



FILED

JUN 29 2005

OFFICE OF INSURANCE REGULATION

KEVIN M. McCARTY  
COMMISSIONER

Docketed by oaw

IN THE MATTER OF:

AMERIFIRST FUNDING GROUP, INC.

CASE NO. 81437-05

FINAL ORDER

THIS CAUSE came on before the undersigned in his capacity as Insurance Commissioner, for consideration and final agency action. On December 17, 2004, the Office of Insurance Regulation (Office) issued a denial letter, denying Petitioner's application for a license as a viatical settlement provider subsequent to Petitioner's withdrawal of its application on December 8, 2004. The Petitioner timely filed a request for a proceeding pursuant to Section 120.57(2), Florida Statutes. Pursuant to notice, the matter was heard before Bob Prentiss, Esquire as hearing officer, on March 15, 2005.

After consideration of the evidence, argument and testimony presented at hearing, and subsequent written submissions, the hearing officer issued his Written Report and Recommended Order. (Attached as Exhibit A). The hearing officer recommended that the Office enter a final order that the denial of Petitioner's application for licensure as a viatical settlement provider was lawful. The petitioner filed exceptions to the Recommended Order.

## RULINGS ON PETITIONER'S EXCEPTIONS

1. This exception is directed to Findings of Fact paragraph 1. The inclusion of this paragraph in the Recommended Order is an administrative acknowledgement of applicable law and is not dispositive of the main jurisdictional issue. This exception is rejected.

2. This exception is directed to Findings of Fact paragraph 10. Paragraphs 7, 8, and 9 of the Recommended Order all support the conclusion that the fact-finding process had been concluded, irrespective of petitioner's knowledge of the outcome. The petitioner made no exceptions to these paragraphs. Case law supports the opinion that jurisdiction in cases such as this is lost by the agency when the applicant withdraws its application **prior** to completion of the fact-finding process. See City of North Port v. Consolidated Minerals, Inc., 645 So. 2d 485 (Fla. 2<sup>nd</sup> DCA 1994); Health Options, Inc. v. Agency for Health Care Administration, 889 So. 2d 849 (Fla. 1<sup>st</sup> DCA 2004). This exception is rejected.

3. This exception is directed to Findings of Fact paragraph 13. This exception is rejected. Again, Paragraphs 7, 8, and 9 of the Recommended Order all support the conclusion that the fact-finding process had been concluded, irrespective of petitioner's knowledge of the outcome. The petitioner made no exceptions to these paragraphs. Case law supports the opinion that jurisdiction in cases such as this is lost by the agency when the applicant withdraws its application **prior** to completion of the fact-finding process. See City of North Port v. Consolidated Minerals, Inc., 645 So. 2d 485 (Fla. 2<sup>nd</sup> DCA 1994); Health Options, Inc. v. Agency for Health Care Administration, 889 So. 2d 849 (Fla. 1<sup>st</sup> DCA 2004). This exception is rejected.

4. This exception is directed to Conclusion of Law paragraph 21. This exception is rejected. Petitioner's exception ignores the applicability of section 120.60(3), requiring notice

that the agency intends to grant or deny, or has granted or denied, the application for license, whether they be viatical providers or not.

5. This exception is directed to Conclusion of Law paragraph 22. This exception is rejected because a plain reading of section 120.60 and its applicability in this case as mentioned in paragraph 4 above.

6. This exception is directed to Conclusion of Law paragraph 25. Paragraphs 7, 8, and 9 of the Recommended Order all support the conclusion that the fact-finding process had been concluded, irrespective of petitioner's knowledge of the outcome. The petitioner made no exceptions to these paragraphs. After the fact-finder retires to deliberate the outcome, it is too late under Rule 1.420, Florida Rule of Civil Procedure, to take a voluntary dismissal. Health Options, Inc. v. Agency for Health Care Administration, 889 So. 2d 849 (Fla. 1<sup>st</sup> DCA 2004). This exception is rejected.

7. This exception is directed to the final sentence of the Conclusion of Law paragraph 27. Based on a reading of Holmes Regional Medical Center, Inc. v. State Agency for Health Care Administration, 737 So.2d 608 (Fla. 1<sup>st</sup> DCA 1999); Middlebrooks v. St. Johns River Water Mgmt. District, 529 So. 2d 1167 (Fla. 5<sup>th</sup> DCA 1988); City of North Port v. Consolidated Minerals, Inc., 645 So. 2d 485 (Fla. 2<sup>nd</sup> DCA 1994); and Health Options, Inc. v. Agency for Health Care Administration, 889 So. 2d 849 (Fla. 1<sup>st</sup> DCA 2004), this exception is accepted.

