NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO. 502,311 SECTION 21

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

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN SUPPORT OF PEREMPTORY EXCEPTION OF *RES JUDICATA* AND DILATORY EXCEPTION OF PREMATURITY AND IN OPPOSITION TO PRELIMINARY AND PERMANENT INJUNCTION AND PETITION FOR DECLARATORY JUDGMENT

State Farm Fire and Casualty Insurance Company ("State Farm") has been named by J. Robert Wooley, Acting Commissioner of Insurance of the State of Louisiana ("the Commissioner"), as a defendant in this action, along with several state officials, including those involved in the operation of the Division of Administrative Law of the Department of State Civil Service ("the DAL"). In this action, the Commissioner seeks to relitigate with State Farm matters that were decided long ago in an administrative proceeding and in judicial proceedings before this Court, the First Circuit Court of Appeal and the Louisiana Supreme Court. *Brown v. State Farm Fire and Casualty Insurance Company*, 2000-0539 (La. App. 1 Cir., 06/22/01), 804 So. 2d 41, *writ. denied*, 2001-2504 (La. 12/07/01), 803 So. 2d 37 ("*Brown v. State Farm*").

State Farm is filing contemporaneously with this Memorandum a peremptory exception of *res judicata*, based upon the proposition that, as between State Farm and the Commissioner, the rulings of the administrative law judge and of the courts in *Brown v. State Farm* preclude the Commissioner from litigating any of the claims raised in this proceeding. State Farm is also filing a dilatory exception of prematurity based upon the lack of ripeness of

the constitutional issues raised by the Commissioner at the preliminary injunction stage of this proceeding. This Memorandum is submitted in support of State Farm's exceptions, as well as to argue, alternatively, on the merits in opposition to the relief sought by the Commissioner.

I. FACTUAL BACKGROUND

State Farm will not burden the Court with a repetition of all the background set forth in the Commissioner's Statement of the Facts, but will summarize briefly certain aspects of that background and elements not treated by the Commissioner.

During nearly two years of discussions and correspondence with the Department of Insurance, State Farm sought to obtain approval of a policy form for rental condominium unit owners ("RCU") insurance in the State of Louisiana. On December 29, 1997, counsel representing State Farm sent correspondence to the Department to request a written decision setting forth the Department's determination regarding the legality of the policy form. A copy of that letter is attached hereto as Exhibit 1. On January 9, 1998, Kathlee Hennigan, Assistant Director of Consumer Affairs in the Department responded to State Farm's counsel's letter stating:

> As stated in our previous letters, it remains the position of the Department that your condo filing does not comply with various sections of Title 22 of the Louisiana Revised Statutes. You have a right to request a hearing on this decision.

A copy of Ms. Hennigan's letter is attached hereto as Exhibit 2. After receiving Ms. Hennigan's correspondence, State Farm followed the steps directed by the Insurance Department to initiate a hearing on the policy form dispute before an administrative law judge ("ALJ") in the DAL. The process was conducted in accordance with Act 739 of 1995, which amended the Louisiana Administrative Procedure Act ("LAPA") by enacting La. R.S. 49:991-999 to shift responsibility for conducting "adjudications" under the LAPA from individual state agencies to ALJ's in the DAL. Following the hearing, the ALJ ruled definitively in favor of State Farm, ordering that the Commissioner approve the RCU policy form as submitted.

Despite clear language in the LAPA indicating that a state agency is not a "person" entitled to seek judicial review of a ruling of an ALJ, the Commissioner filed in this Court a petition for judicial review of the ALJ's decision. During the pendency of the

Commissioner's petition, the Legislature passed Act 1332 of the 1999 Regular Session amending La. R.S. 49:964(A) and 992(B)(3) to confirm that a state agency may not seek judicial review of an ALJ decision.

State Farm then filed an exception of no right of action based upon the Commissioner's lack of standing as a state agency to seek judicial review. In opposing State Farm's exception, the Commissioner raised, briefed and argued his contention that his deprivation by the Legislature of the right to seek judicial review of the decision of the ALJ is unconstitutional and that he should be permitted to submit to judicial review the ALJ's finding that State Farm's RCU policy form complies with the law. This argument was rejected by Judge Calloway of this Court, who granted State Farm's no right of action exception and dismissed, with prejudice, the Commissioner's petition for review. Following the Court's ruling, the Commissioner, perhaps realizing that he had failed to fully argue some other possible bases for unconstitutionality, requested that the Court allow him to amend his petition, apparently to assert an affirmative claim seeking a formal declaration of unconstitutionality of Act 1332. When the district court denied the Commissioner's request to amend, the Commissioner appealed that denial to the First Circuit Court of Appeal, along with the district court's dismissal of his petition for review.

The First Circuit affirmed the district court's decision in its entirety. The Court ruled that the Commissioner is not a "person" entitled to the protection of Article I, Section 22 of the Louisiana Constitution, which guarantees to private persons an "adequate remedy at law by due process of law and justice," and concluded that the provision of the amended LAPA denying the Commissioner a right of judicial review of DAL decisions is not unconstitutional.

With respect to the refusal to allow the Commissioner to amend his complaint, the First Circuit again affirmed the ruling of the district court. The Court held that the first ground of unconstitutionality urged "was squarely before the trial court and was thoroughly argued by both parties." 2000-0539 at p. 7, 804 So. 2d at 46. As to the second ground sought to be urged, violation of the Separation of Powers Doctrine, the court also concluded that the trial court properly denied permission to amend, finding that such an amendment would have converted a

proceeding for judicial review of an agency decision into "some type of ordinary proceeding" involving different parties and seeking different relief. 2000-0539 at p. 8, 804 So. 2d at 47.

In passing, at the end of its decision the Court offhandedly remarked that the Commissioner appeared to have "an adequate remedy at law" with respect to determination of the unconstitutionality of the LAPA "by filing a declaratory judgment action or some other type proceeding." 2000-0539 at p. 8, 804 So. 2d at 47. On December 7, 2001, the Louisiana Supreme Court denied writs sought by the Commissioner to review the First Circuit's decision. Over one year later, the Commissioner, asserting that policyholders are suffering irreparable injury, brought the instant action, citing the reference to his "adequate remedy at law" in the First Circuit's opinion as an invitation to initiate this proceeding.[1]

State Farm submits that, while this proceeding may be a proper vehicle for the Commissioner to litigate the constitutionality of the statutes in question with appropriate governmental entities opposing his position, it is entirely inappropriate to join State Farm in this lawsuit. State Farm should not have to relitigate either the constitutional issues which were specifically addressed or could have been addressed in connection with State Farm's exception of no right of action in *State v. Brown* or the legality of the RCU policy form with respect to which a final judgment has been entered. Accordingly, State Farm has filed and urges the Court to grant its exception of *res judicata*. Likewise, State Farm urges its exception of prematurity based upon the Supreme Court's teaching that constitutional issues are not ripe for determination at the preliminary injunction stage. If the Court determines that State Farm's exceptions themselves cannot be heard on January 21, 2003 at the hearing on the Commissioner's request for preliminary injunction, State Farm nonetheless urges the substance of those exceptions in opposition to that request.

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[1] Commissioner's Memo, p. 1. The Commissioner fails to explain how policyholders are suffering irreparable injury when State Farm has never issued the RCU policy form in Louisiana and has agreed with the Commissioner not to issue that form until it is approved by the Commissioner or until this Court rules that the form is legal. Nor has the Commissioner explained why he has delayed bringing this action for an entire year if irreparable injury is being suffered by policyholders.

Alternatively, if it is determined for some reason that the doctrine of *res judicata* does not bar the Commissioner from relitigating the constitutional issues with State Farm, it is abundantly clear that the statutes enacted by Acts 1995, No. 739 and Acts 1999, No. 1332 ("the Subject Statutes") are not unconstitutional and that the decision of the ALJ in the prior proceeding is final, binding, and *res judicata* in this case. And, in the further alternative, if this Court finds that the Subject Statutes are unconstitutional and that the decision of the administrative law judge was not validly entered or should have been subject to judicial review at the request of the Commissioner, State Farm urges the Court to reach the same decision reached by the ALJ and find that the RCU policy form submitted by State Farm to the Commissioner is in full compliance with legal requirements and should be approved.

II. PRELIMINARY MATTERS

Before reaching State Farm's arguments in support of its exceptions and in opposition to the relief sought by the Commissioner, a preliminary matter must be addressed because it goes to the legitimacy of the proceedings in *Brown v. State Farm*.

Professor Baier, in his *amicus* brief, opines that it was improper in the prior proceeding to refer the dispute between State Farm and the Commissioner regarding the Commissioner's refusal to approve the RCU policy form to an ALJ for an adjudicatory hearing. Because he believes that the ALJ had no jurisdiction over that matter, the Professor reasons that the Nineteenth Judicial District Court and the First Circuit Court of Appeal also had no jurisdiction over the appeal from the ALJ's ruling. Professor Baier's conclusion rests upon the premise that the determination of the dispute between the Commissioner and State Farm is not an "adjudication" under the LAPA because there is no statutory or constitutional requirement that State Farm be afforded a hearing regarding the Commissioner's disapproval of its policy form.

Professor Baier is entirely correct, of course, that under the definitions of "adjudication," "decision," and "order" in the LAPA, in order for a matter to be referred to an ALJ, there must be a statutory or constitutional right to a hearing. La. R.S. 49:951(1) and (3). However, with all due respect to the learned Professor, State Farm must disagree with him regarding the validity of the essential premise of his thesis that State Farm was not statutorily or constitutionally entitled to a hearing in the prior proceeding.

First, there is a statutory right to a hearing in the situation that existed when the Commissioner refused to approve State Farm's submitted RCU policy. La. R.S. 22:1351(2), adopted in 1958, long before passage of Act 739 of 1995 transferring adjudicative hearing authority to the DAL, provides that the Commissioner of Insurance or a qualified employee of the Insurance Department designated by him "shall hold a hearing"

> [u]pon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the Commissioner of Insurance to act, if such failure is deemed an act under any provision of this Code . . . .

The Commissioner's refusal to approve the State Farm policy form was a "failure of the Commissioner of Insurance to act" under a provision of the Insurance Code (La. R.S. 22:620-621, regarding approval of policy forms) and State Farm was a person aggrieved by that failure. Thus, State Farm had a statutory right to a hearing, rendering the procedure that followed an "adjudication" as defined by the LAPA.[2] Necessarily, then, the process was appropriately referred to an ALJ in the DAL, as La. R.S. 22:1351, *et seq.*, providing for a hearing by the Commissioner or his designee, has been implicitly amended by Act 739 of 1995 transferring authority to conduct adjudication hearings from the agency head to the DAL.

Rather than seeing § 1351 as a statutory conferral upon State Farm of a right to a hearing triggering an adjudication, Professor Baier argues that the hearing procedure provided for in La. R.S. 22:1351 and the following sections of the Insurance Code constitutes a separate procedure for the conduct of hearings by the Commissioner of Insurance or his designee which was not "superseded" by adoption of the Louisiana Administrative Procedure Act. He cites the Louisiana Supreme Court cases of *Corbello v. Sutton*, 446 So. 2d 301 (La. 1984) and *Metro Riverboat Associates v. Louisiana Gaming Control Board*, 01-0185, p. 9 (La. 10/16/01), 797 So. 2d 656, 662 for the proposition that "[t]he LAPA was not intended to supersede the more

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[2] This understanding of the procedure called for by the applicable statutes is certainly the one held by the Department of Insurance. As shown by the correspondence attached hereto as Exhibit 2, Kathlee Hennigan, Assistant Director of Consumer Affairs in the Department of Insurance, wrote to State Farm's counsel at the time, E.L. Henry, on January 9, 1998, informing him that State Farm had "the right to request a hearing" pursuant to La. R.S. 22:1351 with respect to the Department's finding that State Farm's filing did not comply with the Insurance Code. Ms. Hennigan's letter further directed State Farm to file a written request for hearing, which State Farm did and which triggered the proceeding before the Administrative Law Judge.

specific provisions of other administrative acts." However, in neither of the cited cases were the "more specific provisions of other administrative acts" at issue statutes requiring hearings before the administrative agencies.

In *Corbello*, the specific administrative statute at issue was La. R.S. 30:12, a portion of the Conservation Act providing for the right of a person aggrieved by an order of the Commissioner of Conservation to pursue a peculiar form of judicial review from the order, with different standards of proof and different remedies in the judicial review process than were provided by the LAPA. Significantly, also, the Conservation Act stated that the remedies provided therein for judicial review were "the exclusive remedies of adversely affected parties." 446 So. 2d at 303. Thus, the *Corbello* Court's statement that the LAPA was not intended to supersede the specific provisions of other administrative acts or to supersede the rights and remedies created thereunder was made in the context of considering a special procedure for obtaining judicial review of agency decisions statutorily stated to be exclusive.

In the *Metro Riverboat* case, the "more specific provisions of the other administrative act" were La. R.S. 27:26 and 27:89 which, taken literally, would have required judicial review of "any decision made by the board, at any point, in any proceeding." 01-0185 at p. 8, 797 So. 2d at 661. The Court, finding that these provisions, strictly applied, would produce absurd results and raise constitutional issues, cited the *Corbello* case to support its decision to construe Sections 26 and 89 together with provisions of the LAPA, which conferred a right to judicial review only upon entry of a final decision or order in an adjudication proceeding. 01-0185 at p. 9, 797 So. 2d at 662. As with *Corbello*, this case involved statutory provisions regulating judicial review rather than internal agency hearing procedures. Moreover, the *Metro Riverboat* case did not invoke *Corbello* to accord priority to more specific pre-existing administrative statutes over provisions of the LAPA. To the contrary, *Metro Riverboat* cited *Corbello* as authority to support its modification of the strict provisions of the more specific statutes by harmonizing them with provisions of the Administrative Procedure Act.

