

IN THE SUPREME COURT OF FLORIDA

ALLSTATE FLORIDIAN INSURANCE
COMPANY; ALLSTATE INDEMNITY
COMPANY; ALLSTATE PROPERTY &
CASUALTY INSURANCE COMPANY;
ALLSTATE INSURANCE COMPANY;
ALLSTATE FLORIDIAN INDEMNITY
COMPANY; ALLSTATE FIRE AND
CASUALTY INSURANCE COMPANY;
ENCOMPASS INSURANCE COMPANY
OF AMERICA; ENCOMPASS INDEMNITY
COMPANY; ENCOMPASS FLORIDIAN
INSURANCE COMPANY; and ENCOMPASS
FLORIDIAN INDEMNITY COMPANY,

CASE NO. : SC08-782
L.T. Case No.: 1D08-275

Petitioners,

vs.

OFFICE OF INSURANCE REGULATION,

Respondent.

**PETITIONERS' BRIEF ON JURISDICTION
ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL**

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STATEMENT OF THE CASE AND FACTS

The Allstate Companies seek discretionary jurisdictional review of a First District Court of Appeal (“First DCA”) decision upholding an Immediate Final Order (“IFO”) of the Office of Insurance Regulation (“OIR”) suspending the certificates of authority of the Allstate Companies to write new insurance policies in Florida. *Allstate Floridian Insurance Co. v. Office of Insurance Regulation*, 2008 WL 2048349 (Fla. 1st DCA May 14, 2008) (attached as Appendix).

The IFO was issued on January 17, 2008. *Id.* at *3. That same day, the Allstate Companies appealed to the First DCA and sought a stay, which was granted. The First DCA rendered an opinion on April 4, 2008, upholding the emergency suspensions. That opinion was withdrawn on May 14, 2008, when the court denied the Allstate Companies’ post-opinion motions, and the new decision was substituted. *Id.* at *1. The court issued its mandate on the same day, and the stay was lifted. OIR issued its own Order staying the IFO on May 16, 2008.

OIR issued the IFO because of its dissatisfaction with the Allstate Companies’ response to investigative subpoenas. *Id.* at *1. The Allstate Companies timely filed objections to the subpoenas, including asserting the attorney-client privilege. *Id.* at *2-3.

The subpoenas were issued pursuant to section 624.321, Florida Statutes, which provides that subpoenas are to be enforced by OIR in circuit court. *Id.* at *4.

Nonetheless, the First DCA concluded that the OIR could self-enforce its subpoenas instead of pursuing enforcement in circuit court, and the court created a “relaxed standard” to find that the IFO was facially valid. *Id.* at *8.

SUMMARY OF THE ARGUMENT

The First DCA’s decision expressly and directly conflicts with the decisions of two district courts of appeal and with two decisions of this Court. By holding that OIR can self-enforce its subpoenas, the decision conflicts with a Third District Court of Appeal decision holding that an administrative agency must apply to a court before enforcing its subpoenas. The decision also conflicts with Fourth District Court of Appeal decisions concerning the need for “particularized facts” supporting a “genuine emergency” before an administrative agency takes emergency action. Acknowledging its departure from established requirements for emergency action, the First DCA creates an unprecedented “relaxed standard” for issuance of an IFO. Finally, the decision conflicts with this Court’s decisions concerning exercise of the police power.

The decision also construes the due process clauses of both the state and federal constitutions, which provides a separate basis for this Court to exercise its discretionary jurisdiction. Contrary to precedent of the United States Supreme Court, the First DCA holds that OIR can enforce its subpoenas without first obtaining an order from a circuit court.

ARGUMENT

I. The First DCA Decision Conflicts with Decisions of Two District Courts of Appeal and with Decisions of the Supreme Court of Florida

A. The First DCA's Decision Conflicts with *Barry v. Garcia*

The court's statement that "OIR was not required to pursue enforcement of its subpoenas in circuit court" expressly and directly conflicts with *Barry v. Garcia*, 573 So. 2d 932, 938 (Fla. 3d DCA 1991) (" a committee . . . must apply to the courts for an order if it wishes to enforce a subpoena against a recalcitrant witness."). The court in *Barry* quoted and relied on *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974):

[A] citizen may not be held in contempt and thereupon punished on failing or refusing to obey any subpoena, process, or order of any administrative agency until after he shall have first been afforded an opportunity for a hearing before a court of competent jurisdiction *and* until that court shall have ordered obedience to such subpoena, process or order and such court order shall have been disobeyed.

