STATE OF LOUISIANA

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

DOCKET NO. 50,2311 **SECTION 21**
HONORABLE JANICE CLARK, J.

J. ROBERT WOOLEY
IN HIS CAPACITY AS ACTING COMMISSIONER OF INSURANCE
STATE OF LOUISIANA

VERSUS
STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, HONORABLE MURPHY J. FOSTER IN HIS CAPACITY AS GOVERNOR OF LOUISIANA, ANN WISE IN HER CAPACITY AS DIRECTOR OF THE DIVISION OF ADMINISTRATIVE LAW, AND ALLEN REYNOLDS IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF STATE CIVIL SERVICE

POST TRIAL BRIEF OF AMICUS CURIAE
LSU PROFESSOR OF LAW
PAUL R. BAIER

IF THE COURT PLEASE,

Mr. Justice Holmes in one of his memorable speeches laid it down that: "It is one thing to utter a happy phrase from a protected cloister; another to think under fire–to think for action upon which great interests depend." I want to thank the Court for inviting me to participate as amicus curiae in constitutional litigation of a vital *res nova* question upon which great interests depend. It was a joy to see my students in court for the hearings. "I quite understand the difficulties of connecting the books with life. I remember a chap who had just left the Law School writing to another that he had seen a real writ," Holmes wrote in a letter.

Your Honor's recital of Chief Justice Marshall's immortal admonition:— "It is emphatically the province and duty of the judicial department to say what the law is."— added life to our learning. All of this, remarkably, in the Bicentennial year of *Marbury v. Madison*.

Now, first let me address gnawing jurisdictional doubts that have troubled me from the beginning of these proceedings.

I. I remain firmly of the view that the underlying dispute between the Department of Insurance and State Farm over the proposed RCU insurance contract involves questions of law and Department policy that are not required by either Louisiana law or the Constitution of the United States to be decided upon an APA "adjudication" remitted by the parties into the hands of an ALJ.

Accord, *Blanchard v. Allstate Ins. Co.*, 774 So.2d 1002 (La. App. 1 Cir. 2000), *writ denied*, 787 So.2d 997 (La. 2001)..

My earlier instincts in this regard are confirmed by a late reading of Professor Pierce's ADMINISTRATIVE LAW TREATISE (Fourth Edition, 2002), Vol. 1, §8., p. 529, **Statutory Requirements for Adjudication**. Professor Pierce points out that the federal APA, §554(a), requires an agency to employ formal trial-type procedures only in an "adjudication required by statute to be determined ***on the record*** after an opportunity for an agency hearing." *Id.*, §8.2, p. 531 (emphsis added). "Relatively few classes of agency adjudications are governed by statutes that require 'determination on the record after opportunity for an agency hearing,' although a high proportion of statutes require determination based on a 'hearing.' If an adjudication is not within the relatively narrow scope of §554(a), the only provision of the APA that prescribes procedures applicable to the adjudication is §555. That section requires only that an agency (1) permit a party to be represented by an attorney or other authorized representative, (2) permit a person to obtain a copy of any data or evidence she provides, and (3) provide a brief statement of the grounds for an application or petition." *Id.*

A careful re-reading of Louisiana's APA, 49 La. R.S. § 951, **Definitions**, confirms likewise that under Louisiana's APA "(1) 'Adjudication' means agency process for the formulation of a decision or order." "Decision" or "order," under § 951(3), "means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, required by constitution or statute to be determined ***on the record after notice and opportunity for an agency hearing"*** (emphasis mine). No Louisiana statute requires the Department to hold an evidentiary, trial-type "adjudication" of the legal dispute between the Department and State Farm over the proposed RCU policy. In short, State Farm's right to a "hearing" under La. R.S. 22:1351(2) does not contemplate remitting the questions of law and policy involved in the underlying dispute to the Division of Administrative Law and its ALJs.

As for State Farm's claim that the Constitution gives it a right to an ALJ "adjudication," it is submitted that due process is quite satisfied by State Farm's right to judicial review of any adverse decision on its RCU policy application by the Commissioner of Insurance. The claim that State Farm is entitled to an "adjudication" before an ALJ where the facts of the proposed RCU policy are undisputed and only legal questions are at issue seems strange to "Amicus Baier," as counsel have

referred to me, including my former student Mary Quaid, who is here as a solid professional representing the Louisiana House of Representatives. I also take great pride in the trial work of Jill Craft, a convincing LSU law alumna, and in reading State Farm's briefs crafted in turn by my former students Steve Bullock and Sarah House, under the eye of Bill Treeby of Stone, Pigman.

