IN THE COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE FLORIDA OFFICE OF INSURANCE REGULATION, an agency of the State of Florida, and DAVID ALTMAIER, as Commissioner of the Florida Office of Insurance Regulation,

Appellees,

Case No. 1D16-5416

vs.

Lower Case No. 2016-020607-CA-22

JAMES F. FEE, JR., Individually,

Appellant.
_____/

OFFICE OF INSURANCE REGULATION AND COMMISSIONER DAVID ALTMAIER'S MOTION TO REINSTATE AUTOMATIC STAY OR, IN THE ALTERNATIVE, MOTION TO EXTEND STAY

Appellants Florida Office of Insurance Regulation and David Altmaier, in his official capacity as Commissioner of the Office (collectively "Office"), pursuant to Rule 9.310, Florida Rules of Appellate Procedure, and by and through undersigned counsel, file this Motion to Reinstate Automatic Stay or, in the Alternative, Motion to Extend Stay, and state:

Factual and Procedural Background

1. On November 23, 2016, Circuit Court Judge Karen Gievers entered an Order on Non-Jury Trial and Final Judgement Providing Declaratory and Injunctive Relief ("Order"). Among other relief granted to Appellee James F. Fee, Jr. ("Fee"), the Order declared void ab initio a Final Order On Rate Filing, Case No. 191880-16 ("Rate Order"), entered by the Office. The filing approved by the Rate Order was submitted by the National Council on Compensation Insurance ("NCCI"), a authorized[1] rating organization, on behalf of its member insurers, and requested a 14.5% increase in the uniform base rate for workers' compensation insurance.

2. On November 28, 2016, the Office filed its Notice of Appeal of the Order. Pursuant to Rule 9.310(b)(2), Florida Rules of Appellate Procedure, that filing effected an automatic stay of the Order. On November 30, 2016, the Office filed with the Circuit Court a Notice of Automatic Stay.

3. On November 30, 2016, NCCI separately filed a Notice of Appeal of the Order. That same date, NCCI filed with the Circuit Court an Emergency Motion for Stay Pending Appellate Review and Motion to Expedite Proceedings. The Office filed a Notice of Joinder in NCCI's Motion.

[1] § 627.221, Fla. Stat.

4. On November 30, 2016, counsel for Fee sent an e-mail to Ms. Lynn Underwood, Judge Gievers' Judicial Assistant, with copies to all counsel of record. This e-mail reads in full as follows:

> Ms. Underwood,
>
> Attached is the Florida Office of Insurance Regulation's and David Altmaier's Notice of Automatic Stay which was just filed by Defendants in this matter. This relates to a rate increase which is scheduled to go into effect tomorrow and which Judge Gievers voided last week. We strongly disagree with the Defendants' contention that the 48 hour limitation does not apply to this action. Because of the urgency, we are requesting an expedited telephonic hearing on this matter at the Court's earliest convenience.
>
> Thank you,
>
> Salvatore H. Fasulo

5. On December 1, 2016, Ms. Underwood sent an e-mail to Mr. Fasulo, with copies to all counsel, which reads in full as follows:

> Ok there will be a telephonic hearing today at 4:00 in Judge Gievers Chambers 365-D (if anyone wants to appear in person). Please notify all parties. Anyone appearing by phone will need to be conferenced in together and then call our office at 850-606-4312 at 4:00.
>
> Thanks,
>
> Lynn

6. Counsel for the parties appeared[2] before Judge Gievers pursuant to the direction in Ms. Underwood's e-mail[3] at 4:00 p.m. on December 1, 2016. There was no court reporter present.

7. Counsel for the parties presented their respective arguments and responses on NCCI's Emergency Motion for Stay, the Office's Joinder, and the Office's Notice of Automatic Stay. During the course of this hearing, counsel for Fee made an *ore tenus* Motion to Vacate Portion of Automatic Stay.

