STATE OF LOUISIANA

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

DOCKET 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

REPLY MEMORANDUM

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MAY IT PLEASE THE COURT:

J. Robert Wooley, Acting Commissioner of Insurance, State of Louisiana (hereinafter "COI" or "Plaintiff"), with all due respect, submits this Reply Memorandum in response to the Brief of Amicus Curiae, Paul R. Baier, Professor of Law.

While the undersigned counsel for the COI is a mere student of the law, not a respected and learned Professor, it is submitted that insofar as Amicus was laboring not only under a constraint of time, but was not privy to all pertinent information as regards the prior proceedings, that certain assertions and conclusions reached in the Brief of Amicus require clarification and/or correction.

The Unconstitutionality of Acts 1995, No. 739 and Acts 1999, No. 1332 Was Not Pled in the Petition for Judicial Review and the Issue Was Not Decided by the Court of Appeal, First Circuit in the Prior Proceeding.

It is a well established that a court should not consider the issue of whether a law is unconstitutional if the issue has not been specifically raised in the petition and the pleadings state with specificity in which respects the law is unconstitutional. General assertions are insufficient. Also, the Attorney General must be served.

In the prior proceedings the COI did **not** allege the unconstitutionality of the Acts at issue herein. At most, the COI merely pointed out that the position advocated by State Farm, if

adopted by the court, would render the laws constitutionally suspect and urged the court to render a ruling granting the COI a right to seek judicial review of the underlying Order. (Cf. Meyer v. Board of Trustees of F. Pension & R. Fund, 6 So.2d 713 (La. 1942.)) However, it is hornbook law that the issue of the unconstitutionality of a law cannot be raised by legal briefs; indeed, the citations to that effect are so lengthy they will not be repeated herein.

It is equally well established that if the issue in dispute can be resolved without resorting to a finding that an Act of the Legislature is unconstitutional, then the court should take that path. In keeping with this principle, in the underlying proceeding the COI cited a long line of cases holding that administrative orders are subject to judicial review notwithstanding the fact that a particular statute stated that such order was "final" or "not subject to review". [1]

Thus, the only issue before the Court of Appeal in the prior proceeding was whether the trial court had properly granted the Exception of No Right of Action filed by State Farm. Ancillary to that issue was whether the COI should be granted leave to amend the Petition for Judicial Review if the trial court's ruling was affirmed. The decision not to grant the COI leave to amend was premised principally on the procedural issue of whether one should raise the issue of the constitutionality of an act of the legislature in conjunction with a Petition for Judicial Review – a petition that triggers the court's appellate jurisdiction rather than its original jurisdiction. Obviously, the First Circuit was of the opinion that such an issue should be raised in the context of an ordinary proceeding by filing a petition for declaratory judgment. As Professor Baier correctly states, any other comments by the First Circuit on the question of constitutionality were mere *dicta*.

Therefore, it is respectfully submitted that the issue of the constitutionality *vel non* of Acts 1995, No. 739 and Acts 1999, No 1332 has never been litigated and this Honorable Court is not foreclosed from rendering a decision on the merits on that issue by any actions or decisions rendered in the prior proceeding.

What Forum is the Proper Forum in an Adjudicatory Hearing Held on an Order Disapproving a Policy?

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[1] See for example Bowen v. Doyal, 253 So.2d 200 (La. 1971). At issue in Bowen, was whether the judicial branch could review a final administrative order when the law stated that it was not subject to review and whether the Administrator has a right of action. The court answered in the affirmative on both issues. However, in the prior proceeding herein, the First Circuit declined to follow Bowen.

Professor Baier asserts that a wrong turn was taken when State Farm's request for a hearing was held before the DAL. This assertion appears to be based in part on the premise that nothing in the APA nor the law creating the DAL gives State Farm a right to an adjudicatory hearing; and in part, on the assertion that the DAL was not the proper forum to hold the hearing.

Regarding the first assertion, it is true that the law giving State Farm a right to request a hearing is found in the Insurance Code - §1351(2), as noted by the Professor, and not in Title 49. However, the question remains "what forum is the proper forum to render a decision"? It appears that it is the opinion of the Professor that if the APA does not give one a right to request a hearing then the jurisdiction of the DAL is not triggered, rather jurisdiction remains with the agency whose specific law grants a right to a hearing.

It is respectfully submitted that Professor Baier's position is inconsistent with the express language of Acts 1995, No. 739, and further that Corbello v. Sutton, 446 So.2d 301 (La. 1984) is not dispositive of the issues raised in this proceeding.

