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Docketed by TMT

CHIEF FINANCIAL OFFICER
JEFF ATWATER
STATE OF FLORIDA

IN THE MATTER OF:

Bogen Law Group, Mark Bogen, and
Richard Michelson d/b/a Michelson
Insurance Group
Petition for Declaratory Statement to the
Florida Department of Financial Services

Case No. 118276-11-DS

DECLARATORY STATEMENT

THIS CAUSE came on for consideration upon the filing of a Petition for Declaratory Statement (hereinafter referred to as "Petition") filed by Bogen Law Group, Mark Bogen (hereinafter referred to as "Petitioner") on June 2, 2011. Notice of the Petition was published June 24, 2011 in Volume 37, Number 25 of the Florida Administrative Weekly. Co-Petitioner Richard Michelson d/b/a Michelson Insurance Group (Michelson) thereafter joined in the Petition, which caused it to be re-noticed on September 30, 2011.

Upon consideration of the Petition and being duly advised, the Department of Financial Services (hereinafter referred to as the "Department"), finds as follows:

1. The Department has jurisdiction over the business and transactions of insurance pursuant to Chapter 626, Florida Statutes.
2. This Declaratory Statement is premised upon the assertions of fact set forth in the Petition. Any modifications to those assertions of fact could alter the conclusions set forth in this Declaratory Statement. None of the assertions are admitted by the Department as being true. If any of the facts asserted in the Petition are untrue

or materially incomplete, the conclusions or this Declaratory Statement could be significantly different.

3. This Declaratory Statement was requested pursuant to the provisions of Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, which authorize a substantially affected person to seek a declaratory statement regarding an agency's interpretation of its statutes, rules, and orders, as they apply to the Petitioner's particular set of circumstances.

BACKGROUND & FACTS ASSERTED IN PETITION

4. Petitioner, Mark Bogen, is an attorney at law duly admitted to practice law in the State of Florida and he is the principal owner of Bogen Law Group, P.A., (Bogen). Co-Petitioner Michelson is a Florida licensed insurance agent. Petitioners seek a determination by the Department that their described proposed activities will not subject either to sanctions under the Florida Insurance Code for violation of Section 626.9541(1)(h), Florida Statutes, or any other provision of the Florida Insurance Code that may be applicable to Petitioners' particular set of circumstances.

5. According to the Petition, Bogen intends to enter into a referral arrangement ("Agreement") with Michelson wherein Bogen will be paid an annual flat fee by Michelson for any and all legal clients referred by Bogen to Michelson for the potential purchase of insurance policies. According to the Petition, Bogen's compensation under the Referral Agreement "will not be dependent in any sense" on whether or not the referred legal client actually purchases insurance from Michelson.

6. Petitioners specifically request the Department's interpretation of Section 626.9541(1)(h), Florida Statutes, as it applies to them.

LEGAL CONSIDERATIONS APPLICABLE
TO THE PETITION FOR DECLARATORY STATEMENT

7. In answering the question presented, three provisions of the Florida Insurance Code should be considered.

8. Section 626.9541(1)(h), Florida Statutes (2010), provides, in part:

Unlawful rebates.—

1. Except as otherwise expressly provided by law, or in an applicable filing with the office, knowingly:
 - a. Permitting, or offering to make, or making, any contract or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon;
 - b. Paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance contract, any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract;
 - c. Giving, selling, or purchasing, or offering to give, sell, or purchase, as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the insurance contract.

9. By its own language, Section 626.9541(1)(h)1, Florida Statutes, applies to the giver or payer of a rebate or unlawful inducement. It prohibits any person from, "paying allowing, giving or offering to pay, allow or give... an inducement to an insurance contract." Except as to title insurance, provided for in subparagraph (1)(h)3.a., which is inapplicable here, Section 626.9541(1)(h), Florida Statutes, does not

apply to the recipient of a rebate or unlawful inducement. According to the Petition, the proposed referral agreement provides for Michelson to pay the referral fee to Bogen. This section should not be interpreted to prohibit payment from Michelson to Bogen unless the payment is intended as an unlawful inducement.

10. Section 626.753(1), Florida Statutes, provides that, "An agent may divide or share in commissions only with other agents appointed and licensed to write the same kind or kinds of insurance." This section would not prohibit payment of a referral fee from Michelson to Bogen because the payment is not dependent upon the purchase of an insurance policy which would generate a commission payment to the agent. As indicated in the petition, the referral fee "will not be dependent in any sense" upon the purchase of an insurance policy.

