



REPRESENTING
ALEX SINK
CHIEF FINANCIAL OFFICER
STATE OF FLORIDA

FILED

JUN 2 1 2010

IN THE MATTER OF:

SAFETY-NET HOSPITAL ALTERNATIVE
RISK POOL, LLC,

Petitioner,

and

AON RISK SERVICES, INC. OF FLORIDA,

Intervenor.

Docketed by 

CASE NO.: 109532-10-AG

DECLARATORY STATEMENT

Safety-Net Hospital Alternative Risk Pool, LLC, (hereinafter referred to as "Petitioner" or "Safety-Net") filed a Petition for Declaratory Statement (Petition) with the Florida Department of Financial Services (Department) on March 12, 2010. This Declaratory Statement is premised upon facts set forth in the Petition for Declaratory Statement and otherwise presented to the Department. If the facts which have been asserted are inaccurate or materially incomplete, the conclusions expressed in this Declaratory Statement may be inapplicable. Upon consideration of the Petition and the Record of this proceeding, the Chief Financial Officer, as head of the Department of Financial Services, finds as follows:

Procedural Background

Petitioner filed the Petition for Declaratory Statement with the Department on March 12, 2010. On April 1, 2010, Petitioner submitted a supplemental written submission with the Department.

On April 14, 2010, Aon Risk Services, Inc. of Florida (Intervenor) filed a Petition for Leave to Intervene. On May 11, 2010, Intervenor filed a supplemental written submission with the Department. On May 21, 2010, the Petition for Leave to Intervene was granted in an Order entered by the Presiding Officer designated by the Department.

Scope of the Declaratory Statement

The Petition for Declaratory Statement requests a determination as to whether Petitioner, as an alliance under Section 395.106, Florida Statutes, should be exempt from the surplus lines policy taxes and fees contained in Sections 626.932 and 626.9325, Florida Statutes. Pursuant to the provisions of Sections 624.01 and 624.307(1), Florida Statutes, the Department is authorized to administer and enforce the provisions of the Florida Insurance Code, including Chapter 626, Florida Statutes. The Department has primary authority to interpret the provisions of Chapter 626, Florida Statutes, and to issue a declaratory statement with respect thereto. By necessary implication, the Department also possesses the authority to interpret the insurance-related provisions of Section 395.106, Florida Statutes, to the extent it references the applicability of the Florida Insurance Code. See Adventist Health System/Sunbelt, 955 So.2d 1173, 1177 (Fla. 1st DCA 2007) (An agency that has “a number of responsibilities” under another act may possess jurisdiction to issue a declaratory statement.); Sutherland Statutory Construction, 7th Ed. (2008) Vol. 3, § 65:2 (Administrative agencies possess only those powers which are conferred either expressly or by necessary implication.) Accordingly, the Department lacks jurisdiction to issue a

declaratory statement with regard to other laws that may be applicable to the activities described in the Petition for Declaratory Statement. Consequently, this Declaratory Statement is limited to a determination as to whether the factual circumstances asserted in the Record in this case are compliant with the provisions of Section 395.106, Florida Statutes, and Chapter 626, Florida Statutes.

The Record

1. The Record in this case includes the Petition filed by the Petitioner, all motions and orders issued regarding intervention, and the written submissions of the Petitioner, Intervenor, and interested parties.

Facts Set Forth in the Record

2. The name of the Petitioner is Safety-Net Hospital Alternative Risk Pool, LLC (Petitioner). Petitioner's principal address is c/o Memorial Healthcare System, 3501 Johnson Street, Hollywood, Florida 33302.

3. Petitioner is a Florida limited liability company.

4. The term "alliance" is used in the Petition to mean a statutory alliance, formed pursuant to Section 395.106, Florida Statutes, by two or more hospitals licensed in this state and located in this state "for the purpose of pooling and spreading liabilities of its members relative to property exposure, implementing self-insurance coverage for its members, **or securing such property insurance coverage for the benefit of its members.**" (Emphasis added).

5. In 2007, a group of licensed Florida hospitals formed Petitioner for the purpose of operating an "Alliance," as authorized by Section 395.106, Florida Statutes.

6. As of the date of the Petition, the member hospitals of the Petitioner are: All Children's Health System, Baptist Health Care, BayFront Medical Center, Lakeland Regional Medical Center, Miami Children's Hospital, and the hospitals operated by the South Broward Hospital District.