To repeat myself, it seems to me that ALJ Hayes was without jurisdiction under the statutory limitations of his and the Division's authority. And without jurisdiction in the first instance, neither the District Court on the Commissioner's petition for judicial review nor the First Circuit Court of Appeal on the Commissioner's appeal had jurisdiction to do anything other than to dismiss. *Hayden v. N.O. S.S. Pilote Fee Com'n*, 707 So.2d 3 (La. 1988).

II. This Court should take judicial notice of the Rules of Practice and Procedure Before the Commissioner of Insurance, Title 37 of the Louisiana Administrative Code, Chapter 11, §1151, **Declaratory Orders and Rulings, Judicial Review**, which provides in pertinent part:

> A. A person entitled to the same is granted the right to seek from the Commissioner a declaratory order or ruling on the applicability of any statute or rule or order of the Commissioner.

This provision, it is submitted, is the proper procedural vehicle for State Farm to press its legal contentions regarding its RCU policy before the Commissioner, with judicial review lodged under La. R.S. 49: 962, 964(B) in the Nineteenth Judicial District Court. State Farm has not done so. Compare *Blanchard v. Allstate Ins. Co.*, 774 So.2d 1002, 1003 (La. 1st Cir. 2001), *writ denied*, 787 So.2d 997 (La. 2001), where precisely this procedure was used.

At this point, Your Honor should take note that the record in these summary and ordinary proceedings shows no final order of the Commissioner of Insurance either approving or disapproving of State Farm's proposed RCU policy. ALJ Hayes ordered the Department of Insurance to approve the policy, but state law, as I read it, requires approval at the top: "No insurance policy is permitted to be issued in this state without the prior approval of its provisions *by the Louisiana Commissioner of Insurance.*" *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 133 (La. 2000) (emphasis mine).

Chief Justice Calogero's opinion in *Doerr* cites La. Rev. Stat. 22:620(A)(1), which, if it means what is says, leaves this case in jurisdictional limbo. It is not true, as alleged in the Commissioner's petition for preliminary and permanent injunctions and for declaratory judgment, that the ruling issued by the ALJ in the underlying administrative matter "*orders the Commissioner*

to approve the RCU policy." Petition, Paragraph XXXV (4), p. 10 (emphasis added).

Caution and wisdom suggest that the burning constitutional issues raised by the parties could well be avoided by insisting upon procedural regularity that leaves to courts determinations of questions of law.

III. One other preliminary matter. What about the First Circuit Court of Appeal decision in *Brown v. State Farm*, 804 So.2d 41 (La. App. 1st Cir. 2001)? Plainly, the Commissioner's constitutional attack upon Act 739 of 1995 and Act 1332 of 1999 puts at issue questions of constitutional law that were not at issue in *Brown* and that were expressly reserved for adjudication *via ordinaria* by the very declaratory judgment suit now brought by Acting Commissioner Wooley. Hence Judge Downing's *Brown* opinion is neither *res judicata*, as this Court held in overruling State Farm's exception, nor binding precedent as to the Commissioner's separation of powers claim under Article II, § 1 and his claim of unconstitutional abridgement of judicial power under Article V of the Louisiana Constitution of 1974. I address both claims in a moment.

But for the record let me say that it seems to Amicus Baier that the First Circuit's rejection of the Commissioner's claim of usurpation of his constitutional authority under Article IV, §11 is quite mistaken. The Commissioner of Insurance is a constitutionally elected state-wide officer. It seems to this professor of law that surely the Commissioner of Insurance has the constitutional power, implicit in his office, to protect the public interest. If this is correct, then the Commissioner's authority necessarily includes the right to seek judicial review of an adverse ALJ decision claimed to be contrary to law and Department policy. Chief Justice Calogero's opinion for the Louisiana Supreme Court in *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 134 (La. 2000), is instructive in this regard:

> The Office of the Commissioner of Insurance is a constitutionally created office, and the elected official holding that office is charged with the administration of the Insurance Code and the protection of the public interest in the realm of insurance. *See* La. Const. Art. IV § 11; La. Rev. Stat. 22:2. Because of the Commissioner's role in the regulation of Louisiana Insurance law, his opinion regarding matters within his province is persuasive. However, it is the job of the courts to resolve disputes over insurance coverage. *See* La. Const. Art. V, § 1 ("The judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this Article.").