573 So. 2d at 938 (underlined emphasis supplied).

The court in *Barry* recognized that as a fundamental concept of due process, judicial enforcement and a judicial determination of objections and privileges are required before an administrative agency can enforce its own subpoenas. Rather than adhere to established precedent that an administrative agency must go to circuit court to enforce its subpoenas, as expressly provided in the subpoena statute at issue (section 624.321), the First DCA shifts the burden to the Allstate

Companies to go to court to seek a protective order. 2008 WL 2048349 at *7-8.

That approach is directly contrary to *Barry*.¹

B. The First DCA's Decision Conflicts with *Witmer v. Department of Business and Professional Regulation* and with *Kodsy v. Department of Financial Services*

The First DCA's application of the statutory and case law requirements governing emergency action by agencies turns established case law on its head by erroneously extending it. In *Witmer v. Department of Business and Professional Regulation*, 631 So. 2d 338, 341 (Fla. 4th DCA 1994), the Fourth District Court of Appeal emphasized that the "factual allegations contained in the emergency order must sufficiently identify particularized facts which demonstrate an immediate danger to the public." If no formal APA hearing is held before entry of an emergency order, "every element necessary to its validity must appear on the face of the order." *Id.* The court emphasized that "[t]he order must be 'factually explicit and persuasive concerning the existence of a genuine emergency.'" *Id.*, quoting *Commercial Consultants Corp. v. Department of Business Regulation*, 363 So. 2d 1162, 1165 (Fla. 1st DCA 1978).

¹ Indeed, OIR has successfully asserted in other cases that circuit courts lack jurisdiction in actions initiated by insurers seeking protection from OIR subpoenas, because section 624.321 only authorizes OIR to initiate circuit court actions regarding subpoena enforcement. *E.g., Cincinnati Insurance Co. v. OIR*, Order Granting Respondent's Motion to Dismiss Petition to Modify Subpoenas and for Protective Order, Case No. 2007-CA-2572 (Leon County Circuit Court, Oct. 10, 2007).

In *Witmer*, which involved the suspension of a pari-mutuel wagering license, the court found the emergency order under review was “legally insufficient to demonstrate that an emergency situation exists on the basis of the Department’s bare conclusory allegation” 631 So. 2d at 341. The court also noted that statutes governing emergency action require more than a “general, conclusory prediction of harm.” *Id.* at 342. While immediate, concrete threats of economic harm may be enough to justify emergency action, “mere speculation” is not. *Id.*

Similarly, in *Kodsy v. Department of Financial Services*, 972 So. 2d 999 (Fla. 4th DCA 2008), the court stated that it “will not accept a general conclusory prediction of harm as support for an emergency order.” 972 So. 2d at 1002. “[T]he order must contain a factual recitation sufficient to demonstrate the existence of an imminent threat of ‘specific incidents of irreparable harm to the public interest’” *Id.*, quoting *UNIMED Prof’l Liab. Ins. Co., Ltd. v. Office of Insurance Reg.*, 884 So. 2d 963, 964 (Fla. 1st DCA 2004). The court emphasized the agency did not use the least restrictive means to address the alleged harm – in that case, a mold repair contractor purportedly acting as an unlicensed insurance agent. *Id.* at 1003.

In the First DCA’s decision, the court baldly acknowledges that it is departing from both its own and the Fourth DCA’s exacting requirements for IFOs:

Consequently, we require a somewhat lesser demonstration of specificity here than what the court may ordinarily find necessary. Applying this relaxed standard, our review of the IFO reveals OIR

met each requirement, and every element necessary to the IFO's validity appears on its face.

2008 WL 2048349 at *5 (emphasis supplied).

Thus, by the court's own admission, the First DCA does not apply the requirements for emergency action articulated by the Fourth DCA in *Witmer* and *Kodsy*, and instead engages in the sort of speculation the Fourth DCA deemed impermissible. The decision is in express and direct conflict with those opinions.

C. The Decision Conflicts with *In re Forfeiture of 1969 Piper Navajo, Model PA-31-310, S/N-31-395, U.S. Registration N-1717G* and with *State v. Saiez*

The First DCA also cites – and then misapplies – controlling precedent from this Court that governs exercise of the state's police power. This Court has maintained that when the state exercises its police power to limit individual rights and property rights, it should do so through the least restrictive means and never in a manner that simply makes it easier for the state to achieve its desired objective. That is precisely what OIR has done here, contrary to the direction of this Court.

