STATE OF LOUISIANA

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

DOCKET NO. _____ SECTION _____

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

VERSUS

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, HONORABLE MURPHEY J. FOSTER IN HIS CAPACITY AS GOVERNOR OF LOUISIANA, ANNE 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

MEMORANDUM IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTIONS, AND PETITION FOR DECLARATORY JUDGMENT

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MAY IT PLEASE THE COURT:

J. Robert Wooley, Acting Commissioner of Insurance, State of Louisiana (hereinafter "COI" or "Plaintiff"), submits this Memorandum in Support of Preliminary and Permanent Injunctions and Petition for Declaratory Judgment. Defendants herein are State Farm Fire and Casualty Insurance Company (hereinafter "State Farm"); Murphy J. Foster, in his official capacity as Governor of Louisiana; Anne Wise, in her official capacity as Director of the Division of Administrative Law; and, Allen Reynolds, in his official capacity as the Director of the Department of State Civil Service (hereinafter jointly referred to as the "DAL").

The petition in this matter, as will be more fully explained below, was filed by the COI in accordance with statements made by the Court of Appeal, First Circuit, in what, for ease of reference will be referred to as "State Farm – Round 1" and/or the "prior proceedings".

I. STATEMENT OF THE FACTS

On February 23, 1996 a Rental Condominium Unitowners policy form (hereafter "RCU filing"), was filed by State Farm Fire and Casualty Insurance Company (hereafter

"State Farm") with the Commissioner of Insurance (hereafter "COI") for his review. The RCU filing was reviewed by a contract forms analyst within the Insurance Department's Division of Licensing and Market Compliance, Property & Casualty Forms Review Section. By letter dated April 19, 1996 notice was given to State Farm that the filing was disapproved for use in Louisiana because it had a number of provisions that were not in compliance with law or public policy. Subsequently, State Farm corrected all of the disapproved provisions, with the exception of one.

The underlying issue in dispute in the prior proceeding, and one that is still in dispute, is the construction to be given to certain provisions of law found in the Insurance Code as regards (1) the proper classification of State Farm's insurance policy and (2) certain terminology in State Farm's RCU insurance policy.[1] The language that State Farm wants to use would allow State Farm to void the policy under certain conditions. Under the agency's construction of the applicable statutes the policy language does not comply with the law. (Pursuant to LRS 22:621(1) the COI **must** disapprove any policy which is not fully in compliance with law.)

In an effort to resolve this one remaining point of contention, over the course of 1997 there was an exchange of correspondence, several telephone conference calls and more than a few meetings between State Farm representatives, including its local and in-house counsel, and representatives of the COI, including the Assistant Commissioner for the Division of Licensing and Market Compliance, the head of the forms review section, and department attorneys.[2] The efforts to work out a compromise failed.

By letter, dated January 8, 1998, State Farm was advised by the agency that the policy remained disapproved. State Farm was also advised of its hearing rights pursuant to LSA-R.S. 22:1351.

By letter dated February 8, 1998 State Farm requested an adjudicatory hearing.[3] A hearing was held on May 18, 1998 before an Administrative Law Judge (hereafter

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[1] At page 4 of the ALJ's opinion, the executive judge stated that "the parties have agreed that the disapproval of the "RCU Policy" creates **issues of law and public policy."**

[2] "The great bulk of administrative decisions are made through highly informal processes of information assembly, analysis, communications, and negotiations." Breyer* & Stewart, *Administrative Law and Regulatory Policy,* at 9 (2ed. 1985) *Now a Supreme Court Justice.

[3] Adjudicatory hearings serve two primary functions. (Or at least they did prior to the creation of the Division of Administrative Law, which will be discussed infra.) One, they provide a way to involve the agency head in decisions being made by the agency staff under a delegation of power, and secondly, as a means to develop a

"ALJ") with the Division of Administrative Law, Department of State Civil Service (hereafter "DAL").[4]

In an opinion issued on June 5, 1998, the ALJ adopted State Farm's construction of the law and thereafter ruled that the COI erred in disapproving the policy. The ALJ issued an order ordering the COI to approve the policy for use in Louisiana.