8. This exception is directed to Conclusion of Law paragraph 28. This exception is rejected based on the applicable case law as discussed in this Order.

Upon careful consideration of the record, the submissions of the parties and being otherwise fully advised in the premises, it is **ORDERED**:

1. That the Written Report and Recommended Order (attached hereto as Exhibit A) be incorporated herein by reference.

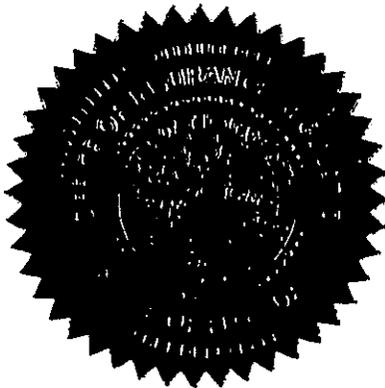
2. The Findings of Fact of the hearing officer are adopted in full as the Office's Findings of Fact.

3. That the Conclusions of Law of the hearing officer are adopted in full as the Office's Conclusions of Law, except as otherwise specified herein.

4. That the hearing officer's recommendation that the Office enter a final order that the denial of Petitioner's application for licensure as a viatical settlement provider was lawful is approved and accepted as being the appropriate disposition of this case.

ACCORDINGLY, the Office finds that the denial of the application of Petitioner, AMERIFIRST FUNDING GROUP, INC., for licensure as a viatical settlement provider, was lawful.

DONE and ORDERED this 23<sup>rd</sup> day of June, 2005.



  
\_\_\_\_\_  
KEVIN M. MCCARTY, COMMISSIONER  
OFFICE OF INSURANCE REGULATION

**NOTICE OF RIGHTS**

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 Notice of Appeal with Steve Parton, General Counsel, acting as the agency clerk, at 612 Larson Building, Tallahassee, Florida 32399-4206, and a copy of the same and the filing fee with the appropriate District Court of Appeal within thirty (30) days of the rendition of this Order.

**COPIES FURNISHED TO:**

Bob Prentiss, Esquire  
Division of Legal Services  
Office of Insurance Regulation  
200 East Gaines Street  
623D Larson Building  
Tallahassee, Florida 32399-4206

James Harris, Esquire  
Division of Legal Services  
Office of Insurance Regulation  
200 East Gaines Street  
612 Larson Building  
Tallahassee, Florida 32399-4206

G. Alan Howard, Esquire  
50 N. Laura Street, Suite 2900  
Jacksonville, Florida 32202



## OFFICE OF INSURANCE REGULATION

**KEVIN M. MCCARTY**  
COMMISSIONER

IN THE MATTER OF:

**AMERIFIRST FUNDING GROUP, INC.,**  
Petitioner.

CASE NO. 77635-04-CO

### WRITTEN REPORT AND RECOMMENDED ORDER

Pursuant to written notice, a proceeding was held in this matter before Bob Prentiss, Hearing Officer for the Office of Insurance Regulation (the "Office"), pursuant to the provisions of Section 120.57(2), Florida Statutes, on March 15, 2005, in Tallahassee, Florida. The purpose of the proceeding was to receive documentary and oral evidence on the issue of whether the Office properly denied the application of Amerifirst Funding Group, Inc., as a viatical settlement provider.

### APPEARANCES

For Petitioner: G. Alan Howard, Esquire  
50 N. Laura Street, Suite 2900  
Jacksonville, FL 32202

For Respondent: James Harris  
Assistant General Counsel  
Office of Insurance Regulation  
Legal Services Office  
612 Larson Building  
200 E. Gaines Street  
Tallahassee, FL 32399-0333

### BACKGROUND

On or about August 11, 2004, the Petitioner applied to the Office for licensure as a viatical settlement provider. On October 27, 2004, the application was initially denied



in the Office's electronic applications system. On November 30, 2004, an Evidentiary Hearing was held. On December 8, 2004, the Petitioner withdrew its application. By letter the Office denied the application, on or about December 17, 2004. The Petitioner requested a proceeding to be conducted in accordance with Section 120.57(2), Florida Statutes. Petitioner's original assertion is that the Office lacked authority to deny the application subsequent to the withdrawal of the application by the Petitioner. An additional assertion raised later by Petitioner is that the denial letter is an examination report and the Office is estopped from issuing the denial letter for failure to comply with Section 624.319, Florida Statutes, to wit, failing to furnish the Petitioner with a copy of it 30 days before filing it.

The parties elected to proceed by a hearing in Tallahassee.

