# Background Information on the DAL and Wooley

## Regulation of Insurance

### McCarron-Ferguson Act - 1945

#### With a few exceptions, leaves the regulation of insurance to the states.

##### Insurers are organized by state

##### The national insurers such as State Farm are holding companies of state companies.

##### States do not have the information or expertise to do the job

### Implications of state regulation - risk pools

#### Insurance works better if you can aggregate large numbers of policy holders who do not have identical risk exposure.

##### You would not want to do homeowners wind insurance only on the coast.

##### You would not want to do fire insurance for cabins in the western woods.

#### It is more difficult to predict the risks on smaller pools

##### Uncertainty increases premiums

##### Uncertainty increases rate volatility.

#### Medical malpractice insurance as an example.

##### Insured by specialty class and procedures done, by state.

##### No state has very many neurosurgeons

###### Small pool risk – high rates and premium volatility.

###### No state has enough to make risk management worthwhile.

##### If we had national medical malpractice risk pooling, we could have lower and more stable rates and better risk management.

#### Heath Insurance

##### Prior to the ACA, most private insurance was set up under ERISA and was not regulated by either the state or federal government.

##### The ACA provided a federal standard for the basic coverage of medical insurance plans.

##### States are big enough for decent risk pools, but the pools are fragmented across companies and employers.

### Bottom-line – The Insurance Commissioner is an important office.

## Fairness in Adjudications

### Anti-regulatory forces like to attack adjudications as being biased in favor of agencies. This is a very powerful argument in state legislatures, where few people understand administrative law.

### One major complaint is that ALJs are biased in favor of agencies because they are part of the agency.

#### Experience with federal ALJs shows that it is more likely that they will be biased against the agency.

#### This happens because they forget that they are supposed to represent the agency, not be a referee like an Article III judge.

#### The problem is that if they starting thinking like a referee, there is no one to present the agency’s case.

#### Interviews with SSI ALJs show them saying they have to rule for the claimant because there is no one advocating for the agency.

### The key question in thinking about fairness is fairness to who?

#### The regulated party is visible.

#### Who does the agency represent?

##### EPA?

##### State health department?

##### FDA?

#### What happens when the ALJs see themselves are referees rather than hybrid decisionmakers who represent the public good while trying to find the truth in adjudications?

## ALJs in LA

### Prior to the creation of DAL the LA APA did not have specific provisions authorizing ALJs or their credentials

### The ALJS were employed by the agencies

### They were selected for expertise in the area they regulated.

#### Some were not lawyers, but were experts in the system they administered.

#### If they are making decisions in a narrow domain, do they really need to be lawyers?

## The LA Worker’s Compensation Model

### The worker’s compensation agency is intended to provide an administrative resolution of comp claims within the statutory benefits system.

#### It displaces the traditional tort system.

#### The tradeoff is quick and sure payment of regulated benefits in return for elimination of traditional tort defenses against claims by employees.

### In 1988 the legislature gave the ALJs in the worker’s compensation system the power to issue final judgments.

#### The worker’s comp agency had no role in the final judgment.

#### The worker or the employer could appeal to the district court.

### This system was declared an unconstitutional violation of separate of powers in 1990.

#### The ALJ would to be issuing a final, enforceable judgment, which can only be done by a Louisiana Article V judge.

#### The case was overruled with a constitutional amendment to allow worker’s comp ALJs to issue final judgments.

### This was used as a model for the DAL (Department of Administrative Law) legislation in 1995.

#### The irony is that the LA workers compensation system was a disaster.

#### The ALJs saw themselves as an extension of the plaintiff’s bar and uncritically granted claims.

#### Premiums went to the highest in the US and low wage employers fled the state.

#### Bad doctors and unscrupulous lawyers conspired to transform minor injuries into permanent disabilities to run up fees.

#### This was finally addressed by legislation limiting the discretion of the ALJs and forcing them to abide by medical care guidelines.

#### Claims have dropped and there is now pressure to get injured workers off narcotics and get them proper rehabilitation.

## Key Provisions of the DAL - 1995

### The DAL shall handle all adjudications required by the LAPA,

#### that the ALJ shall issue the final decision or order and

#### the agency shall have no authority to override the decision or order,

#### no agency or official thereof shall be entitled to judicial review of an adjudication.

### that the governor shall appoint, and the Senate confirm, a director for DAL, who, in turn, shall employ the ALJs, and that the current ALJs employed by the various affected agencies shall be transferred to and employed in the DAL.

### (Some agencies such as medical licensing are excluded)

## The Big Picture

### Pushed by concerns about fairness to the regulated parties

#### Smoke screen to pass the law

#### Like family farming and the farm bill

#### Protects little guys, like Exxon

### But there are big problems in a lot of little agencies

#### LA has 300/400+ boards and agencies

#### No systematic staffing or procedure

#### Gresham's law in the big agencies

## Key Questions

### How does a central panel improve fairness?

#### Fairness to whom - who is the agency representing?

#### What core agency attribute do you lose?

### Why does finality mean that the ALJs are deciding legal and not just factual questions?

## \*\* The Regulatory Ratchet \*\*

### What is the effect of having the ALJ bind the agency without appeal, while allowing the regulated party to appeal to the courts?