Thus, *Corbello* and *Metro Riverboat* do not support the theory that a statute pre-dating adoption of the LAPA which confers on a private party a right to a hearing before an

agency head was not implicitly amended by Act 1332 of 1999 to transfer hearing authority to the DAL.

Moreover, another case relied upon and cited at length by Professor Baier for its reasoning regarding when there is an "adjudication" under the LAPA, strongly supports State Farm's position that the RCU policy form dispute was properly referred to an ALJ. Particularly instructive is the Court's discussion in *Government Computer Sales v. State of Louisiana*, 98-0224 (La. App. 1 Cir. 9/25/98), 720 So. 2d 53 of the statutes at issue there as sources of a right to a hearing.

The *Government Computer* Court concluded that the second lowest bidder complaining of an allegedly improper award of a state contract to the lowest bidder had no constitutional or statutory right to a hearing on its complaint. Under the statute in question, La. R.S. 39:1671(A), the Chief Procurement Officer of the Office of State Purchasing was empowered to "settle or resolve" a protest of an aggrieved person concerning the award of a contract under agency regulations. The decision of that officer could then be appealed to the Commissioner of Administration pursuant to La. R.S. 39:1683 and the aggrieved party was allowed to seek judicial review of the Commissioner's determination in the Nineteenth Judicial District Court under La. R.S. 39:1691(A). The Court correctly found that these statutes do not grant a party protesting a contract award a right to a hearing before the agency and held, therefore, that the procedure called for in the statute did not constitute an "adjudication" under the LAPA.

Significantly, the Court pointed to two other provisions of the Procurement Code that conveyed a right to a hearing and triggered an "adjudication":

> In contrast, both LSA-RS 39:1601 and 1672 specifically grant the right to a hearing respectively to bidders disqualified for lack of responsibility and those debarred or suspended from consideration from award of a contract. Through these statutes, the legislature clearly expressed its intent as to those situations it believed required a hearing . . . .

98-0224 at p. 8, 720 So. 2d at 58.

Like § 1351 of the Louisiana Insurance Code, Section 1601 and Section 1672 of the Conservation Act grant a right to a hearing to persons aggrieved by an agency decision and further provide for such hearings to be conducted by the agency head or other designated

functionary of the agency. There is no basis for distinguishing the hearing requirement established by La. R.S. 39:1601 and 1672 – which the *Government Computer* court recognized triggered an LAPA "adjudication" – and the hearing requirement found in La. R.S. 22:1351. As that Court stated, when hearings are mandated by statutes governing a regulatory agency, the agency determination process called for in those statutes becomes an "adjudication" under the LAPA.

Since the passage of Act 739 of 1995, moreover, the official conducting such a statutorily mandated hearing will be an AJL rather than the head of the agency – whether the Commissioner of Insurance, the Commissioner of Administration, or any other agency head – or an agency employee designated by the agency head. There are many agencies which conducted their own hearings pursuant to statutes like 22:1351, 39:1601 and 39:1672 prior to 1996.[3] The Legislature obviously did not see fit to specifically amend each statute to transfer that authority to the DAL. It was not necessary that it do so. Such amendments are implicit in Act 739. Were Professor Baier's theory correct that the failure to specifically amend Section 1351 exempts hearings conducted thereunder from the provisions of Act 739, the DAL would be authorized to conduct virtually no hearings because the vast majority of statutes mandating hearings before agencies in Louisiana were enacted before 1995 and call for such hearings to be conducted by the agencies themselves. Indeed, the *Government Computer* case specifically recognized the implicit amendment of La. R.S. 35:1601 and 1672, and therefore of 22:1351 and similar laws, when it stated that Act 739 of 1995 "transferred jurisdiction from the Office of State Purchasing to the Division of Administrative Law to conduct hearings in procurement matters where the disposition rendered constitutes an 'adjudication' pursuant to the APA." 98-0224 at p. 4, 720 So. 2d at 56.

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[3] Examples of statutes calling for hearings before agency officials that could be conducted by ALJ in the DAL after the effective date of Act 739 include La. R.S. 18:53 (Dept. of Elections and Registration); La. R.S. 36:207 (Dept. of Culture, Recreation and Tourism); La. R.S. 8:76 and 677 (Louisiana Cemetery Board); La. R.S. 30:2016, 2024, and 2039 (Dept. of Environmental Quality); La. R.S. 30:143 (Dept. of Natural Resources); La. R.S. 33:2218.2 (Dept. of Public Safety); La. R.S. 38:3089.3 (Dept. of Transportation and Development); La. R.S. 17:10 (Dept. of Education); La. R.S. 6:646, 242 and 731 (Office of Financial Institutions); La. R.S. 39:1599 and 1671 (State Bond Commission).

Thus, as a "person aggrieved by" a failure of the Commissioner of Insurance to act pursuant to his authority under the Insurance Code, State Farm had a right to a hearing regarding its RCU policy submission and it was appropriate that the matter was referred to an ALJ employed by the DAL for determination.

Professor Baier also argues that the finding by the ALJ in *Brown v. State Farm* that the action of the Commissioner in rejecting State Farm's policy form was not an adjudication supports the Professor's argument that the determination made by the administrative law judge himself in that case is not an "adjudication" under the LAPA. Once again, State Farm must disagree.

The ALJ in the prior proceeding considered for one purpose only whether the Commissioner's determination constituted an adjudication – to ascertain whether that determination was entitled to deference in the proceeding he was conducting. Determining whether a decision is an adjudication so as to be entitled to deference when the decision is reviewed is an entirely different inquiry from determining whether the review proceeding itself constitutes an "adjudication" as specially defined under the LAPA. As Professor Baier elsewhere correctly notes, the latter inquiry is determined solely by whether a hearing is statutorily or constitutionally required. Thus, the ALJ's determination that the Commissioner's action did not constitute an adjudication by which he was required to defer should have no bearing upon whether the State Farm-Commissioner dispute was properly referred to and adjudicated by an ALJ.

Moreover, even if there were not a clear statutory right to a hearing in the prior proceeding, State Farm would be constitutionally entitled to a hearing because the refusal of the Commissioner to approve its submitted policy form constitutes a constitutionally protected deprivation of property which the State cannot effect without affording due process.

The Fourteenth Amendment to the U.S. Constitution and Article I, § 2 of the Louisiana Constitution prohibit deprivation by the State of property without due process of law. For due process protections to apply, there must be some property on liberty interest adversely affected by state action. *Delta Bank & Trust Co. v. Lassiter*, 383 So. 2d 330, 334 (La. 1980).

Protected property interests are defined by existing rules or understandings and stem from various sources, such as state law, securing certain benefits and supporting claims to entitlement of those benefits. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972).

A due process analysis involves three questions: (1) whether the interest is protected by due process; (2) if the interest is so protected, whether due process requires some kind of hearing; and (3) if a hearing is required, what kind of hearing is mandated. *Paillet v. Wooten*, 559 So. 2d 758, 760 (La. 1990). For present purposes, it is not necessary to reach the third question since the inquiry here is solely to determine whether State Farm was constitutionally entitled to any type of hearing regarding the policy form determination.

An ongoing business is a property right entitled to constitutional protection. *Callais Cablevision, Inc. v. Houma Cablevision, Inc.*, 561 So. 2d 6, 12 (La. App. 1st Cir.), *writ denied*, 452 So. 2d 1175 (La. 1984). Deprivation of a permit to operate a private ambulance service was recognized as a protected property interest in *Acadian Ambulance Service v. Parish of East Baton Rouge*, 97-2119, p. 11 (La. App. 1 Cir. 11/06/98), 722 So. 2d 317, 324. Likewise, a decision of the Board of Barber Examiners approving or disapproving authority to operate a barber school implicates the owner's protected property right to conduct his business and cannot be made without a hearing. *Parker v. Board of Barber Examiners*, 84 So. 2d 86 (La. App. 1st Cir. 1955).

State Farm is a licensed insurer in State of Louisiana and has been authorized by the Commissioner to insure risks of the type covered by the proposed RCU policy. The company has a protected property interest in its ongoing business in the State and in issuing to a Louisiana insured a policy (otherwise comporting with substantive law) insuring the risks covered under the proposed policy form. The Commissioner's refusal to approve the subject policy form prevents State Farm from offering the RCU coverage to Louisiana policyholders and thus deprives it of conducting one aspect of its ongoing business. The principles stated in the case law cited above establish that due process requires that State Farm be afforded some form of hearing in connection with the Commissioner's refusal to approve issuance of the RCU policy.

State Farm urges that the Court find that because of its statutory and constitutional right to a hearing, the ALJ in the prior proceeding had jurisdiction to adjudicate the RCU policy form dispute and that the courts conducting the judicial proceedings in *Brown v. State Farm* did so properly and with jurisdiction.

III. LAW AND ARGUMENT

A. State Farm's Exception Of *Res Judicata* Should Be Maintained.

Louisiana's statutory law governing *res judicata* and collateral estoppel is set forth in La. R.S. 13:4231, which provides:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The amendment of this provision in 1991 dramatically broadened the scope of *res judicata* in Louisiana, which now prevents relitigation of the same issues in subsequent suits based on alternate causes of action. La. R.S. 13:4231, Comment (a). Louisiana's doctrine of *res judicata* is now quite broad and provides that a second action is barred if it arises out of the occurrence which was the subject matter of prior litigation. *Avenue Plaza, L.L.C. v. Falgoust*, 96-0173, p. 7 (La. 07/02/96), 676 So. 2d 1077, 1080; *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-0654, p. 13 (La. 01/16/96), 666 So. 2d 624, 632; La. R.S. 13:4231, Comment (a).

The purposes of *res judicata* are to "promote judicial efficiency and final resolution of disputes by preventing needless relitigation" and to free parties from "vexatious litigation." *Duffy v. Si-Sih Corp.*, 98-1400, p. 7 (La. App. 4 Cir. 01/06/99), 726 So. 2d 438, 442, *writ denied*, 99-0372 (La. 04/30/99), 741 So. 2d 14; La. R.S. 13:4231, Comment (a). Louisiana law recognizes both claim preclusion and issue preclusion. *Hudson v. City of Bossier*, 33,629, pp. 7-8 (La. App. 2 Cir. 8/25/00), 766 So. 2d 738, 743, *writ denied*, 2000-2687 (La. 11/27/00), 775 So. 2d 450; La. R.S. 13:4231, Comment (b). Claim preclusion bars the relitigation not only of

matters that have been litigated but also of matters that have never been litigated but should have been litigated in the first suit. *Hudson*, 33,629 at p. 7, 766 So. 2d at 743. Issue preclusion or collateral estoppel prevents relitigation of the same issues in a different cause of action between the same parties. *Roland v. Owens*, 00-1846, pp. 4-5, (La. App. 5 Cir. 04/24/01), 786 So. 2d 167, 169-70; *Hudson*, 33,629, at p. 7, 766 So. 2d at 743.

1. **The Legality Of State Farm's RCU Policy Form Cannot Be Relitigated In This Action Because The ALJ's Decision In *Brown v. State Farm* Constituted A Valid Final Judgment.**

A final order in an adjudication by an administrative agency is *res judicata* with the same preclusive effect as a judgment of a court of law. *Robinson v. City of Baton Rouge*, 566 So. 2d 415, 418 (La. App. 1st Cir. 1990); *Thomas v. Department of Corrections*, 430 So. 2d 1153 (La. App. 1st Cir.), *writs denied,* 435 So. 2d 432 and 438 So. 2d 566 (La. 1983). If an agency decision is not subject to judicial review or if review is available but is not timely sought, the agency decision is final and the courts of this state lack jurisdiction to conduct a collateral review of the agency ruling. *Ogburn v. City of Shreveport*, 614 So. 2d 748, 753 (La. App. 2d Cir.), *writ denied,* 619 So. 2d 547 (La. 1993); *Robinson*, 566 So. 2d at 418; *Department of Culture, Recreation & Tourism v. Fontenot*, 518 So. 2d 1067 (La. App. 1st Cir. 1987); *Johnson v. Odom*, 470 So. 2d 988 (La. App. 1st Cir.), *writ denied*, 476 So. 2d 355 (La. 1985).

As discussed above, the legislature clearly vested in the DAL the authority to hear LAPA "adjudications" like the one conducted in the proceeding that led to *Brown v. State Farm*. Under the LAPA, the Commissioner of Insurance had no right to appeal the decision of the ALJ. Thus, upon issuance of the decision in favor of State Farm, the ALJ decision constituted a valid final judgment. The existence of a valid final judgment on the issue precludes the relitigation of whether State Farm's RCU policy form complies with law and should be approved.

In the current suit, the Commissioner of Insurance seeks a preliminary injunction "quashing and enjoining" the ruling issued by the ALJ ordering the Commissioner to approve the RCU policy as well as a judgment enjoining State Farm from issuing the RCU form. The principle of issue preclusion prevents the issuance of the injunction prayed for, as the ALJ's decision approving the use of the policy form is a final judgment entitled to *res judicata* effect. *Roland v. Owens*, 00-1846 at pp. 4-5, 786 So. 2d at 169-70. This action for injunction is a

prohibited collateral attack on the final order of the ALJ and an attempt to relitigate the policy form dispute. As the same parties were involved in the hearing before the ALJ and the policy form issue was fully litigated, *res judicata* precludes reconsideration of that matter. *Id.*; *Hudson v. City of Bossier*, 33,629 at pp. 7-8, 766 So. 2d at 743.