8. On December 5, 2016, Judge Gievers entered an Order Denying Defendants' Emergency Motion to Stay Pending Review and Granting Plaintiff's *Ore* Tenus Motion to Vacate Portion of Automatic Stay ("Order on Stays"). The order was issued nunc pro tunc to December 2, 2016.

9. Review of the Order on Stays is appropriately before this Court on motion. *See* Fla. Rule App. P. 9.310(f). The burden of proof is on the Office to show that the Circuit Court abused its discretion in vacating the automatic stay. See St. Lucie County v. North Palm Dev. Corp., 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984).

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[2] Messrs. Shubin and Fasulo and Ms. Brunswick appeared by telephone for Fee. Mr. Stiller appeared by telephone and Ms. End-Of-Horn was present in chambers for the Office. Messrs. McKee and Paquette were present in chambers for NCCI.

[3] No notice of hearing was filed prior to the hearing.

Motion to Reinstate Automatic Stay

10. Florida Rule of Appellate Procedure 9.310(b)(2) provides in pertinent part as follows:

> *Public Bodies; Public Officers.* The timely filing of a notice shall automatically operate as a stay pending review . . . when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

11. The policy rationale behind the automatic stay

> involves the fact that planning-level decisions are made in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally.

St. Lucie County v. North Palm Dev. Corp., 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984).

12. "[E]ven though rule 9.310(b)(2) authorizes the lower court to vacate the automatic stay, '[g]iven the rationale for staying such judgments in the first instance . . . the stay should be vacated only under the most compelling circumstances.'" Department of Environmental Protection v. Pringle, 707 So. 2d 387, 390 (Fla. 1st DCA 1998) (quoting St. Lucie County, 444 So. 2d at 1135). Put another way, an automatic stay will be vacated only when "the equities are

overwhelmingly tilted against maintaining the stay." Tampa Sports Authority v. Johnston, 914 So. 2d 1076, 1084 (Fla. 2d DCA 2005).

13. The party seeking to vacate the stay bears the burden "to establish an evidentiary basis for the existence of such 'compelling circumstances.'" Pringle, 707 So. 2d at 390 (citing St. Lucie County, 444 So. 2d at 1135).

14. The December 1, 2016, hearing was not noticed as an evidentiary hearing and no evidence was presented. There was no court reporter present at the hearing. Thus, there is no record for this Court to review. Where a trial judge's decision to vacate an automatic stay "is not based upon any evidentiary record, the usual presumptions do not abide the conclusion in question." St. Lucie County, 444 So. 2d at 1135.

15. Fee did not file a motion setting forth the compelling circumstances in support of vacating the automatic stay as required by Rule 9.310(b)(2), Florida Rules of Appellate Procedure. At the December 1, 2016, hearing, Fee did not present any evidence to establish compelling circumstances in support of vacating the automatic stay as required under St. Lucie and Pringle.

16. In the absence of a motion to vacate and with no record evidence to demonstrate compelling circumstances, the Circuit Court Judge abused her discretion in vacating the automatic stay. See Pringle, 707 So. 2d 390 (motion to reinstate stay granted where "limited evidence" did not support a finding of

compelling circumstances to vacate stay). The Order on Stays must be reversed and the automatic stay reinstated.

17. In the November 30, 2016, e-mail requesting the expedited hearing which ultimately resulted in the Order on Stays here under review, counsel for Fee represented to the Circuit Judge's Judicial Assistant that "[w]e strongly disagree with the Defendants' contention that the 48 hour limitation does not apply to this action." The limitation referenced by counsel provides "that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases." Fla. Rule App. P. 9.310(b)(2).

18. This e-mail is not a properly-filed motion or other paper in this case. Assuming that this e-mail or counsel's *ore tenus* Motion at the expedited hearing properly placed this legal argument before the Circuit Court, it must be rejected. This case does involve meeting requirements and a natural first reaction may be to characterize it as a public meeting case. However, the central and dispositive issue in this case is the Circuit Court Judge's overly-broad interpretation of a provision of the Florida Insurance Code, and not the Sunshine Law.