11. Section 626.112(8), Florida Statutes, also prohibits referral fees to be paid by licensed agents to unlicensed persons, but only if the fee is dependent upon the purchase of an insurance policy. Section 626.112(8), Florida Statutes, provides:

No insurance agent, insurance agency, or other person licensed under the Insurance Code may pay any fee or other consideration to an unlicensed person other than an insurance agency for the referral of prospective purchasers to an insurance agent which is in any way dependent upon whether the referral results in the purchase of an insurance product.

12. As stated in the Petition, the referral agreement between Michelson and Bogen "will not be dependent in any sense" on whether or not the referred legal client actually purchases insurance from the Agent.

13. There are no existing appellate decisions interpreting these statutes which provide any help in answering the question at hand.

CONCLUSION

14. Accordingly, Section 626.9541(1)(h), Florida Statutes, when read in pari materia with Sections 626.753 and 626.112(8), Florida Statutes, does not prohibit Bogen from receiving the referral fee and would not prohibit Michelson from paying the referral fee, provided the payment is not an inducement and is not contingent upon the purchase of an insurance policy.

15. Because the Petition does not display how the "legal plan" referenced in Paragraph 5 (e) is exempt from regulation pursuant to Section 642.017(1), Florida Statutes, as asserted, and because the "specified legal services" offered thereunder are not sufficiently described as to nature, content, terms, or conditions, no opinion is offered as to the propriety of that plan or the methods through which it may be offered to customers of the Agent, or to others.

16. This declaratory statement does not and cannot state whether the proposed contractual agreement is permitted by the Rules Regulating the Florida Bar.

DONE and ORDERED this 14th day of November, 2011.



[Redacted Signature]
J. Paul Whitfield
Deputy Chief Financial Officer

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 petition or notice of appeal with the Agency Clerk at 200 East Gaines Street, Tallahassee, Florida 32399-0390, and a copy of the same with the appropriate District Court of Appeal within thirty (30) days of rendition of this Order.

Copies furnished to:

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STATE OF FLORIDA
DEPARTMENT OF FINANCIAL SERVICES

RECEIVED
DEPT OF FINANCIAL SERVICES
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IN RE:

BOGEN LAW GROUP,
MARK BOGEN,

DFS Case No. _____

**PETITION FOR DECLARATORY STATEMENT BEFORE THE DEPARTMENT OF
FINANCIAL SERVICES**

THE BOGEN LAW GROUP, P.A., and MARK BOGEN (hereinafter collectively referred to as "Petitioner"), by and through the undersigned counsel, hereby submits this Petition for Declaratory Statement pursuant to section the provisions of sections 120.565, *Florida Statutes*, and Rule 28-105, *Florida Administrative Code*, and states as follows:

1. The Florida Department of Financial Services ("Department") has jurisdiction to issue declaratory statements pursuant to section 120.565, *Florida Statutes*, and is the state agency charged with the responsibility of licensing and regulating insurance agents, and certain transactions involving such agents, pursuant to the provisions of Chapter 626, *Florida Statutes*.

2. Petitioner Mark Bogen is an individual licensed attorney at law, with a business address of 1900 W. Glades Road, Suite 354, Boca Raton, FL 33431, (561) 392-8555, and is the principal owner of Bogen Law Group, P.A.

3. Petitioner intends to enter into a referral arrangement ("Agreement") with a Florida licensed resident agent ("Agent") wherein Petitioner will be paid an annual flat fee by the Agent for any and all legal clients referred to Agent for potential purchase of insurance policies. Petitioner's compensation under the Agreement will not be dependant in any sense on whether or not the referred legal client actually purchases insurance from Agent. Petitioner's substantial

interests, as well as that of the Agent's, are affected by the Department's interpretation of the applicable provisions of the Florida Insurance Code governing the payment of rebates or other inducements by Agent to Petitioner under the Agreement.

4. Petitioner seeks a Declaratory Statement from the Department as to whether the provisions of the Unfair Insurance Trade Practices Act, specifically, section 626.9541(1)(h), *Florida Statutes*, or any other provision of Chapter 626, *Florida Statutes* (or rules promulgated thereunder) prohibit the Agreement contemplated herein, as more fully described below.

FACTS AND BACKGROUND

5. Petitioner proposes the following factual scenario for consideration:

- (a) Agent is properly licensed for all lines of insurance business to be written, including condominium and homeowners' association coverages.
- (b) Petitioner Bogen is currently licensed as an Attorney at Law in the State of Florida, and provides legal services to condominium and homeowners' associations.
- (c) Petitioner will have no ownership or equity interest whatsoever in Agent or affiliated agency.
- (d) Petitioner and Agent will enter into an Agreement whereby Agent will pay a single, annual fee to Petitioner for the Petitioner's referral of its current or future legal clients to Agent for purposes of providing an insurance premium quote. The Agent will pay the annual referral fee to Petitioner whether or not the referred client ultimately purchases insurance from Agent, or whether or not the referred client even chooses to

meet with the Agent to discuss insurance needs in the first instance. The fee is not otherwise tied in any way to the volume of business actually produced by Agent.

