of the requests, and assertion of privileges. These acts would usurp the judicial function. Thus, this case presents a question of unique, exceptional importance in ensuring that the boundaries between the judiciary and administrative agencies receive their due constitutional respect.

In sum, as briefed to the panel in the Initial and Reply Briefs, and as set forth in the Motion for Rehearing above, the Panel Opinion interprets the Florida Insurance Code and the Florida Administrative Procedure Act (“APA”) in a way that renders the statutes unconstitutional. The Panel Opinion would deprive the Allstate Companies of their rights to due process, their rights to procedural safeguards against unreasonable government intrusion, their rights to assert such fundamental protections as attorney-client and work product privileges in response to government investigations, and their rights to obtain judicial review prior to being punished for not satisfying an administrative agency that has issued investigatory subpoenas.

B. The Panel Opinion Allows The OIR And Other Agencies To Abrogate The Attorney-Client Privilege.

Under clear Florida Supreme Court precedent, an administrative agency cannot compel attorney-client privileged documents from a regulated company. *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1382 (1994) (holding that even though the “PSC is specifically empowered with broad authority to regulate” and “has a statutory duty to ensure Southern Bell’s compliance with the law, the PSC cannot exercise its regulatory power at the expense of destroying the corporate attorney-client privilege”); *see also* Motion for Rehearing, Point II at pages 10 - 15. Contrary to this precedent, the OIR has demanded that the Allstate Companies produce attorney-client privileged documents or face suspension of their licenses. By affirming the IFO, the Panel Opinion authorizes the OIR to disregard Supreme Court precedent and potentially forces the Allstate Companies and other insurers to involuntarily waive their attorney-client privilege.

C. The Panel Opinion Significantly And Unconstitutionally Lowers The Standard For Imposing An Emergency Order.

Section 120.60(6) allows Florida administrative agencies to take immediate action to suspend or restrict licenses so long as: (1) the agency provides procedural fairness (defined in Section 120.60(6)(a) to mean at least the same procedural protections afforded by any other statute and by the state and United States Constitutions); (2) the agency’s immediate action is necessary; and (3) the

agency identifies with particularity the particular harm that is immediately threatened. The Panel Opinion departs from established and clear precedent as to each of these requirements, as detailed in point II of this motion below.

First District decisions have properly required that any emergency order include particular and specific allegations of harm to satisfy the requirement of immediate serious danger to the public health, safety, or welfare. These decisions have interpreted and applied Section 120.60(6) to demand a compelling demonstration of a genuine emergency, not just as a matter of statute, but in order to apply the statutes in a way that meets state and federal due process requirements.

By contrast, the allegations of the IFO here include only (i) a bare reference to complaints with no further description whatsoever, (ii) a reference to an article describing a sales advertisement concerning a program from the early 1990s, and (iii) the inadequate production of documents in accordance with OIR's understanding of subpoenas that it refused to submit to judicial review. First District precedent has consistently rejected IFOs that have suspended licenses even where the IFO lists specific incidents of harm – let alone when no harms are described at all. As these prior decisions all confirm, constitutional due process requires much more.

Similarly, an alleged violation of the statute requiring responses to OIR subpoenas is not enough in and of itself to constitute an immediate serious danger.

Moreover, any claims of immediate serious danger here are decisively rebutted by the OIR Commissioner's statement that "It's not a matter of time; we would happily grant you the time to produce documents." (Tr. at 42) In finding an immediate serious danger under such circumstances, the Panel Opinion effectively eviscerates this requirement for an IFO and contradicts numerous First District decisions.

As to procedural fairness, Section 120.60(6)(a) requires that the emergency procedure provide at least the same procedural protections afforded under other statutes and constitutional provisions. Section 624.321(2) provides for the OIR to apply to the circuit court for enforcements of its subpoenas. The Panel Opinion, however, focuses only on whether Section 624.321(2) provides a "better enforcement option" for OIR (Op. at 10), when Section 120.60(6)(a) requires the focus to be on procedural protection for the Allstate Companies. The Panel Opinion thus violates Section 120.60(6)(a) by allowing OIR to use an emergency procedure providing less protection than both constitutional and Florida law allow.

