

IN THE SUPREME COURT OF FLORIDA

ROBIN HOOD GROUP, INC.,
JEANIE B. COOK a/k/a/ BARBARA
J. COOK, KRISTAN J. FEWKES,
MICHAEL FEWKES, FEWKES

4th DCA Case No: O3-3376
Supreme Court Case No:

MANAGEMENT CORPORATION,
and COREY LAMA,

Petitioners,

FLORIDA OFFICE OF INSURANCE
REGULATION and KEVIN M.
MCCARTY, as Director,

Respondents,
_____ /

Petitioners' Jurisdictional Brief

On Review from the District Court of Appeal,
Fourth District, State of Florida

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

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STATEMENT OF THE CASE AND OF THE FACTS

Respondents, OFFICE OF INSURANCE REGULATION and KEVIN M. MCCARTY, as Director (collectively, the “OIR”), entered an Immediate Final Order (the “IFO”) against the Petitioners on or about July 31, 2003, without notice or the opportunity to be heard. The IFO alleged that Petitioners were in violation of the insurance laws for conducting viatical settlements without a license, and directed Petitioners to immediately cease and desist from transacting any new viatical insurance business. In addition, Petitioners were directed to: (a) send a letter (to be approved by the OIR) to each and every viator, policyholder, agent, investor, broker, salesperson, etc. notifying them of the cessation of the Petitioners’ Florida business; (b) to deliver to the department a complete accounting of all life insurance contracts purchased, sold or negotiated since the inception of the business in Florida; and (c) to maintain Petitioners’ existing policies. The IFO stated that the issuance of the IFO was "fair under the circumstances due to the potential grave harm resulting from unauthorized insurance entities engaging in the business of insurance in Florida."

On August 29, 2003, Petitioners sought review of the IFO through appeal to the Fourth District Court of Appeal, pursuant to Section 120.68, Florida Statutes, and Fla. R. App. P. 9.110. Oral argument was heard on July 7, 2004. The Fourth District Court of Appeal affirmed the IFO in its Opinion filed October 13, 2004 (the “Opinion”).¹ The Opinion restated (nearly verbatim) the allegations set forth in the

¹ Robin Hood Group, Inc. v. Florida Office of Insurance Regulation, 885 So.2d 393 (4th DCA 2004) (Rehearing Denied Nov. 16, 2004), attached hereto as Appendix A.

IFO as support for its finding that the IFO alleged facts “sufficiently specific and particularized to demonstrate the risk of immediate and ongoing harm to the insurance buying public.” The Opinion then affirmed, without discussion, the “second issue raised by [Petitioners]” on appeal.²

SUMMARY OF ARGUMENT

The Fourth District erred and created conflict with the opinions of the First District by: (A) affirming the IFO, despite affirming that the OIR had not effectively served the IFO on all the Petitioners in accordance with *Florida Statutes* §120.569; and (B) misapplying the standard of review of an immediate final order and accepting the allegations set forth in the IFO as true, despite clear evidence in the supplemental record refuting allegations asserted in the IFO.

² Challenging whether the IFO was effectively served on the Petitioners as required under Florida’s Administrative Procedures Act.

ARGUMENT

A. THE OPINION OF THE FOURTH DISTRICT UPHOLDING AN AGENCY’S IMMEDIATE FINAL ORDER, DESPITE THE FAILURE OF THE ORDER TO BE SERVED ON THE REGULATED PARTY IN ACCORDANCE WITH FLORIDA STATUTES, CONFLICTS WITH THE OPINION OF THE FIRST DISTRICT THAT SERVICE ON THE REGULATED PARTY OR ITS ATTORNEY OF RECORD IS REQUIRED.

The Fourth District’s Opinion in affirming the IFO, despite the failure of the OIR to serve the IFO on all the Petitioners in accordance with *Florida Statutes* §120.569, directly conflicts with the First District’s holding in *Resort Sales International, Inc. v. Florida Department of Business and Prof’l Regulation*, 795 So.2d 1040 (Fla. 1st DCA 2001). The Petitioners’ second issue on appeal³ stated that: “[t]he OIR has not effectively served the order on all the [Petitioners] in this action, as is required under the Administrative Procedure Act.” The Opinion affirmed the Petitioners’ second issue on appeal, but nevertheless also affirmed the IFO. The Opinion conflicts with the fundamental proposition asserted by the First District. In *Resort Sales*, the First District found that *Florida Statutes* §120.569 required that “an initial document such as an administrative complaint or a notice to show cause must be served directly on the regulated party, even if the agency lawyers know that the party in question is represented by a particular lawyer.” *Id.* at 1042.

In the present case, the IFO was not only an initial document, but a final document as well. Because the Fourth District affirmed that the IFO was not effectively served on the Petitioners in accordance with *Florida Statutes* §120.569,

³ As stated in the Table of Contents of the Petitioners’ appellate brief.

its holding directly conflicts with the First District's finding in *Resort Sales* which necessitates that the IFO be quashed. The Fourth District's Opinion affirming the IFO is irreconcilable with that of the First District. The Opinion creates new law in Florida, going in the opposite direction from another district. This Court should accept jurisdiction in order to restate a uniform measure of the effect of an agency's failure to serve an order pursuant to *Florida Statutes* §120.569.