Acts 1995, No. 739 enacted Part A of Chapter 13-B of Title 49, consisting of §§ 991 through 999 and sets up the Division of Administrative Law. Pertinent provisions of this Act read as follows:

> - §992A(1) Prior to October 1, 1996, the provisions of the Administrative Procedure Act shall apply to all adjudications as defined in that Act.
>
> - §992A(2) On or after October 1, 1996, **the division shall commence and handle all adjudications** in the manner required by the Administrative Procedure Act **provided that the provisions of that Act are not inconsistent** with the provisions of this Chapter.
>
> - §992B(1). **Notwithstanding any other provision of law to the contrary** except as provided by R.S. 49:967 [exempted agencies] and the provisions of this Section, all adjudications shall be resolved **exclusively** as required by the provisions of this Chapter and the Administrative Procedure Act.
> (2) In an adjudication commenced by the division, the administrative law judge **shall issue the final decision or order**, whether or not on rehearing, **and the agency shall have no authority to override such decision or order.**
>
> **- §994D The Administrative Law Judge shall have the authority to:**
>
> **...**
>
> **(3) Exercise those powers vested in the presiding officer in the Administrative Procedure Act.**

Corbello was decided over a decade before the creation of the DAL. Therefore, *Corbello* does not speak to the issue of which **forum** was the proper forum-- that is, which agency had jurisdiction to render a decision as regards the disapproval of State Farm's RCU policy.[2] The

[2] The term "forum" is defined in Black's Law Dictionary, 5th Ed., in pertinent part as "a place of jurisdiction".

effect of Acts 1995, No. 739 was not to deprive aggrieved persons of a right to a hearing, rather it was to create a new forum and thereby remove the hearing process from the regulator and transfer it to the DAL. Whether the Act is constitutional, on its face or as applied, is not decided by the statement in *Corbello* that the specific laws of the agency control over the more general provisions of the APA because nothing in the "APA" purports to transfer the power to issue adjudicatory orders from the enforcing agency to the DAL. Indeed, Act 739, as quoted above, makes a distinction between the "APA" referred to in *Corbello* and the newly enacted Chapter creating the DAL.

Prior to the enactment of Acts 1999, No. 739 adjudicatory hearings were conducted by the COI in accordance with LRS 22:1351 – 1367. Section 1351, *inter alia,* grants to any person aggrieved by an "order" of the COI the right to demand a hearing thereon. After conducting an administrative hearing pursuant to §1359 "the COI shall make his *order* thereon".

Within the administrative arena there are different kinds of "orders". The "order" referred to in §1359 is an "adjudicatory order" – which is an order that is required to be made after notice and an opportunity for a hearing.

Professor Baier asserts that pursuant to LRS 22:1366 the COI has the right to file an injunctive proceeding in the 19th JDC to enforce his order disapproving the State Farm policy. This is incorrect. Under §1366 only "adjudicatory orders" can be enforced via the injunctive process. The "order" disapproving State Farm's policy was rendered pursuant to LRS 22:620-621. Such an order is not required to be made "on the record" after notice and an opportunity for a hearing. Thus it is not an "adjudicatory order". Rather, it is the type of "order" by which a person might be "aggrieved" and therefore would have a right to a hearing pursuant to §1351.

In this instance, State Farm's request for a hearing on the order disapproving its policy was made after Acts 1995, No. 739 took effect. Therefore, pursuant to LRS 49:992A(2) the adjudicatory hearing requested by State Farm had to be commenced and decided by the DAL, not by the COI.

The "Deference" Issue

Professor Baier puts great emphasis on the fact that the COI argued that the ALJ should show deference to the COI's position to support his argument that the COI was confused about the nature of the disapproval order. Not so.

When State Farm's hearing was held the DAL was relatively new. Frankly, neither it nor the agencies subject to it were certain as to how it was to function. Indeed, the law is glaringly lacking in specifics on this point. Since the DAL conducts hearings that would have been conducted by the regulatory agency it would appear that it is acting as the original tribunal. However, the law also states that it is to conduct its proceedings in accordance with the Administrative Procedure Act, to the extent that that act is not inconsistent with Act 739. Some ALJs were of the opinion that they should decide matters coming before them in accordance with the standards set forth for judicial review proceedings found in LRS 49:964G. That is, they viewed their role "appellate" in nature and thus limited to deciding whether the agency had acted in an arbitrary or capricious manner. Others did not adhere to this view but rather were of the opinion that they were to decide the matter in dispute *de novo*. And some took a middle of the road approach some where in between *de novo* and appellate.[3] (Indeed, this difference of opinion still exists.)