Respectfully, it is not constitutionally open to the legislative branch to strip a constitutional

officer of the Executive Branch of his inherent authority and to transfer such power to an appointed executive branch agency. Thus the Minnesota Supreme Court held in an analogous case:—

> The provision in Article V providing that the duties of the state executive offices "shall be prescribed by law" is present in several other state constitutions. Appellate courts in these jurisdictions have consistently held that the prescribed-by-law provision does not allow a state legislature to transfer inherent or core functions of executive officers to appointed officials.

State of Minnesota ex. rel. Mattson, Treasurer v. Kiedrowski, Commissioner of Finance, 391 N.W.2d 777 (Minn. 1986).

IV. Laying aside my threshold jurisdictional concerns and Judge Downing's opinion in *Brown v. State Farm*, let me address the merits. It is this LSU Law School professor's best judgment that in combination Acts 739 and 1332 work an unconstitutional violation of separation of powers in violation of Article II, § 1 of the Louisiana Constitution of 1974 and unconstitutionally infringe upon judicial power in violation of Article V.

Act 739 of 1995 transfers all adjudicative functions of the Department of Insurance to the Administrative Law Division and to its civil service administrative law judges who are unaccountable to the People at large. Thereafter, the Legislature by Act 1332 of 1999 cut off the Commissioner and the Department from judicial review of any adverse ALJ ruling—leaving vital questions of law and policy in the hands of an appointed, unaccountable, quasi-judicial executive agency. "The A.L.J. is a single person of unknown predilections and politics. Moreover, the public cannot hold the A.L.J. accountable, except to the extent that courts can subject the A.L.J.'s decision to review. On the other hand, the agency, designed to make policy, is accountable for the policy it makes." F. Scott McCowan and Monica Leo, When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?, 50 Baylor Law Rev. 65, 77 (1998).

Merely to describe the effects of Acts 739 and 1332 is sufficient to condemn them. This, I take it, is the thrust of my erstwhile colleague at LSU Law School, Professor Jay Bybee:

> the Legislature has deprived the *executive* of its authority. Agency adjudication has always been thought permissible within a scheme of separated powers because it was adjunct to the exercise of executive power. So long as agencies possessed the authority to review an ALJ's decision, the decision belonged to the agency, which exercised executive power. The new role of ALJs in the LAPA belies the notion of any exercise of *executive* authority. Their authority is purely judicial in nature, yet their decisions are executive by nature and tradition.

Jay S. Bybee, Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act, 59 La. L. Rev. 431, 463 (1999).

And more:

> The heads of the traditionally structured agencies have always controlled policy through their power to review ALJ determinations. Indeed, ALJ powers have extended only to the determination of evidentiary facts. *Awareness of the always limited role of ALJs is a key to unraveling many of the current disputes arising in the context of nontraditionally structured administration about the respective powers of the enforcement or administering authorities on one hand and of the adjudicating authorities on the other.* (Emphasis added.)

This from a University of Minnesota law professor. Daniel J. Gifford, Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure, 66 Notre Dame L. Rev, 965, 1023 (1991) (emphasis added).

Under Article V of the Louisiana Constitution of 1974, it is not open to the Legislature to shut the judicial door to agency review in circumstances that are no longer "quasi-judicial," but remit final authority to an administrative law judge to determine questions of law and agency policy.

My conclusion rests upon the timeless view of Professor Louis Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965), Ch. 14, Judicial Review: Questions of Law, p. 546, *viz.*:

> The distinction between fact and law is vital to a correct appreciation of the respective roles of the administrative and the judiciary. The administrator is the sole fact finder. The judiciary may set aside a finding of fact not adequately supported by the record, but, with certain exceptions its function is at that point exhausted. It has, as it were, a veto, but no positive power of determination. On the other hand, the administrative and the judiciary *share* the role of law pronouncing and law making. They are in partnership. The court may supersede the administrative and itself determine the question of law; it is the senior partner.

