

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PROFESSIONS**

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	7/19/2013
File #	2013-04045

In re: Petition for Declaratory Statement

DON MEYLER INSPECTIONS, INC.,

Petitioner.

DS 2013-039

DECLARATORY STATEMENT

This Cause arises from the Petition for Declaratory Statement filed by Don Meyler Inspections, Inc., (DMI), through its authorized representative, with the Division of Professions (“the Division”) on May 10, 2013. DMI seeks clarification regarding the prohibition against offering fees for home inspection referrals—imposed by section 468.8319(1)(h), Florida Statutes—when applied to referrals from property and casualty insurers for windstorm mitigation inspections. The Division assigned case number DS 2013-039 to DMI’s petition. The petition was noticed in issue 39/112 of the Florida Administrative Register on June 10, 2013. The Division herein grants DMI’s petition and declares as follows:

QUESTIONS PRESENTED

1. DMI presented three questions to the Division, which are restated as:

Question 1. Is a licensed contractor or licensed home inspector under Florida law legally allowed to provide a flat referral fee to an insurance agent in light of the statutory prohibition of “any compensation, inducement, or reward to any broker or agent therfor” for referrals, § 468.8319(1)(h), Fla. Stat., when conducting wind mitigation inspections, as contemplated in section 627.711?

Question 2. Does the phrase “broker or agent therfor,” used in § 468.8319 (1)(h), apply to insurance agents and thereby prohibit an inspector from offering the agent a referral fee?

Question 3. Is the advertisement of an incentive and/or referral fee to insurance or agent associations prohibited within the framework of the Division's regulatory authority?¹

FINDINGS OF FACT

1. The Division is the State Agency charged with the licensure of home inspectors and the regulation of home inspection services as defined in section 468.8311, Florida Statutes. Ch. 468, Part XV, Fla. Stat.²

2. DMI is a Florida for-profit corporation whose corporate address is 2703 Gateway Drive, Suite A, Pompano Beach, Florida 33069.

3. DMI is organized for the primary purpose of scheduling, overseeing, and providing quality assurance for the inspection of windstorm mitigating fixtures and construction techniques. Homeowners then may report the fixtures and techniques to their insurers and receive premium discounts for hurricane loss mitigation.

4. DMI intends to enter into a referral arrangement with individuals representing residential property insurers. In this arrangement, DMI or its contractors would pay a flat fee to the insurers' representatives for each windstorm mitigation inspection completed for an insurer's referred policyholder.

5. Individuals who represent insurers in policy transactions are known as "agents." An agent transacting property insurance is a "general lines agent." A general lines agent restricted to noncommercial property and casualty insurance is a "personal lines agent." *See* Fla. Stat. §§ 626.015 (2); 626.015 (5)(a); 626.015 (15).

¹ While DMI asks more broadly if the advertisements are "a legally acceptable practice," the Division understands that this question is implicitly limited to the scope of the Division's authority and rephrases to clarify that limitation.

² The Petition filed by DMI is incorporated by reference into the instant Declaratory Statement. The Division's analysis assumes that the facts alleged in the Petitions are true. *See* Fla. Admin. Code R. 28-105.003 (providing that "[t]he agency may rely on the statements of fact set out in the petition without taking any position with regard to the validity of the facts.").

6. Section 468.8319 (1)(h), Florida Statutes, provides that a person may not “Offer or deliver any compensation, inducement, or reward to any *broker or agent therefor* for the referral of the owner of the inspected property to the inspector or the inspection company.” (emphasis added).

JURISDICTION

7. “Any substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.” § 120.565, Fla. Stat.

8. “The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. A party who obtains a statement of the agency’s position may avoid costly administrative litigation by selecting the proper course of action in advance. Moreover, the reasoning employed by the agency in support of a declaratory statement may offer useful guidance to others who are likely to interact with the agency in similar circumstances. Another party can expect the agency to apply the rationale for its declaratory statement consistently, or to explain why a different application is required.” *Chiles v. Dep’t of State*, 711 So.2d 151, 154–55 (Fla. 1st DCA 1998)(internal citation omitted).