Lastly, the IFO also violates the Section 120.60(6)(b), which requires necessity for the emergency action. There was no necessity for the IFO. The OIR Commissioner stated that time was not the problem and that the time for production could be extended. Nor is the IFO's drastic remedy of license suspension tailored to the particular harms alleged in the complaint. Finally, the

OIR had less severe remedies available, such as fines, market conduct examinations of actual claim files (*see* Motion for Rehearing *supra*, at 18 - 19), an order directed to claims handling, or doing what the OIR is legally required to do: seeking judicial enforcement of its subpoenas.

II. THE PANEL OPINION SHOULD BE REHEARD TO MAINTAIN UNIFORMITY WITH OTHER DECISIONS OF THIS COURT.

The Panel Opinion contradicts and departs from many prior decisions of this Court. These conflicts, either overlooked or misunderstood in the Panel Opinion, are detailed in the Motion for Rehearing. The following is a brief overview of those conflicts with references to where they are discussed in more detail in the Motion for Rehearing above.

First, the Panel Opinion holds that the “OIR was not required to pursue enforcement of its subpoenas in circuit court” but, instead, could suspend the Allstate Companies’ certificate of authorities prior to judicial review of its subpoenas. As explained in the Motion for Rehearing at pages 5 - 8, this statement contradicts cases including *Carrow v. Dep’t of Professional Regulation*, 453 So. 2d 842, 843 (Fla. 1st DCA 1984) (“[T]he Department may not charge him by administrative complaint with failure to comply with the subpoena until it has first sought enforcement in the circuit court under Section 120.58(3), the court has ruled adversely to him, and he has failed to comply with the subpoena within a

reasonable time thereafter.”); *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628, 632 (Fla. 1st DCA 1974) (holding that a party receiving an administrative subpoena “may not be held in contempt, and thereupon punished, upon failing or refusing to obey any subpoena, process or order of respondent or any other administrative agency until *after* he or she shall have first been afforded an opportunity for a hearing before a court of competent jurisdiction and until after that court shall have ordered obedience to such subpoena, process or order of such administrative agency, and such court order shall have been disobeyed”); and *Florida Dep’t of Insurance v. Bankers Insurance Co.*, 694 So. 2d 70, 73 (Fla. 1st DCA 1997) (“[T]he circuit court must also determine, in a case where a resisting party properly raises such issues, whether an agency’s investigatory subpoena is overly broad or otherwise unduly burdensome, and whether enforcement would violate some privilege or constitutional right.”).

Second, the Panel Opinion allows the OIR to suspend the Allstate Companies’ certificates for not producing attorney-client privileged documents. As explained in the Motion for Rehearing at pages 12 - 13, this contradicts *Bankers Ins. Co. v. Florida Dep’t of Ins. & Treasurer*, 755 So. 2d 729 (Fla. 1st DCA 2000) (“We also AFFIRM the trial court’s finding that an attorney-client relationship exists between the appellant and attorney Cheryl Gentry, so that the work-product privilege attaches to the letter written to Gentry by a polygraph examiner.”).

Third, the Panel Opinion does not require the IFO to provide at least as much procedural protections as required by other statutes, such as Section 624.321(2), and the constitution. As explained in the Motion for Rehearing at pages 15 - 17, this contradicts cases including *Bio-Med Plus, Inc. v. State, Dep't of Health*, 915 So. 2d 669, 671 (Fla. 1st DCA 2005).

Fourth, the Panel Opinion accepts general allegations of non-specific complaints and hearsay statements concerning a third party's advertisements for a program as evidence of harm. As explained in the Motion for Rehearing at pages 17 - 22, this contradicts First District cases requiring particularized allegations of specific incidents of harm, including *Bio-Med Plus*, 915 So. 2d at 673; *United Ins. Co. of Am., v. Dep't of Insurance*, 793 So. 2d 1182, 1184 (Fla. 1st DCA 2001); and *Commercial Consultants Corp. v. Dep't of Bus. Regulation*, 363 So. 2d 1162, 1164 (Fla. 1st DCA 1978).

