STATE OF LOUISIANA
NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

DOCKET NO: 50 2311 SEC. 21

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, 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

AMICUS CURIAE MEMORANDUM ON BEHALF OF THE LOUISIANA LEGISLATIVE BLACK CAUCUS

MAY IT PLEASE THE COURT:

In this instant case, this court has been charged with the responsibility of determining *inter alia*, the constitutionality of Acts 1999 No. 1332 and Acts 1995, No. 739 which in effect amend LSA-R.S.49:964 and LSA R.S. 49:992 respectively. This case puts at issue three very fundamental principles: (1) the power of the judicial branch to declare what the law is, and (2) the rights of a party adversely affected by a decision of an administrative tribunal to have the legal correctness of those decisions reviewed by the judicial branch, and (3) the distribution of power among the three separate branches of government.

The Amicus, the Louisiana Legislative Black Caucus (hereinafter referred to as "LLBC") is comprised of thirty-one (31) African-American members from both the Louisiana House of Representatives and the Louisiana State Senate. They have been duly elected from their respective districts, and represent their constituent's interests in the Louisiana legislature. This body, in tandem with the remainder of the Louisiana legislature is vested with the responsibility to create the laws that govern the state of Louisiana. It is their position, after a careful review of the pleadings filed in this matter thus far, that the provisions contained in Acts 1999 No. 1332 and Acts 1995, No. 739 which in effect amend LSA-R.S.49:964 and LSA R.S. 49:992 respectively are, among

other things, unconstitutional as they deprive the judiciary of its final say on what the law is.

The Judicial Branch & Function

Representative Lancaster introduced Act 1999, No. 1332 of the 1999 Regular Session of the Legislature. It provides in pertinent part that, "no governmental agency, public official, or other person on behalf of any such agency or person is entitled to judicial review of an adjudication proceeding." LSA R.S. 49:964(a) and 992 (B) (3). Although this statute does not foreclose the rights of all the parties, it does abridge the right of the aggrieved agency party from seeking judicial review of an unfavorable administrative law decision. This is wholly unacceptable. Since the issue that prompted this constitutional myriad involves pure questions of law, its resolution is wholly within the discretion of the judicial branch of government, which the Department of Administrative Law is not. The Court in Cleco Evangeline v. Louisiana Tax Com'n, 813 So. 2d 351 (La. 2002). In Cleco, the Court determined that the question before it presented a question of law, much like this instant case. The Cleco Court stated that the, "Court is the ultimate arbiter of the meaning of the laws in this state" Id. at 350. It is Amicus' position that nothing should preempt that long established rule.

It is a well-settled principle that, "It is emphatically within the province of the judicial department to declare what the law is" Marbury v. Madison, 5 U.S. 137 (1803). Furthermore, with regard to the interpretation and construction of legislation, it too is within the discretion of the judicial branch. See 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 power of judicial review is the very essence of judicial of judicial duty" Albe v. Louisiana Workers' Compensation, 700 So. 2d 824, 828 (La. 1997).

Furthermore, in support of the Commissioner of Insurance's brief, the Commissioner of Insurance by law is vested with the duty to review all policies written in the state, and cannot approve any policy which contains language in contravention to Louisiana state law. Based upon the pleadings filed to date there appears to be a question as to the interpretation of language in a Rental Condominium Unitowner's Policy (hereinafter "RCU Policy") proffered by State Farm. The Amicus have no guidance to the language of the policy, and will leave that ultimate determination of that issue to this

Honorable Court, however; Amicus do recognize that pursuant to LSA R.S. 22:621 (1) the Commissioner of Insurance must disapprove any policy which is not fully in compliance with the law. Id.

Role of Administrative Law & Administrative Law Judges

The Department of Administrative law is an administrative agency under the Executive branch of government. The role of Administrative Law Judges are to make findings of fact, not non-reviewable decisions on questions of law. Not only is the latter in contravention of Marbury v. Madison, but a host of cases. Cleco Evangeline v. Louisiana Tax Com'n, 813 So. 2d 351 (La. 2002); Bourgeois v. A.P. Green Industries Inc., 783 So. 2d 1251 (La. 2001); Meyer v. Board of Trustees of F. Pension & R. Fund, 6 So. 2d 713 (La. 1942), Moore v. Roemer, 567 So. 2d 75 (La. 1990); Pope v. State of Louisiana, 792 So.2d 713 (La. 2001); State v. O'Reilly c/w State v. Brewster, 785 So. 2d 768 (La. 2001). Administrative Law Judges have never been vested with the power to interpret what the law is, however; the Acts in question allow just that. The function of administrative law has traditionally been to apply the construction of law adopted by the agency head, subject to judicial review. While these adjudications bear some resemblance to judicial proceedings, the function of administrative law, and administrative law judges are at best quasi-judicial. The necessity for agencies to confer these quasi-judicial powers is based on various state agencies' need for decisions and orders in order to perform their regulatory duties. However, Act 739 which was adopted by the Louisiana Legislature in 1995, created the Department of Administrative Law and transferred all adjudicatory functions (with certain enumerated exceptions) to the Department of Administrative Law. However, In light of this reorganization, Act 739 of 1995 in effect created an insular body of Administrative Law Judges with the authority to render final adjudicatory decisions or orders in areas of regulatory law, where they may have no experience, or specialized knowledge. See La. R.S. 49:994 D (3). Furthermore, each agency subject to the provisions of the Act is expressly divested of its authority to issue final decisions or order, and more importantly, may not override the decision of an administrative law judge. This creates a problematic relationship in that the Administrative Law Judges employed by the Department of Administrative Law have been vested with the authority previously held by an agency or an agency head to issue