2. The Arguments That La. R.S. 49:964(A)(2) And 49:992(B)(3) Are Unconstitutional Are Also *Res Judicata* As To State Farm.

As discussed above, the Commissioner of Insurance appealed to the Nineteenth Judicial District Court in *Brown v. State Farm*, seeking judicial review of the decision by the ALJ. State Farm filed an exception of no right of action based on La. R.S. 49:964(A)(2) and 49:992(B)(3), the provisions of the LAPA which preclude an appeal by the Commissioner from the ALJ decision. In opposition to the exception, the Commissioner asserted that those provisions were unconstitutional and should not be given effect. The district court rejected this argument and dismissed the Commissioner's appeal with prejudice. Upon dismissal the Commissioner appealed to the First Circuit Court of Appeal, re-urging his due process constitutional argument. The First Circuit flatly rejected the Commissioner's position that its office was deprived of due process by La. R.S. 49:992(B)(3), and the Supreme Court denied writs from the Court of Appeal's affirmance. *Brown v. State Farm*, 2000-0539 at pp. 4-8, 804 So. 2d at 44-47, *writ. denied*, 813 So. 2d 37. Thus, because due process constitutionality was fully and specifically litigated between the parties, under La. R.S. 13:4231(3) the issue is *res judicata*.

The Commissioner apparently recognizes that the unconstitutionality of the Subject Statutes based upon their alleged denial of due process to the Commissioner is *res judicata* between him and State Farm because he has not briefed this issue in this case.[4] However, he appears to rely upon a statement in the Court of Appeal opinion in *Brown v. State Farm* for the proposition that he is entitled to litigate with State Farm in this action certain other constitutional objections to the Subject Statutes. However, Louisiana's law of *res judicata* and

[4] However, see discussion at pp. 37, *et seq.*, *infra*.

collateral estoppel bar litigation of these issues between the Commissioner and State Farm as well.

The district court's dismissal of the Commissioner's suit against State Farm, with prejudice, based upon State Farm's peremptory exception of no right of action, constituted a final judgment which achieved *res judicata* effect when *certiorari* was denied by the Louisiana Supreme Court. *Downs v. R.T.S. Sec., Inc.*, 95-835, p. 8 (La. App. 3 Cir. 01/31/96), 670 So. 2d 434, 439, *writ denied*, 96-1325 (La. 09/13/96), 679 So. 2d 104. Under Louisiana's current law, *res judicata* bars relitigation of subject matter arising from the same transaction or occurrence that provided the basis for a previous suit. *Terrebonne Fuel*, 95-0654 at p. 12, 666 So. 2d at 631. "Thus, the chief inquiry is whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action." *Leon v. Moore*, 98-1792, p. 3 (La. App. 1 Cir. 4/01/99), 731 So. 2d 502, 504, *writ denied*, 99-1294 (La. 07/02/99), 747 So. 2d 20, citing *Terrebonne Fuel, supra*. Not only are issues actually litigated in the prior suit precluded, but also issues that could have been but were not raised therein. *Hudson v. City of Bossier*, 33,629 at p. 7, 766 So. 2d at 743.

In *Brown v. State Farm*, the cause of action asserted by the Commissioner sought judicial review and reversal of the agency determination regarding the RCU policy form. State Farm's exception raised the defense that the Commissioner had no legal right to such review or reversal. The Commissioner, admitting that he was statutorily barred from the relief he was seeking, raised in written briefs and in oral argument to the Court the issue of whether the statute in question was unconstitutional. The Commissioner could and should have raised all arguments he might have regarding the constitutionality – or any other basis for invalidity – of the Subject Statutes. The *res judicata* principles discussed above do not countenance a party reserving some of his arguments in support of a position he takes in litigation in order to later assert them in separate litigation he brings against the same opponent involving the same subject matter. Yet, this is precisely what the Commissioner seeks to do in this action against State Farm.

Too, it bears noting that the Commissioner did, in fact, argue in the district court in *Brown v. State Farm* a number of the same constitutional issues he is seeking to adjudicate

against State Farm again here, including in particular his claim that the Subject Statutes offend the principle of separation of powers.[5] However, even if these arguments had not been made, their subsequent assertion in this proceeding against State Farm would be barred by La. R.S. 13:4231 and the jurisprudence applying it.[6]

Professor Baier implicitly recognizes State Farm's *res judicata* defense to the Commissioner's constitutional claims when he says that the *Brown v. State Farm* "ruling may not technically be *res judicata* as to all parties defendant herein." (Emphasis added) This strongly suggests that the Professor believes the ruling is *res judicata* as to State Farm.

As stated above, the Commissioner apparently incorrectly interprets a statement made at the very end of the First Circuit's opinion in *Brown v. State Farm* as a suggestion that he is entitled to maintain this action against State Farm. This statement was made in the context of the First Circuit's affirmance of the district court's refusal to permit the Commissioner the opportunity to amend his petition for review "to bring an action to challenge the constitutionality of La. R.S. 49:964(A)(2)" on grounds that "the LAPA unconstitutionally violates the separation of powers doctrine." *Brown v. State Farm*, 2000-0539 at p.7, 804 So. 2d at 47. The trial court record in this matter does not contain a motion by the Commissioner to amend his petition or an order by the Court denying such a motion. However, it appears that the Commissioner's request to amend was made after full litigation of the no right of action exception and the Court's decision to dismiss the Commissioner's action with prejudice. From the opinion of the Court of Appeal, it seems that Court perceived the amendment proposed by the Commissioner as one which would have drastically altered the proceeding by transforming it from one seeking review of an administrative order into an ordinary proceeding against different parties seeking a general judicial declaration of unconstitutionality of the statute. The Court stated that the "proposed amendment apparently would not merely add a cause of action or a party, but would substitute

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5 *See* Brief in Opposition to the Exception of No Right of Action, pp. 48-53 of the Trial Court Record in *Brown v. State Farm*, No. 451,786, 19th JDC, attached hereto as Exhibit 5.

6 State Farm does not suggest that the Commissioner is barred from litigating the constitutionality of the Subject Statutes with the other defendants to this action.

one lawsuit for another, *changing the parties*, the form of procedure and the relief sought." 2000-0539 at p. 8, 804 So. 2d at 47 (emphasis added). The court preempted the Commissioner's efforts to bring an entirely new action, further finding no indication that the proposed amendment would remove the grounds for State Farm's exception of no right of action. *Id.*

When the Court of Appeal stated that the Commissioner had "an adequate remedy at law" to challenge the constitutionality of the LAPA through a declaratory judgment action "or some other type of proceeding," it obviously contemplated an action by the Commissioner like this one against the appropriate governmental agencies and officials, but without State Farm. There is nothing in the Court's short statement suggesting in any way that Louisiana's invigorated principles of *res judicata* would not foreclose the Commissioner from forcing State Farm to retry claims and issues already determined or subject to determination but withheld by the Commissioner in the earlier litigation. As to State Farm, the unconstitutionality issues and the policy form issues have been decided and are final. State Farm's exception of *res judicata* should be maintained.

B. A Declaration Of Unconstitutionality Of A Statute Is Premature At The Preliminary Injunction Stage.

The Louisiana Supreme Court has held that when a plaintiff files suit seeking a judgment declaring a statute unconstitutional as well as a preliminary injunction prohibiting enforcement of the statute, the unconstitutionality of the statute is not ripe for determination at the preliminary injunction stage and cannot be determined at that point in the proceeding. *Women's Health Clinic v. State*, 01-2645 (La. 11/09/01), 804 So. 2d 625, 626; *Kruger v. The Garden District Assn.*, 99-3344 (La. 03/24/00), 756 So. 2d 309, 310.

The *Women's Health* and *Kruger* decisions both determined that a decision of unconstitutionality at the preliminary injunction stage is "in effect a ruling on the merits of the plaintiff's petition for declaratory relief." *Women's Health Clinic*, 804 So. 2d at 626. Because the declaratory action is an ordinary proceeding while the preliminary injunction is a summary proceeding, the Court in both cases found it improper to rule of the constitutional issue until it was before the district court at the hearing on the declaratory action.

Here, the Commissioner seeks both a declaratory judgment that Act 739 of 1995 and Act 1332 of 1999 are unconstitutional and a preliminary injunction prohibiting the operation and enforcement of the provisions of those acts. If this Court determined the unconstitutionality of those acts at the preliminary injunction stage, it would in effect constitute a ruling on the merits of the Commissioner's Petition for Declaratory Relief. Thus, the Court should not rule on the Commissioner's constitutional arguments at the preliminary injunction stage but reserve them for determination at the trial on the merits of the declaratory action.

C. **The Subject Statutes Are Not Unconstitutional.**

State Farm maintains it should not have to litigate the constitutionality of the Subject Statutes with the Commissioner again. However, if relitigation is required, it strongly contends that those statutes should be held constitutional.

Because the presentation in the Commissioner's Memorandum of his arguments in favor of finding Act No. 739 of 1995 and Act No. 1332 of 1999 unconstitutional is somewhat undisciplined and disjointed, State Farm begins by briefly analyzing the structure of that presentation and attempting to group and characterize those arguments. The Commissioner begins with a "Summary of Argument,"[7] stating three "fundamental principals" which this "case puts at issue." Following the enumeration, the Commissioner cites three cases he claims support the first proposition, one case purportedly supporting the second and four cases as authority for the third.

Next, the Commissioner presents his "Statement of the Law," in which most of his arguments regarding the alleged invalidity of the statute are presented in the context of seeking to establish the existence of two exceptions to the requirement that the plaintiff establish irreparable harm in order to be entitled to an injunction – (1) the alleged unconstitutionality of the statutes and of the conduct of the DAL pursuant to them and (2) the "*ultra vires* action of the DAL and the Legislature."[8] At the very end of his Memorandum, he refers back to these

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7 Commissioner's Memo, pp. 4-5.

8 Commissioner's Memo, pp. 6-7.

arguments and indicates that they also support the preliminary injunction requirement of establishing that the plaintiff will prevail on the merits.[9]

The first and third "fundamental principals" listed in the Summary of Argument are reiterated and expanded upon in the Commissioner's arguments regarding unconstitutionality and *ultra vires*, but the second one does not reemerge in a recognizable form anywhere in the rest of the Commissioner's Memo. Also, in arguing unconstitutionality and "*ultra vires*" the Commissioner appears to raise some additional arguments not initially articulated in the Summary of Argument.

Perhaps by design, the Commission's arguments regarding various alleged grounds of unconstitutionality of the Subject Statutes, tend to blend and merge together, often becoming blurry and indistinct. In an attempt to simplify the task of responding to the Commissioner's Memo and to assure that all his arguments have been addressed, State Farm will group and restate those arguments and examine the authorities offered as support for each. This exercise will demonstrate that the Commissioner has done no more than cite authorities for broad, general principles that are not dispositive of, and which in fact beg, the issues at hand. State Farm will then furnish the Court with what it contends are the relevant authorities and the proper analysis establishing that the Subject Statutes most certainly are constitutional.

1. There Is A Strong Presumption That Legislative Acts Are Constitutional.

The burden of proving that an act is unconstitutional is upon the party attacking the act. *Moore v. Roemer*, 567 So. 2d 75, 78 (La. 1990). Because the Legislature is entitled to exercise any power not specifically denied by the Constitution, a party questioning the constitutionality of an act must point to a specific provision of the Constitution which clearly prohibits the legislative action. *Board of Dirs. of the La. Recovery Dist. v. All Taxpayers, Prop. Owners, & Citizens of La.*, 529 So. 2d 384 (La. 1988).

There is a strong presumption that legislative actions are constitutional. *In re Angus Chem. Co.*, 94-1148, p. 2 (La. App. 1 Cir. 06/26/96), 679 So. 2d 454, 456, *writ denied*,

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[9] Commissioner's Memo, p. 12.

97-1600 (La. 11/14/97), 703 So. 2d 1290. Only when the statute is clearly repugnant to the Constitution will it be stricken. *Doherty v. Calcasieu Parish Sch. Bd.*, 93-3017, p. 2 (La. 04/11/94), 634 So. 2d 1172, 1174. The Louisiana Legislature may enact any legislation that the State Constitution does not explicitly prohibit. Thus, in order to hold legislation invalid under the Constitution, it is necessary to rely on some particular constitutional provision that specifically limits the power of the Legislature. *Polk v. Edwards*, 626 So. 2d 1128, 1132 (La. 1993). Any doubt as to the legislation's constitutionality must be resolved in favor of constitutionality. *Id.*

2. The Subject Statutes Do Not Unconstitutionally Infringe On The Power of the Judicial Branch.

The Commissioner first argues that the Subject Statutes are unconstitutionally infirm because they deprive the judicial branch of the power "to declare what the law is."[10] He offers quotes, first from *Marbury v. Madison*, then from more modern cases, stating the general truism, too obvious to require citation, that construction of statutes is a judicial function. These legal platitudes, articulated in contexts bearing no pertinence to the issues facing this Court, do not support the relief sought by the Commissioner.