19. A "public meeting case" as mentioned in Rule 9.310(b)(2), Florida Rules of Appellate Procedure, is one based in Florida's Government in the Sunshine Law. This Law, found in Section 286.011, Florida Statutes, imposes certain requirements on "meetings of any board or commission of any state agency or

authority or of any agency or authority of any county, municipal corporation, or political subdivision . . . at which official acts are to be taken . . . .” § 286.011(1). By these plain terms, only governmental entities in Florida are subject to the requirements of the Sunshine Law. See Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010).

20. NCCI is a private corporation registered to do business in the State of Florida. NCCI is not a governmental entity. NCCI is not a board or commission of any governmental entity. Thus, the Sunshine Law does not generally apply to NCCI.

21. The Circuit Court Judge recognized that the Sunshine Law does not directly apply to NCCI, writing in her Order that Plaintiff’s argument is that the Sunshine Law is “made applicable to NCCI and OIR in section[] 627.091 . . . , Florida Statutes.” Order at 3, ¶ 4.

22. The relevant portion of the statute provides as follows:

> Whenever the committee of a recognized rating organization with responsibility for workers’ compensation and employer’s liability insurance rates in this state meets to discuss the necessity for, or a request for, Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, and any such other matters pertaining specifically and directly to such Florida rates, such meetings shall be held in this state and shall be subject to s. 286.011.

§ 627.091(6), Fla. Stat.

23. The questions before the Circuit Court Judge, then, were whether Section 627.091(6), Florida Statutes, makes the Sunshine Law applicable to NCCI[4] and, if so, the committee meetings to which it applies.

24. As to the first question, the Circuit Court Judge ruled that section 627.091(6), Florida Statutes, makes the Sunshine Law applicable to NCCI, concluding that "[a]s a statutorily recognized workers' compensation rating organization, NCCI is required to conduct its rate filing preparation meetings in public, following public notice." Order at 56, Findings of Fact and Conclusions of Law ¶ 1.

25. As to the second question and the rate filing preparation meetings to which Sunshine Law would extend, the Circuit Court Judge first wrote that "the credible evidence shows NCCI clearly does use committees, with a series of meetings to finalize it rate filings." Order at 62, Findings of Fact and Conclusions of Law ¶ 10(a). The Court wrote that the NCCI committees for the subject rate review included those referred to in the record as "Phase I, Technical Peer Review

[4] With or without mention in the provisions of the Florida Insurance Code, the Sunshine Law applies to meeting of boards or commissions of the Office. There are no allegations of such meetings in this case.

and Phase II for supervisory interaction." Order at 63-64, Findings of Fact and Conclusions of Law ¶ 10(c).[5]

26. The Circuit Court did not stop here. Rather, the Court continued and committed fundamental error when it wrote the critical requirement out of the relevant statute: "Whether NCCI had a 'committee' subject to Section 671.091(6) is irrelevant to its obligation to conduct the decisional rate filing preparation meetings in the public." Order at 63-64, Findings of Fact and Conclusions of Law ¶ 10(a).

27. Despite the plain language of the statute and its application only to committee meetings, the Court concluded that that the Legislature had intended for the entire rate filing process to be subject to the Sunshine Law "even if there were no committee meetings involved . . . ." Order at 56, Findings of Fact and Conclusions of Law ¶ 2. The Judge summed up her ruling in the following paragraph.

> The statutory public meeting requirement attaches to the licensed rating organization, in this case NCCI. Whether NCCI arranges for its historical committee to prepare the rate filing or tries to make it the responsibility solely of actuary Jay Rosen, the Legislature has made clear **the decisional work relating to the rate filing** should be transparent, and controlled by the Florida Sunshine Law.

Order at 57, Findings of Fact and Conclusions of Law ¶ 3 (emphases added).

[5] The Office concurs with NCCI that the evidence did not demonstrate that any of these groups are "committees" for purposes of section 627.091(6), Florida Statutes.