Under Act 1332, which cuts off judicial review of ALJ decisions, the "quasi-judicial" administrative law judge is the senior partner. Article V courts, not to mention the Commissioner of Insurance, are made eunuchs. This will not do:—

> Limiting the agency's power to correct the A.L.J.'s misunderstanding or misapplication of the law would amount to delegating policy-making power to a single A.L.J. As stated by the Austin Court of Appeals in *Hunter Industrial Facilities v. Texas Natural Resource Conservation Commission*, "[f]orcing the Commission to accept the hearing examiners' conclusions of law . . . would destroy the Commission's discretion to interpret the rules that the Commission *itself* has promulgated."

F. Scott McCowan and Monica Leo, When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?, 50 Baylor Law Rev.65, 72 (1998).

The New Jersey Supreme Court, construing New Jersey's statute creating the Office of Administrative Law, which reserves decisional authority to the agency, has said the same thing:

"The reservation of decisional authority in administrative agencies was purposeful on the Legislature's part. Its significance is related to the fact that administrative adjudication is an integral aspect of agency regulation generally." *In re Uniform Adm'n Procedure Rules*, 447 A.2d 151, 155 (N.J. 1982). "Administrative law judges have no independent decisional authority. *Any attempt to exercise such authority would constitute a serious encroachment upon an agency's ability to exercise its statutory jurisdiction and discharge its regulatory responsibilities.*" *Id.*, at 156 (emphasis mine).

"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied," *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936), Brandeis, J., concurring. Amicus Baier stands with Justice Brandeis. I commend his sound views to Your Honor.

With great respect but with gnawing doubt, what the First Circuit in *Brown* seems to have overlooked is that agency access to courts on judicial review is constitutionally required. *Bowen v. Doyle*, 253 So.2d 200, 202 n.1 (La. 1971).

This is precisely the view, of late, of one of Louisiana's foremost jurists, a member of Louisiana's Constitutional Convention of 1973, later a distinguished Justice of the Louisiana Supreme Court, now Judge James L. Dennis of the United States Court of Appeals for the Fifth Circuit. The title of Judge Dennis's essay in honor of LSU Law Center's Professor Lee Hargrave fits this case perfectly: Judicial Power and the Administrative State, 62 La. L. Rev. 59 (2001). By analogy to Article III of the Federal Constitution, Judge Dennis cogently links Article V of the Louisiana Constitution to judicial control of administrative action, including a core requirement of the availability of judicial review. "The underlying constitutional conception is that those with governmental power must be subject to the limits of law, and those limits should be determined, not by those whose authority is in question, but by an impartial judiciary." *Id.*, at 74. What is at stake is "the value of judicial integrity," says Judge Dennis. "At some point judicial integrity is compromised by limitations on the scope of judicial review." *Id.*, at 75. And more (pp. 78-79):

> The 1974 Louisiana Constitution plainly vests in courts established and authorized by Article V the judicial power to declare laws unconstitutional and to review the actions of the executive branch of government. The Louisiana Supreme Court consistently has held under both the 1921 and 1974 state constitutions that it is the final arbiter of the meaning of the state constitution and laws. Undoubtedly, these interpretations of the state constitutions, as well as the adoption of Article V, §

> 5(D) itself, were influenced by Chief Justice Marshall's opinion in *Marbury v. Madison* and its progeny.

In this Bicentennial year of *Marbury v. Madison*, it is quite remarkable that *Wooley v. State Farm* presents essentially the same question of allocation of authority between the executive and the judiciary. Down the corridor of two centuries, John Marshall's echo controls this case:

> [I]t may be strongly argued that Article V, Section 1 requires that the determination by all administrative adjudicatory tribunals must be reviewed at least for constitutional and legal error and for a substantial evidentiary basis to support factual findings. If an administrative tribunal's faithful adherence to the requirement of law is not subject to judicial review, separation of powers values will be endangered.