For instance, the language quoted from *In re La. Health Serv. & Indem. Co.*, 98-3034, p. 11 (La. 10/19/99), 749 So. 2d 610, 616 ("The construction to be given to legislative acts rests with the judicial branch of government")[11] was used by the Court in that case not in discussing an infringement upon judicial power but in the context of discerning the proper method of statutory interpretation to be employed by the Court. Likewise, the Court's statement in the opinion that "[T]his court is the ultimate arbiter of the meaning of the laws of this state," in *Cleco Evangeline, L.L.C. v. La. Tax Comm'n*, 01-2162, p. 3 (La. 04/03/02), 813 So. 2d 351, 353 was made in the context of stating the proper standard to be used in reviewing a question of law on appeal and specifically referred to the authority of the Louisiana Supreme Court rather than the judicial branch in general.

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10 Commissioner's Memo, p. 4.

11 Commissioner's Memo, p. 4.

Finally, the Commissioner cites *Bourgeois v. A.P. Green Industries, Inc.*, 00-1528, p. 8 n. 8 (La. 04/03/01), 783 So. 2d 1251, 1258 n. 8 for the proposition that "[u]nder our system of government with limited powers, 'it is emphatically the province and duty of the judicial department to say what the law is.'" Again, however, this is no more than the Court's broad statement of principle rendered in the process of considering whether an act amending a statute to "legislatively overrule" a prior decision of the Louisiana Supreme Court could be applied to the original plaintiffs in the Supreme Court case without unconstitutionally depriving those individuals of a vested right in their causes of action. As before, this statement of generalities in an entirely inapposite context is unhelpful in determining the issues before this Court.

The Commissioner does touch upon the provision that should be the starting point of the analysis supporting his claim of unconstitutionality.[12] Article V, Section 1 of the Louisiana Constitution states "[T]he judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this Article." However, this is only the first step in the proper exegesis. The Commissioner would like the Court to jump from this broad constitutional statement of principle, together with the general judicial pronouncements quoted above, to the flawed conclusion that judicial review is required of every decision an agency makes or, perhaps, of every agency decision that involves an interpretation of the law. A more disciplined and directed consideration of all of the pertinent constitutional provisions and of the relevant case law – much of it directly on point – demonstrates the falsity of the Commissioner's conclusion.

In order to determine the precise contours of the "judicial power" that is vested in Louisiana courts, it is not sufficient to stop with Article V, Section 1. Article V, Section 16 of the Louisiana Constitution provides for the specific situations in which district courts have been accorded jurisdiction. Similarly, Article V, Section 10 establishes the cases in which the Court of Appeal has jurisdiction and Article V, Section 5 provides the same with respect to the

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12 Commissioner's Memo, p. 8.

Supreme Court. Despite the broad delegation of judicial power to the courts in Article V, Section 1, unless there is a delegation of jurisdiction over a specific type of case to a specific court elsewhere in the Constitution, the court has no power to exercise jurisdiction over that specific type of case.

Here, the Commissioner contends that the provisions of the Subject Statutes disallowing judicial review in the district court at the instance of the Commissioner of the decisions of the DAL regarding State Farm's RCU policy form, unconstitutionally deprived the district court of its jurisdiction. However, it is clear from Article V, Section 16, as interpreted by the Louisiana courts, that there is no constitutional delegation of jurisdiction to review the ruling of the DAL in this matter and the Subject Statutes constitute appropriate exercise by the Legislature of its constitutional power to limit judicial review of agency determinations.

The relevant portions of Article V, Section 16 state:

> (A) Original Jurisdiction. Except as otherwise authorized by this Constitution . . . a district court shall have original jurisdiction in all civil . . . matters. . . .
>
> (B) Appellate Jurisdiction. The district court shall have appellate jurisdiction as provided by law. (Emphasis added.)

In the case of *In re American Waste & Pollution Control Co.*, 588 So. 2d 367 (1991), the Louisiana Supreme Court held:

> We find that DEQ [Department of Environmental Quality] determinations are not civil matters within the meaning of La. Const. Art. V, § 16(A). They are therefore not within the scope of the district courts' constitutional grant of original jurisdiction, because waste disposal and water discharge permitting did not exist as a traditional judicial civil matter in 1974 and has never been delegated in the first instance to the judicial branch, and because such matters were thereafter constitutionally delegated by the Legislature to the DEQ within the executive branch.

588 So. 2d at 373. On this issue, the *American Waste* Court also cited with approval its original opinion in *Loop, Inc. v. Collector of Revenue*, 523 So. 2d 201 (La. 1987), which concluded that review by a district court of an administrative tribunal's action is an exercise of its appellate review jurisdiction and that "for the purpose of judicial review of administrative action, the district courts are courts of limited jurisdiction, having only such appellate jurisdiction to review administrative actions as is provided by law or constitutionally required." *American Waste*, 588 So. 2d at 371, citing from *Loop*, 523 So. 2d at 203.

The *Loop* court went on to reason from the foregoing premise that "a litigant seeking judicial review of administrative action in a district court must establish that there is a statute which gives subject matter jurisdiction to that court." 523 So. 2d at 203. Moreover, when the statute upon which he relies establishes a specific procedure for judicial review of an agency's action, a litigant may invoke the reviewing court's jurisdiction only by following the statutorily prescribed procedure, unless there can be found within the act a genuine legislative intent to authorize judicial review by other means.[13]

The *American Waste* case has been followed consistently in subsequent decisions considering the issue of judicial review of administrative agency action. *See, e.g., MEDX, Inc. v. Templet*, 633 So. 2d 311 (1st Cir. 1993), *writ denied*, 635 So. 2d 1137 (La. 1994); *Boeing Co. v. La. Dept. of Econ. Dev.*, 94-0971 (La. App. 1 Cir., 06/23/95), 657 So. 2d 652; *In re Angus Chem. Co.*, 94-1148 (La. App. 1 Cir., 06/26/96), 679 So. 2d 454, *writ denied*, 97-1600 (La. 11/14/97), 703 So. 2d 1290. The agency action involved in the *MEDX* case was the denial by the DEQ of a medical waste permit; in *Angus Chemical*, it was the granting by DEQ of an exemption from Louisiana's ban on the land disposal of hazardous waste; and in the *Boeing* case, it was the denial of an application for a tax exemption under the State's Industrial Ad Valorem Tax Exemption Program by the Louisiana Department of Economic Development and the State Board of Commerce and Industry.

The *Boeing* case briefly characterized the holding of *American Waste* as follows:

> Judicial review of a quasi-judicial administrative agency action is said to be appellate review. . . . District courts have appellate authority only when provided by law. La. Const. art. V, § 16(B).

94-0971 at pp. 5-6, 657 So. 2d at 656. The *Boeing* court went on to determine that there was no statute providing judicial review over actions of the State Board of Commerce and Industry and

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13 In support of this rule, the *Loop* court cited *Corbello v. Sutton*, 446 So. 2d 301 (La. 1984); *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 85 S. Ct. 551 (1965); *Memphis Trust Co. v. Bd. of Governors of Fed. Reserve Sys.*, 584 F.2d 921 (6th Cir. 1978); *Investment Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270 (D.C. Cir. 1977); *In re Application of Lakeview Gardens, Inc.*, 605 P.2d 576 (Kan. 1980); *Mont. Health Sys. Agency, Inc. v. Mont. Bd. of Health & Envtl. Sciences*, 612 P.2d 1275 (Mont. 1980); and *Bay River, Inc. v. Envtl. Quality Comm'n*, 554 P.2d 620 (Ore. 1976).

concluded that therefore there was no appellate jurisdiction in the district court to review the action of the Board. Contrary to Boeing's argument that it had a right to judicial review of the Board's denial of its tax exemption, the court stated: "It is simply not correct to say that everything an agency does must be subject to the availability of judicial review for its validity." *Id.* at p. 7, 657 So. 2d at 657.[14]

In his argument to the Court, the Commissioner fails to cite *American Waste, MEDX, Loop, Angus,* or *Boeing* but, rather disingenuously, cites three cases where the courts found the *American Waste* rationale inapplicable because the matters involved in the agency determinations at issue were "civil matters" traditionally within the original jurisdiction of the district courts rather than matters typically or traditionally determined by administrative agencies.

One of the cases cited by the Commissioner is *Moore v. Roemer*, 567 So. 2d 75 (La. 1990). The issue before the Court there was the constitutionality of a legislative provision which vested in administrative hearing officers the "exclusive original jurisdiction" to adjudicate worker's compensation claims. Reasoning that the framers of the 1974 Constitutional Convention were aware that worker's compensation claims had been brought in the State's district courts from the time the legislature first enacted compensation statutes and that such claims constitute litigation adjudicating disputes between private parties resulting in money judgments affecting only those parties, the Court concluded that the term "civil matters" as used in Section 16(A) includes claims for worker's compensation. 567 So. 2d at 80-81. Thus, such claims are within the original jurisdiction of the district courts and the delegation of original jurisdiction to adjudicate them to an administrative agency is unconstitutional.

The Commissioner also cites *Pope v. State*, 99-2559 (La. 06/29/01), 792 So. 2d 713 to support his position. Once again, the Commissioner's reliance is misplaced. At issue in

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[14] The court went on to state that there is right to judicial scrutiny when there is a claim of deprivation of a constitutionally protected right or the assertion that agency action exceeds constitutional authority. The decision noted, however, that such review does not address the merits of an adjudication or quasi-adjudication by the agency and would be conducted under the exercise of the district court's original jurisdiction. *Id.*

Pope was the constitutionality of the Corrections Administrative Remedy Procedure (CARP). CARP required presentation of tort claims, for physical injuries of a person incarcerated at a state correctional institution, to the warden. This administrative remedy procedure was a prerequisite to the prisoner filing suit in district court. The CARP procedure provided that a prisoner aggrieved by a decision in favor of the Department of Corrections in the administrative remedy procedure could seek judicial review in the Nineteenth Judicial District Court within 30 days of receipt of the decision. The review was confined to oral argument (which the court had discretion to grant or deny) and was generally based upon the record made up in the administrative proceeding. The court found that the CARP statute divested the district courts of the original jurisdiction granted by the Constitution in all civil matters and vested original jurisdiction in certain tort actions in administrative officials. Noting that district courts historically have exercised original jurisdiction in tort actions as civil matters, the *Pope* court correctly determined that the Legislature could not by statute alter the constitutional delegation of power to the district courts. The Supreme Court was careful to distinguish the subject matter at issue there from that involved in the *American Waste* case. The court stated:

> [T]he statutes at issue in *American Waste* (vesting an administrative agency with original jurisdiction in permit and enforcement actions, subject to review by the court of appeal) are vastly different from statutes granting original jurisdiction to an administrative agency in tort actions, even those in which the government is the alleged tortfeasor.

99-2559 at pp. 10-11, 792 So. 2d at 719.

There is no doubt that the agency determination at issue in this case – the approval or disapproval by the Louisiana Insurance Commissioner of a policy form for issuance in the State pursuant to La. R.S. 22:621 — clearly falls within the category of administrative matters that are not "civil matters" under Article V, Section 16(A). Like the permitting decisions of the DEQ and the tax exemption determination in *Boeing*, policy form decisions by the Commissioner are not subject matter which traditionally has been assigned to the district courts within their original jurisdiction. Rather, they are garden variety administrative/regulatory determinations which have always been made by an agency rather than by the district court. Thus, any review conducted by the district courts of agency decisions of this type is accomplished under the courts' appellate jurisdiction, "as provided by law".

Article V, Section 16(B) states that district courts have appellate jurisdiction "as provided by law." Thus, it is the Legislature's prerogative to invest appellate review of such agency determinations in a court other than the district court, as it did in *American Waste*, or it may, consistent with Section 16, exclude judicial review entirely, as it did in the *Boeing* case.[15] Thus, the effect of the Subject Statutes in eliminating jurisdiction in the district courts to entertain judicial review of a determination of the DAL at the instance of the Commissioner is clearly permissible under Article V, Section 16 of the Louisiana Constitution and does not constitute any deprivation of constitutionally delegated judicial power.[16]

The Commissioner also cites the case of *Meyer v. Board of Trustees of Firemen's Pension & Relief Fund*, 199 La. 633, 6 So. 2d 713 (1942) for the proposition that "any law which denies the judicial branch the power to review the correctness of an order of an administrative agency would be null." This is a vast overstatement of the holding of the *Meyer* case and misses the primary rationale of the Court's decision in that case. *Meyer* involved an action by a widow against the Board of Trustees in which she was seeking a pension in the sum of $15 per month. The Board had made a finding that her husband's death from a cerebral hemorrhage was not the result of injuries he received during the course of his duties as a fireman and refused to award the widow his pension. A statute provided that the decisions of the Board would be "final and conclusive, and [not] subject to review or reversal except by the Board." The court found that if

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15 As discussed in *Boeing*, private litigants may not be deprived of due process if the agency action implicates protected property or liberty interests. 94-0971 at p. 8, 657 So. 2d at 657. However, this issue is entirely separate from whether the courts have been deprived unconstitutionally of judicial power. It is also an issue that has no relevance in this case because the Commissioner is not a person entitled to due process protection. *See* discussion at pp. 14 - 16, *supra* and at pp. 37 - 41, *infra*.