B. THE FOURTH DISTRICT ERRED IN APPLYING THE STANDARD OF REVIEW OF AN IMMEDIATE FINAL ORDER

The Fourth District's Opinion expressly states that “[t]he standard of review of an immediate final order is whether, on its face, the order sufficiently states particularized facts showing an immediate danger to the public welfare.” The standard of review which has been identified, labeled and applied by the Fourth District is different from the standard of review applied by the First District. The First District has never explicitly identified or labeled its standard of review for immediate final orders, and Petitioners' counsel has found no other district court or Supreme Court opinion which has identified the “standard of review” for such orders. However, it is evident from the language utilized by the First District in its review of immediate final orders, and its application in cases similar to the one before this Court, that the standard of review utilized by the First District conflicts with that of the Fourth District.

The First District requires that an immediate final order must allege facts sufficient to demonstrate that specific incidents of irreparable harm to

the public interest will occur without an immediate cease and desist order, “requiring the use of the extraordinary device afforded by section 120.569(2)(n).” *Unimed v. Office of Insurance Regulation*, 884 So.2d 963 (Fla. 1st DCA 2004) citing *Commercial Consultants v. Department of Business Regulation*, 363 So.2d 1162 (Fla. 1st DCA 1978) and *United Insurance Co. of America v. State of Florida, Department of Insurance*, 793 So.2d 1182 (Fla. 1st DCA 2001). The agency’s statement of reasons for acting “must be factually explicit and persuasive concerning the existence of a genuine emergency.” *Commercial* at 1164-1165. In *Commercial*, the emergency order was declared invalid because, in part, because the emergency order did not “specifically describe the alleged irreparable harm.” *Id.* The First District does not accept a general conclusory prediction of harm based on the failure of a party to be licensed in Florida as support for an emergency order. *See Unimed*, 884 So.2d 963.

Although the language setting forth the standard utilized by the First District in reviewing immediate final orders is similar to that of the Fourth District, clear distinctions are evident. The immediate final orders affirmed by the First District specify instances of irreparable harm, and do not merely reference specific instances of violations of Florida Statutes, such as the Fourth District found in its Opinion. For example, in *Saviak v. Guner*, 375 So.2d 1080 (Fla. 1st DCA 1979)⁴ the First District found that despite policing

⁴ Cited by the Fourth District in its Opinion as precedent for its articulated standard of review for immediate final orders.

efforts by the state agency, the party was and continued to be engaged in withholding remittance of insurance premiums to the insurers, resulting in the cancellation of the automobile liability insurance of her insureds.

In contrast, the Opinion at issue does not recite a single specific incident of harm to the public by the Petitioners. The IFO did not allege any fact that a member of the public was harmed. The IFO does not specifically assert what specific harm the public will endure if an emergency order was not entered without the opportunity for the Petitioners to be heard. The allegations of the IFO, and the Fourth District's recitation of the facts set forth in the IFO, merely establish that the Petitioners have violated Florida Statutes. Such allegations are insufficient to warrant the issuance of an immediate final order without the opportunity to be heard. *See Unimed*, 884 So.2d 963; *Commercial Consultants* 363 So.2d 1162; and *United Insurance* 793 So.2d 1182.

Additionally, the facts recited in the Opinion quoted the IFO's allegation that in June 2001 and in June 2002, Petitioners "performed the functions of a viatical settlement provider, or ha[d] entered into or solicited viatical settlement contracts without first having obtained a license from the [OIR], in violation of Section 626.9912, Florida Statutes." However, no mention is made in the Opinion or the IFO that the OIR later withdrew these

allegations and findings of fact.⁵ The allegations relied on by the OIR in its IFO are themselves inadequate to satisfy the Fourth District's own requirement that the complained of conduct was likely to continue.

The effect of the Fourth District's Opinion is to create a definite split on the same issue of law. The standard of review applied by the Fourth District is significantly different, and less stringent, than that applied by the First District. This Court should accept jurisdiction in order to restate a uniform standard of review for immediate final orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should accept jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice to Invoke Discretionary Jurisdiction has been furnished to Clifford A. Taylor, Esq., Division of Legal Services Office of Insurance Regulation, 200 East Gaines Street, 6th Floor, Tallahassee, Florida 32399-0333, on this ____ day of December, 2004.

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⁵ Petitioners supplemented the record on appeal on October 22, 2003, to include documents (such as the Consent Order and Settlement Stipulation entered between the Petitioners and the OIR or its predecessor agency) evidencing that the OIR withdrew these allegations and findings prior to issuing the IFO. The Respondents then moved to strike the Petitioners' supplemental record. On October 13, 2004, the Court determined Respondents' motion to strike to be moot.

APPENDIX

Robin Hood Group, Inc. v. Florida Office of Insurance Regulation, 885
So.2d 393 (4th DCA 2004)