The First DCA cites cases of this Court for the proposition that “[w]hen the Legislature enacts penal statutes, it does so under the State's police power, which is limited to protection of the public's health, safety and welfare. . . . Thus, the IFO assertion that Allstate's failure to comply with the subpoenas, each offense of which constitutes a separate criminal violation, poses a danger to the public health, safety or welfare, has merit.” 2008 WL 2048349 *6 . The first two cases cited are

In re Forfeiture of 1969 Piper Navajo, Model PA-31-310, S/N-31-395, U.S. Registration N-1717G, 592 So. 2d 233 (Fla. 1992) (“*Piper Navajo*”) and *State v. Saiez*, 489 So. 2d 1125 (Fla. 1986).

The First DCA then proceeds to misapply this controlling precedent by ignoring the stringent limits on the police power discussed in both opinions and concluding that “[o]ngoing criminal violations constitute a danger to the public health, safety and welfare.” 2008 WL 2048349 at *6. In *Piper Navajo*, this Court reasons that once a court has determined that a state can infringe upon property rights to regulate public safety, it must then determine whether the means chosen are “narrowly tailored to achieve the state’s objective . . . through the least restrictive means.” The Court then quotes *State v. Leone*, 118 So. 2d 781, 784-85 (Fla. 1960), for the proposition that: “[I]nterference or sacrifice of private rights can never be justified nor sanctioned merely to make it more convenient or easier for the State to achieve the desired end.” Here, section 624.321(2) provides for the OIR to apply to the circuit court for enforcements of its subpoenas. Contrary to the principles announced by this Court, the First DCA authorized OIR to impose immediate punishment to coerce compliance with subpoenas based on the view that OIR self-enforcement would be the “better enforcement option” than the circuit court enforcement procedure mandated by statute. 2008 WL 2048349 *5.

Similarly, in *Saiez*, the Court states that the police power “is not boundless and is confined to those acts which may be reasonably construed as expedient for protection of the public health, safety, welfare or morals.” 489 So. 2d at 1127. Moreover, “the guarantee of due process requires that the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious.” *Id.* at 1127-28.

The *Piper Navajo* and *Saiez* cases do not support the First DCA’s assertion that any ongoing criminal violation constitutes a danger to the public health, safety and welfare. Rather than seek the “least restrictive alternative” to achieve its objectives, OIR took the most drastic route to achieve its objective. Such action represents an erroneous reading of *Piper Navajo* and *Saiez*.

II. The First DCA Decision Expressly Construes the Due Process Provisions of the State and Federal Constitutions

The First DCA expressly construes the due process provisions of the Florida and United States Constitutions. Under the heading of “Procedural Fairness,” the court states: “Courts must consider the facts of the particular case to determine whether the parties have been accorded the procedural due process state and federal constitutions demand.” 2008 WL 2048349 *7. Citing general allegations, the court concludes the Allstate Companies were afforded due process and that “OIR’s decision to forgo futile attempts to enforce its subpoenas in circuit court, issue the IFO to temporarily suspend Allstate’s ability to transact new insurance

business, and provide for a formal administrative hearing to determine whether the suspension should be permanent, met the statutory ‘procedural fairness under the circumstances’ requirement.” *Id.* at *8.

This conclusion is contrary to due process, as well as the requirement in section 120.60(6)(a) that the procedure for emergency suspension “provides at least the same procedural protections as is given by other statutes, the State Constitution, or the United States Constitution.” Section 624.321(2), which requires that OIR subpoenas be enforced in circuit court, is the kind of statute contemplated by section 120.60(6)(a), providing procedural protection for the Allstate Companies that is consistent with constitutional due process requirements. *See, e.g., See v. City of Seattle*, 387 U.S. 541, 544-45 (1967) (As a matter of Fourth Amendment safeguards against unreasonable administrative subpoenas, “the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.”); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (“Thus although our cases make it clear that the Secretary of Labor may issue an administrative subpoena without a warrant, they nonetheless provide protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.”).

CONCLUSION

For the reasons expressed, the Allstate Companies respectfully request that this Court exercise its discretionary jurisdiction to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been hand delivered to Steven H. Parton, Anoush Arakalian Brangaccio, Jim L. Bennett, and Susan Dawson, Office of Insurance Regulation, 200 East Gaines Street, Suite 612, Tallahassee, Florida 32399-4206, this 20th day of May, 2008.

Donna E. Blanton

NOTICE OF COMPLIANCE WITH FONT REQUIREMENT

I CERTIFY that this Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2) and is printed in Times New Roman 14-point font.

Donna E. Blanton