16 In support of his judicial branch deprivation argument, the Commissioner also cites the case of *State v. O'Reilly*, 00-2864 (La. 05/15/01), 785 So. 2d 768. *O'Reilly* considered the constitutionality of a statute authorizing an appointed Commissioner of the Twenty-Second Judicial District Court to conduct criminal trials, accept pleas and impose sentences in misdemeanor cases. The court found that the statute in question violated Louisiana Constitution Article V, Section 1 which vested judicial power in the courts and Article V, Section 22 which requires an elected judiciary. The case, of course, is of little relevance to the issues here because it is a matter involving criminal jurisdiction. However, its holding is entirely consistent with the civil cases discussed in the text in that the statute in question authorized the exercise by someone other than an Article V judge of jurisdiction constitutionally vested in the original jurisdiction of the district courts.

the statute were interpreted to deprive the plaintiff of the right to judicial review of the Board's denial of benefits, "the Board, at will and upon purely arbitrary grounds, could deprive the claimant of her vested statutory rights." 199 La. at 641, 6 So. 2d at 715. The court thus held that this construction of the statute would result in a violation of Section 6 of Article I of the 1921 Constitution, which was then in effect, providing: "All courts shall be open, and every person for injury done him in his rights, lands, goods, and personal reputation shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay."

It is clear from the Court's decision that the basic premise underlying its holding is the finding that the absence of judicial review in this instance would result in the deprivation of a private party's protected property interest. As discussed elsewhere in this Memorandum, the Commissioner has no standing to claim a deprivation of due process because he is not a private juridical person.[17]

The *Meyer* Court does mention as additional authority for its conclusion that the statute being considered was unconstitutional the conferral of judicial power under the 1921 Constitution in the Supreme Court, the courts of appeal and the district courts and, in particular the vesting of original jurisdiction in the Civil District Court for the Parish of Orleans, where plaintiff sought to bring her action for review. However, unlike Article V Section 16 of the 1974 Constitution, the 1921 Constitution extended to the district courts no appellate jurisdiction to review agency decisions. Thus, the review of the Pension Board's denial of Mrs. Meyer's pension which was necessary in order to assure her due process rights, necessarily would have had to be conducted under the district court's original jurisdiction, which the 1921 Constitution forbade the legislature to diminish. *See Loop, Inc. v. Collector of Revenue*, 523 So. 2d at 203 n. 1.[18] Thus, although *Meyer* would likely be decided in the same way today based upon the

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17 *See* discussion at pp. 14 - 16, *infra* and pp. 37 - 41, *supra*.

18 "Under the 1921 Louisiana Constitution, a district court's appellate jurisdiction was expressly restricted to the review of decisions of several specifically named municipal and justice of peace courts. La. Const. 1921, Art. VII, § 36. In order to pay respect to this provision and yet afford litigants judicial review of administrative actions by district courts, this court held such review could be conducted as an exercise of a district court's

(continued on next page)

private litigant-due process analysis that dominates that decision, the "make weight" subsidiary argument regarding the district court's original jurisdiction would no longer be valid under the 1974 Constitution.

Because there is no constitutionally delegated authority to the courts of this State to conduct review of agency decisions, but only a delegation of authority to the Legislature to authorize such review, the Subject Statutes precluding judicial review at the request of the Commissioner do not unconstitutionally deprive the judiciary of power.

From a functional perspective, Professor Baier expresses skepticism in his Amicus Brief regarding the Commissioner's argument that the Subject Statutes deprive the judiciary of its role as the governmental agency with final authority to interpret the state's insurance law. He states that: "Nothing in Acts 739 and 1332 deprives the judiciary of its final say as to what the law is." Baier Amicus Brief, p. 3.

Skipping for a moment the next sentence of the Professor's argument, State Farm notes that he then cites four cases in support of his position. In each case cited, the respective court rendered a judgment interpreting Louisiana insurance statutes in a procedural context other than review of an agency ruling at the instance of the Insurance Commissioner. In *Delta Life Insurance Co. v. Martin*, 59 So. 2d 465 (La. App. 1st Cir. 1952), an insurer sought judicial review of a ruling by the Commissioner. *Block v. Reliance Insurance Co.*, 433 So. 2d 1040 (La. 1983) and *Osbon v. National Union Fire Insurance Co.*, 93-1975 (La. 2/28/94), 632 So. 2d 1168, were both private litigation between an insured and an insurer. Finally, in *Blanchard v. Allstate Insurance Co.*, 99-2460 (La. App. 1 Cir. 10/18/00), 774 So. 2d 1002, an insured sought judicial

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original rather than its appellate jurisdiction. *Bowen v. Doyal, supra.* Because the 1974 Louisiana Constitution restores the Legislature's plenary power to define district court appellate jurisdiction, the obstacle to legislation vesting the district courts with appellate jurisdiction including judicial review of administrative actions has been removed. La. Const. 1974, Art. V, § 16(B). Therefore, we conclude that under the 1974 Louisiana Constitution a legislative act establishing procedures for judicial review of an administrative tribunal by a district court, should properly be considered to be a law providing for that court's appellate jurisdiction. *Accord: Touchette v. City of Rayne, Municipal Fire & Police Civil Service Board,* 321 So. 2d 62 (La. App. 3d Cir. 1975)."

review of a ruling by the Insurance Commissioner in favor of an insurer in a declaratory judgment proceeding brought by the insurer before the Commissioner.

If Professor Baier's point is as it seems to be, given the cases he cites – that merely because the Commission cannot appeal rulings of an ALJ in an adjudication, it does not follow that the courts will not have ample opportunity to interpret Louisiana insurance statutes in other procedural contexts, State Farm wholeheartedly agrees. For instance, any insured disadvantaged by the "void for fraud" provisions in an RCU policy issued by State Farm would be free to litigate the legality of those provisions with State Farm in a lawsuit like *Osbon* and *Block* in which the courts *will* have the final word on the meaning of the provisions of the Insurance Code and the legality of the policy terms under those provisions.

Moreover, although none of the cases cited by the Professor are examples of this situation, it does seem that the Commissioner, *prior to initiation of an adjudication* under the provisions of the Insurance Code and the LAPA, could bring an action for a declaratory judgment within the original jurisdiction of a district court, to seek an interpretation of any provision of the Insurance Code with respect to which he has a live dispute with one or more insurers. However, what the Commissioner may not do is to seek to undo an adverse ruling of an ALJ by bringing a collateral declaratory action to relitigate the same issues with the same insurer *after* the Commissioner and that insurer have submitted the matter to adjudication. To allow the Commissioner to take this action would offend the principles set forth in Part III (A)(1) of this Memorandum regarding the *res judicata* effect afforded final rulings in agency adjudications and the clear intent of the Legislature to preclude the Commissioner from seeking to override a decision of the DAL in favor of a private party in an adjudication by means of judicial review.

Undoubtedly, this was the understanding of the Court of Appeal when it stated in *Brown v. State Farm*:

> We do not interpret La. R.S. 49:951(5) to limit the personhood and attendant rights, obligations or duties of the Department of Insurance beyond the confines of the LAPA . . . . We do, however, conclude that the legislature manifested a clear intention to limit the Department of Insurance's right to seek judicial review under the LAPA.

2000-0539 at p. 5, 804 So. 2d at 45.

This returns us to the skipped sentence in Professor Baier's Brief, where he says: "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." Given the cases cited immediately following this sentence, State Farm assumes that the Professor's conclusion is based upon the premise stated elsewhere in his Brief that the ALJ in the prior proceeding had no jurisdiction to adjudicate the RCU policy dispute and that his ruling is therefore null and void. If so, State Farm does not disagree that if there had never been an ALJ determination in *Brown v. State Farm*, the Commissioner could have brought a declaratory action in the district court to determine the legality of the policy form. However, State Farm strongly contends that it is improper for the Commissioner to be allowed to relitigate the same issues with State Farm again because the matter *was* properly before the ALJ and *was* fully adjudicated to finality between the parties.

3. The Subject Statutes Do Not Violate The Principle Of Separation Of Powers.

The Commissioner raises as his third "fundamental principal" [sic] "(3) the distribution of power amongst the three separate but co-equal branches of government." He also cites cases and uses language at various points in his Memorandum referring to the principle of separation of powers.[19] In the course of the Commissioner's legal ruminations, it is sometimes difficult to discern whether he is arguing that the Subject Statutes deprive the courts of judicial power or that they authorize an improper exercise by another branch of government of the powers of the judiciary. Admittedly, there is substantial overlap between the contention that a statute is unconstitutional because it deprives the courts of judicial power and the claim that a statute by which the Legislature invests judicial powers in the executive offends separation of powers. In any case, the Commission's arguments that the Subject Statutes violate the separation of powers provisions of the 1974 Constitution have no more validity than his contentions that they unconstitutionally diminish judicial power.

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19 *See. e.g.. Bruneau v. Edwards.* 517 So. 2d 818 (La. 1987) and references to "systems of checks and balances," at p. 5 of the Commissioner's Memo, and to Louisiana Constitution Article II, Section 2, at p. 8 of the Commissioner's Memo.

Once again, the Commissioner mentions only in passing what should be the starting point for any evaluation of his separation of powers argument — Article II, Section 2 of the 1974 Louisiana Constitution.[20] Article II, Section 2 states:

> Except as otherwise provided by this Constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.

This prohibition obviously does not mean that members of one branch of the government may not exercise powers of the same nature as those primarily delegated to another branch. Rather, this constitutional provision prohibits one branch of government from performing a specific function that the Constitution has vested exclusively in another branch.

At both the federal and state level, it has long been recognized that the exercise of "judicial" power (in conducting adjudications) and "legislative" power (in rulemaking) by the executive (in administrative agencies) does not violate the separation of powers concept or, in the case of Louisiana, the provisions of Article II, Section 2. *See, e.g.*, Kenneth Culp Davis and Richard J. Pearce, Jr., ADMINISTRATIVE LAW TREATISE, Section 2.8, pp. 90, *et seq; In re American Waste & Pollution Control Co.*, 580 So. 2d 392, 406 (1st Cir. 1991) ("Implicit in the Louisiana Constitution is the legislative authority to vest quasi-judicial powers in administrative agencies . . . .") Thus, the allocation of "judicial" powers by the Legislature to administrative agencies was obviously contemplated by the redactors of the Constitution.

Given the fact that the Louisiana Insurance Department has for many years, if not from its inception, engaged in countless adjudications of matters within the Department's jurisdiction, the Commissioner cannot seriously contend that Article II, Section 2 means that the exercise by the DAL of "judicial" or "quasi-judicial" powers violates Article II, Section 2. If the DAL were now conducting – or the Commissioner of Insurance for that matter had at any time in the past conducted — adjudications that the Constitution committed to the original jurisdiction of the district courts, arguably their activities would violate Article II, Section 2. However, as discussed above, so long as the matters adjudicated by the DAL do not constitute "civil matters", the Division is not exercising "power belonging to" the judicial branch and therefore is not in

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[20] Commissioner's Memo at p. 8.

violation of the separation of powers provision. Article II, Section 2 cannot mean that an administrative agency may not exercise any "judicial-like" powers. What is forbidden is usurpation of authority that has been specifically delegated by the Constitution to the courts.

The case of *Bruneau v. Edwards*, 517 So. 2d 818 (La. 1987), cited by the Commissioner for the proposition that the Legislature cannot enact laws "that undermine or disrupt the distribution of power among the three branches of government – the system of checks and balances which is fundamental to our form of government" (Commissioner's Memo, p. 5) is, again, irrelevant to this case. At issue in *Bruneau* was whether the Legislature could delegate to the Governor the power to transfer money from dedicated funds into the general fund and then from the general fund to any of the state agencies without any specific appropriations being made by the Legislature. This is entirely unlike the situation here in which an agency is exercising a longstanding administrative adjudicative function which the Constitution has not committed to the courts.

The Commissioner must admit that the exercise by the DAL, like any other agency, of functions that are "judicial" in nature does not in itself violate Article V, Section 1 or Article II, Section 2. If the Commissioner's contends that such exercise violates these two Constitutional provisions simply because it is not subject to judicial review, there is no logic in his position, nor has he offered authority supporting it, directly or by analogy. The delegation of functions by their nature "judicial" by the Legislature to an administrative agency is either valid and legitimate pursuant to Article V, Section 1 and Article II, Section 2, using the criteria discussed above, or it is not. If such delegation is legitimate at the outset, there is no basis for finding that it becomes less so under the constitutional provisions in question because the ultimate agency determination is not subject, in all instances, to review by the judicial branch.[21]

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[21] This is not to say, of course, that due process considerations may not demand judicial review in most cases of agency determinations at the behest of private parties. However, this is an entirely separate question from the legitimacy of agency adjudications under the constitutional grant of judicial power and the separation of powers provisions of the Constitution.

Apparently also as part of his "separation of powers" argument, the Commissioner cites the case of *Save Ourselves Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984). However, once again that case is not instructive with respect to the matters before this Court and only furnishes another "sound byte" quotation superficially supporting the Commissioner's argument but taken entirely out of context. The language quoted by the Commissioner in his Memorandum came from the portion of the Supreme Court's opinion headed "Scope of Review" and refers to the standard of review to be used by the Court in reviewing agency determinations. The full context in which the quoted language appears, replicated in the footnote below, demonstrates that the "courts' traditional primacy" terminology quoted by the Commissioner refers to the *de novo* review of issues of law generally used by courts as contrasted to the standard used to review factual findings.[22] The *Save Ourselves* Court certainly did not even remotely suggest that judicial review of agency decisions interpreting the law is required by either the constitutional delegation of judicial power to the courts or the constitutional prohibition against the exercise by one branch of power belonging to another.

State Farm urges the Court to find that the Subject Statutes do not offend Article II, Section 2 of the Louisiana Constitution.