28. Upon ruling that section 627.091(6), Florida Statutes, applies the Sunshine Law to the entire decisional process, the Circuit Judge then concluded that all in-person and telephonic meetings between various individuals employed by or representing NCCI and Office staff[6] about the rate filing that were not publicly noticed and otherwise did not comply with the Sunshine Law were improperly conducted in the shade. On this basis, the Court voided the Office's Final Order "because the lack of sunshine so permeated the process." Order at 5, ¶ 7.

29. The actions ultimately cited by the Circuit Court Judge as being conducted without complying with the requirements of the Sunshine Law were made subject to those requirements only by the erroneous interpretation of section 627.091(6), Florida Statutes.[7] The appeal of this interpretation of the Insurance Code by the agency charged with regulation of insurance companies is exactly the

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[6] The referenced staff meetings between NCCI and the Office were not plead in the Complaint as facts upon which relief could be granted, were not properly before the Lower Tribunal, and should not have been a basis for the Order. When Fee first attempted to add these allegations into the case as "issues of law and fact which are in dispute" in the Pre-Hearing Stipulation, the Office objected because, inter alia, they were not pleaded in the Complaint. See Pre-Hearing Stipulation at 8, ¶ 24. Fee never moved to amend the Complaint or conform the pleadings.

[7] The Circuit Court also wrote that NCCI should have conducted another meeting: "There should also have been one final public meeting of NCCI regarding the rate filing proposal prepared to address the OIR order . . . ." Order at 63-64, Findings of Fact and Conclusions of Law ¶ 10(c). There is nothing in the statute requiring such a meeting.

type of matter affecting the public generally and to which the automatic stay is meant to apply.

30. The forty-eight hour limitation for public record and public meeting cases was adopted and exists to address situations far different from this one.

31. In 1979, section 119.11(2), Florida Statutes (1979), a provision in Florida's Public Records Act, provided in full as follows:

> Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within 48 hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such 48-hour period. The filing of a notice of appeal shall not operate as an automatic stay. [emphasis added]

32. The underscored provision was found by the Florida Supreme Court to be an unconstitutional invasion of its rule-making power in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979), and was removed from section 119.11(2), Florida Statutes, by the Legislature.

33. When subsequently revising the Rules of Appellate Procedure in 1985, the Florida Supreme Court wrote as follows regarding a requested amendment to Rule 9.310(b)(2) to address this issue.

> We conclude that we should implement the public policy evidenced by section 119.11(2), Florida Statutes (1979), and have modified the rule to provide for a 48-hour automatic stay in public meeting and public record cases. Any additional stay may, as in other cases, be entered by either the trial court or the appellate court.

The Florida Bar re: Rules of Appellate Procedure, 463 So. 2d 1114, 1115 (Fla. 1985).

34. The forty-eight hour provision was added to recognize the public policy in favor of the prompt production of records once ordered by a court and, by analogy, prompt conduct of public meetings in the sunshine when so ordered by the court.

35. The relief in the Order as to the Office does not involve any such actions. Plaintiff never made a public records request to the Office. Agency public records are not the subject of the Complaint or Order. This matter is not a public meeting case. There are no future meetings subject to Court direction to be conducted in the sunshine. The forty-eight hour limitation should not be stretched to apply in these circumstances.

36. To the extent the limitation is found to apply, it should be extended through the disposition of this appeal on the merits for the reasons set forth below.

Motion to Extend Stay

37. In ruling on a request to grant or extend a stay pending appeal and preserve the status quo, the factors a court is to consider "include the moving party's likelihood of success on the merits, and the likelihood of harm should a stay not be granted." *Perez v. Perez*, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999) (*citing State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980)).

38. The Office has a significant likelihood of prevailing on its appeal of the Order. As set forth above, this case as to the Office hinges entirely on the Circuit Court's interpretation of section 627.091(6), Florida Statutes. The Court's interpretation of that statute as set forth in the Order is a conclusion of law subject to *de novo* review by this Court. *Panama City Beach Cmty. Redev. Agency v. State*, 831 So. 2d 662, 665 (Fla. 2002)("It is clear that this Court's review of the trial court's conclusions of law is *de novo*.").