On March 15, 2005, an informal hearing was held. On the record, certain facts were stipulated to by the parties. On March 31, 2005, Petitioner's Motion to Supplement Record was granted, there being no objection by the Office. The parties have timely filed their Proposed Recommended Orders. All submissions by the parties and all oral testimony has been considered in the preparation of this Written Report and Recommended Order.

#### EXHIBITS AND WITNESSES

The Petitioner submitted the following exhibits for consideration:

- Petitioner's Exhibit 1: Notice of Investigatory Hearing
- Petitioner's Exhibit 2: Packet sent by Petitioner to Office
- Petitioner's Exhibit 3: Letter requesting withdraw of application
- Petitioner's Exhibit 4: Denial letter

Petitioner's Exhibit 5: Public Records Request

Petitioner's Exhibit 6: OIR Response to Public Records Request

The Office submitted the following exhibit for consideration:

Respondent's Exhibit 1: Letter from Barb Szumowski and  
Letter from James Harris

All of the Exhibits are admitted without objection.

Each party called one witness. Testifying for the Petitioner was G. Alan Howard, Esquire. Testifying for the Office was Barb Szumowski.

Citations to the transcript of the informal hearing in this matter are as follows: Transcript page 1, line 2 is cited as "1:2". Reference to the exhibits introduced at the informal hearing in this matter are as follows: Petitioner's Exhibit 2 would be cited as "P Exhibit 2."

#### FINDINGS OF FACT

1. By requesting a proceeding to be conducted in accordance with Section 120.57(2), Florida Statutes, the Petitioner admits to all the factual allegations in the Office's Denial letter.
2. On October 27, 2003, Petitioner filed its first application for licensure as a viatical settlement provider. In response to a clarification letter by the Office, additional information was submitted to the Office on November 5, 2003. [On the record stipulation of the parties; 46:17]
3. After an on-site examination by the Office in the month of February of 2004, this first application was withdrawn by the Petitioner on April 5, 2004. [On the record stipulation of the parties] No examination report was prepared subsequent to that examination. [47:13-22]

4. On or about August 11, 2004, the Petitioner filed a second application for licensure as a viatical settlement provider. [On the record stipulation of the parties]

5. No on-site examination of the Petitioner occurred subsequent to the filing of the second application. [48:9-12]

6. On October 27, 2004, the Commissioner of the Office of Insurance Regulation, Kevin McCarty, entered in CORE, the Office's electronic applications system, the denial of the second application. Mr. McCarty instructed his staff to contact Fred Karlinsky, attorney for Petitioner, and inform him that the denial letter would be forthcoming. [48:19 through 49:17]

7. An evidentiary hearing on the application of Petitioner was held by the Office on November 30, 2004. [On the record stipulation of the parties]

8. The evidentiary hearing was conducted at the request of the Petitioner, [20:22-25] and its counsel, Mr. Fred Karlinsky. [50:3-4]

9. The Petitioner provided the Office with documents at the evidentiary hearing and subsequent to the hearing on December 7, 2004. [23:1-21; 51: 16-18]

10. Petitioner knew, prior to it requesting the evidentiary hearing, that Mr. McCarty had already denied its application for licensure.

11. Petitioner felt the evidentiary hearing had been confrontational, "in fact, hostile." [27:22-24]

12. On December 8, 2004, a request was made by the Petitioner to withdraw its application for licensure. [On the record stipulation of the parties]

13. Petitioner knew, prior to sending its letter to withdraw the application, that its application most likely would be denied.

14. On December 17<sup>th</sup>, the Office issued a letter denying the application of Petitioner. [On the record stipulation of the parties]

15. The Office did not send the Petitioner a copy of the denial letter thirty days prior to December 17<sup>th</sup>. [On the record stipulation of the parties; 38:6-21]

16. On January 10, 2005, Petitioner sent a public records request to the Office requesting information including documents relating to actual or planned communications between the Office and other state departments of insurance. [39:16-18; Petitioners Exhibit 5]

17. The Office's response to the request included in part a denial for some of the records; one basis for the denial included an exemption pursuant to Section 624.319, Florida Statutes. [39:19-25; Petitioner's Exhibit 6]

#### CONCLUSIONS OF LAW

18. The Office of Insurance Regulation has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Chapter 626, Florida Statutes, and Section 120.57(2), Florida Statutes.

19. The first ground addressed in these Conclusions of Law is the assertion by Petitioner that the denial was inappropriate in that the denial letter was an examination report and the Office failed to provide it to the Petitioner 30 days before it was filed, as required by Section 624.319, Florida Statutes.

20. The Office asserts that the denial letter was not an examination report, but rather "the manner in which the Office complied with the requirements of Florida Statutes 120.60(3)...." The Office has particularly broad discretion in interpreting

statutes it is charged with administering. *Natelson v. Department of Ins.*, 454 So.2d 31,32 (Fla. 1st DCA 1984).