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[22] "Due concern both for the intention of the constitution and the statute, and, more generally, for the boundaries between the legislative and the judicial functions, demands that a reviewing court exercise certain aspects of its review function with more circumspection than is appropriate to others. In light of the structure and aims of the public trust doctrine and the environmental act, and the breadth of authority delegated to the ECC, the judicial review function encounters significant limitations in the substantive aspects where the given statutory standards are 'arbitrary', 'capricious' or 'abuse of discretion.' It is elementary that a court's function is not to weigh *de novo* the available evidence and to substitute its judgment for that of the agency. *Buras v. Bd. of Trustees of Police Pension*, 367 So. 2d 849 (La. 1977). *See Weyerhaeuser Co. v. Costle*, 191 U.S. App. D.C. 309, 590 F.2d 1011 (D.C. Clr. 1978); K. Davis, ADMINISTRATIVE LAW (1982 Supp.) at 536, *et seq.*

On the other hand, the constitutional-statutory scheme, its history, intent and the nature of the duties it delegates to the agency and the judiciary, does not imply any derogation of the courts' traditional primacy in interpreting constitutional and statutory provisions and enforcing procedural rectitude. *Benson & Gold Chev. v. Louisiana Motor Vehicle Comm'n*, 403 So. 2d 13 (La. 1981); *Weyerhaeuser Co. v. Costle, supra*, at 1027." *Save Ourselves*, 452 So. 2 at 1159.

4. The Subject Statutes Do Not Violate Article V, Section 22 Of The Louisiana Constitution.

During the course of his argument, the Commissioner also suggests that the Subject Statutes violate Article V, Section 22 of the 1974 Constitution which provides for an elected judiciary.[23] This contention also has no merit. As was the case with Insurance Department hearing examiners prior to adoption of Act 379 of 1995, the ALJ employees of the DAL, who conduct hearings regarding agency determinations do not adjudicate "civil matters" under Article V, Section 16. Therefore, they need not be elected Article V judges. The case of *State v. O'Reilly*, 00-2864 (La. 05/15/01), 785 So. 2d 768 does not hold to the contrary. As discussed above, *O'Reilly* involved an attempt by the Legislature to vest in a non-elected Commissioner criminal jurisdiction that was vested by the Constitution in the district court. The circumstances are entirely different here.

5. The Subject Statutes Do Not Unconstitutionally Diminish The Powers Of The Commissioner.

Although he does not list it as one of the "fundamental principals" at issue in this case, the Commissioner nonetheless makes the argument that the Subject Statutes "unconstitutionally diminish the powers of the Commissioner."[24] The Commissioner contends that because his is a constitutionally created office within the executive branch, by adopting the Subject Statutes, the Legislature has violated Article IV, Section 1(B) of the Constitution which he claims prohibits diminution of his powers. The Commissioner goes on to posit that the Subject Statutes, "by transferring to **employees** of the DAL the authority to make final, non-reviewable decisions on matters that involve the exercise of executive discretion . . . caused the COI to suffer a diminution of the powers vested in him as the holder of a constitutionally created office." (Emphasis original.)[25] The Commissioner then once again cites the *Bruneau* case in support of his reasoning.

As with his other constitutional arguments, the Commissioner's diminution theory does not hold water. It is true that Article IV, Section 1(A) does create the office of

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23 Commissioner's Memo, p. 7.

24 Commissioner's Memo, pp. 8-9.

25 Commissioner's Memo, p. 9.

Commissioner of Insurance within the executive branch. However, there is no logic in the succeeding steps of the Commissioner's analysis.

The full text of Subsection B of Article IV, Section 1, upon which the Commissioner relies as prohibiting diminution of his powers, states:

> (B) Number of Departments. Except for the offices of Governor and Lieutenant Governor, all offices, agencies and other instrumentalities of the executive branch and their functions, powers, duties, and responsibilities shall be allocated according to function within not more than 20 departments. The powers, functions and duties allocated by this Constitution to any executive office or commission shall not be affected or diminished by the allocation provided herein except as authorized by Section 20 of this article.[26] (Emphasis added.)

The only other provision in the Constitution regarding the powers and duties of the Commissioner of Insurance is Article IV, Section 11, which provides as follows:

> Section 11. Commissioner of Insurance; Powers and Duties.
>
> There shall be a Department of Insurance, headed by the commissioner of insurance. The Department shall exercise such functions and the commissioner shall have powers and perform duties authorized by this Constitution or provided by law.

The foregoing provisions establish that the only constitutional investiture of powers and duties enjoyed by the Commissioner of Insurance is that the position shall exist within the executive branch and that the Commissioner will head the Department of Insurance. Article IV, Section 11 does not delegate to the Commissioner of Insurance any other specific powers or functions nor does any other portion of the Constitution. Thus, the Commissioner only has such powers and duties as are "provided by law."

Contrary to the impression the Commissioner seeks to create by his selective quotation of Article IV, Section 1(B) in his Memorandum,[27] the only diminution of powers prohibited by that provision is reduction of constitutionally delegated powers, functions and duties as a result of the allocation of functions, powers, duties and responsibilities to not more

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26 Section 20 of Article IV allows the Legislature, by two-thirds vote of each House to provide for appointment rather than election of the Commissioner of Agriculture, the Commissioner of Insurance, the Superintendent of Education, the Commissioner of Elections, or any of them. It also provides that the Legislature, by similar vote, may provide for merger or consolidation of any such office, its department and functions with any other office or department in the executive branch.

27 Commissioner's Memo, p. 9.

than 20 departments.[28] The only powers, functions, duties and responsibilities the Commissioner has are those entrusted to him by statute. Thus, the Legislature has full power, authority and prerogative to vest the Commissioner with authority and to withdraw that authority as it sees fit. To the extent that the Subject Statutes have in any way reduced the Commissioner's powers, such reductions are not only constitutionally permissible but are precisely the sorts of legislative exercise envisioned by the Constitution's framers.

Finally, the citation to the *Bruneau* case is as inapposite here as it is elsewhere in the Commissioner's Memorandum. As discussed above, in *Bruneau*, the court found it inappropriate for the Legislature to delegate its power to appropriate funds to the Governor, an official in the executive department. That case bears no resemblance to this one. Here, the Legislature has taken the authority for conducting "adjudications" as defined in the LAPA from one executive agency and transferred that authority to a different agency within the executive department. The Subject Statutes do not effect a transfer of executive power to any other branch of government, but merely reallocate statutorily delegated power, responsibility and function within the executive branch. Not only does this action by the Legislature not contravene any constitutional prohibition, it is specifically approbated by Article IV, Section 1(C) of the Constitution, which states:

> (C) Reorganization. Reallocation of the functions, powers, and duties of all departments, offices, agencies, and other instrumentalities of the executive branch, except those functions, powers, duties, and responsibilities allocated by this Constitution, shall be as provided by law. (Emphasis added.)

The Commissioner's strained efforts to construct a constitutional argument to rid himself of what he sees as unacceptable constraints upon the exercise of his power by the Subject Statutes are typical of the institutional aggrandizement which very likely led to the Legislature's enactment of the Subject Statutes in the first place. While there is room for disagreement regarding the wisdom of the procedural innovations wrought by the adoption of the Subject Statutes from a policy standpoint, there should be no question that they are constitutional.[29]

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28 This consolidation by the bureaucracy was an innovation of the 1974 Constitution.

29 It must be remembered that the Subject Statutes have changed adjudication procedures conducted by all agencies of the state government except those specifically excepted by

(continued on next page)

6. Due Process Considerations Are Not Implicated By The Subject Statutes.

Finally, State Farm addresses an argument that is suggested by the Commissioner's second "fundamental principal", but which he does not expand upon in the remainder of his Memorandum: "(2) the right of a party adversely affected by the decision of the administrative tribunal to have the legal correctness of that decision reviewed by the judicial branch."[30] This statement suggests that the Commissioner is raising the question whether a state agency (which is the only "party" who is precluded from judicial review by the Subject Statutes) has a due process right to such review.

This, of course, is precisely the argument that was raised by the Commissioner and rejected by the Court in *Brown v. State Farm, supra.* As discussed above, State Farm maintains that the decision in the *Brown* case precludes litigation of all the Commissioner's unconstitutionality arguments, at least *vis-à-vis* State Farm. *A fortiori*, the court's specifically

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law. Thus, the private person who is party to such adjudications before agencies may as likely be an individual whose driver's license has been revoked as a multi-national corporation seeking a permit from the Department of Environmental Quality. A great deal of concern has been expressed over many years by courts and commentators regarding the neutrality of hearing officers who conduct adjudications between private parties and governmental agencies. *See, e.g., Arnett v. Kennedy,* 416 U.S. 134, 171 (1974), White, J. concurring and dissenting; Davis and Pearce, ADMINISTRATIVE LAW TREATISE, Section 9.8, pp. 67-68; Verkuil, A STUDY OF INFORMAL ADJUDICATION PROCEDURE, 43 U. Chi. L. Rev. 739 (1976). When the hearing officer is an employee of the very agency with whom the private party is adjudicating a dispute, his potential lack of neutrality is troubling and can even have due process implications. *Id.* Studies have long urged a separation of the adjudicatory function from other parts of agencies' operations. Davis and Culp, ADMINISTRATIVE LAW TREATISE, Section 9.9, p. 92, citing to the Ash Council Report on Selected Independent Regulatory Agencies (1971) and the President's Committee on Administrative Management (1937). Louisiana is one of many states which have created central administrative law judge panels whose rulings are given finality. Among the many benefits of this approach are independence of decision making, enhanced efficiency and accuracy. Rossi, Journal of the National Association of Administrative Law Judges, 19 JNALJ 1 (1999). The legislative history of Act 739 of 1995 indicates that the legislature was motivated by the conviction that "the ALJs who currently work in the various state departments should be removed from the direct influence of those departments and given some measure of independence so that they might render decisions without fear of offending a department head." Committee on House and Governmental Affairs, Minutes of Meeting, May 23, 1995, p. 4. Florida, South Carolina, and Missouri have adopted this model across the board. Other state systems which afford ALJs or hearing officers final order authority in certain types of cases include California, Colorado, Maryland, Massachusetts, Minnesota, New Jersey, North Carolina, Tennessee, Wisconsin, Washington, and Wyoming. *Id.* at p. 8.

30 Commissioner's Memo, p. 4.

litigated holding there that the Department of Insurance, as a state agency, is not a "person" for purposes of Article I, Section 22, and thus is not entitled to due process, is entitled to preclusive effect.

Aside from *res judicata* considerations, the holding of the Court in *Brown v. State Farm* would in any case be binding upon this Court for its precedential effect and is clearly correct in its reasoning. As held by the First Circuit, a state agency, as a juridical person that is a creature of law, has only those legal rights granted by the law. 2000-0539 at pp. 4-5, 804 So. 2d at 45. The purpose of the Bill of Rights to the Louisiana Constitution is to protect private parties from governmental intrusion. The *Brown* court correctly treated the Commissioner's effort to claim the protection of the state due process clause as no more than an improper and inappropriate effort by one agency of the executive branch to prevent the Legislature from reallocating powers from that agency to another executive agency.

Our courts have long recognized the distinction between the protection afforded to private parties by the due process clause and the absence of such protection for government agencies with respect to determinations made by other agencies. In *Loop, Inc. v. Collector of Revenue*, 523 So. 2d 201, 202 (La. 1987), the court stated:

> It is well settled that an individual's right of judicial review of administrative proceedings is presumed to exist. La. Const. of 1974, Art. 1, §§ 2 and 22. *Delta Bank & Trust Co. v. Lassiter*, 383 So. 2d 330 (La. 1980).... A government agency which does not have a constitutionally guaranteed right of judicial review necessarily must rely upon and comply with statutory provisions for such review. *See, Estep v. United States*, 327 U.S. 114, 66 S. Ct. 423, 90 L.Ed. 567 (1946); *Board of Commissioners v. Department of Natural Resources*, 496 So. 2d 281, 287 (La. 1986).

State Farm submits that much of the concern expressed by some commentators regarding the constitutional implications of denying the Commissioner a right to judicial review stems from the contemporary assumption, that is almost an automatic reflex, that it is unfair to deny anyone judicial review of an adverse agency determination. However, it is important to realize that what is at stake here is not the deprivation of a private person of a protected property or liberty interest. Leaving aside the technical legal conclusion that an agency is not a "person" for due process purposes, from a functional perspective, the value at stake in whether the legislature should be permitted to preclude one executive agency from asking a court to adopt its

interpretation of the law over that of another agency in the first agency's dealings with a private party.

The real question is not procedural fairness as a matter of individual right, or the usurpation of the power of the judicial branch, or the diminution of power of the executive branch. Rather the Subject Statutes represent a valid legislative choice to reallocate certain decisional authority directly affecting individual private parties from one agency of the executive to another and to eliminate the first agency's ability to reverse the second agency's decision when it favors the private party. This is not nearly as "shocking" or "remarkable" a state of affairs as may seem at first blush or as some commentators suggest.