The COI filed a timely Petition for Judicial Review. However, a hearing on the petition was stayed by agreement of all parties pending a decision by the Court of Appeal, First Circuit, in another judicial review proceeding instituted by the COI; the issue before the First Circuit in that matter was whether the COI had a right of action to appeal rulings of the DAL by means of a petition for judicial review. A ruling favorable to the COI was issued by the Court of Appeal, First Circuit in the other matter, pursuant to which that matter was remanded to Division B of the 19th Judicial District Court and eventually settled.[5]

Meanwhile, the Legislature enacted Acts 1999, No. 1332, which amends LSA-R.S.49: 964 and LSA-R.S. 49:992, in an apparent and thus far successful attempt, to shut the door the First Circuit had opened. This Act forecloses the right of review for one of the parties appearing before the DAL- the agency, while preserving a right of review for the other party, the non-agency.

Shortly after the enactment of Acts 1999, No 1332, State Farm filed in the prior proceeding a Peremptory Exception of No Right of Action citing in support of the exception the amendments to Title 49 effected by Acts 1999, No.1332.

Following a hearing on the exception, the Honorable Curtis A. Calloway, Judge Presiding, by judgment signed on January 19, 2000, sustained the Peremptory Exception of

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record upon which judicial review might be had. For example, the Insurance Department receives over a thousand policy form filings every month. The COI cannot personally review each filing. Therefore, as authorized by La. R.S. 36:861, that duty is delegated to agency staff trained for that responsibility. On average 65 of every 100 forms are disapproved on initial review and must be modified before they can be approved for use in Louisiana.

[4] The DAL was created by Acts 1995, No. 739. For a detailed, comparative analysis of the law creating the DAL, see Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 La.L.Rev.431 (Winter, 1999). Only Maine and Florida, have laws that are somewhat similar to Louisiana's , that is that create "administrative courts", but in both instances the "agency-party" may seek judicial review. Indeed, the Florida Supreme Court noted that the right to seek judicial review provided a sufficient "**check**" on the power delegated to the administrative court to save it from a constitutional challenge on the grounds that the law creating the court conflicted with the State Constitution's separation of powers article. See Dept. of Admin. v Stevens,344 So.2d 290, (Fl. 1977) discussed in Jim Rossi, *ALJ Final Orders on Appeal:Balancing Independence with Accountability*, 19 N.A.A.L.J. No.2, pg. 1, at 12 (Fall, 1999).

[5] The decision favorable to the COI has not been cited because it is in an unpublished opinion. It is only mentioned to give context to the delay in the "judicial review" proceedings at the district court.

No Right Action filed by State Farm and dismissed the COI's Petition for Judicial Review with prejudice.

The judgment of the District Court was affirmed by the Court of Appeal, First Circuit, in a ruling rendered on June 22, 2001. The First Circuit found that because the COI is not a person under the LAPA he does have a right to seek judicial review of a decision rendered by a DAL judge. Rather the only remedy available to the COI would be to file a declaratory judgment action to have the offending Acts declared unconstitutional.[6]

Indeed, at the close of its opinion in the prior proceeding, the First Circuit stated: "[W]e also observe that the Commissioner appears to have an adequate remedy at law in this regard by filing a declaratory judgment action or some other type of proceeding." Thus, the filing of this Petition seeking a declaratory judgment and injunctive relief.[7]

II. SUMMARY OF ARGUMENT

This case puts at issue the following fundamental principals: (1) the power of the judicial branch to declare what the law is, and (2) the right of a party adversely affected by the decision of an administrative tribunal to have the legal correctness of that decision reviewed by the judicial branch, and (3) the distribution of power amongst the three separate but co-equal branches of government.

It has been long established jurisprudence that questions of law in the final instance are to be decided by the judicial branch:

> **"It is emphatically the province of the judicial department to declare what the law is"**
> Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803)

This principle was recently reiterated by the Louisiana Supreme Court:

> **"[T]he construction to be given to legislative acts rest with the judicial branch of government."**
> In Re: The Matter of Louisiana Health Service and Indemnity Company d/b/a Blue Cross/Blue Shield of Louisiana, 749 So.2d 610, (La. 1999).

The principal stated above is so firmly entrenched in our legal system that in Meyer v. Board of Trustees of F. Pension & R. Fund, 6 So.2d 713 (La. 1942), the Court stated that

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[6] Indeed, during the course of oral argument that issue was specifically posed by a member of the panel to counsel for State Farm, who reluctantly conceded that the COI could seek such relief.

[7] Brown v. State Farm, 804 So.2d 41. (La. App. 1Cir. 2001). The COI sought a rehearing, which was denied on August 23, 2001. The Louisiana Supreme Court denied the COI's application for a Writ of Certiorari.

any law which denies the judicial branch the power to review the legal correctness of an order of an administrative agency would be null.