39. Section 627.091(6), Florida Statutes, provides that a "committee of a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates" must meet in the Sunshine when discussing matters relating to Florida rates. As discussed above, the Circuit Court ignored the plain language of this statute when it concluded that "[w]hether NCCI had a 'committee' subject to Section 671.091(6) is irrelevant to its obligation to conduct the decisional rate filing preparation meetings in the public." Order at 63-64, Findings of Fact and Conclusions of Law ¶ 10(a). The Circuit Court not only ignored the plain language of the statute by deeming the key word "irrelevant," but essentially rewrote the statute to apply it beyond any committee to all "decisional work relating to the rate filing." Order at 57, Findings of Fact and Conclusions of Law ¶ 3.

40. "When the statutory language is clear, 'courts have no occasion to resort to rules of construction – they must read the statute as written, for to do otherwise would constitute an abrogation of legislative power." *Daniels v. Department of Health*, 898 So. 2d 61, 64 (Fla. 2005) (*quoting Nicoll v. Baker*, 668 So. 2d 989, 990-91 (Fla. 1996)). In so doing, courts "are required to give effect to every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage." *Quarantello v. Leroy*, 977 So. 2d 648, 652 (Fla. 5th DCA 2008) (citations and quotations omitted).

41. On this fundamental issue, the Circuit Court erred and the Office has a significant likelihood of prevailing on the merits.

42. Though the provision is not mentioned in the conclusions of law portion of its Order, the Circuit Court may have relied on section 627.093, Florida Statutes, in concluding that NCCI is subject to the Sunshine Law.[8] Early in the Order here under review, the Circuit Court wrote as follows:

> The Legislature has recognized the important role recognized rating organizations play, mandating in section 627.093, Florida Statutes[,] that the rating organizations comply with Florida's Government in the Sunshine meeting requirements [section 286.011, Florida Statutes]:
>
> > Section 286.011 shall be applicable to every rate filing, approval or disapproval of filing, rating

[8] As an initial matter, section 627.093, Florida Statutes, was not mentioned in the Pre-Trial Stipulation as an issue of law that remained to be litigated and should not have been considered by the Circuit Court.

> deviation from filing, or appeal from any of these regarding workers' compensation and employer's liability insurances.

Order at 8, ¶ 16. The Court's reliance on this provision is misplaced.

43. This provision does not expand the universe of entities to which the Sunshine Law is applicable. It provides only that the rate filing process is subject to the Sunshine Law, which in turn still only applies to the government. The only extension of the Sunshine Law beyond governmental entities for purposes of workers' compensation filings is found in section 627.091(6), Florida Statutes, which extends this reach only to committees of recognized rating organizations.[9]

44. If section 627.093 expands the reach of the Sunshine Law to private entities, this reach would include all entities making a workers' compensation filing. Section 627.093 is not limited to recognized rating organizations on its own terms or in the context of Chapter 627. Thus, the Circuit Court erred both in applying that statute to non-public entities and in concurrently limiting that expansion to recognized rating organizations.

[9] If section 627.093, Florida Statutes, requires that all matters relating to rate filings be subject to the Sunshine Law, the Legislature's enactment of section 627.091(6) with applicability to only one aspect of rate filings would have been unnecessary. Such a reading violates the "basic rule of statutory construction [which] provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render a part of a statute meaningless." *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002).

45. On these issues, the Circuit Court erred and the Office has a significant likelihood of prevailing on the merits.

46. As to the second factor, the likelihood of harm is substantial if the stay is not extended.

47. The Order places extraordinary procedural burdens on the Office never intended by the Legislature. Construed most narrowly, the effect of the Order may be to mandate that any meetings between Office staff and any representative or employee of a recognized rating organization for workers' compensation relating to a rate filing be noticed two weeks prior in the Florida Administrative Register and made open to the public with minutes taken. Given the list of "meetings" in the Order that qualify for Sunshine treatment, such notice may be required before a telephone call is made to request a document or arrange a public hearing.