Indeed, there are many examples in Louisiana and other states of one executive agency being delegated authority to adjudicate disputes between another executive agency and private parties, where the decision of the adjudicating agency involves interpretation of the law and is final and binding, and there is no right on the part of the litigating agency to judicial review of the adjudicating agency's decision. For instance, in *State of Louisiana, Through Department of Public Safety & Corrections, Office of State Police, Riverboat Gambling Division v. Louisiana Riverboat Gaming Commission*, 94-1872 (La. 05/22/95), 655 So. 2d 292, the Gaming Enforcement Division of the Louisiana State Police (the "Division") sought judicial review of a licensing decision rendered by the Louisiana Riverboat Gaming Commission (the "Commission") in an adjudication in which the Division had been a party. The Supreme Court determined that the Division was not a "person" within the meaning of the statute authorizing a "person adversely affected by an action, order or decision of the Commission" to seek judicial review. The Court reviewed the development of the law, both before and after adoption of the 1961 version of the Model State Administrative Procedure Act, citing no less than 25 cases from numerous jurisdictions, and concluded that the virtually unanimous rule adopted by the courts was that one executive agency does not have the right to judicial review of another executive agency's adjudicated decisions. 94-1872 , pp. 8-12, 655 So. 2d at 297-99. Indeed, the Court concluded that appeals by state agencies of decisions made by other agencies are disfavored and

unavailable unless the right to such appeal is specifically conferred by statute. *Id.* at p. 16, 655 So. 2d at 301.

Although the *Riverboat Gaming Commission* case did not specifically consider whether preclusion of judicial review upon the application of a governmental agency would be subject to constitutional impediments, the virtual unanimity of the numerous courts following the rule that agencies have no right to judicial review absent specific statutory authorization raises massive doubts that any serious constitutional issues exist.[31] Indeed, the First Circuit Court of Appeal in *State Department of Public Safety & Corrections v. Lee*, 98-0270 (La. App. 1 Cir. 02/19/99), 729 So. 2d 717, specifically considering the procedure called for by the subject statutes, was not the least bit offended by the provision precluding the Department of Public Safety from seeking judicial review of a decision of an ALJ in the DAL dismissing the suspension of a private individual's driver's license. The court stated, without hesitation:

> DPSC points to no other statutory means of review, but contends it is absurd that an ALJ could be the final judge of law in a driver's license suspension case. The legislature chose to make an exception to Revised Statute 49:964 to permit an agency to appeal an interlocutory ruling in a disciplinary case under Title 37. If it chooses to do so in the future, the Legislature could make an exception for issues of law in driver's license suspension cases. But as the law stands now, DPSC has no such right. The trial court correctly dismissed DPSC's suit for judicial review, and we affirm that decision.

98-0270 at p. 2, 729 So.2d at 719.

Should this Court determine that it is necessary and appropriate to decide the constitutional issues posed by the Commissioner in this case, it should reach the same conclusion as was reached in the *Lee* case. The Commissioner of Insurance, and perhaps other agencies such as the Department of Public Safety, may feel that their loss of absolute control over the agency adjudicatory process has weakened their powers and is "absurd". However, unless the powers that have been taken away are constitutionally guaranteed, which they are not in the case of the Insurance Commissioner, diminution is not constitutionally prohibited. The Legislature

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31 *Loop, Inc. v. Collector of Revenue*, 523 So. 2d 201 (La. 1987) is another Louisiana case holding that one state agency has only such right to judicial review of an adverse ruling of another agency as might be provided by statute. The Supreme Court ruled that when a specific procedure is provided by statute by which an agency can seek judicial review of another agency's action, that procedure is exclusive and must be followed precisely.

presumably understood precisely what it was doing when it passed the Subject Statutes, virtually unanimously, in 1995 and 1999. If the Commissioner's position is that his ability to carry out his statutorily conferred powers has been weakened by the reallocation of authority wrought by the Legislature, his remedy is to seek relief from the Legislature, not from this Court.

Professor Baier has correctly cautioned the Court not to declare the Subject Statutes unconstitutional, largely because the First Circuit Court of Appeal has recently held in a matter between the Commissioner and State Farm involving precisely the same subject matter that the Subject Statutes are not unconstitutional. This certainly is sage advice but, if the Court nonetheless wishes to consider in greater detail the merits of the constitutional issues, State Farm submits that the result advised by the Professor is still clearly the correct one.

D. In The Alternative, The Commissioner Should Be Ordered To Approve State Farm's RCU Policy Form.

Should the Court determine that the ruling of the ALJ and the decisions of the Courts in *Brown v. State Farm* are not entitled to *res judicata* effect in this proceeding, the Court may conclude that it is appropriate to consider here the merits of the dispute between the Commissioner and State Farm regarding the RCU policy form filing that was the underlying matter at issue in the prior proceeding. State Farm submits that because the Commissioner and State Farm have agreed that State Farm will not issue the contested policy form until there has been a judicial determination that such issuance is appropriate or the Commissioner approves the form, the Commissioner's request for preliminary injunction is moot and a ruling by the Court thereon at this time is unnecessary.

Furthermore, should the Court determine that it is appropriate to consider the merits of the policy form issue, State Farm urges that consideration thereof be postponed to permit State Farm to present the matter to the Court in a broader context by means of a counterclaim. More specifically, State Farm currently has at least 28 policy forms of various sorts issued to policyholders in Louisiana, which have been approved by the Commissioner over the years and which incorporate the same "void for fraud" provision at issue in connection with the RCU policy form. Moreover, it is likely that in the future State Farm will submit other policy forms to the Commissioner for new or revised coverages that also will contain this provision. If

this matter is to be re-litigated in this Court, State Farm requests that, for sake of efficiency, the issues be presented in a global manner rather than litigated piecemeal.

1. **Background Of The Policy Form Dispute.**

The RCU Policy provides property and liability insurance to owners of condominium property who rent such property to others.[32] Because the RCU Policy provides, among other things, first party fire insurance coverage, it incorporates the mandatory provisions of the Louisiana Standard Fire Policy, La. R.S. 22:691 ("SFP").

The dispute in this matter concerns **Section I and Section II – CONDITIONS, Paragraph 2. Concealment or Fraud** of the RCU Policy ("RCU Concealment/Fraud Clause") which provides:

> This policy is void as to you and any other insured if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.

This clause mirrors the SFP's Concealment/Fraud Clause found at La. R.S. 22:691(F) which provides:

> 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 or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

The Department does not contend the RCU Concealment/Fraud Clause violates the mandatory requirements of the SFP. Instead, the Department contends that in the case of non-fire perils, the clause violates the provisions of Subsection D of La. R.S. 22:636.2 pertaining to cancellation of homeowners policies. Subsection D provides:

> No insurer providing property, casualty, or liability insurance shall cancel or fail to renew a homeowner's policy of insurance or to increase the policy deductible that has been in effect and renewed for more than three years unless based on nonpayment of premium, fraud of the insured, a material change in the risk being insured, two or more claims within a period of three years, or if continuation of such policy endangers the solvency of the insurer. This Subsection shall not apply to an insurer that ceases writing homeowner's insurance or to policy deductibles increased for all homeowners policies in the state.

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32 The Commissioner inaccurately characterizes the proposed policy as one insuring "persons who rent as oppose to own a home." Commissioner's Memo, p. 10. The coverage is in fact in favor of the owner of a leased condominium.

Significant in the resolution of this matter is the distinction between canceling a policy and voiding a policy. Canceling a policy is terminating the policy prior to its expiration date. It is done when an insurer believes the risk of loss is greater or different than it had heretofore assumed and, consequently, wishes to inform the insured that it no longer accepts the risk as insurable under the insurer's own guidelines. An example is where there has been an increase in the hazard insured against that did not exist prior to the inception or renewal date of the policy but which would have caused the insurer to deny the application or not renew the policy. The insurer must provide the insured with advance notice of cancellation so he or she may have enough time to find replacement coverage.

Voiding a policy is wiping out the existence of the policy as of the date of the act which gives rise to the right to void the policy. Voiding a policy is a matter of contract law. It is usually invoked when one party has breached the two-way covenant of good faith and fair dealing associated with all contracts. This, of course, does not mean that a "voided" policy will always be considered never to have existed. For example, La. R.S. 22:619 allows an insurer to void the policy *ab initio* in the instance of fraud in the application for such policy. However, if a fraud is perpetrated in the submission of a claim, voiding of the policy would become effective on the date the fraudulent claim was submitted.

The Department argues that cancellation, with its attendant notice requirements, is the only remedy available to an insurer in the case of fraud in the submission of a claim involving non-fire perils covered by policies insuring the property against perils in addition to fire.[33] The Department's argument is based solely on the fact that § 636.2(D) mentions fraud as one of the several permissible grounds for cancellation and the statute post-dates La. R.S. 22:691 which allows an insurer to void a policy for fraud "before or after a loss."

2. Standards Governing Approval And Disapproval Of Policy Forms.

The Insurance Code requires that all basic insurance policy forms, subject to some exceptions not relevant here, be filed with and approved by the Commissioner of Insurance before issuance or delivery. La. R.S. 22:620. The First Circuit Court of Appeal recently

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33 Commissioner's Memo, p. 11.

reiterated that the provisions of La. R.S. 22:620 must be interpreted "to mean that, in the absence of conflict of laws or policy, an insurer has the same right to limit its liability and impose whatever conditions it pleases upon its obligation under the policy." *Jackson v. Rogers*, 95-0486, p. 3 (La. App. 1 Cir. 11/09/95), 665 So. 2d 440, 442, citing *La. Commercial Bank v. Ga. Int'l Life Ins. Co.*, 618 So. 2d 1091, 1096 (La. App. 1st Cir.), *writ denied*, 620 So. 2d 880 (La. 1993). Accordingly, unless the proposed policy conflicts with law, it must be approved.

Any decision of the Commissioner disapproving a policy form "shall state the grounds therefor." La. R.S. 22:620(C). The grounds for disapproval are enumerated in La. R.S. 22:621 as follows:

> (1) If it is in any respect in violation of or does not comply with law.
>
> (2) If it does not comply with any controlling filing theretofore made and approved.
>
> (3) It if contains or incorporates by reference any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract.
>
> (4) If it has any title, heading, or other indication of its provisions which is misleading.
>
> (5) If the purchase of insurance thereunder is being solicited by deceptive advertising.
>
> (6) If it is in any respect in violation of or does not fully comply with the law or any rule or regulation promulgated by the Commissioner of Insurance.

State Farm's RCU Policy was disapproved on the grounds that its concealment/fraud clause is in violation of La. R.S. 22:636.2(D), *i.e.*, grounds (1) and (6) above.

For the reasons below, State Farm respectfully submits the RCU Concealment/Fraud Clause is in full compliance with the law and public policy of this state and, therefore, the RCU Policy should have been approved.

3. **Argument.**

It is not disputed that the RCU Concealment/Fraud Clause complies with the provisions of the SFP Concealment/Fraud Clause. The sole issue in this matter is, therefore, whether that clause as applied to perils other than fire in a policy which provides coverage for multiple perils violates La. R.S. 22:636.2(D). More specifically, the issue is whether cancellation under § 636.2(D) is the only method by which an insurer may rid itself of a risk

where the basis for such risk avoidance is fraud committed by the insured in the submission of a claim.

Because no provision of the Insurance Code expressly prohibits application of the SFP Concealment/Fraud Clause to risks other than fire when several property risks, including fire, are assumed in one policy, determination of this issue requires application of the rules of statutory interpretation and the search for the Legislature's intent in enacting Subsection D of § 636.2.

The Department's argument that § 636.2(D) does not permit an insurer to void a policy for fraudulent submission of a claim involving non-fire perils is legally incorrect in that it ignores the longstanding law in effect at the time Subsection D was enacted and, consequently, runs afoul of two well-settled rules of statutory interpretation, namely: (1) existing law is repealed by subsequent legislation only in case of positive enactment or clear repugnancy and (2) where two statutes arguably deal with the same subject matter, they must be harmonized, if possible. *Thomas v. Highlands Ins. Co.*, 617 So. 2d 877, 878-79 (La. 1993).

(a) The Law Permitted And Still Permits Application Of The SFP Concealment/Fraud Clause To Fire And Non-Fire Perils Covered In A Single Policy.

The law has never stated that an insurer's option to void any policy in the wake of fraud committed by the insured, either in the negotiation of an insurance contract or the submission of a claim, violates the public policy in Louisiana. For example, this right of insurers has been embodied in the provisions of La. R.S. 22:619 and 22:691, and in the case law interpreting these statutes since 1948. *Cf. First Guar. Bank v. Pelican State Mut. Ins. Co.*, 590 So. 2d 1306 (La. App. 1st Cir. 1991), *writ denied*, 592 So. 2d 1303 (La. 1992); *Shelter Ins. Co. v. Cruse*, 446 So. 2d 893 (La. App. 1st Cir. 1984); *Green v. Pilot Life Ins. Co.*, 450 So. 2d 406 (La. App. 3d Cir. 1984); *Page v. United Ins. Co. of Am.*, 286 So. 2d 188 (La. App. 4th Cir. 1973); *St. Paul Fire & Marine Ins. Co. v. St. Clair*, 193 So. 2d 821 (La. App. 1st Cir. 1966), *writ denied*, 250 La. 375, 195 So. 2d 646 (1967). In fact, the public policy of Louisiana emanating from the Insurance Code and jurisprudence interpreting it supports an insurer's right to deal swiftly with insureds who submit fraudulent claims by voiding the policy regardless of the risk assumed in such policy.

(b) Statutory Law Permitted And Still Permits Voiding In The Instance Of Fraud.