final decisions and/or orders. See id. Without specifically declaring this as their intent, the legislature has created an administrative court with extraordinary authority. Not only does this present a problem with interpretation, it is also a frightful step toward re-defining the boundaries of separation of powers. The Division of Administrative Law is an administrative agency under the Executive branch of government. Consequently Act 739 compounded with Act 1332, which has the effect of foreclosing the right of an agency party from judicial review of any administrative law decision, creates an autonomy in the Executive branch that cannot withstand judicial scrutiny.

The effect of the First Circuit's Ruling in Brown v. State Farm Fire & Casualty Co., 804 So. 2d 41 (La. App. 1st Cir. 2001), writ denied 803 So. 2d 37 (La. 2001).

The First Circuit ruled on the same issue at bar in this instant case in a separate action instituted by the Commissioner of Insurance. The issue before the court in that case was the exact one that presents itself to this court; Whether the Commissioner of Insurance had a right of action to appeal rulings of the Department of Administrative Law by means of a petition for judicial review. A ruling favorable to the Commissioner was issued, and the case was ultimately remanded to the 19th Judicial District Court and settled.[1] However, despite the favorable ruling from the Court of Appeal, the Louisiana Legislature enacted Acts 1999, No. 1332, which foreclosed the right of the aggrieved agency-party to seek judicial review of unfavorable administrative law hearings. As a result, in a separate suit involving State Farm, based on the enactment of Acts 1999, No. 1332 attorneys for State Farm filed a Peremptory Exception of No Right of Action, which was sustained and affirmed on appeal. Amicus Professor Baier states in his brief that, "This Court should decline the Commissioner's invitation to tango to the tune of unconstitutionality" (Amicus Curiae Brief – Baier at 2.) relying in part on his opinion that the First Circuit Court of Appeal previously rejected the Commissioner's argument that Act 1332 was unconstitutional. (Id. at 2). Respectfully, Amicus LLBC must oppose this proposition. The First Circuit did not reject outright the Commissioner's argument of unconstitutionality on its merits, rather they circuitously sidestepped the constitutional issue by stating that the Commissioner of Insurance had an alternative remedy, which was to file a petition seeking declaratory judgment which would resolve the question

[1] Based on an unpublished opinion. Mention in Amicus' brief for contextual illustration only.

finally. Brown v. State Farm Fire & Casualty Co., 804 So. 2d 41 (La. App. 1st Cir. 2001), writ denied 803 So. 2d 37 (La. 2001). Therefore, Amicus' Baier's proposition that this Court too sidestep the underlying issue of constitutionality may be somewhat premature; as it is our belief that the First Circuit Court of Appeal merely stated that the Commissioner had an alternative remedy at law available, which made the constitutionality issue non-ripe for review. See id.

In conclusion, Amicus reiterate their position that Acts 1999, No. 1332 and Acts 1995, No. 739 are unconstitutional. It is folly to remove the ability of a state agency to appeal a decision from an administrative law judge. The Acts at issue here completely strip the administrative agencies opportunity for modification in state courts, and the Louisiana Supreme Court as well. This not only gives the administrative law judge wide latitude of interpretation of fact, but also absolute power of interpretation and construction of the law as well. Absolute power such as this cannot be allowed under our form of government. It is the beginning of a tyrannical decline of one of the very foundations of our legal system – due process. Under this regime, administrative law judges hold absolute power and unyeilding discretion. An agency that loses before the administrative law judge has no recourse, even if the administrative law judge's decision is *clearly reversible* because it is contrary to law, clearly erroneous on the facts, or arbitrary and capricious. The ability to appeal decisions of lower courts is of significant value to the way our legal system operates. How administrative law judges (with regard to the ability of state-agencies right to appeal) became so insulated and exempt from review is unfathomable. In Meyer v. Board of Trustees of F. Pension & R. Fund, 6 So. 2d 713 (La. 1942), the Court stated that any law which denied the judicial branch the power to review the legal correctness of an order of administrative agency would be null. Id. By their very nature, these Acts subvert the judicial system and our form of government by allowing one branch of government (in this case the Division of Administrative Law) to act in two capacities – both executive and judicial. See Bruneau v. Edwards, 517 So. 818 (1987). Furthermore, although the legislature enacted these laws, the Louisiana Supreme Court has repeated stated that the Legislature cannot enact laws that deprive the judicial branch of the power vested to it under the Louisiana

constitution. Moore v. Roemer, 567 So. 2d 75; Pope v. State of Louisiana, 792 So. 2d 713.

For the reasons set forth above, Amicus respectfully request that this court declare Acts 1999, No. 1332, and Acts 1995, No. 739 unconstitutional.

RESPECTFULLY SUBMITTED:

LOUISIANA LEGISLATIVE BLACK CAUCUS

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above Amicus Curiae Memorandum on behalf of the Louisiana Legislative Black Caucus via regular mail on the _____ of December 2002 to all attorney's of record.

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Suchitra J. Satpathi