7. Petitioner, in carrying out its statutorily authorized role as a joint purchasing arrangement, has negotiated the purchase of direct property insurance for its members. Petitioner does not self-insure.

8. Petitioner and one or more of its member hospitals are named insureds on the direct property insurance policies in question.

9. Petitioner has provided certain documentary support that it has satisfied the financial, reporting, and organizational requirements of Subsections 395.106(1) (a)-(d), Florida Statutes; however, the Petition does not specifically seek a resolution of that issue. Accordingly, this issue is not addressed in this Declaratory Statement.

Petitioner's Standing

10. Pursuant to Section 120.565(1), Florida Statutes, a party has standing to submit a Petition for a Declaratory Statement if they are a "substantially affected person."

11. To establish standing under the "substantially affected" test, a party must show: (1) that the policy will result in a real and immediate injury in fact, and (2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Florida Bd. of Medicine, 917 So.2d 358, 360 (Fla. 1st DCA 2005).

12. Liability for payment is a real and immediate injury in fact. Greynolds Park Manor, Inc. v. Department of Health and Rehabilitative Services, 491 So.2d 1157, 1159 (Fla. 1st DCA 1986).

13. A person need not suffer resulting injury in order to obtain standing. Ward v. Board of Trustees of Internal Imp. Trust Fund, 651 So. 2d 1236, 1238 (Fla. 4th DCA 1995).

14. Here, Petitioner has standing as its substantial interests are affected in that the payment of the surplus lines taxes and fees constitutes an injury in fact and the statutes at issue regulate the applicability of the taxes and fees to Petitioner.

Aon Risk Services, Inc. of Florida Petition To Intervene

15. Pursuant to Rule 28-105.0027, Florida Administrative Code, intervenors must meet the requirements for intervention provided in Rule 28-106.205, Florida Administrative Code.

16. Rule 28-106.205, Florida Administrative Code, requires that intervenors have a substantial interest that will be affected.

17. Here, Aon Risk Services, Inc. of Florida (Intervenor) may also be liable for payment and/or its collection, as its agents sold property insurance to Petitioner.

18. Pursuant to Sections 626.932(2)(a) and 626.9325(2)(a), Florida Statutes, if the Petitioner is required to pay the surplus lines policy taxes and fees, then the Intervenor is required to collect such taxes and fees and remit it to the Department on a quarterly basis.

19. Here, the Intervenor has standing as its substantial interests are affected in that the requirement that it collect and remit the surplus lines taxes and fees to the Department constitutes an injury in fact and that the statutes at issue regulate the applicability of the taxes and fees to Intervenor.

DISCUSSION

Applicability of Sections 626.932 and 626.9325, Florida Statutes

20. Section 626.932(1), Florida Statutes, provides that “The premiums charged for surplus

lines coverages are subject to a premium receipts tax of 5 percent of all gross premiums charged for such insurance.”

21. Section 626.9325(1), Florida Statutes, provides that “The premiums charged for surplus lines insurance are subject to a service fee as provided in s. 626.921(3)(f).”

22. Sections 626.932 and 626.9325, Florida Statutes, do not specifically address the appropriate tax treatment of an “alliance” formed under Section 395.106, Florida Statutes.

23. Section 395.106, Florida Statutes provides:

Risk pooling by certain hospitals and hospital systems.--

(1) Notwithstanding any other provision of law, any two or more hospitals licensed in this state and located in this state may form an alliance for the purpose of pooling and spreading liabilities of its members relative to property exposure, implementing self-insurance coverage for its members, **or** securing such property insurance coverage for the benefit of its members, provided an alliance that is created:

(a) Has annual premiums in excess of \$3 million.

(b) Maintains a continuing program of premium calculation and evaluation and reserve evaluation to protect the financial stability of the alliance in an amount and manner determined by consultants using catastrophic (CAT) modeling criteria or other risk-estimating methodologies, including those used by qualified and independent actuaries.

(c) Causes to be prepared annually a fiscal year-end financial statement based upon generally accepted accounting principles and audited by an independent certified public accountant within 6 months after the end of the fiscal year.

(d) Has a governing body comprised entirely of member entities whose representatives on such governing body are specified by the organizational documents of the alliance. (Emphasis provided.)