The Insurance Code contains no prohibition against application of the SFP Concealment/Fraud Clause to non-fire perils assumed in addition to fire in a single policy. Subsection E of La. R.S. 22:691 contemplates such combination policies wherein it provides, in pertinent part:

> E. Appropriate forms of other contracts or endorsements whereby the interest in the property described in such policy shall be insured against one or more of the perils which the insurer is empowered to assume, in addition to the perils covered by 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.
>
> * * *
>
> Any policy or contract otherwise subject to the provisions of Subsection A and B hereof, which includes either on an unspecified basis as to the coverage or for a single premium, coverage against the peril of fire and substantial coverage against other perils need not comply with the provisions of Subsections A and B hereof provided (1) such policy or contract shall afford coverage, with respect to the peril of fire, not less than the coverage afforded by said standard fire policy, (2) the provisions in relation to mortgagee interests and obligations in said standard fire policy may be incorporated therein without change, (3) such policy or contract is complete as to all of its terms without reference to the standard form of fire insurance policy or any other policy, and (4) the commissioner is satisfied that such policy or contract complies with the provisions hereof.

Whether by endorsement or original policy, this statute expressly permits combination policy forms which contain provisions related to non-fire perils that are inconsistent with the SFP. It does not stand to reason, however, that at the same time this or any other statute prohibits application of provisions consistent with the SFP to all risks in combination policies.

Consequently, insurers have always enjoyed the right under the Insurance Code to void an entire policy covering fire and other risks in the case of fraud by the insured in the submission of a claim.

(c) § 691 Governs The Insurer's Remedy In Case Of Fraud.

The pertinent provisions of § 691 have remained essentially unchanged since 1948. The statute has always allowed an insurer to void the "entire" policy for fraud or willful concealment/misrepresentation of a "material" fact committed "before or after a loss." In light of Subsection E of § 691 recognizing that coverage for the risk of fire may be combined with coverage for other risks in a single policy, the reference to the "**entire**" policy in the SFP

Concealment/Fraud Clause supports the conclusion that fire is not the only coverage subject to being voided for fraud whether the fraud is committed before or after a loss.

(d) Case Law Supports Voiding A Policy In The Instance Of Fraud.

The case law likewise recognizes the right of an insurer to void an entire policy covering fire and non-fire perils particularly in the submission of a fraudulent claim. *Cf. Williams v. United Fire & Cas. Co.*, 594 So. 2d 455 (La. App. 1st Cir. 1991). In *Williams*, the plaintiffs submitted a claim for losses due to theft of personal belongings from their home. The policy under which coverage was sought by plaintiffs assumed the risk of fire in addition to theft. Attached to the policy, therefore, was the SFP endorsement required by law which included the Concealment/Fraud Clause.

The jury in *Williams* found that during the investigation of the claim, the plaintiff had made several material misrepresentations with the intent to defraud the insurance company. Plaintiff's claim was dismissed with prejudice. In affirming the trial court judgment, the First Circuit relied upon *First Guaranty Bank v. Pelican State Mutual Insurance Company*, 590 So. 2d 1306 (La. App. 1st Cir. 1991), *writ denied*, 592 So. 2d 1303 (La. 1992), in holding that the insurance company need not have detrimentally relied on the false statement in order to raise the false statement as a defense to the claim.

More importantly, the First Circuit held at footnote 5 of the opinion:

> *First Guaranty Bank v. Pelican State Mutual Insurance Company*, 590 So. 2d 1306 (La. App. 1st Cir. 1991), . . . concerned the Standard Fire Insurance Policy set forth in LSA-R.S. 22:691(F)(2) and 692.1. However, the same reasoning applies in the instant situation. The Standard Fire Policy Endorsement was attached to the policy at issue in the instant case, in the following form, as required by statute:
>
> > The provisions of the Standard Fire Policy are stated below. *State law still requires that they be attached to all policies.* If any conditions of this form are construed to be more liberal than any other policy conditions relating to the perils of fire, lightning or removal, the conditions of this form will apply.
> >
> > * * *
> >
> > This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.
> >
> > Concealment fraud. This 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 or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Williams, 594 So. 2d at 459 n. 5 (underscoring added).

Even before *Williams*, the Supreme Court expressly recognized in *Rodriguez v. Northwestern National Insurance Company*, 358 So. 2d 1237 (La. 1978) that the provisions of La. R.S. 22:692, which clarify the circumstances under which an insurer may avoid liability under a policy, apply to policies covering multiple perils.

Although addressing technical, as opposed to fraudulent, breaches of contracts, the court in *Rodriguez* held:

> La. R.S. 22:692 does not apply exclusively to contracts which insure solely against loss through fire. It applies as well to warranty conditions upon fire insurance coverage included in contracts of insurance which cover a variety of risks. This Court has previously applied the statute to a policy covering accident and theft in addition to fire losses. *Lee v. Travelers Fire Ins. Company*, 219 La. 587, 53 So. 2d 692 (1951).

358 So. 2d at 1241.

It is admitted that the above-cited cases were decided based upon the law as it existed prior to the 1992 addition of Subsection D to § 636.2. Accordingly, the Department's decision in disapproving State Farm's RCU filing must be premised on the argument that the addition of Subsection D to § 636.2 in 1992 effected a repeal of the law which allowed an insurer to apply the SFP Concealment/Fraud Clause to non-fire perils in a policy covering fire and other perils in accordance with La. R.S. 22:691(E). *Cf Williams v. United Fire & Cas. Co.* and La. R.S. 22:691(E) discussed above.

(e) Subsection D of § 636.2 Did Not Repeal The Law Allowing Application Of The SFP Concealment/Fraud Clause To Fire And Non-Fire Perils.

The jurisprudence has long been settled regarding the methods by which a repeal of existing law is accomplished through subsequent legislation. They are "positive enactment" and "clear repugnancy." *Thomas v. Highlands Ins. Co.*, 617 So. 2d 877 (La. 1993). The Supreme Court in *Thomas* held at pages 878-79:

> This Court does not favor legislative repeals by implication. *State v. Randall*, 219 La. 578, 53 So. 2d 689 (1951). In determining whether a statute implicitly repeals existing law, this court has consistently relied upon 'those well established principles of law, reiterated in *State v. Standard Oil Co. of La.*, 188 La. 978, 178 So. 601, 626 (1937), that 'repeals by implication are not favored and will not be indulged if there is any other reasonable construction . . .' . . . that prior laws are

> repealed by subsequent laws only in case of positive enactment or clear repugnancy . . .; that nothing short of irreconcilable conflict between two statutes works a repeal by implication . . .; that where a statute is ambiguous and susceptible of two constructions, the courts will give that construction which best comports with the principles of reason, justice, and convenience, for it is to be presumed that the Legislature intended such exceptions to its language as would avoid its leading to injustice, oppression, or absurd consequences." *Id.* (emphasis added).

Acts 1992, No. 594 adding Subsection D is neither a positive enactment repealing or clearly repugnant to existing law.

(f) **§ 636.2(D) Contains No Repealing Language.**

First, Subsection D does not expressly pronounce that cancellation is the only method by which coverage of non-fire risks may be terminated when those risks are assumed in a policy applying the statutory SFP provisions to all covered risks. Insertion of just one sentence in Subsection D could have accomplished such an intent to change existing law had that in fact been the Legislature's intent.

The Legislature "is presumed to have enacted a statute in light of preceding statutes involving the same subject matter and decisions construing such statutes . . ." *La. Civil Service League v. Forbes*, 258 La. 390, 246 So. 2d 800, 809 (1971). Similarly, "all laws are presumed to have been passed with deliberation and it is reasonable to conclude that the legislature did not intend to abrogate prior law, in the absence of language conveying such an intention in the later act." *Caulfield v. Leonard*, 95-1043, p. 5 (La. App. 5 Cir. 06/25/96), 676 So. 2d 1117, 1120, *writ denied*, 96-1911 (La. 11/01/96), 681 So. 2d 1262, citing *Town of Abbeville v. Vermillion Parish*, 207 La. 779, 22 So. 2d 62 (1945).

The Legislature is presumed to have known of the language of § 691 and § 692 and that "decisions construing such statutes" had applied the SFP Concealment/Fraud Clause to non-fire perils when it enacted Subsection D of § 636.2 in 1992. The Department should acknowledge the countless occasions wherein the Legislature has explicitly stated in legislation its intent to repeal or overrule prior law. The language the Legislature chose to use in the 1992 enactment of § 636.2(D) is not "positive enactment" repealing any existing law.

The reasoning used by the Department in not approving the RCU policy is analogous to the unsuccessful argument made in *Caulfield v. Leonard, supra*, at p. 5, 676 So. 2d at 1120. Plaintiff in *Caulfield* argued the Legislature's enactment of La. R.S. 22:1220 in 1990

effected a repeal of La. R.S. 22:1391 enacted in 1970. La. R.S. 22:1220 provides for the imposition of special and general damages against an insurer when the insurer is found to have breached certain duties owed to insureds and claimants. Subsection F of R.S. 22:1220 expressly prohibits an award of any "special damages" under the statute against the Louisiana Insurance Guaranty Association ("LIGA"). La. R.S. 22:1391 is a statute which affords LIGA immunity from all damages in matters relating to the performance of its duties.

Plaintiff in *Caulfield* argued that by negative inference an award of "general damages" against LIGA became acceptable. The court rejected this argument stating that "the negative inference appellees would have us draw from La. R.S.22:1220(F) is not clear enough statement of legislative intent to repeal the immunity granted to LIGA by La. R.S. 22:1391." *Id.* The same conclusion applies in this case. Such a drastic change in insurance law as necessarily espoused by the Department in this case must come from legislative pronouncement much clearer than the negative inference interpretation on which the Department relies.

(g) § 636.2(D) Is Reconcilable With The Law That Allows Voiding For Fraud.

Considering the lack of positive enactment by the Legislature declaring that cancellation is the exclusive method by which an insurer may avoid the continued coverage of non-fire perils in the case of the submission of a fraudulent claim, the Department should approve State Farm's RCU Policy if Subsection D is not "clearly repugnant" to the pre-1992 law as embodied in § 691 and the jurisprudence interpreting the statutes.

Where two statutes deal with the same subject matter, they should be harmonized, if possible. *Morris v. East Baton Rouge Parish Sch. Bd.*, 93-2396, p. 5 (La. App. 1 Cir. 03/03/95), 653 So. 2d 4, 11, *writ denied*, 95-0852 (La. 05/05/95), 654 So. 2d 335. Such statutes must be harmonized if possible because "nothing short of irreconcilable conflict will work a repeal by implication." *Caulfield, supra*, at p. 5, 676 So. 2d at 1120. There is no irreconcilable conflict between § 636.2(D) and the SFP and RCU Concealment/Fraud Clauses as embodied in § 691 because the provisions can operate in harmony.

For example, assume an insured commits fraud in the application for a policy insuring property against fire and other perils. Also assume the insurer does not discover the

fraud until years after the fact at which time the insured has paid all premiums when due and may have collected under the policy on one or more otherwise valid claims. Rather than voiding the policy *ab initio*, returning all premiums paid and seeking to recoup past claim payments made, the insurer could choose instead to cancel the policy under § 636.2(D).

Additionally, if § 636.2(D) is in conflict with and, therefore, repeals the law applying concealment/fraud clauses to non-fire perils, then even R.S. 22:619 would be repealed. This law allows an insurer to void the policy from its inception if the insurer later discovers the insured committed fraud in the application. Surely the insurer should be able to void *ab initio* and not simply cancel coverage. There is nothing in the § 636.2(D) which suggests that it is intended to prohibit the insurer from voiding the policy for fraud in this instance. Given the fact that other provisions of the Insurance Code permit an insurer to void a property policy for fraud, the Legislature most surely would have repealed them in order to give superior effect and status to § 636.2(D).

Moreover, Subsection D was a brand new addition to § 636.2 in 1992. Before Subsection D, an insurer was under no restrictions concerning the stated reason for cancellation of or failure to renew homeowners policies. After Subsection D, an insurer remains free of such restrictions except in the case of any insured holding a policy which has been renewed for more than three years. In the case of any policy renewed for three years or less, an insurer can ignore Subsection D. The Department's conclusion that the Legislature's intent under Subsection D was to repeal existing law by completely taking away an insurer's right to void a policy in the sole instance of fraud is not supported by a reading of the provision in its entirety.

The most reasonable interpretation of the Legislature's intent in adding Subsection D is that the provision was designed merely to create a new right in favor of insureds who have been in good standing with their insurers for at least three consecutive policy years rather than to remove a right long held by insurers to deal swiftly with fraudulent insureds. For an insured meeting the qualifying language of the subsection, and who has been informed his or her policy is being cancelled or will not be renewed, the insurer must provide one of the reasons listed in the statute. There is no support for the argument that the Legislature intended to limit the

remedies available to an insurer to rid itself of the risk posed by fraudulent insureds. This interpretation is the one consistent with well-established law that disfavors repeal by implication and which requires that all laws be harmonized if possible.

IV. CONCLUSION

For the foregoing reasons, State Farm urges that the Court find that *res judicata* requires dismissal of State Farm from this lawsuit. Alternatively, the Court should not rule on the constitutionality of the Subject Statutes at the preliminary injunction stage. In any event, if the substantive merits of the constitutional issues are considered, the Court should find that the Subject Statutes are constitutional and deny the relief sought by the Commissioner.

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Memorandum in Support of Peremptory Exception of *Res Judicata* and Dilatory Exception of Prematurity and in Opposition to Preliminary and Permanent Injunction and Petition for Declaratory Judgment has been served upon all counsel of record by facsimile, this 15th day of January, 2003.