Further, the notion that a party, including a public official such as the Commissioner of Insurance, can be barred from seeking review of a decision adversely affecting him, or ordering him to do or not to do an act was rejected long ago in State of Louisiana ex rel. James H. Grahm, State Auditor, and A. Dublucet, State Treasurer v. The Judge of the Eight District Court of the Parish of Orleans, 23 La. Ann. 595 (La. 1871) as being inconsistent with the fundamental principles which underlie our form of government.

Finally, this case concerns the proper balance of power between the branches of government. As the Louisiana Supreme Court has repeatedly stated, the Legislature cannot enact laws that deprive the judicial branch of the power vested in it under the Louisiana Constitution. Moore v. Roemer, 567 So. 2d 75 (La. 1990); Pope v. State of Louisiana, 792 So.2d 713 (La. 2001) and State v. O'Reilly c/w State v. Brewster, 785 So. 2d 768 (La. 2001). Nor can it enact laws that undermine or disrupt the distribution of power amongst the three branches of government – the system of checks and balances which is fundamental to our form of government. Bruneau v Edwards, 517 So. 818 (La. 1987).

III. STATEMENT OF THE LAW

A. Injunctive Relief

The COI seeks preliminary and permanent injunctive relief enjoining and prohibiting Acts 1999, No. 1332 and Acts 1995, No. 739, and more particularly an order (1) prohibiting State Farm from using the RCU form filing until it is in compliance with law and has been approved by a lawful order of the COI or a final decision has been rendered on the merits by the judicial branch; (2) quashing and enjoining the DAL order ordering the COI to approve the non-compliant RCU policy; (3) enjoining the DAL from exercising power belonging to the judicial branch of government; and, (4) enjoining the DAL from exercising powers or performing duties properly vested in the COI.

In order to obtain the issuance of a preliminary injunction the Petitioner must make a prima facie showing that he will prevail on the merits and that he will suffer irreparable harm; or that one of the exceptions to the showing of irreparable harm is applicable.

Ouachita Parish Police v. American Waste, 606 So.2d 1341 (La. App. 2Cir. 1992), Kenner v. New Orleans Aviation Bd., 603 So2d 220 (La.App. 5 Cir. 1992).

Irreparable harm need not be established if the Petitioner can show deprivation of a constitutional right or that the agency is acting ultra vires. Kenner, supra and Vonderhaar v. Parish of St. Tammany, 633 So.2d 217 (La.App. 1Cir. 1993). **Further, irreparable injury does not have to be proved if the conduct to be enjoined is unconstitutional.** La. Municipal Assoc. v. State of Louisiana, 762 So.2d 1177 (La.App. 1Cir 2000) and Jurisivich v. Jenkins, 749 So.2d 597 (La. 1999). See also C.C.P. art. 3061.

1. Unconstitutional conduct

It is respectfully submitted that the DAL is engaged in unconstitutional conduct by carrying out and exercising powers belonging to the judicial branch by rendering **final decisions** on disputed questions of law. Cleco Evangeline v. Louisiana Tax Com'n, 813 So.2d 351 (La. 2002).[8] In *Cleco* , the Court after observing that the matter before it involved "solely a question of law" emphatically stated that **"[T]his court is the ultimate arbiter of the meaning of the laws in this state."** However, pursuant to Acts 1999, No. 1332, the judicial branch is **not** the final arbiter of the meaning of the laws of this state if the ALJ adopts the meaning advanced by the non-agency party since the agency-party to the proceeding is precluded from seeking judicial review of the ALJ's ruling.[9] See also Bourgeois v. A.P. Green Industries Inc., 783 So.2d 1251 (La. 2001) where the Court once again reiterated the long-established principle that "[U]nder our system of government with limited powers, '[i]t is emphatically the province and duty of the judicial department to say what the law is'."

It is also submitted that when the matter in dispute is whether or not a contract complies with the law, or involves the interpretation of a statute, that such a dispute is a *civil matter*, the jurisdiction over which is constitutionally vested in the judicial branch.[10]

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[8] It should be noted that boards and commissions are exempted from the law creating the DAL, which is why the ruling at issue in *Cleco* was a ruling of the Tax Commission and not a DAL – ALJ.