In view of this uncertainty, when the State Farm matter went before the DAL's ALJ, the COI advanced in his brief the argument that the ALJ should show "deference" to the COI's decision - the same argument that he would make to a reviewing court. There was no harm in attempting that tactic, especially since some ALJs were receptive to that approach. But, in the State Farm matter, the ALJ rejected the COI's argument, finding as noted by Professor Baier, that the disapproval order was not an adjudicatory order and therefore was not entitled to any deference. However, the COI did not argue, nor was it ever his intention to advance such an argument, that the order disapproving the State Farm policy was an adjudicatory order.

If Not the DAL and Not the COI – Then Where?

The last argument advanced by Professor Baier in support of his assertion that the issue of the constitutionality of Acts 1995, No. 739 and Acts 1999, No. 1332 can be avoided is that the COI has the right to file a declaratory judgment action in court to determine if the State Farm policy is lawful. But why should the COI file a declaratory judgment action to test the correctness of his (non-adjudicatory) order disapproving State Farm's policy? The onus is not on the COI but on the aggrieved party to seek a hearing. Further, the notion that disputes between

[3] Also, at the time of the State Farm hearing the DAL had not yet promulgated standards for the proceedings it conducted as it was instructed to do by LRS 49:996(6) nor had it promulgated any regulations as required by §996(7).

regulated entities and regulators should be resolved by resorting to ordinary proceedings before a court is inconsistent with long established administrative law and policy. Indeed, the whole thrust of administrative law and policy, driven primarily by jurisprudential doctrine aimed at lessening the court's role in such matters, has been to expedite and streamline the administrative decision making process.

CONCLUSION

The First Circuit did **not** rule on the question of constitutionality of the Acts at issue herein in the prior proceeding for the simple reason that that issue was not raised in the pleadings. Therefore, the issue is ripe for decision by this Honorable Court.

The decision to disapprove the policy was not an adjudicatory order. However the act of disapproving the policy did vest State Farm with the right to ask for an adjudicatory hearing pursuant to LRS 22:1351(2).

Pursuant to LRS 49:992 and 994, the adjudication was required to be conducted by the DAL not the COI.

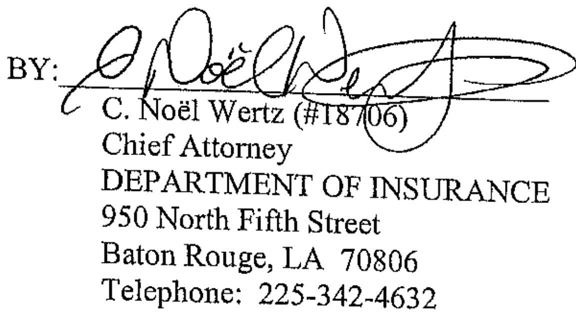
LRS 22:1359 nor 1366 have been neutered by Acts 1995, No. 739, and thus were never triggered by State Farm's request for a hearing. Indeed, absent a declaration by this Honorable Court that Acts 1995, No. 739 is unconstitutional, the COI has been divested of his power to conduct adjudicatory hearings and can no longer "issue his order" as per §1359 nor seek its enforcement as per §1366, notwithstanding Professor Baier's arguments to the contrary.

Would that it were so simple to just take the position that under the rationale of *Corbello* the COI is free to ignore the express language of Acts 1995, No. 739.

For the reasons stated above, and in the original memorandum submitted by the COI herein, it is respectfully submitted that Petitioner is entitled to a Preliminary Injunction, and in due course a Declaratory Judgment and Permanent Injunction as prayed for in the Petition.

RESPECTFULLY SUBMITTED:

J. ROBERT WOOLEY
ACTING COMMISSIONER OF INSURANCE
STATE OF LOUISIANA



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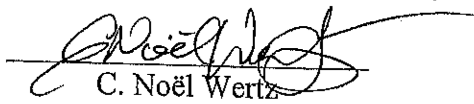
CERTIFICATE OF SERVICE

I hereby certify that on this 13 day of January, 2003, a copy of the above and foregoing has been served on all parties of record in this proceeding, via United States Postal Service, postage prepaid and properly addressed, or by hand-delivery.



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C. Noël Wertz