9. “Declaratory statements are appropriate where a petition is filed by an individual corporation alleging a ‘particular set of circumstances’ involving ‘a unique industry having very limited participants engaged in almost identical operations.’ ... an agency may not decline to respond to a petition for a declaratory statement simply because ‘declaratory statements as to one would almost invariably be of interest to others in the very limited group.’” *ExxonMobil Oil Corp. v. Dep’t of Agric. & Consumer Servs.*, 50 So.3d 755, 757–58 (Fla. 1st DCA 2010) (*citing*

Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutual Wagering v. Inv. Corp. of Palm Beach, 747 So.2d 374, 385 (Fla. 1999)).

10. DMI submits a particular set of circumstances, is substantially affected by the Division's application of the statute, and can likely avoid costly administrative litigation by selecting the proper course of action in advance. Accordingly, the Division finds jurisdiction to issue a Declaratory Statement pursuant to section 120.565, Florida Statutes.³

CONCLUSIONS OF LAW

11. The resolution of the questions posed by DMI turns on the proper interpretation of section 468.8319 (1)(h), Florida Statutes.

12. "Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." *Fla. Dep't of Children & Family Servs. v. P.E.*, 14 So. 3d 228, 234 (Fla. 2009). In this regard, "legislative intent is determined primarily from the text" of the statute. *Cont'l Cas. Co. v. Ryan, Inc. E.*, 974 So. 2d 368, 374 (Fla. 2008). If the language of a statute is clear and unambiguous, then there is no reason to go beyond the plain meaning of the statute's words. *Saunders v. Saunders*, 796 So. 2d 1253, 1254 (Fla. 1st DCA 2001).

13. A statute is ambiguous if reasonable people could find different meanings from the same language. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1230 (Fla.2004).

³ The petitioner should note that the Division's authority to regulate home inspectors and home inspection services under Ch. 468, Part XV, Fla. Stat. is limited to regulatory enforcement. Section 468.8319 (2) provides criminal penalties for violation of its provisions. While the interpretation of statutes by the agencies charged with their enforcement is entitled to great deference and will not be overturned unless clearly erroneous, *Gay v Canada Dry Bottling Co* , 59 So2d 788, 790 (Fla 1952), the Division's interpretation does not bind the authority of Florida's criminal prosecutors to bring charges under this section.

14. “Statutes, as a rule, ‘will not be interpreted so as to yield an absurd result.’ ” *State v. Iacovone*, 660 So. 2d 1371, 1373 (Fla.1995) (quoting *Williams v. State*, 492 So. 2d 1051, 1054 (Fla. 1986)).

15. “It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.” *Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003).

16. By its terms, section 468.8319 (1)(h) cannot be read as a simple prohibition upon any fees for referrals because it would render the whole phrase “to any broker or agent therefor” surplusage. The two limits upon fees for referrals in the text are (1) to whom they may not be offered and (2) for what they may not be offered for.

17. Turning first to the question of to whom the fees may not be offered, the statute in question superficially reads as the prohibition of offering payment for a referral from any person whose function is as a broker or agent. This interpretation is problematic for several reasons.

18. First, terms “broker” and “agent” are not defined in the statute. Second, the modifier therfor⁴ after the word “agent” seems to limit the restriction to agents for the broker. The dictionary meaning of the word “broker” is “An agent who acts as an intermediary or negotiator, esp. between prospective buyers and sellers; a person employed to make bargains and contracts between other persons in matters of trade, commerce, and navigation. *Black’s Law Dictionary* 187 (7th ed. 1999).

19. Because of the near limitless application of the dictionary meaning of “broker,” if the legislature meant the terms to apply to anyone whose function falls within the dictionary

⁴ As opposed to therefore (i.e. ergo) therfor means “for that” or “for it” *Garner’s Dictionary of Legal Usage* 891 (3rd ed. 2009).

meaning, then the term “agent therefor” would become surplusage. The term “agent therefor” is only given meaning when the term “broker” is used as a specific title (e.g. a real estate broker) and an agent acts on behalf of that broker. In other words, there is a strong indication that the legislature meant for the terms “broker or agent therefor” to apply in a limited sense—to a specific group of brokers and agents—but did not clearly define the limits of the terms.