[9] It should also be noted that unlike the ALJ's under the Louisiana DAL, most ALJ's cannot render decisions on questions of law or **interpret** the law. Rather, their purpose is to make findings of fact. See Christopher B. McNeil, Esq., *The Administrative Hearing Officer and the National Appeals Division of the United States Department of Agriculture: A Brief History, A Contemporary Perspective, and Some Thoughts for the Future,* 19 N.A.A.L.J.75, 79 (Fall, 1999). This article which addresses, inter alia, the benefits and limitations of an "administrative judiciary" made the following pertinent observation: **"Unlike Article III judges, ALJs do not have the discretion to decide what the appropriate interpretation of the law is."** Rather, the ALJ is to apply the construction of law adopted by the agency head, subject of course, to judicial review.

[10] Admittedly, the approval process mandated by LRS 22:620, *inter alia*, requires the COI to review a policy form to see if it complies with the law. Indeed, as discussed above, LRS 22:621 requires the COI to

La. Const. art V.§1. See also *Roemer*, and *Pope* ,cited supra – in both instances, the Court struck down legislation that altered the original jurisdiction vested in the judicial branch. While *Roemer* and *Pope* involved acts of the Legislature that divested the judicial branch of its original jurisdiction in tort actions it is respectfully submitted that the rationale of those decisions applies equally to laws that divest the judicial branch of its jurisdiction over actions involving contracts and statutory construction.

It is further submitted that the hearings held by the DAL are being conducted by civil service employees, i.e, by an unelected judiciary in violation of La. Const. art V. § 22. In *State v. O'Reilly*, cited supra, the Court declared LSA-R.S. 13:719 null and void because it vested a commissioner for the Twenty Second Judicial District Court with the authority to render **final decisions** in misdemeanor cases, stating as follows:

> **"Because we find La. R.S. 13:719(E)(2)(e) authorizes the exercise of the adjudicatory power of the state by a non-elected official, we find that it violates La. Const. art. V § 1 and 22 and is therefore unconstitutional."**

Finally, it is submitted that the Legislature has acted unconstitutionally by conferring on an executive agency powers belonging to the judicial branch.

Therefore, in view of the above, it is respectfully submitted that the COI is not required to prove irreparable harm in order to have this Honorable Court issue a preliminary injunction. However, in an abundance of caution, the COI will addresses the other grounds for the granting of such relief.

2. Ultre vires action by the DAL and the Legislature

Insofar as the Administrative Law Judges (hereinafter "ALJ") employed by the DAL are issuing non-appealble rulings, which finally decide disputed questions of law, it is clear that the DAL is exercising powers that belong to the judicial branch in violation of La. Const. Art. V.§1. Indeed, it is a violation of La. Const. art V. §22 to vest unelected persons with judicial power, since art.V§22 requires that judges be elected officials. *O'Reilly,* supra.

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disapprove a policy if it does not comply with law. However, this administrative process is fundamentally different from the judicial process. To wit, unless and until an insurer decides to contest the disapproval, there is no adversarial relationship. And, until that adversarial relationship comes into being, the matter is not one that is *ripe* for judicial action. However, if an insurer decides to dispute the COI's finding that its policy does not comply with law, or wants to contest the COI's construction of the law, then the matter takes on another nature. It is no longer administrative, it is adversarial. In matters involving questions of law, the proper forum for the final resolution of such disputes is the judiciary.

Whether are not a contract complies with the law in the final instance is a decision for the judicial branch. *Roemer,* supra. Ergo, in rendering such decisions the DAL is acting ultre vires.

The Legislature has plenary power unless restrained by the constitution. Here, the Legislature is so constrained as La. Const. Art.V §1 plainly states: "[T]he judicial power is vested in the supreme court, courts of appeal, district courts and other courts authorized by this Article." Further, La. Const art. II §2 states: "[E]xcept as otherwise provided by this constitution, **no one of these branches** [executive, legislative and judicial] nor any person holding office in one of them, **shall exercise power belonging to either of the others.**"

In Save Ourselves, Inc. v. La. Environ. Cont. Com'n, 452 So.2d 1152, 1158 (La. 1984) the Court in describing the different functions between the judiciary and executive agencies, stated that the delegation of certain functions and duties to an agency by the legislature "... **does not in any way imply any derogation of the court's traditional primacy in interpreting constitutional and statutory provisions...**". However, by creating a statutory scheme that precludes the judicial branch from reviewing rulings by the DAL that involve the interpretation of statutes, the Legislature has stripped the judicial branch of its **"traditional primacy"** as regards such matters. In doing so the Legislature has acted beyond the scope of its powers and thus its action is ultre vires, and Acts 1995, No. 739 and Acts 1999, No. 1332 are null and void.