Judge James L. Dennis, Judicial Power and the Administrative State, 62 La. L. Rev., at 92. "Article V courts must also review all questions of law decided by non-Article V tribunals." *Id*., at 93. Judge Dennis concludes (p. 96):

> Article V, the Louisiana judiciary article, continues to serve as a worthy vehicle by which Louisiana judges can maintain their independence; enforce doctrines of separation of powers, checks and balances, and the rule of law with respect to administrative agencies and other branches of government; and uphold the constitution for the protection of individuals, minorities and the people as a whole.

The Commissioner of Insurance is elected by the people as a whole. He represents the people as a whole. One cannot read Judge Dennis's views without reaching the firm conclusion that the Legislature's recent amendments of Louisiana's Administrative Procedure Act, its creation of the Administrative Law Division, its immunizing of ALJ's decisions from any judicial review—all have worked an unconstitutional violation of Article II, § 1 and Article V of the Louisiana Constitution of 1974.

Judge Dennis's analysis of Article V and his conclusions draw upon the earlier work of Harvard Law School Professor Richard Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 916 (1988), which focuses on the Judiciary Article of the Federal Constitution and posits an "appellate review theory" under which "searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III." *Id.*, at 918. Professor Fallon reasons:

> Even with the values supporting congressional and administrative flexibility carefully taken into account, compelling normative and doctrinal arguments require the reviewability of at least some issues decided by legislative courts and administrative agencies. The normative arguments are straightforward. *To the extent that questions of fidelity to legal norms can be immunized from judicial inquiry, separation of powers values are put at risk*. . . . Some accommodation of the values favoring non-article III tribunals must of course be made. But accommodation

> occurs better in fixing the requisite scope of review by an article III court than through total preclusion of judicial oversight in significant classes of cases.

Id., at 950, 951 (emphasis mine)..

Professor Fallon's conclusion under Federal Judiciary Article III foreshadows Judge Dennis's identical conclusion under Louisiana Judiciary Article V:— "Article III courts should have jurisdiction to review all 'questions of law' that are decided by non-article III federal adjudicators." *Id.,* at 976. "In my judgment, the sounder of the competing lines of cases is the one holding that an article III court must exercise independent judgment concerning all questions of law that it is called upon to decide. *Separation-of-powers values call for this conclusion, and sometimes emphatically so.*" *Id.*, at 983 (emphasis mine).

This does not mean a return to "article III literalism." Nor should Your Honor apply Article V literalism to the matter at hand. Professor Fallon explains:

> When a court renders its ruling after an administrative agency has spoken, the agency's decision is a part of the legal landscape that the court appropriately takes into account. Even though a court must have ultimate responsibility for the correct decision of questions of law, no article III value forbids acknowledgement that, concerning questions to which administrative expertise is relevant, the agency interpretation furnishes a presumptively reliable indicator of how the question ought to be resolved.

Id., at 985.

Fallon's point, of course, reflects the doctrine of *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), "which announced the principle that the courts will accept an agency's reasonable interpretation of the ambiguous terms of a statute that the agency administers." Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511 (1989). To this calculus, the Administrative Conference of the United States wisely adds: "Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts that the judge finds in an individual case." ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, Recommendations and Reports, 1992, Vol. 1, Recommendation 92-7, The Federal Administrative Judiciary, p. 37.

Of course neither Article III nor Article V, "standing alone, is violated by judicial deference to administrative construction of the law." Henry P. Monaghan, *Marbury* and the Administrative State, 83 Columbia L. Rev. 1, 27 (1983). But deference is one thing. Total abandonment of judicial review worked by Act 1332 is quite another. "[A] conception of public administration free from

judicial oversight would have damaged the fundamental political axiom of limited government and thus undermined in advance a principal buttress for the legitimacy of the modern 'administrative state.'" *Id.,* at 1.

What all this theorizing means to the case at hand, of course, is that Act 1332 is manifestly unconstitutional. The presumption of constitutionality has plainly been overcome by the Commissioner on the record painstakingly hammered out *via ordinaria* by trial lawyer Jill Craft and house counsel Noël Wirtz. Your Honor, if I may say so, properly overruled the Division's motion for involuntary dismissal.