24. Additionally, Section 395.106 (3), Florida Statutes provides: “[a]n alliance that meets the requirements of this section is not subject to **any provision** of the insurance code.” (Emphasis provided.)

25. The Department construes Subparagraph (1) of Section 395.106, F.S. to evidence an intent by the Legislature to permit a statutory “alliance” to be formed by two or more hospitals

for three basic purposes: (i) pooling and spreading the liabilities of its members relative to property exposure; (ii) implementing self-insurance coverage for its members or (iii) securing such property insurance coverage for the benefit of its members. This is an appropriate analysis, because the Legislature's use of the disjunctive "or" indicates an intent to permit an "alliance" to be formed for three independent purposes or functions. As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately. See, e.g., Quindlen v. Prudential Insurance Company of America, 482 F.2d 876 (5th Cir. 1973); In re Rice, 83 U.S.App.D.C. 26, 165 F.2d 617 (1947); 82 C.J.S. Statutes 335 (1953). It is settled that to determine the Legislature's intent in enacting a statute, courts first look to a plain reading of that statute. Kasischke v. State, 991 So. 2d 803, 807 (Fla. 2008) (citing Borden v. East-European Ins. Co., 921 So.2d 587, 595 (Fla. 2006)). The plain meaning of Subsection (1) fully supports the conclusion that the alternative of "securing such property insurance coverage for the benefit of its members" should be viewed as an independent, qualifying purpose or function for an alliance. Further, an alliance's ability to secure or obtain property insurance directly from an insurer is apparent from the definition of "property coverage" set forth in subsection 395.106(2)(b), which provides:

"Property coverage means property coverage provided by self-insurance or insurance for real or personal property of every kind and every interest in such property against loss or damage from any hazard or cause and against loss consequential to such loss or damage." (Emphasis provided.)

Thus, a review of Section 395.106, F.S. in its entirety reveals that the Legislature did not obligate an alliance to utilize self-insurance to spread or pool the risks of its members. Nothing in the statute limits the manner in which the alliance may secure property insurance coverage for the benefit of its members. Therefore, if Safety-Net has, as it represents, secured property insurance

on behalf of and for the benefit of its members, and the Alliance otherwise meets the requirements listed in subsections (1)(a)-(d) of Section 395.106, F.S., it logically follows that it is exempt from all provisions of the Insurance Code, including those provisions requiring the payment of surplus lines taxes and fees.

26. Additionally, Section 395.106 (5), Florida Statutes, which was subsequently enacted in 2008, provides as follows:

Reinsurance companies complying with s. 624.610 may issue coverage directly to an alliance self-insuring its liabilities under this section. An alliance purchasing reinsurance shall be considered an insurer for the sole purpose of entering into such reinsurance contracts. Contracts of reinsurance issued to an alliance under this section shall receive the same tax treatment as reinsurance contracts issued to insurance companies. However, the purchase of reinsurance coverage by an alliance self-insuring pursuant to this section shall not be construed as authorizing an alliance to otherwise act as an insurer.

It has been asserted by Counsel to the Florida Surplus Lines Service Office (“FSLSO”) that the Legislature, by specifically providing an exemption for reinsurance taxes, intended that an alliance be subject to all other taxes. However, the better reading of that statutory section is that the Legislature was addressing a separate issue (the ability of an alliance to purchase reinsurance directly and the attendant tax treatment of that purchase) arising from the legislatively-bestowed right for an alliance to self-insure.

27. Consequently, it would appear that Section 395.106(5), Florida Statutes is intended to address the specific purpose, in Section 395.106(1), Florida Statutes, of “implementing self-insurance coverage for its members”, rather than the purpose of “securing such property insurance coverage for the benefit of its members.” Said another way, this statutory section is merely intended to clarify that an alliance is permitted to self-insure, purchase reinsurance

coverage directly, and to be treated as an insurer for that limited purpose. Thus, the Department deems Subsection (5) to be inapplicable to the resolution of the instant Petition.