Fifth, the Panel Opinion finds an immediate danger of harm even though the OIR's commissioner stated that "It's not a matter of time; we would happily grant you the time to produce documents." As explained in the Motion for Rehearing at page 22, this conclusion contradicts First District cases requiring a genuine emergency to justify an emergency order including *Commercial Consultants*, 363 So. 2d at 1165 (holding that agency's reasons for acting "must be factually explicit and persuasive concerning the existence of a genuine emergency"), and *Premier*

Travel Int'l, Inc. v. State, Dep't of Agric. and Consumer Servs., 849 So. 2d 1132, 1136 (Fla. 1st DCA 2003) (holding that the IFO could not justify an emergency where it did not “demonstrate the level of urgency that would make the orders necessary”).

Sixth, the Panel Opinion found an immediate danger based on an alleged willful statutory violation.²⁰ As explained in the Motion for Rehearing, pages 20 - 22, this contradicts First District cases including *Commercial Consultants, supra*, 363 So. 2d at 1164 (finding that simple allegations of violations of Land Sales Practices Act, which also constituted felonies under the Act, could not support an emergency order) and *Unimed v. State, Office of Insurance Regulation*, 884 So. 2d 963, 964 (Fla. 1st DCA 2004) (“As all of those decisions emphasize, it is not sufficient merely to allege a statutory violation; instead, the order must contain a factual recitation sufficient to demonstrate the existence of an imminent threat of

²⁰ The IFO invokes Section 624.15(1), which is a generic blanket penalty providing that unless there is a greater penalty set forth in another provision of the code or rule, any willful violation of the insurance code is a second degree misdemeanor in addition to grounds to deny, suspend, or revoke a license. Thus, the IFO, and the Panel Opinion, note that an allegation of a willful statutory violation also constitutes a continuing crime. If this were sufficient to establish an emergency, then agencies could dispense with pre-deprivation due process hearings in most cases, since this sort of blanket criminal penalty for violating regulatory statutes is very common. Virtually all of the First District emergency order cases involved alleged statutory violations that could also be crimes under the regulatory scheme, including *Commercial Consultants, Unimed, and Premier Travel*, and those alleged violations were found insufficient to justify the agency’s emergency action.

‘specific incidents of irreparable harm to the public interest’ requiring use of the extraordinary device afforded by section 120.569(2)(n).”.

Finally, the Panel Opinion approved an IFO imposing license suspension without the agency attempting to use less harsh remedies such as fines, filing in Circuit Court for subpoena enforcement, reviewing actual claim files in a market conduct examination, or directing an order to the claims practices described in the consumer advocate report attached to the IFO. As explained in the Motion for Rehearing at pages 22 - 27, this ruling violates cases such as *Premier Travel, supra*, 849 So. at 1136 and *Preferred RV, Inc., v. Dep’t of Highway Safety and Motor Vehicles*, 869 So. 2d 713, 714 n.3 (Fla. 1st. DCA 2004) (“Absent factual allegations concerning what actions the Department has taken prior to the issuance of the emergency order, however, it is not readily apparent that immediate suspension of appellant’s business license is the only adequate remedy available.”).

In short, the Panel Opinion presents a case of exceptional importance by dramatically expanding agency powers to use subpoenas and emergency orders, while shielding those powers from judicial scrutiny. It also violates constitutional separation of powers. The Panel Opinion allows an administrative agency to exercise judicial functions by reviewing and disposing of subpoena recipients’ objections to the agency’s own administrative subpoenas without pre-enforcement review by the judiciary. Additionally, the Panel Opinion creates an intra-district

conflict with the many First District opinions requiring pre-enforcement judicial review of agency subpoenas, upholding claims of attorney-client privilege against agency subpoenas, and enforcing the rules regarding when emergency orders can be issued. For these reasons, rehearing en banc is necessary to bring the Panel Opinion into conformity with the law.