V. Having scanned the cosmos by telescope, focusing on core constitutional principles, let me now focus on microscopic details[1] of record:

1. Legislative History. The tapes and transcripts of the House and Senate Governmental Affairs Committees on Senate Bill 636 and House Bill 2206, which culminated in Act 739 and Act 1332, are of record. They warrant comment here. It is quite plain that the Louisiana Legislature focused exclusively on creating the Division of Administrative Law so as to make its administrative law judges independent of agency control and influence. Fact finding by Department controlled hearing officers, the Legislature rightly felt, leaves an impression of bias and unfairness. It is equally plain, however, that no thought was given to the proper allocation of responsibility between agency and adjudicator involving, not questions of fact, but questions of law and agency policy. No attention was paid to the constitutional separation of powers issues raised by these bills. No attention was paid to their impact on the tradition of judiciary control of the administrative state. Noël Wirtz's extensive commentary in this regard was bushed aside in Committee, doubtless unwittingly, with the statement: "Well, I think you made a good academic argument. I think it was well thought out, and I commend you for it. I think it don't work in the real world." Transcription, HB-2206, 5/6/99, State Farm 6, p. 25.

In stark comparison, the legislative history of North Carolina's recent amendments to its

[1] Here I am practicing what I profess. See Paul R. Baier, The Constitutionality of Minimum Age Requirements for Public Office: Reading Joseph Story on Constitution Day, 60 La. L. Rev. 481, 483 (2002) : "Constitutional adjudication most assuredly should begin with the words in question, preferably read with the eye of a 'master of both microscope and telescope.'" "One must also keep in mind the Cosmos of the Constitution—I mean is conception, intended reach, and interpretive leeways."

APA, addressing precisely these same problems, shows that the questions raised are delicate ones, requiring extensive research and reflection. All of which culminated, not in giving ALJs final and unreviewable adjudicative authority, but carefully crafted standards of judicial review that save to the courts a fitting measure of judicial control. See Charles E. Daye, Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment, 79 North Carolina L. Rev. 1571 (2001).

North Carolina's Chief Administrative Law Judge Julian Mann, III, rehearses North Carolina's thoughtful changes in his article, Administrative Justice: No Longer Just A Recommendation, 79 North Carolina L. Rev. 1639 (2001). And North Carolina State Senator Brad Miller literally walks you into the mind of North Carolina's legislative process in resolving the thorny questions presented in his exposé, What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA, 79 North Carolina L. Rev. 1657 (2001).

All of which forms a blueprint for *constitutionally* accomplishing the legitimate ends the Louisiana Legislature had in mind.

2. Empirical Data. And what of the thick black binder of ALJ "judgments," "decisions," and "orders" affecting the Department of Insurance now of record? I have no doubt they establish an unconstitutional skewing of intra-executive branch authority between the Commissioner and the Division. ALJs are regularly rejecting the Department's legal and policy conclusions, including the underlying RCU ruling of Administrative Law Judge Hayes, and building their own "Administrative Court" body of precedent and policy contrary to Department's views. *In the Matter of Youree Anderson*, rejecting the Department's suspension of license upon a conviction of bankruptcy fraud, has become an ALJ precedent for lenity, whereas the Department's policy favors strict enforcement. *John Willis Hartzog* is especially troublesome. The COI's revocation of license upon a guilty plea of child molestation was reversed citing *Youree Anderson*. I need not multiply examples. They are in the black binder of empirical data. They suggest a kind of "super agency"—"an ALJ panel that, through time, practice, and politics, substitutes its own policy objectives for those of the individual agencies." Comment, South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?, 48 So. Carolina L. Rev. 1, 9 (1996).

What is quite fantastic is that Louisiana ALJ reversals of the Insurance Department's sanctions are a law professor's hypothetical come to court. I mean F. Scott McCowan and Monica

Leo, When Can an Agency Change the Findings or Conclusions of an ALJ:? Part Two, 51 Baylor L. Rev. 63, 64, 91 (1999), *viz.*: "[C]ases do generally support the idea that determination of the sanction is a decision that belongs to the agency, not the ALJ."