Lest one doubts whether the Legislature has indeed created an executive court and transferred judicial power to the DAL, LRS 49:997 removes any such doubt. Section 997 instructs the director of the DAL to "develop and implement a program of **judicial evaluation**". It goes on to state which "three areas of **judicial performance** are to be evaluated", and then prescribes those areas in detail. Subsection E instructs the director to discuss any findings made pursuant to an evaluation "with the affected **judge**" before taking any action based on such findings.

3. Acts 1995 No. 739 and Acts 1999 No. 1332 unconstitutionally diminish the powers of the Commissioner

The COI is an elected **official** and the holder of a constitutionally created office within the executive branch. La. Const. art. 4 §1. As such, he serves as the head of the Louisiana Department of Insurance (hereafter "LDI"). La. Const. art. 4 §11.

Further, subsection B of art. 4 §1 in states in pertinent part that "[T] powers, functions and duties allocated by this constitution to any executive office ... shall not be affected or diminished ...".

An **official,** as contradistinguished from an employee, is a person in whom a portion of the sovereign power has been vested. This distinction was addressed in detail in State v.Dark , 196 So. 47 (La. 1947) as follows:

> "The best general and most concise definition we have been able to find of what is a public office and who are public officers is that given by Mechem in his work on Public Officers, viz.: 'A public office is the right, authority and duty, created or conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, **an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.** The individual so invested is a pubic officer.' Section 1, page 1."
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> "The author (Mechem) further states that "The most important **characteristics which distinguishes an office from an employment** or contract is that *the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public;-- that some portion of the sovereignty of the country,* either legislative, executive or judicial, *attaches, for the time being, to be exercised for the public benefit.* Unless the powers conferred are of this nature, the individual is not a public officer."

Pursuant to this delegation of sovereign power, a public official has discretionary authority, that is, the power to make decisions regarding what is or is not in the public interest. Further, he is accountable to the public for the policymaking decisions he makes in the exercise of his discretion. Acts 1995 No. 739 and Acts 1999, No. 1332, by transferring to **employees** of the DAL the authority to make final, non-reviewable decisions on matters that involve the exercise of executive discretion – i.e, what is or is not to the benefit of the public, has caused the COI to suffer a diminution of the powers vested in him as the holder of a constitutionally created office. Such a diminution of power is unconstitutional. Bruneau, supra.

In *Bruneau*, at issue was an act of the Legislature that vested part of the power of appropriation in the executive branch, more particularly in the Office of the Governor. A number of Legislators filed suit alleging that the act resulted in an unconstitutional diminution of the power of the individual legislators and of the Legislature as a whole. The Court, stating as follows, found that a portion of the act was unconstitutional because it vested legislative power in the executive branch:

> **"The separation of powers article is violated if one branch of government or its members exercises power belonging to either of the others".**

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

It is respectfully submitted for the reasons stated below, that the DAL does not have the lawful authority to approve policies nor to order the COI to approve a policy. Further, not only is the use of the form unlawful because it is not approved by the COI, its use, because of the unlawful provisions can and will cause irreparable harm to the public and to State Farm policyholders. Therefore, State Farm's use of the RCU without the approval of the COI is unlawful and must be enjoined.

LRS 22:620 states that no insurance policy shall be delivered, issued for delivery or used in Louisiana unless it has been reviewed and **approved** by the COI. The COI has never approved the RCU policy. To the contrary, he disapproved it. Indeed, LRS 22:621 mandates the COI to **disapprove** or to **withdraw the approval of any previously approved policy, if it in any respect is in violation of the law**.

At this point, it is necessary to address briefly the merits of the dispute between State Farm and the COI has regards the RCU insurance policy.

The RCU form is a variant of a Homeowner's policy, i.e., it is a homeowner's policy for persons who rent as oppose to own a home; in this instance the type of property leased is a condominium. Among other perils covered, the policy provides protection from the peril of fire.

Louisiana along with most states adopted what is known as "The Standard Fire Policy" Law. See LRS 22:691. The original law, which was first adopted in New York around at the end of the Nineteenth Century, was developed in response to widespread abuses by fire insurers. It was modified in 1944 and that is the version currently in effect in Louisiana. At the time these laws were originally enacted, standard fire policies only provided first party property coverage.