20. This leads us to the second limit placed upon the prohibition—what the fees may not be offered for. That is, they may not be offered for the referral of “owners of inspected property.” To determine whether the property would be an “inspected property”, we first have to answer the question of what is an inspection. The statute does not define “inspection,” but does define “home inspection services”.

21. “‘Home inspection services’ means a limited visual examination of the following readily accessible installed systems and components of a home: the structure, electrical system, HVAC system, roof covering, plumbing system, interior components, exterior components, and site conditions that affect the structure, for the purposes of providing a written professional opinion of the condition of the home.” Fla. Stat. § 468.8311 (4).

22. “[I]f the statutory intent is unclear from the plain language of the statute, then ‘we apply rules of statutory construction and explore legislative history to determine legislative intent.’” *Koile v. State*, 934 So. 2d 1226, 1231 (Fla. 2006)(quoting *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003)).

23. Among the basic principles of statutory construction is that statutes relating to the same subject matter must be read together, or *in pari materia*. *Fla. Dep’t of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) (“The doctrine of *in pari materia* is a principle of statutory construc-

tion that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.”).

24. Read *in pari materia*, the prohibitions in section 468.8319 only apply to the regulation of Home Inspection Services as defined in 468.8311(4). Home inspection services are those conducted “for the purposes of providing a written professional opinion of *the condition of the home*” Fla. Stat. § 468.8311(4) (emphasis added).

25. The distinction here between “the” condition and “a” condition is critical. “[T]he condition of the home” means the overall or general condition. For example, a roofer that only inspects a roof to give a job estimate is not providing home inspection services. A heating and air conditioning salesman that only inspects a home’s condition of insulation is not providing an opinion about the overall condition of the home and is not providing home inspection services.

26. An individual, whether a licensed home inspector, or licensed contractor that inspects wind mitigation fixtures and construction techniques, then prepares and signs a form for the owner to provide to their insurer for premium discounts, does not provide an opinion of the condition of the home and is not performing home inspection services.

27. Finally, the purpose for a prohibition on fees for referrals is clearly to guard against conflicts of interest. For instance, if a home inspector were to have a referral fee arrangement with a real estate broker or agent therefor, the sale would depend in part on a favorable sign off by the inspector. The inspector would have an incentive to provide a favorable inspection and the brokers would have incentive to seek out inspectors that would work in their favor. The public purpose for regulating home inspectors is consumer protection, which is directly undermined by the incentives provided by a referral fee arrangement.


28. While home insurers may use similar terminology, (i.e. “agent”) they do not present the same conflict of interest when referring customers to a particular inspector. The insurers’ sales are not contingent on the positive results of a mitigation inspection. To the contrary, positive inspections result in discounts by the insurers. The insurers’ interest is in guarding against catastrophic loss and therefore they seek to have accurate inspections of wind mitigation features. What’s more, a prohibition of referrals in this case would undermine the public purpose of the wind mitigation program, which is to promote to the greatest extent possible the proper installation of features that will guard against catastrophic loss from hurricanes.

29. Therefore, as to DMI’s question 1, a licensed home inspector or licensed contractor would not violate the provisions of § 468.8319 by offering a fee to insurers for referral of wind mitigation clients.

30. As to DMI’s question 2, the phrase “broker or agent therfor,” used in § 468.8319 (1)(h), does not apply to insurance agents and does not prohibit an inspector from offering the insurance agent a referral fee.

31. As to DMI’s question 3, such advertisements are not prohibited by Ch. 468, Part XV, Florida Statutes.

DONE and ORDERED on this the 19th day of July, 2013.


G.W. Harrell, Director
Division of Professions
1940 North Monroe Street

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Oder is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review Proceedings are governed by Rules 9.110 and 9.190, Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Department of Business and Professional Regulation, Attn: Ronda L. Bryan, Agency Clerk, 1940 North Monroe Street, Suite 92, Tallahassee, Florida 32399 and a Second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Florida Appellate District where the Party Resides. The Notice of Appeal must be filed within thirty (30) Days of Rendition of the Order to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this the 19th day of July 2013 to Nick Iarossi, Authorized representative for Don Meyler Inspections, Inc., Capital City Consulting, LLC., 101 E. College Avenue Suite 303, Tallahassee, Florida 32301



Agency Clerk's Office

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF PROFESSIONS

FILED	
Department of Business and Professional Regulation Deputy Agency Clerk	
CLERK	Brandon Nichols
Date	5/10/2013
File #	

In re: Petition for Declaratory Statement

Don Meyler Inspections, INC.,

Case No: **DS 2013-039**

Petitioner.