3. The Underlying RCU Dispute. The Commissioner's petition complains in Paragraph XXIV that "Petitioner is aggrieved by the order issued by the ALJ ordering him to approve a policy that contains provisions in violation of the law, contrary to his sworn duty to uphold the law and administer the provisions of the Insurance Code for the protection of the public interest." The Commissioner's Memorandum in Support of Preliminary and Permanent Injunctions, and Petition for Declaratory Judgment, p. 10, recites (emphasis in original):

> **4. State Farm's use of the RCU filing is unlawful and will cause irreparable harm to the public and to State Farm policyholders.**

The Commissioner's legal analysis of the Insurance Code and Department policy follows. On State Farm's side, it argues extensively that its RCU filing is not in violation of the law and that the Commissioner of Insurance should be ordered to approve State Farm's RCU Policy Form. Issue has been joined, and as I suggested in my opening brief (p. 3): "It is plainly open to this Court, exercising its original jurisdiction on the Commissioner's petition and prayer for relief, Paragraph XXXV, to adjudicate the merits of the RCU policy dispute between the Commissioner and State Farm." Of course, Your Honor should keep in mind the wise rule of judicial deference reasonable agency construction of the law and agency policy.

On the merits of the RCU dispute, I must sit in silence. My field is the law of the Constitutional, not the Insurance Code. It is best to stick to one's knitting.

VI. The Remedy. On summary proceedings, Your Honor now has in hand the Commissioner's petition for a preliminary injunction, upon which the matter is ripe of decision. A full hearing has also been held *via ordinaria* on the Commissioner's petition for declaratory judgment, now ripe for decision. Your Honor has reserved hearing the Commissioner's petition for permanent injunctive relief, albeit State Farm has objected to bifurcating the hearing on the petition for permanent injunctive relief and for declaratory relief. That objection aside, what should Your Honor do at this point by way of constitutional remedy?

A preliminary injunction should issue enjoining La. R.S. 49:964(A)(2), which provides: "No agency or official thereof, or other person acting on behalf of an agency or official thereof shall be

entitled to judicial review under this Chapter."

A preliminary injunction should issue enjoining La. R.S. 49:992(B)(2), which provides: "In an adjudication commenced by the division, the administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order."

A preliminary injunction should issue enjoining that part of La. R.S. 49:992(B)(3) providing: "However no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to this Chapter."

Your Honor should issue a declaratory judgment, declaring La. R.S. 49:964(A)(2), La. R.S. 49:992(B)(2) and La. R.S. 49:992(B)(3) unconstitutional. This is a limited, cautious approach, but it seems to me the wise approach to take at this time.

As I said, Article V literalism should be avoided. There is nothing per se unconstitutional about creating the Administrative Law Division and separating the quasi-judicative from the administrative within the Executive Branch. The difficulty, as I have tried to show, is in properly allocating the fact finding function to a neutral adjudicator, reserving to the agency its policy and law making functions, all the while reserving to the courts ultimate reviewing authority under neatly crafted standards of appellate judicial review. Cf. *Matter of American Waste & Poll. Control*, 588 So.2d 367 (La. 1991). Thereafter, of course, the Legislature will have to sculpt a new framework for the old problem of *Marbury* and the administrative state.

Rushed, I leave the fine points of the remedy to the parties.

CONCLUSION

Of one thing Amicus Baier is certain:—Whatever I have said is subject to Your Honor's judicial review. I pray only for this Court's caution and wisdom.

Respectfully submitted,

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18 February 2003

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above Post-Trial Brief of Amicus Curiae LSU Professor of Law Paul R. Baier, by fax, e-mail, or personal hand-delivery, upon J. Robert Wooley, Acting Commissioner of Insurance, through legal counsel Jill Craft and Noël Wirtz; State Farm Fire and Casualty Insurance Company through legal counsel Stephen G. Bullock; Honorable Murphy J. Foster, Governor, through legal counsel Charles Braud; Allen H. Reynolds, Director Department of State Civil Service through legal counsel Robert Boland; Ann Wise, Director of Division of Administrative Law, through legal counsel Vivian Guillory; Honorable Richard P. Ieyoub, Attorney General, through legal counsel Charles Braud; Louisiana House of Representatives as Amicus Curiae through legal counsel Mary Quaid; Louisiana Legislative Black Caucus as Amicus Curiae through legal counsel Suchita Satpathi; Southern University Law Center Elder Law Clinic as Amicus Curiae through legal counsel Dorothy Jackson.

DONE this **18th day of February, 2003.**

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Paul R. Baier