Subsection F of §691 sets forth the minimum threshold of mandatory provisions for fire policies, as well as other types of property policies that include coverage for the peril of fire. Subsection E of §691, a more recent provision, states that **if a standard fire policy is combined with other contracts** or endorsements, "such forms may contain provisions and stipulations inconsistent with the standard policy if applicable only to such other perils." Furthermore, LRS 22:691.2A states that a policy need not comply with the

standard fire policy form if **"in the opinion of the commissioner** the policy forms covering the property are equivalent to **or exceed the provisions of the standard fire policy**."

A "homeowners policy" has such a combination of coverages. While it includes coverage for the peril of fire it also provides other types of coverages. It is **not** merely a "standard fire policy". It is a "package policy". See Appendix "A" which is hereby incorporated by reference. See also LRS 22:6 *Kinds of Insurance* paragraphs (10) Fire and Extended Coverages, and (15) Homeowners. As such it provides not only first party property coverage, but also liability coverage in the event that the insured negligently causes injury to a third party.

The standard fire insurance policy as found in LRS 22:691F has a provision that allows an insurer to **void** the policy for fraud or concealment "whether before or after a loss" in relation to the subject of the insurance or in connection with a claim. However, more recent acts of the Legislature dealing specifically with **homeowner's policies** now provide that if there is fraud on the part of an insured then the insurer's remedy is to deny coverage for the claim and **cancel** the policy. See LRS 22:636.2.

It is the position of the commissioner that §636.2 is the applicable provision of law as regards homeowners policies, particularly insofar as such policies combine liability coverage for the homeowner as well as protection for property damage.[11] Therefore, the COI has required insurers to use policy language that comports with §636.2. Indeed, with the exception of State Farm, insurers have made the requested revisions.

However, the ALJ adopted State Farm's classification of the contract and construction of the law. Thus, he issued an order stating that **"The Commissioner must approve the policy."**

Indeed harm by use of the non-compliant language has already occurred. The LDI has received a complaint from a State Farm policyholder whose policy has been

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[11] See Taylor v. MFA Mutual Ins. Co., 334 So.2d 402 (La. 1976) where the Court discussed the **strong public policy of this state** as regards the purpose of laws governing cancellation provisions in insurance contracts, particularly as regards policies providing liability coverage.
Certainly no one countenances fraud. Indeed, the fraudulent claimant is barred from recovery by the COI's construction of the law and faces criminal prosecution under other provisions of the Insurance Code. However, innocent third parties who might be injured by acts completely unrelated to any fraud on the part of a policyholder are protected by the requirement imposed by §636.2 that the policy be cancelled upon proper notice.

declared "void". If the COI takes regulatory action against State Farm, with all likelihood the dispute will end up back before the DAL which will once more make a decision in a matter that revolves around the interpretation of a statute and the protection of the public. Such harm is irreparable. It is impossible to know how many claims have been denied under the noncompliant provisions; how many persons have experienced a gap in

It is further submitted that the COI has and will continue to suffer irreparable harm insofar as he is hindered implementing the policy decisions he has made as regards what is in the best interest of the public and the policyholders of this state. Indeed, as a result of Acts 1999, No. 1332 and Acts 1995, No. 739 such "public policy" decisions are being made by un-elected, un-accountable civil service employees of the DAL.

C. COI Will Prevail on the Merits

It is respectfully submitted that on the basis of the cases cited supra that the COI will prevail on the merits.

II. DECLARTORY JUDGMENT

Petitioner seeks a Declaratory Order as authorized by the Louisiana Code of Civil Procedure, Art. 1871 et seq., declaring that Acts 1999 No. 1332 and Acts 1995, No. 739 are unconstitutional, null and void under any or all of the foregoing premises.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Petitioner is entitled to a Preliminary Injunction, and in due course a Declaratory Judgment and Permanent Injunction.

RESPECTFULLY SUBMITTED:

J. ROBERT WOOLEY, ACTING
COMMISSIONER OF INSURANCE
STATE OF LOUISIANA

BY: _____

C. Noël Wertz (#18706)
Chief Attorney
DEPARTMENT OF INSURANCE
950 North Fifth Street
Baton Rouge, LA 70806
Telephone: 225-342-4632

STATE OF LOUISIANA
DIVISION OF ADMINISTRATIVE LAW
INSURANCE SECTION

IN THE MATTER OF:

STATE FARM FIRE AND CASUALTY INSURANCE CORPORATION

DOCKET NO. INS-98-0044

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INTRODUCTION AND APPEARANCES

This administrative court has jurisdiction over this matter pursuant to the Louisiana Administrative Procedure Act, Louisiana Revised Statutes 49:950 et seq., ("the LAPA").

