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

DOCKET NO. 502,311 SECTION 21

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

V.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, HONORABLE MURPHY J. FOSTER IN HIS CAPACTIY 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

ORIGINAL BRIEF OF AMICUS CURIAE ON BEHALF OF THE LOUISIANA HOUSE OF REPRESENTATIVES

INTRODUCTION

The Louisiana House of Representatives files this amicus curiae brief to support neither the Plaintiff, J. Robert Wooley, Acting Commissioner of Insurance, nor Defendants, State Farm Fire and Casualty Insurance Company, et al, but rather in support of the legislative power of the state.

The subject matter and issues of law in this case involve questions concerning the legislature's authority to create and define the duties of the Division of Administrative Law within the Executive branch. More specifically, this case questions the plenary power of the Legislature as granted in Article III, §1 of the Louisiana Constitution vis-à-vis: (a) the limitations on each co-equal branch of government as provided in Article II, §1 of the Louisiana Constitution, (b) the authority to define the powers and duties of the Commissioner of Insurance as stated in Article IV, §11 of the Louisiana Constitution, and (c) the authority to define the scope of review of an administrative agency determination as provided in Article V of the Louisiana Constitution. The decision in this case will address fundamental issues of the legislature's constitutional powers and prerogatives and, as such, legislative members and the institution as a body, has a vital and substantial legitimate interest in the outcome of this case.

I. STATEMENT OF FACTS

This case is a dispute between the Department of Insurance and State Farm regarding a Rental Condominium Unitowners Policy form and, irrespective of the substantive, procedural, and jurisdictional aspects of this case, this court has been asked to declare Acts 1995, No.739 and Acts 1999, No. 1332 unconstitutional.

Acts 1995, No. 739, which originated as Senate Bill 636 of the 1995 Regular Session, creates the Division of Administrative Law within the Department of Civil Service to employ and manage Louisiana's Administrative Law Judges (ALJ). In presenting Senate Bill 636 by Senator Bankston to the Legislative Committee on House and Governmental Affairs, the chairman of the committee Representative Joseph Accardo, Jr. concurred with Senator Bankston's assertion that 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. (*Minutes and audio tape of the House and Governmental Affairs Committee, May 23, 1995.*) A motion to specifically exempt the Department of Insurance from the transfer of their ALJs to the newly proposed Division of Administrative Law was offered but rejected prior to the bill being reported by the House Committee without objection.

Acts 1999, No. 1332, which originated as House Bill 2206 of the 1999 Regular Session by Representative Charles D. Lancaster, Jr. precludes a governmental agency, public official, or other person on behalf of any such agency or person from seeking judicial review of a decision of an adjudication proceeding. During the deliberation of House Bill 2206, again in the Committee on House and Governmental Affairs, Representative Emile "Peppi" Bruneau, Jr. opined that the present system of allowing a governmental entity to pursue judicial review places the public in the position of having to compete in the judicial system against the power and unlimited financial backing of the state. (*Minutes and audio tape of the House and Governmental Affairs Committee, May 6, 1999.*) That bill was also reported by the House Committee without objection and passed the House and Senate Floors without a dissenting vote.

II. PLENARY POWER OF THE LEGISLATURE, ARTICLE III, §1

It is fundamental law that the "legislative power of the state is vested in a legislature", La. Const. Art. III, §1; plenary power is the rule and prohibition the exception. *Board of Commissioners of Orleans Levee District v. Department of Natural Resources,* 496 So.2d 281 (La. 1986); *Chamberlain v. State Dept. of Transportation and Development,* 624 So.2d 874 (La. 1993); Cooley, 1 Treatise on Constitutional Limits, 176-77 (8th Ed. 1927). This plenary rule and prohibition exception is echoed throughout case law with slight variation of diction but with the same solid conclusion: Unlike the federal constitution a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature. *Board of Directors of Louisiana Recovery District v. All Taxpayers, Property Owners, and Citizens of State of La.,* 529 So.2d 384 (La. 1988) citing *Board of Commissioners of Orleans Levee District v. Dept. of Natural Resources,* 496 So.2d 281 (La. 1986). In its exercise of the entire legislative power of the state, the legislature may enact any legislation that the state constitution does not prohibit. *Meredith v. Ieyoub,* 96-1100 (La.9/9/97), 700 So.2d 478. It is a fundamental principle of judicial interpretation of state constitutional law that the legislature is supreme except when specifically restricted by the Constitution. *Louisiana Department of Agriculture and Forestry v. Sumrall,* 95-1587 (La.3/2/99), 728 So.2d 1254, 1259, citing *Guillory v. Department of Transportation and Development, Division of Maintenance and Field Operations,* 450 So.2d 1305, 1308 (La. 1984).