21. There was no examination done as part of the second application. Consequently, there was no examination report. The denial letter issued by the Office on December 17, 2004, was not an examination report within the purview of Section 624.319, Florida Statutes.

22. There is no requirement that a denial letter be furnished to an applicant 30 days before it is officially sent to the applicant, which would, as pointed out by the Office, have the effect of shortening the statutory requirements found in Section 120.60, Florida Statutes.

23. The second ground addressed by these Conclusions of Law is the assertion by the Petitioner that the Office had no jurisdiction to issue a denial once the Petitioner withdrew the application.

24. Petitioner cited numerous cases in support of this assertion. Unfortunately, they were string cited, with no argument. A review of those cases revealed many to be distinguishable, several because they related to third party dismissals, and others relating to dismissals of hearings brought pursuant to Section 120.57, Florida Statutes.

25. With respect to such dismissals, the voluntary dismissal rule, FRCP 1.420(a)(1) cannot be utilized to divest an adjudicatory agency such as the Office of the jurisdiction granted it by the legislature. *Wiregrass v. Saddlebrook*, 645 So.2d 374, 376 (1994).

26. No rule of the Office has made Florida Rule of Civil Procedure 1.420, relating to voluntary dismissals, expressly applicable to administrative matters before the Office.

27. The recent DOAH case *Jacoby v. Department of Health, Board of Medicine*, DOAH Case No. 03-4433, 2004 WL 882070 (April 22, 2004), is on point factually and is very helpful in resolving this issue. In *Jacoby* the Petitioner applied for a temporary certificate to practice medicine. Because of ongoing disciplinary proceedings against his license in other states, the Credentials Committee of the Department of Health was going to recommend denial of his application. Once he became aware of this, the applicant requested he be allowed to withdraw his application. The request was denied, as was his application for licensure, and the applicant requested and was granted a formal hearing in front of the Division of Administrative Hearings. The applicant argued, as does Petitioner in our case, that the agency lacked authority to make a determination on the application once he had withdrawn it. The ALJ concluded there was no error in the agency's denial of the request to withdraw the application. He based this conclusion on his reading of *Holmes Regional Medical Center, Inc., v. State, Agency for Health Care Administration*, 737 So.2d 608 (Fla. 1st DCA 1999), which he concluded stood for the rule that "the agency was without authority to accept a withdrawal absent such express authority." The undersigned has a problem with such a reading, as did the Board of Medicine in its final order.<sup>4</sup> It is the opinion of the undersigned that the better reading of *Holmes*, which relies on *Middlebrooks v. St. Johns River Water Management*

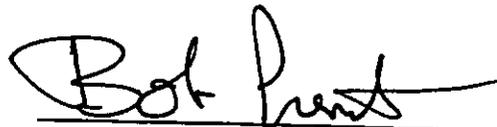
*District*, 529 So.2d 1167 (Fla. 5th DCA 1988), is that an applicant does not have the right to withdraw an application unless an agency rule expressly grants such a right.

28. This becomes especially true when, as in our case, the applicant knows that it is extremely unlikely that its application will be approved. That Petitioner had such knowledge at the time it made its request to withdraw is made clear by the fact that it knew the application had already been denied by Commissioner McCarty. Further evidence of this knowledge is that the evidentiary hearing it subsequently requested was, in the words of counsel for Petitioner, confrontational. The First DCA in *Holmes* stresses the importance of this fact, that when the withdrawing applicant knows what the outcome will be, it is not appropriate to allow it to withdraw its application, calling such, a "dubious remedy". *Holmes*, supra, at 608.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is:  
RECOMMENDED that a Final Order be entered finding that the denial of the application for a viatical settlement license by Amerifirst was lawful.

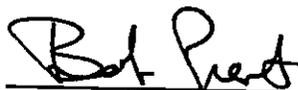
Respectfully submitted this 29th day of April, 2005.



Bob Prentiss  
Office of Insurance Regulation  
Legal Services Office  
657B Larson Building  
200 E. Gaines Street  
Tallahassee, FL 32399-0333

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Written Report and Recommended Order has been furnished by U.S. Mail to: G. Alan Howard, Esquire 50 N. Laura Street, Suite 2900, Jacksonville, FL 32202, and by hand delivery to: James Harris, Assistant General Counsel, Office of Insurance Regulation, Legal Services Office, 612 Larson Building, 200 E. Gaines Street, Tallahassee, FL 32399-0333, this 29<sup>th</sup> day of April, 2005.



\_\_\_\_\_  
Bob Prentiss, Esquire