A hearing was held on May 18, 1998, pursuant to a request by State Farm Fire and Casualty Insurance Corporation (hereinafter, the Petitioner) to consider the denial of its Rental Condominium Unitowners Policy form filing by the Department of Insurance (hereinafter, the Department).

Present at the hearing were Mr. Barry Ingram, Attorney for the Department and Mr. B. Scott Cowart, Attorney for the Petitioner.

FINDING OF FACTS

The petitioner submitted its "Rental Condominium Unitowners Policy" (hereinafter, "RCU Policy") to the Department for approval on February 23, 1996. The form filing was initially disapproved on April 19, 1996. The Petitioner corresponded with

the Department concerning the matter, but the filing remained disapproved. The Petitioner requested a hearing to determine whether the disapproval was proper under Louisiana law.

The parties stipulated that the matter would be stipulated on briefs only.

CONCLUSION OF LAW

The first issue that must be resolved is what is the proper standard of review in this case. The Division of Administrative Law was created by the Louisiana Legislature in L.S.A.-R.S. 49:991-999 (Administrative Procedure Act). The division was created to "commence and handle all adjudications as defined by the Administrative Procedure Act." L.S.A.-R.S. 49:991.

In determining the proper standard of review, it is necessary to define what is an adjudication. Black's Law Dictionary defines "adjudication" as "the formal giving or pronouncing of a judgment or decree in a court preceding." Black's Law Dictionary 42 (6th ed. 1990). The definition as given in Black's Law Dictionary also goes on to state that an adjudication "implies a hearing by a court, after notice, of legal evidence on the factual issue(s) involved." Black's Law Dictionary 42 (6th ed. 1990).

A comparison of the actions of the Department with the definition of adjudication would indicate that the Department's

actions in disapproving the "RCU Policy" are not an adjudication. In reviewing the "RCU Policy," the Department of Insurance conducts no hearing before a court. A examiner looks at the language to determine if the policy meets certain guidelines. That process is not adjudication in the strictest sense of the term. It is a fact finding process. Adjudication of matters in conflict has been placed in the hands of the Division of Administrative Law by the Louisiana Legislature.

The cases relied on by the Department apply only in situations where there has already been an administrative agency adjudication that is subject to judicial review. The amount of deference given by the court to the decisions of an administrative agency depends upon the nature of the decision. The First Circuit has found that decisions of the insurance commissioner "are entitled to great weight and should be upheld unless they are manifestly erroneous or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercises of discretion." *Marine Marketing Services, Inc. v. Louisiana Department of Insurance* 673 So.2d 335 (La. App 1st Cir. 1996). The First Circuit has also found that "manifest error doctrine relates only to factual findings of the trier of fact and has no application to conclusions of law or public policy." *Marine Marketing Services, Inc. v. Louisiana Department of*

Insurance, 673 So.2d at 337. The parties involved in this case have agreed that the disapproval of the "RCU Policy" creates issues of law and public policy. Therefore, the decisions of the Department that are issues of law and public policy do not have to be given deference by the Administrative Law Judge in rendering his decision.

The second issue that must be resolved in this case is whether the "RCU Policy" complies with the requirements of the Standard Fire Policy in L.S.A.-R.S. 22:691(F)(2).

The language of L.S.A.-R.S. 22:691(F)(2) is as follows:

> Concealment, fraud -- The entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance, the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

A comparison of the language contained in State Farm's "RCU Policy" with the language of L.S.A.-R.S. 22:691(F)(2) shows that the "RCU Policy" wording is almost identical to the wording of the statute:

> Section I and Section II -- Conditions
> 2. Concealment or Fraud. This policy is void as to you and any other insured if you or any other insured under this policy intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.

The language in the Petitioner's "RCU Policy" differs from the language of L.S.A.-R.S. 22:691(F)(2) in that it does not provide for false swearing. The "RCU Policy" also differs in the fact that it uses the adverb "intentionally" to modify the verb "concealed," whereas L.S.A.-R.S. 22:691(F)(2) uses the adverb "willfully." This comparison shows that although there are a few minor differences, the "RCU Policy" language complies in wording and meaning with L.S.A.-R.S. 22:691(F)(2). Therefore, the "RCU Policy" is a Standard Fire Policy under L.S.A.-R.S. 22:691(F)(2).