In exercising its plenary powers, the legislature enacted Acts 1995, No.739 and Acts 1999, No. 1332, authorizing the creation of the Division of Administrative Law and precluding a governmental agency from seeking judicial review of an adjudication arising therefrom.

III. PRESUMED CONSTITUTIONALITY OF LAWS

Laws enacted by the legislature are presumed to be constitutional, and the constitutionality of statutes should be upheld whenever possible. *State v. Muschkat,* 96-2922 (La. 3/4/98), 706 So.2d 429. Further,

> "'it is not enough [for a person challenging a statute] to show that the constitutionality [of the statute] is fairly debatable, but, rather, it must be shown clearly and convincingly that it was the constitutional aim to deny the legislature the power to enact the statute.' *Board of Directors of Louisiana Recovery District v. All Taxpayers, Property Owners, &*

Citizens of the State of Louisiana, 529 So.2d 384, 388 (La. 1988), citing *Ancor v. Belden Concrete Products, Inc.*, 260 La. 372, 379, 256 So.2d 122 (1971) (other citations omitted.)."

Louisiana Public Facilities Authority v. Foster, 2001-0009 (La. 9/18/01), 795 So.2d 288.

IV. PROHIBITIONS ON PLENARY POWER OF THE LEGISLATURE

Based on the fundamental law that the legislative power of the state is vested in a legislature, and plenary power is the rule and prohibition the exception (as briefed in Amicus' Paragraph II, above) in order to render legislation unconstitutional, it is necessary to rely on some particular constitutional provision that specifically limits the power of the legislature. *Board of Commissioners,* supra, and *Polk v. Edwards,* 626 So.2d 1128, 1132 (La. 1993). The Commissioner of Insurance erroneously relies on several constitutional provisions purporting to limit the plenary power of the legislature, including Article I, §§2, 3, and 22, Article II, §§1 and 2, Article IV, §§1(B) and 20, and Article V, §§1, 16, and 22. Amicus will address these Articles and why they can either be read in conjunction with the exercise of legislative plenary powers or their inapplicability to the enactment and constitutionality of Acts 1995, No. 739 and Acts 1999, No. 1332.

A. Article I ~ Declaration of Rights

The Acting Commissioner suggests to this court that certain enumerated Declaration of Rights afford to the executive branch of government the inalienable right to pursue judicial review of an executive decision adverse to the executive branch. In Article I, §1:

> All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the *individual* and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state. (*Italics added.*)

Likewise, the enumerated declarations in Article I, §§2, 3, and 22, cited by the Commissioner in support of his case, all use the word "person"; not government, department, agency, nor "a party duly elected". "No *person* shall be deprived of life, liberty, or property, except by due process of law; no *person* shall be denied the equal protection of the laws....; and all courts shall be open, and every *person* shall have an

adequate remedy by due process of law and justice..." (Emphasis added) Article I, §§2, 3, and 22.