MOTION FOR CERTIFICATION

In the alternative, the Appellants respectfully request, pursuant to Article V, § 3(b)(4) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(v), that this Court certify the following questions to the Florida Supreme Court as matters of great public importance:

1. Whether a Florida state agency may self-enforce its own subpoenas prior to any judicial review or whether, as a matter of constitutional separation of powers and United States Constitution Fourth Amendment dictates, an agency must instead bring an enforcement action in circuit court when there are timely objections and privileges asserted?
2. Whether the OIR can use investigatory subpoenas and the threat of a license suspension to compel production of attorney-client privileged documents from insurance companies?

3. Whether an emergency order that does not refer to any specific incidents of harm can satisfy the requirement of showing an immediate danger to the public health, safety, or welfare required by Section 120.60(6)?
4. Whether for purposes of Section 120.60(6)(a) an emergency action by the OIR seeking to enforce a subpoena must provide the procedural protection provided in Section 624.321(2) of first seeking enforcement in the circuit court?

As described and argued fully in the Motion for Rehearing and Motion for Rehearing En Banc, this decision stands for the proposition that an administrative agency may, by subpoena, demand and compel a licensee to produce any and all of its books, records and accounts and testify on such subjects as directed by the agency without any opportunity for prior judicial review of the subpoena, the reasonableness of the compulsion, or the right to assert privileges or constitutional rights in defense to enforcement. Appellants submit that this is such a fundamental shift in the balance of power in this state and such an aberration of individual rights, including the right to attorney-client privilege, that this matter should not be decided without review by the Supreme Court of the State of Florida.

ATTORNEY'S STATEMENTS PURSUANT TO FLA. R. APP. P. 9.331(d)(2)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional performance.

In addition, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court, and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court:

Administrative investigatory subpoena enforcement

Carrow v. Dep't of Professional Regulation, 453 So. 2d 842 (Fla. 1st DCA 1984)

State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628 (Fla. 1st DCA 1974)

A AAAH Auto Cash Register Auto Insurance of Jax, Inc. v. Dept. of Insurance, 625 So. 2d 139 (Fla. 1st DCA 1993)

Nathanson v. Dep't of Labor and Emp. Sec., 620 So. 2d 1066 (Fla. 1st DCA 1993)

Florida Dep't of Insurance v. Bankers Insurance Co., 694 So. 2d 70 (Fla. 1st DCA 1997)

Bankers Ins. Co. v. Florida Dep't of Insurance, 755 So. 2d 729 (Fla. 1st DCA 2000)

Emergency orders (ESOs/IFOs/other)

Bio-Med Plus, Inc. v. State, Dep't of Health, 915 So. 2d 669 (Fla. 1st DCA 2005)

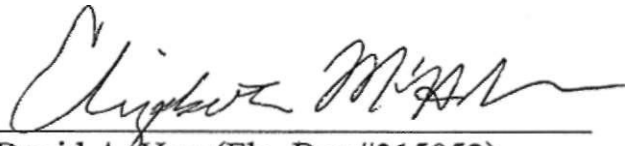
United Ins. Co. of Am., v. Dep't of Insurance, 793 So. 2d 1182 (Fla. 1st DCA 2001)

Commercial Consultants Corp. v. Dep't of Bus. Regulation, 363 So. 2d 1162 (Fla. 1st DCA 1978)

Unimed v. State, Office of Insurance Regulation, 884 So. 2d 963 (Fla. 1st DCA 2004)

Preferred RV, Inc., v. Dep't of Highway Safety and Motor Vehicles, 869 So. 2d 713 (Fla. 1st. DCA 2004)

Respectfully submitted this 14th day of April, 2008.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been Hand Delivered to Steven H. Parton, Anoush Arakalian Brangaccio, Jim L. Bennett, and Susan Dawson, Office of Insurance Regulation, 200 East Gaines Street, Suite 612, Tallahassee, Florida 32399-4206, this 14th day of April, 2008.