**PETITION FOR DECLARATORY STATEMENT BEFORE THE DEPARTMENT OF
BUSINESS AND PROFESSIONAL REGULATION**

COMES NOW, Don Meyler Inspections, Inc. ("DMI" or "Petitioner"), pursuant to Section 120.565, Florida Statutes, and Rule 28-105, Florida Administrative Code, and requests the issuance of a declaratory statement by the Department of Business and Professional Regulation, Division of Professions ("Division") regarding the application of certain statutes to the Petitioner's particular set of circumstances. Specifically, the Petitioner presents questions as to the Petitioner's ability to provide referral fees to insurance agents licensed under Chapter 626, Florida Statutes ("Agents") for the referral of policyholder wind mitigation inspection businesses conducted under s. 627.711, Florida Statutes, and performed by Petitioner's contracted Home Inspectors licensed under Chapter 468, Florida Statutes ("Contractors"). In support of the Petition, Petitioner states as follows:

1. The affected agency is the Department of Business and Professional Regulation – Division of Licensing, located at Northwood Centre, 1940 North Monroe Street, Tallahassee, Florida 32399.

2. DMI is a Florida for-profit corporation whose corporate address is 2703 Gateway Drive, Suite A, Pompano Beach, Florida 33069. For purposes of this petition, however, DMI's address is that of its undersigned representative.

3. The primary organizational purpose of DMI is to schedule, manage, oversee, and provide quality assurance for windstorm mitigation inspections to homeowners. Contractors document the results of in-person windstorm mitigation inspections on a Uniform Mitigation Verification Form OIR-B1-1802. The Form is submitted to the homeowner's property insurer to achieve eligible insurance premium discounts for mitigation features.

4. Petitioner intends to enter into a referral arrangement with Florida licensed resident Agents wherein Petitioner or its Contractors pay a flat fee to the Agents for referrals of Agent policyholders to Petitioner for each windstorm mitigation inspection completed, the same practice currently engaged by equivalent associations and inspection companies. Petitioner's substantial interests, as well as that of the Contractors, are affected by the Division's interpretation of the applicable provisions of Florida law governing the payment of referral fees by Contractors to Agents.

5. Petitioner seeks a Declaratory Statement from the Division as to whether the provisions of s. 468.8319(1)(h), *Florida Statutes*, regulating home inspectors, prohibit the Agreement contemplated herein.

**LEGAL CONSIDERATIONS APPLICABLE TO THE PETITION FOR
DECLARATORY STATEMENT**

6. Section 468.8319(1)(h), *Florida Statutes*, on its face prohibits persons from providing inducements to any agent for referrals to a home inspector or inspection company and provides in part as follows:

468.8319 Prohibitions; penalties.—

(1) A person may not:

(h) Offer or deliver any compensation, inducement, or reward to any broker or agent therefor for the referral of the owner of the inspected property to the inspector or the inspection company.

(2) Any person who is found to be in violation of any provision of this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

7. The prohibition on inducements in Section 468.8319(1)(h), Florida Statutes, applies to "Home inspection services" as defined in section 468.8311(4), Florida Statutes, which states:

468.8311 Definitions.—As used in this part, the term:

(4) "Home inspection services" means a limited visual examination of the following readily accessible installed systems and components of a home: the structure, electrical system, HVAC system, roof covering, plumbing system, interior components, exterior components, and site conditions that affect the structure, for the purposes of providing a written professional opinion of the condition of the home.