In the "first round of this case" (Brief of Amicus Baier, page 2), the First Circuit Court of Appeal held that the Department of Insurance, as represented by then Commissioner Jim Brown, is a "juridical person" and not a "natural person" for purposes of Article I, §22 and, as such, has no more legal capacity than the *law* allows, *Brown v. State Farm Fire & Cas. Co.* 2000-CA-0539 (La.App. 1Cir. 6/22/01) 804 So.2d 41. (Emphasis added for later discussion.) The specific language of Article I, §22 providing that "all courts shall be open, and every **person** shall have an adequate remedy by due process of law and justice..." coupled with the other Declaration of Rights applicable to *individuals* and *persons* and not the government, supports Professor Yiannopoulos observations that a governmental entity (such as the Department of Insurance) is a "creature of law" and "[T]hey are indispensable for the realization of human interests, and, in order to assure their function, **the law grants to them** the power to participate in legal life by the attribution of legal personality... and their interest are purely those recognized by law." Citing A.N. Yiannopoulos, *Louisiana Civil Law System* §48 (1977) as reproduced in *Brown*, at 44.

B. Article II ~ Limitations on Each Co-equal Branch of Government

The Acting Commissioner of Insurance avers that Acts 1995, No. 739 and Acts 1999, No. 1332 violate the separation of powers article and that Acts 1999, No. 1332 is unconstitutional as it does not provide a "check" on the powers exercised by the executive branch by making its rulings non-reviewable by the judicial branch in those circumstances involving a ruling that is adverse to the executive branch.

It has long been established that the delegation of certain quasi-judicial powers to various administrative agencies and the exercise of quasi-judicial functions by agencies of the executive branch has been upheld against attacks alleging violation of the constitutional requirement of separation of powers among the branches of government.

See *Pope v. State of Louisiana*[1], 99-CC-2559 (La. 6/29/01) 792 So.2d 713, discussing Congressional delegation of quasi-judicial powers to the federal executive branch, recognizing the state's constitutional counterpart of La. Const. Art. II, §2, and citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985) and *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed. 675 (1986).

In answering the Commissioner's inquiry regarding a "check" on the powers exercised by the executive branch, Amicus asserts that a resolution to the discrepancy solely within the executive branch (i.e., the conflicting interpretation of law by the ALJ and the Commissioner) merely requires the Commissioner to approach the legislature to enact legislation clarifying the law.

C. Article IV, §11 – Authority to Define the Powers and Duties of the Commissioner of Insurance

The Acting Commissioner of Insurance cites Article IV, §§1(B) and 20 for the proposition that Acts 1995, No. 739 and Acts 1999, No. 1332 constitute a divestiture of powers delegated to the Commissioner of Insurance. These cited provisions of Article IV do not define the powers and duties of the Commissioner of Insurance but rather cap the total number of departments at twenty and authorize the legislature, by two-thirds vote, to provide for the appointment in lieu of election of specifically enumerated commissioners, including the Commissioner of Insurance. The constitutional provision specific to the powers and duties of the Commissioner of Insurance is Article IV, §11 that provides:

> "[T]here 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*." (Emphasis added.)

This provision is very similar to that originally offered by the delegates of the Louisiana Constitutional Convention of 1973 with one major exception; ", who shall administer the Insurance Code" was originally included at the end of the first sentence. In offering the language of what is now Article IV, §11, specifically omitting any

[1] The holding in *Pope* was distinguished in the case of *Peterson v. Toffton*, 36-372 (La.App.2 Cir. 9/18/02) 828 So.2d 160, as "*Pope* was directed at the application of the Corrections Administrative Remedy Procedure (CARP) to traditional tort actions; actions which are not related to conditions of confinement. The injuries suffered by the inmate in *Pope* had nothing to do with disciplinary or administrative remedy proceedings... In contrast, Peterson's alleged "tort" claims arise directly from the disciplinary and administrative remedy proceeding of the Department of Corrections (DOC) and not from an independent accident." *Peterson*, at 164. The case sub judice, like *Peterson*, arises from an administrative remedy proceeding.

enumerated powers of the Insurance Commissioner including rate-making, delegate Casey stated "Let's lay it on the line that as this amendment is present right now, today, the legislature and the legislature alone, unless we put something else someplace in this constitution, will enunciate those duties and functions of the commissioner of insurance and will enunciate the functions of the department of insurance." *Records of the Louisiana Constitutional Convention of 1973; Convention Transcripts, Vol. VI, Page 654.* Rising in support of the Casey amendment, Delegate Jenkins said in part "Let's have a commissioner of insurance elected by the people, but let's give the legislature some authority to alter his functions and responsibilities as changing times and new information dictate, rather than once and for all setting him up as a czar over this industry." *Records of the Louisiana Constitutional Convention of 1973; Convention Transcripts, Vol. VI, Page 655.* And that is just what the delegates, and the people of this state in the ratification of the 1974 Constitution, did.

