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September 7, 2010

VIA HAND DELIVERY

DFS Agency Clerk
Julie Jones, CP, FRP
Florida Department of Financial Services
200 E. Gaines St.
Tallahassee, FL 32399-0390

Re: Petition for Declaratory Statement

Dear Ms. Jones:

Pursuant to Section 120.565, Florida Statutes, enclosed please find a Petition for Declaratory Statement filed on behalf of Mr. Mark D. Boardman. Please let me know if you have any questions.

Very truly yours,



Kenneth J. Plante

KJP:tbn

encl.

cc: Mark A. Boardman

**STATE OF FLORIDA
DEPARTMENT OF FINANCIAL SERVICES**

**IN RE: PETITION FOR DECLARATORY
STATEMENT BEFORE THE
STATE OF FLORIDA DEPARTMENT
OF FINANCIAL SERVICES**

PETITION FOR DECLARATORY STATEMENT

Petitioner, Mark D. Boardman, by and through his undersigned counsel, pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, hereby submits to the State of Florida, Department of Financial Services (the “Department”), the following Petition for Declaratory Statement, and would state:

1. Petitioner, Mark D. Boardman, is a public adjuster licensed by the State of Florida pursuant to Chapter 626, Florida Statutes. Petitioner’s license number is A024318.
2. Petitioner’s business address is 1660 N. Maitland Ave., Maitland, Florida 32751; mailing address: P.O. Box 940608, Maitland, Florida 32794; telephone number (800) 830-0635; and facsimile number (407) 265-8343.
3. Petitioner’s representatives in this matter are Wilbur E. Brewton, Esquire, and Kenneth J. Plante, Esquire, and the law firm of Brewton Plante, P.A., whose business address is 225 S. Adams St., Ste. 250, Tallahassee, Florida 32301; telephone number (850) 222-7718; and facsimile number (850) 222-8222.
4. Petitioner seeks a declaratory statement as to the Department’s interpretation of Section 626.854, Florida Statutes.
5. As a licensed public adjuster, Petitioner’s actions are regulated by the Department and he is subject to disciplinary action in the event that his activities do not comply with the

Department's interpretation of its rules, regulations and governing statutes. As more specifically stated below, Petitioner is directly and substantially affected by the Department's interpretation of Section 626.854, Florida Statutes.

BACKGROUND

Section 626.854(1), Florida Statutes, defines "public adjuster" as:

. . . any person, except a duly authorized attorney at law as hereinafter in s. 626.860 provided, who, for money, commission or other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured or third-party claimant in negotiating for or effecting a settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims, and also includes any person who, for money, commission, or other thing of value, solicits, investigates, or adjusts such claims on behalf of any such public adjuster.

Section 626.854(6), Florida Statutes, provides:

(6) A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured.

In Frederick W. Kortum, Jr. v. Alex Sink, Case No. 2009CA3926, in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, the Court upheld the constitutionality of Section 626.854(6), Florida Statutes. In reaching this decision, the Court accepted the Department's interpretation of Section 626.854(6), Florida Statutes, holding:

The Defendant . . . reads the statute as no more than a ban for 48 hours of face to face or telephonic solicitation. Defendant couches her arguments as a curb on conduct and not a suppression of commercial speech. Defendant contends that printed or

electronic correspondence such as e-mails or letters, flyers or door hangers are not prohibited by the statute during the 48 hour period.

* * *

The Court finds that the language of Florida Statute 626.854(6) is not clear and unambiguous. Either interpretation advanced by the parties is reasonable and logical. The statute could be read to ban only face to face or telephonic contact as Defendant contends or alternatively it could be read to ban all contact “directly or indirectly” which would include all oral and written or electronic contact. This is how Plaintiff reads the statute.

* * *

Finding, as the Court does, that Defendant’s interpretation is not “clearly unauthorized or erroneous” the Court must accept the Defendant’s interpretations of what the statute allows and what it prohibits. The Court’s finding is that for the first 48 hours after a casualty, a public adjuster may not solicit face to face or by telephone with an insured who has sustained a loss. No other form of contact is prohibited by the statute during the first 48 hours and no prohibition of contact exists after 48 hours. [Emphasis added.]

Kortum, Id. A copy of the Court’s opinion is attached hereto as Exhibit A.

Although not a party in the Kortum litigation or Mr. Kortum’s subsequent appeal of that decision, as a licensed public adjuster, Petitioner has an interest in, and will be directly affected by, the Court’s ruling and any subsequent action that may be taken by the Department to interpret and to apply its interpretation of Section 626.854(6), Florida Statutes, to the licensed public adjuster profession. Petitioner has reviewed the pleadings filed in Kortum and is both confused and uncertain as to how to proceed in the daily operation of his business, as more questions have been raised by the Kortum decision than were answered. For example, the Department’s position, as presented to the Court, is inconsistent with the information disseminated by the Department through its official website, which begs the question as to what interpretation of the statute has been adopted by the Department. See Exhibit B, Transcript of Proceeding, at 52-54.