The Department argues that the "RCU Policy" is not a Standard Fire Policy because it is a multi-peril policy that covers more than damage by fire and lightning. The language of L.S.A.-R.S. 22:691(E) refutes that contention:

> Appropriate forms of other contracts or endorsements whereby the interest in the property described in such policy shall be insured against one or more perils which the insurer is empowered to assume, in addition to the perils covered by said standard fire insurance policy, may be approved and may, unless at any time disapproved by the fire insurance division, be used in connection with a standard fire insurance policy and such forms may contain provisions and stipulations inconsistent with the standard policy if applicable only to such other perils.

L.S.A.-R.S. 22:691(E) plainly states that a policy can insure property for other perils if the insurer is empowered to assume them.

The Department also argues that the "RCU Policy" does not comply with L.S.A.-R.S. 22:691(E) because extra coverages in the "RCU Policy" are not added by endorsement and are included in the body of the policy. The counsel for the Petitioner states correctly that there is no provision in L.S.A.-R.S. 22:691(E) that specifically designates the addition of other perils must be added by endorsement. In fact, L.S.A.-R.S. 22:691(E) states that the addition of other perils can be done by "appropriate forms of other contracts or endorsements." It would be appropriate for an insurance company like the Petitioner to put additional perils in the body of an insurance contract if that contract was being written to cover those perils.

The Department also raises the issue of whether the "RCU Policy" undermines public policy. The Department argues that the Petitioner's use of "void" in the "RCU Policy" undermines public policy behind insurance because voiding it would have the effect of making the contract non-existent and deny recovery to innocent third parties.

The Department states that because the "RCU Policy" is not a Standard Fire Policy, the only way to void the policy would be for fraud in the negotiation, as is stated in L.S.A.-R.S. 22:619(A). The Department argues that if there is no fraud in the

negotiation, the contract must be canceled by the provisions of L.S.A.-R.S. 22:636.

However, L.S.A.-R.S. 22:619(A) does provide for a policy to be voided for fraud. The statute states that "no oral or written misrepresentation or warranty made in the negotiation of an insurance contract, by the insured or in his behalf, shall be deemed material or defeat or void the contract or prevent it attaching, unless the misrepresentation or warranty is made with the intent to deceive."

The phrase "made with the intent to deceive" connotes fraud, as several definitions of fraud indicate. La. C.C. Article 1953 defines fraud as "a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other."

Black's Law Dictionary defines fraud "as distinguished from negligence, it is always positive, intentional. It comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another." Black's Law Dictionary 660 (6th ed. 1990).

In light of these definitions, L.S.A.-R.S. 22:619(A) allows a policy to be voided for fraud.

In the Louisiana Civil Code, the consent required for the formation of a contract can be vitiated by fraud. La. C.C. Articles 1927, 1948. Since La. C.C. Article 1914 defines insurance as a nominate contract, any fraud in an insurance contract will vitiate the consent required for a valid contract in Louisiana. In this matter under consideration, it would not be against public policy to void a contract for fraud.

DECISION AND ORDER

IT IS HEREBY ORDERED THAT judgment on behalf of the Petitioner is granted as prayed for. The Department must approve the "RCU Policy" as submitted by the Petitioner.

Baton Rouge, Louisiana, this 5th day of June, 1998.

RUFUS D. HAYES
ADMINISTRATIVE LAW JUDGE
DIVISION OF ADMINISTRATIVE LAW
INSURANCE SECTION

Certified To Be A TRUE AND CORRECT COPY

BY: Sue Bickham DATE: 6/05/98
Sue Bickham, Court Reporter,
Deputy Clerk of Court

FURTHER REVIEW RIGHTS

PLEASE BE ADVISED THAT, PURSUANT TO LA R.S. 49:964, A PERSON AGGRIEVED BY THIS ORDER MAY INSTITUTE JUDICIAL REVIEW BY FILING A PETITION IN THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, WITHIN THIRTY (30) DAYS AFTER THIS NOTICE IS MAILED. COPIES OF THE PETITION SHALL BE SERVED UPON THE DIVISION OF ADMINISTRATIVE LAW, INSURANCE SECTION, AND ALL PARTIES OF RECORD. A PETITION FOR JUDICIAL REVIEW SHOULD BE IDENTIFIED AS A DIVISION OF ADMINISTRATIVE LAW, INSURANCE SECTION MATTER FOR PROPER ALLOTMENT BY THE NINETEENTH JUDICIAL DISTRICT COURT.