- (e) Petitioner will offer a legal plan to all association customers of Agent. The legal plan will be exempt from any regulation pursuant to the provisions of section 642.017(1), *Florida Statutes*. The legal plan requires an annual payment to Petitioner, made by the association client, for specified legal services over a twelve (12) month period. The Agreement between the Agent and the Petitioner will make no reference to the legal plan. The Petitioner, not the Agent, will make known to legal clients the availability of the legal plan to clients of the Agent. Petitioner may choose to offer the legal plan to other entities not clients of the Agent.
- (f) Petitioner is not licensed by the Department in any capacity. Petitioner will not engage in any activity involving the transaction or solicitation of insurance business so as to require Petitioner to become licensed under Chapter 626, *Florida Statutes*.
- (g) Clients of Agent will not be required to conduct any business with Petitioner, including participating in the legal plan.

NATURE OF DECLARATORY STATEMENT SOUGHT

6. The Petitioners seek a declaratory statement that the contemplated activities described in Agreement above do not constitute an "unlawful inducement" as that term is used in section 626.9541(1)(h), *Florida Statutes*, and that the Agreement is not otherwise prohibited under Chapter 626, *Florida Statutes*.

MEMORANDUM IN SUPPORT OF DECLARATORY STATEMENT

7. Section 626.112(8), *Florida Statutes*, specifically allows referral arrangements between licensed agents and unlicensed persons so long as the fee or other consideration paid to the unlicensed person is in no way dependent upon whether the referral results in the purchase of an insurance product. As the DFS currently acknowledges on its website,

To summarize, it is OK to pay an unlicensed person for every referral. If you only pay that unlicensed person for referrals that result in the sale of an insurance product, it violates the law. www.myfloridacfo.com/agents/Licensure/general/index_FAQ.htm

8. Section 626.9541(1)(h), *Florida Statutes*, prohibits any “person” from
Paying, allowing, or giving, or offering to pay, allow or give, directly or indirectly, as inducement to such insurance contract, any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract.

As used in the above cited provision, “person” means,

... any individual, corporation, association, partnership, reciprocal exchange, interinsurer, Lloyds insurer, fraternal benefit society, or business trust or any entity *involved in the business of insurance.*” Section 626.9511(1), *Florida Statutes* (emphasis supplied).

9. Under the Agreement, Petitioner will be paid for referrals on a “flat fee” basis.
The fee is payable whether there are fifty referrals during the term of the Agreement, or only five.
The referral fees are therefore not connected in any way to the number of policies ultimately issued by the Agent as a result of the referrals, and not otherwise tied to the Agent’s production.

10. When the Agent meets with a referred client, the Agent need not, and will not, discuss the availability of the legal plan offered by Petitioner. Petitioner will have already provided information regarding the legal plan to the client. Any inquiries made to the Agent by the client regarding the legal plan will be referred back to the Petitioner.

11. As a licensed attorney in the State of Florida, Petitioner is free to provide legal services to whomever he chooses, and at whatever price he chooses. This includes entering into legal plans applicable to classes of clients involved in the same or closely related areas.

See, section 642.017(1), Florida Statutes.

12. The clear language of section 626.9511(1), *Florida Statutes*, underscores that the provisions of section 626.9541(1)(h), *Florida Statutes*, do not apply to the Petitioner as a licensed attorney at law not otherwise "involved in the business of insurance." Under the Agreement, the Agent will pay the Petitioner a referral fee not tied in any way to the sale of an insurance product, will offer the potential client nothing as an inducement to purchase, and will not discuss the legal plan offered by Petitioner to clients of Petitioner's choosing.

CONCLUSION

Petitioner respectfully requests the Department issue a Declaratory Statement finding that the proposed activities of the Petitioner and the Agent as described herein in the Agreement do not violate the provisions of section 626.9541(1)(h), *Florida Statutes*, or any other applicable provision of Chapter 626, *Florida Statutes*.

Respectfully submitted,



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by Hand Delivery to The General Counsel, acting as Agency Clerk for the Department of Financial Services, and William W. Tharpe, Esq., both at Room 612, Larson Building, 200 East Gaines Street, Tallahassee, FL 32399-0333, this 2nd day of June, 2011.



Steven M. Malono