8. The type of inspections performed by Petitioner's Contractors for windstorm mitigation inspections are not defined by statute, but are contemplated in section 627.711, Florida Statutes, which states:

627.711 Notice of premium discounts for hurricane loss mitigation; uniform mitigation verification inspection form.—

(1) Using a form prescribed by the Office of Insurance Regulation, the insurer shall clearly notify the applicant or policyholder of any personal lines residential property insurance policy, at the time of the issuance of the policy and at each renewal, of the availability and the range of each premium discount, credit, other rate differential, or reduction in deductibles, and combinations of discounts, credits, rate differentials, or reductions in deductibles, for properties on which fixtures or construction techniques demonstrated to reduce the amount of loss in a windstorm can be or have been installed or implemented. The prescribed form shall describe generally what actions the policyholders may be able to take to reduce their windstorm premium. The prescribed form and a list of such ranges approved by the office for each insurer licensed in the state and providing such discounts, credits, other rate differentials, or reductions in deductibles for properties described in this subsection shall be available for electronic

viewing and download from the Department of Financial Services' or the Office of Insurance Regulation's Internet website. The Financial Services Commission may adopt rules to implement this subsection.

(2)(a) The Financial Services Commission shall develop by rule a uniform mitigation verification inspection form that shall be used by all insurers when submitted by policyholders for the purpose of factoring discounts for wind insurance. In developing the form, the commission shall seek input from insurance, construction, and building code representatives. Further, the commission shall provide guidance as to the length of time the inspection results are valid. An insurer shall accept as valid a uniform mitigation verification form signed by the following authorized mitigation inspectors:

1. A home inspector licensed under s. 468.8314 who has completed at least 3 hours of hurricane mitigation training approved by the Construction Industry Licensing Board which includes hurricane mitigation techniques and compliance with the uniform mitigation verification form and completion of a proficiency exam;
2. A building code inspector certified under s. 468.607;
3. A general, building, or residential contractor licensed under s. 489.111;
4. A professional engineer licensed under s. 471.015;
5. A professional architect licensed under s. 481.213; or
6. Any other individual or entity recognized by the insurer as possessing the necessary qualifications to properly complete a uniform mitigation verification form.

(b) An insurer may, but is not required to, accept a form from any other person possessing qualifications and experience acceptable to the insurer.

9. Petitioner is in doubt as to the proper interpretation of s. 468.8319 (1)(h), Florida

Statutes, in relation to its contemplated Agent referral fee arrangement by Petitioner or its

Contractors and seeks clarification of the following questions before engaging in such a practice:

QUESTIONS PRESENTED TO DIVISION

Question 1. Is a licensed contractor or a licensed home inspector under Florida law legally allowed to provide a flat referral fee to the insurance agent in light of the statutory prohibition of "any compensation, inducement, or reward to any broker or agent" for referrals, s. 468.8319 (1)(h), when conducting wind mitigation inspections, as contemplated in s. 627.711?

Question 2. Does the phrase "broker or agent," used in s. 468.8319 (1)(h), apply to insurance agents and thereby prohibit the inspector from offering the agent a referral fee?

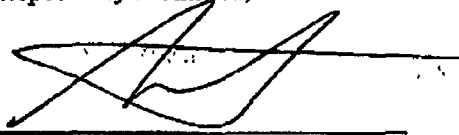
Question 3. Is the advertisement of such an incentive and/or referral fee by insurance or agents associations a legally acceptable practice?

CONCLUSION

Petitioner respectfully requests the Division issue a Declaratory Statement as to whether the proposed activities of the Petitioner and Agents as described herein violate the provisions of section s. 468.8319 (1)(h), *Florida Statutes*, relating to inspections conducted under s. 627.711, *Florida Statutes*, and performed by Petitioner's contracted Home Inspectors licensed under Chapter 468, *Florida Statutes* (Contractors), or any other applicable provision of Chapter 626, *Florida Statutes*.

DATED this 10 day of May, 2013.

Respectfully submitted,



Nick Iarossi
Authorized Representative
Capital City Consulting, LLC.
101 E. College Avenue Suite 303
Tallahassee, Florida 32301
Telephone: (850) 222-9075

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by hand delivery, to the Agency Clerk of the Department of Business and Professional Regulation, 1940 N. Monroe Street, Tallahassee, FL 32399-1035, this 12 day of May, 2013.



Nick Larossi