At the Kortum trial the Department objected to certain portions of Mr. Altieri's testimony, arguing:

MR. DAVIDSON: Further objection. There are only three ways that an agency can speak definitely as to what a statute may or may not mean, a statute within its jurisdiction. And that's provided in Chapter 120.

You can issue a declaratory statement if you're asked to issue one, you can promulgate a rule to pronounce the position on a statute, or you can enter a final order to pronounce whatever the results of the statute is. Those are the only three ways an agency can speak.

Anything less is just chatter between people and of no consequence to the agency's position as to how to interpret the statute. That's the APA primer 101. You've got three ways the agency can speak to a statute. [Ex. B at 50]

* * *

... Website is not agency position, a rule, a dec statement or a final order. And the only way an agency can speak - - [Ex. B at 51]

* * *

... Once again, he's asking where do you go to see what the Chief Financial Officer says. The Chief Financial Officer can only say things through rules, dec statements, and final orders. [Ex. B at 122]

Notwithstanding the foregoing, the Department argued:

... what you are hearing today is coming from the agency that's charged with administrating the statute.

It's an executive construction of the statute. And executive constructions of the statutes are charged with administering are afforded great deference by the courts, and only when they are clearly erroneous will a court say, "No, that's the wrong construction." Any permissible construction is acceptable.

* * *

And so what we're saying here to you today is our construction of statute is clearly that it allows written communication within 48 hours. [Ex. B at 32-33, emphasis added.]

The “executive construction” of the statute presented by the Department and adopted by the Court is not a rule, declaratory statement, or final order. It does not, therefore, as explained by the Department, represent the official position of the Department. Since the “executive construction” first presented by the Department in argument in the Kortum litigation is not one of the three ways an agency can speak, it is, in the words of the Department: “Just chatter between people and of no consequence to the agency’s position as to how it interprets the statute.” [Ex. B at 50]

At the time of the trial, the Department’s position with respect to the interpretation of Section 626.854(6), Florida Statutes, was still in its embryonic stage. As stated by the Department:

MR. DAVIDSON: . . . In fact, the department, to clarify matters, is amidst rule promulgation where we’re putting together a rule that expressly says, “Yes, for gosh sakes, did you see the Task Force hearings? You can have written communication within 48 hours.”

To clarify the law, we’re doing that right now. [Ex. B at 31]

See also Department of Financial Services’ Memorandum of Law filed in Kortum, wherein the Department stated:

Based on comments made and amendments approved at the November 16, 2007 Task Force meeting, it is the department’s construction of the statute that it does not proscribe contact initiated by the public adjuster or contract entry within 48 hours via written or electronic means. In furtherance of that construction, the department is in the process of promulgating an administrative rule to that effect.

Exhibit C at Fn p.4.

At the Kortum trial, the Department stressed the fact that the Department was in the process of promulgating an administrative rule to clarify the 48 hour restriction placed on public

adjusters by Section 626.854(6), Florida Statutes, and objected to any discussion of a previous rule advertized by the Department, arguing:

MR. DAVIDSON: . . . I don't see that it's relevant material. If it's an unadopted rule, what's it got to do with anything?

THE COURT: This is a proposed rule that was not adopted; correct?

MR. DAVIDSON: That's what Mr. D'Alemberte is telling us.

* * *

. . . as it is a rule that's never been adopted, it has no force or effect whatsoever.

* * *

. . . if an agency can only speak through a rule that it has promulgated, how can it speak through a rule that was not promulgated? [Ex. B at 56-57]

The relevance of the Department's "executive construction" of Section 626.854(6), Florida Statutes, as mere "chatter"; the fact that the Department has, for all intents and purposes, disavowed the comments posted on its official website as agency policy; and the existence of a proposed, yet unadopted rule interpreting Section 626.854(6), Florida Statutes, has created a degree of uncertainty and confusion within the licensed public adjuster profession and Petitioner is uncertain as to what activities are authorized by the Department under Section 626.854(6), Florida Statutes.

In its opening remarks to the Court in Kortum, the Department chastised Mr. Kortum for not seeking a declaratory statement from the Department in lieu of filing suit:

MR. DAVIDSON: . . . [Mr. Kortum's] reading of the statute [is] based on his own interpretation of it, based on his own counsel's advice, or his association's counsel's advice, but not anything the department ever told him because he's never asked the department about that, never.

He could have asked for a declaratory statement; he's not done it. He has not gotten any communication with the department saying written communications within 48 hours of the ban. That's

been his construction of the statute and his lawyer's construction of the statute. [Exhibit B at 30]

Therefore, rather than run afoul of the Department, and in the absence of a rule, declaratory statement or final order of the Department on the interpretation of Section 626.854(6), Florida Statutes, Petitioner has elected to heed the advice of the Department and seek a Declaratory Statement as to the Department's interpretation of Section 626.854(6), Florida Statutes.