48. Construed most broadly, the effect of the Order may be to mandate that any meetings between Office staff and any representative or employee of any private entity relating to a rate filing be noticed in the Florida Administrative Register and subject to all Sunshine Law requirements.

49. In either case, the additional burdens placed on the Office will have a significant impact on the review process. From January 1, 2015, through present, the Office received 284 workers' compensation rate filings. Depending on the reading afforded the Order, meetings between Office staff and applicants, as

broadly defined above, for some or all of these filings would be subject to prior notice and other Sunshine Law requirements., The unbudgeted advertising expenses, greatly increased response times, and limitations on the flow of information attendant these newly-created requirements will impact the Office's operations in light of firm statutory deadlines and substantive regulatory requirements.[10]

50. NCCI has also set forth in its Emergency Motion for Stay the impacts of the Order on its member companies. NCCI estimates the impact of the Order if not stayed to be a $7 million weekly increase of an existing unfunded liability of $1 billion, all flowing from the recent court actions which gave rise to the rate filing. NCCI correctly represents in its Emergency Motion that these funds cannot be recouped in the future with retroactive premiums and that, if collected now and ruled unlawful in the future, current premiums could be refunded.

51. Coupling the likelihood of harm to the Office and NCCI, the equities are tilted heavily in favor of Appellants and extending the stay through this appeal.

52. Ensuring a functioning regulatory system and solvent insurers through adequate rates are matters of great public interest and will be served by extending the stay.

[10] The Office's inability to quantify more precisely the impact of this Order is due mainly to the fact that the sweeping requirements it imposes are unprecedented and do not exist in any existing regulatory program at the Office.

WHEREFORE, the Office respectfully requests that this Motion be granted; that the automatic stay be reinstated; alternatively, that the forty-eight hour stay be extended through disposition of this appeal; and that such other relief consistent with this Motion be granted as is necessary and proper.

Respectfully submitted this 8th day of December 2016.

/s/ Shaw Stiller
Shaw Stiller
Chief Assistant General Counsel
Florida Bar No. 936110
Lacy End-Of-Horn
Assistant General Counsel
Florida Bar No. 104735
C. Timothy Gray
Assistant General Counsel
Florida Bar No. 602345
Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399-4206
Telephone: (850) 413-4317
Fax: (850) 922-2543
E-mail: Shaw.Stiller@floir.com
E-mail: Lacy.End-Of-Horn@floir.com
E-mail: Timothy.Gray@floir.com

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the foregoing this paper is computer generated in 14-point Times New Roman font.

/s/ Shaw Stiller
Shaw Stiller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Reinstate Automatic Stay or, in the Alternative, Motion to Extend Stay has been furnished by e-mail on this 8th day of December 2016 to:

John Shubin, Attorney
Lauren Brunswick, Attorney
Mark Grafton, Attorney
Salvatore H. Fasulo, Attorney
SHUBIN & BASS, P.A.
46 S.W. First Street Third Floor
Miami, Florida 33130
Tel.: (305) 381-6060
Fax: (305) 381-9457
jshubin@shubinbass.com
lbrunswick@shubinbass.com
mgrafton@shubinbass.com
sfasulo@shubinbass.com

Counsel for Appellee James F. Fee, Jr.

Thomas J. Maida, Attorney
James A. McKee, Attorney
Nicholas R. Paquette, Attorney
Foley & Lardner LLP
106 E. College Avenue, Suite 900Tallahassee, Florida 32301
(850) 222-6100 (Telephone)
(850) 561-6475 (Fax)
tmaida@foley.com
jmckee@foley.com
npaquett@foley.com

Counsel for Appellee National Council on Compensation Insurance, Inc.

/s/ Shaw Stiller
Shaw Stiller