28. Counsel for the FSLSO also contends that the Legislature intended that all members of an alliance be required to “pool” their respective risks to be exempt from the Insurance Code. However, a review of subsection (1) reveals that the “pooling and spreading [the] liabilities of its members relative to property exposure” is, as discussed above, merely *one of three methods* by which an alliance can insure. It has not been disputed that the Alliance has “secured” property insurance at issue for the benefit of its members. The Petitioner and Intervenor have submitted documentation to support that contention. It has also been represented by the Petitioner and Intervenor (with documentary support) that the Alliance routinely appears on the policy with the individual hospital receiving coverage as a joint insured, which further evidences that the Alliance has indeed secured the coverage. To the extent these facts are correct, the third function to qualify as an alliance (“securing such property insurance coverage for the benefit of its members”) is satisfied.¹

Additionally, to require, as Counsel for the FSLSO has suggested, that either only the alliance appear on such policies or that *every* member of an alliance must appear on *every* policy would not appear possible, and would thus render the third purpose of “securing such property insurance coverage for the benefit of its members” meaningless. See U.S. v. Velez, 586 F.3d 875 (11th Cir. 2009). (In interpreting a statute, the court must not read any provision, or even any word, of the statute so as to make it superfluous.) See also Martinez v. State, 981 So.2d 449 (Fla. 2008). For the following reasons, such a requirement would effectively operate to prevent the ability of an alliance to qualify for the statutory exemptions provided by the Legislature.

As previously stated, the Alliance and its member hospitals are represented to be joint named insureds on the policies at issue. Due to statutory constraints, an alliance cannot be the sole named insured on any policy which it secures for the benefit of its members. Section 627.405, F.S. "*Insurable interest; property*," provides in subsection (1) that: "No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss." In this case, Safety-Net, in carrying out its statutorily authorized role as a joint purchasing arrangement, has negotiated and secured the purchase of property insurance for its members. The named insured on each policy may be the individual hospital *and* the Alliance, but the member hospital *must* be a named insured, because as owner of the property insured, it alone has the insurable interest. Similarly, it would be problematic for each individual hospital to obtain an insurable interest in another hospital's property.

29. The better view is that the Alliance, and the member hospitals that comprise it, should be viewed as a single indivisible entity.² This analysis receives support from Sections 626.932 and 626.9325, Florida Statutes, which provide that the surplus lines agent must collect "*from the insured*" the surplus lines tax and fee. The surplus lines taxes on the same policy cannot be required from one half of "the insured" (the member hospitals), but not required of the other half (the alliance). Accordingly, surplus lines taxes should not be exempt for an alliance, but still collectible from the members of an alliance on the same risk for which the alliance was created. Such a statutory construction would defeat the perceived purpose of the legislation, to permit qualified alliances to obtain affordable property insurance coverage.

¹ However, it should be noted that if the Alliance does *not* appear on a certain policy (which, as stated, is a significant indicia that the alliance actually secured the coverage for the benefit of its members), *and* there is no proof otherwise that the Alliance secured the coverage, the third purpose would *not* be satisfied.

² Webster's Ninth New Collegiate Dictionary (1985) defines "member" as "a constituent part of a whole".

Conclusion

If the Petitioner otherwise meets the requirements of Subsections 395.106 (1)(a)-(d), Florida Statutes, the Petitioner would be deemed to satisfy the statutory requirements to be an “alliance” pursuant to Section 395.106, Florida Statutes, and as such, for the reasons stated herein, would be exempt from the surplus lines taxes and costs provisions of Sections 626.932 and 626.9325, Florida Statutes, contained in the Florida Insurance Code.

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel acting as the Agency Clerk, at 612 Larson Building, Tallahassee, Florida 32399-0333, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

DONE and ORDERED this 21st day of June, 2010.



MICHAEL W. CARLSON
Deputy Chief of Staff



COPIES FURNISHED TO:

F. PHILIP BLANK
TIMOTHY G. SCHOENWALDER
Blank & Meenan, P.A.
204 South Monroe Street
Tallahassee, Florida 32301
Attorney for Safety-Net

KAREN ASHER-COHEN
HARRY O. THOMAS
Radey Thomas Yon & Clark, P.A.
Post Office Box 10967
Tallahassee, Florida 32302
Attorney for Aon

Julie Jones, Agency Clerk
Department of Financial Services
200 East Gaines street
Tallahassee, Florida 32399-0390
Agency Clerk

CLYDE W. GALLOWAY, JR.
Galloway Brennan, P.A.
240 East Fifth Avenue
Tallahassee, Florida 32303
Attorney for FLSO