The questions presented to the Department are based on the following scenario which reflects a common occurrence experienced by Petitioner and which has the likelihood of repeating itself:

An insured property owner suffers a fire loss to his/her home. The insured receives a brochure from a contractor stating that the contractor can work with the insured's insurance company to obtain the best settlement. The contractor inspects the insured's property in order to assess the amount of damage and prepares a scope of damages that includes all items that the contractor believes, as an expert, should be repaired or replaced and states the charges for each item. The contractor then presents the scope of work to the insured and the insurance adjuster. The adjuster tells the contractor that a door should be repainted rather than replaced as stated/recommended in the scope of work. The contractor agrees and executes the contract with the insured to repair the damage in accordance with the changes suggested by the insurance adjuster. In this scenario, the contractor is not a licensed public adjuster.

QUESTIONS

QUESTION 1: If the contractor acquiesces to a lesser scope of work or unit cost, will the contractor have adjusted the claim on behalf of the insured?

QUESTION 2: If the contractor engages in any discussion with the insurance adjuster regarding the scope of work to be performed and the unit costs of the work, will the contractor be considered to have negotiated with the adjuster on behalf of the insured?

QUESTION 3: What is considered to be an "insurance claim form" as that term is used in Section 626.854(1), Florida Statutes?

QUESTION 4: Is a contract for repairs between a contractor and an insured considered “any other thing of value” as that term is used in Section 626.854(1), Florida Statutes?

QUESTION 5: How does the Department define “in any manner,” as that term is used in Section 626.854(1), Florida Statutes?

QUESTION 6: If the contractor agrees to a reduced scope of work and a commensurate reduction in the overall cost of repairs, has the contractor “effectuated a settlement” with the insurance company as that term is used in Section 626.854(1), Florida Statutes?

QUESTION 7: If, in agreeing to the changes to the scope of work recommended by the insurance adjuster, the contractor has “effectuated a settlement” of the insured’s claim, is the contractor in violation of the provisions of Section 626.854(1), Florida Statutes?

QUESTION 8: If, in discussing the scope of work included in the claim with the insurance adjuster, the contractor has engaged in “negotiating” the claim on behalf of the insured, is the contractor in violation of the provisions of Section 626.854(1), Florida Statutes?

QUESTION 9: Is the contractor in violation of the provisions of Section 626.854(1), Florida Statutes, if he advertizes that he will work with the insurance company to reach a settlement of any claims?

QUESTION 10: If the insurance adjuster is aware that the contractor is not a licensed public adjuster, is the insurance adjuster in violation of any Department rules or statutes by continuing to negotiate a settlement of the claim with the contractor?

QUESTION 11: As a licensed public adjuster, Petitioner uses printed materials such as letters, flyers or door hangers to solicit clients. In order to place the flyers, brochures, or door hangers on the insured’s property, he must physically go onto the property. Petitioner is concerned that if he uses such printed material to contact an insured person within the

first 48 hours after a casualty, he may run afoul of the Court’s ruling and the Department’s “executive construction” of Section 626.854(6), Florida Statutes, and be subject to disciplinary action. Thus, the following question: If, in the process of placing a flyer or door hanger on the premises of an insured person within the first 48 hours after a casualty, Petitioner is approached by an individual who may or may not be the insured or a member of the insured’s family, is Petitioner allowed to talk to the individual(s) about his services once it is discovered that the person is the insured?

QUESTION 12: If, in the process of placing a flyer, brochure or door hanger on the premises of an insured person within the first 48 hours after a casualty, Petitioner is approached by an individual who may or may not be the insured or a member of the insured’s family, is Petitioner allowed to talk to the individual(s) about his services once it is disclosed that the person is not the insured, or is this considered to be an “indirect contact” with the insured?

QUESTION 13: Rule 69B-220.201, F.A.C., entitled “Ethical Requirements,” provides, in pertinent part:

(2) Violation

(a) Violation of any provision of this rule shall constitute grounds for administrative action against the licensee.

* * *

(3) Code of Ethics. The work of adjusting insurance claims engages the public trust. The adjuster shall put the duty for fair and honest treatment of the claimant above the adjusters own interests in every instance. The following are standards of conduct that define ethical behavior, and shall constitute a code of ethics that shall be binding on all adjusters.

* * *

(g) An adjuster shall promptly report to the Department any conduct by any licensed insurance representative of this state which violates any provision of the Insurance Code or Department rule or order.


The term “licensed insurance representative” is not defined by rule or statute. Please define.

QUESTION 14: Does the term “licensed insurance adjuster” include all types and classes of insurance adjusters (company, independent or public), subject to Chapter 626, Florida Statutes, or just licensed representatives of insurance companies?

QUESTION 15: In the event that Petitioner encounters a contractor negotiating a settlement with an insurance company representative/adjuster for a specific task for an insured person:

- a. Is Petitioner required under Rule 69B-220.201, F.A.C., to report the matter to the Department?
- b. Is the Petitioner required under Rule 69B-220.201, F.A.C., to report the suspected activities of the contractor to any other entity? If so, what entity?

Respectfully submitted, this 7th day of September, 2010.



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