Clearly, the constitution in Article IV affirms the legislature's plenary control over the Department of Insurance. Again, absent the Commissioner of Insurance pointing to a specific limiting constitutional provision, legislative Acts are presumed constitutional and these two Acts are to be upheld. The Commissioner has not met his burden to overcome this presumption in his mis-reliance on §§1 and 20 of Article IV.

D. Article V ~ Authority to Determine Review of an Administrative Agency Determination

The Commissioner of Insurance cites several provisions of Article V relative to the powers, proceedings, and composition of the Judicial Branch as support for his allegations that Acts 1995, No. 739 and Acts 1999, No. 1332 violate one or more of its Sections. Many of these arguments are directly related to the separation of powers issue that has previously been addressed and rejected, supra.

In considering a constitutional challenge to Acts 1995, No. 739 and Acts 1999, No. 1332 based on Article V, the Louisiana State Supreme Court in the consolidated cases of *In re American Waste & Pollution Control Co,* 588 So.2d 367 (1991) recognized the constitutionality of quasi-judicial executive agencies vis-à-vis the Judiciary and stated: "It is apparently unquestioned that the issuance of environmental permits is a power which vests, not in the judiciary, but in the executive branch. In this instance, the Legislature has properly reposed this power in the executive and has authorized the DEQ

(within the executive branch) to exercise quasi-judicial authority." Id. at 369. In addressing the specific argument regarding Article V, §16(A) which grants a district court "original" jurisdiction in all civil... matters", the Supreme Court continued by stating: "The Legislature has frequently vested such quasi-judicial authority in administrative agencies, and as we determine in this opinion, has acted under the 1974 Louisiana Constitution within its constitutional authority in vesting judicial review of DEQ determinations in the First Circuit Court of Appeal." *In re American Waste & Pollution Control Co,* at 369 and 370. In rendering its decision, the high court found:

1. DEQ 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...[2] Id at 373.

2. Review of DEQ's permitting decisions clearly represents an exercise of appellate review of quasi-judicial determinations. Id at 370.

3. There is today constitutional authority for the Legislature to vest judicial review of administrative agency decisions in either the district courts or the courts or appeal. Id at 370.

4. If the Legislature were to decide that district courts, either *de novo* or on the agency record, should review DEQ's decisions regarding the issuance of permits, we would find that constitutionally within the prerogative of the Legislature. Conversely, it is within the Legislature's prerogative to provide for that appellate review in a court of appeal. Id at 370, 371.

Likewise, the court in *Anderson v. State*, 363 So.2d 728, (La. 2nd Cir. 1978), stated: "The constitutional article vesting district courts with original jurisdiction of civil matters and exclusive original jurisdiction of cases involving the state does not preclude the legislature from creating administrative agencies with quasi-judicial duties, and whose decision are subject to judicial review." *Anderson* at 730.

Acts 1995, No. 739 and Acts 1999, No. 1332 do not operate to foreclose judicial review of ALJ rulings. In truth, whenever a party, other than the 'agency' is aggrieved by the result of an administrative adjudication that party has the absolute, constitutionally protected, right to seek judicial review. What the Department of Insurance suggests is that when the Executive agency is aggrieved by the decision of the alter ego of itself (the ALJ) then the agency should have a right of judicial review of it's own decision. These participants, the agency and the ALJ, are one in the same – both persona of the Executive branch of our state government. The Commissioner of Insurance is asking for the right

[2] The Supreme Court indicated that DEQ permitting is not a traditional judicial civil matter thereby distinguishing *Moore v. Roemer*, 567 So.2d 75, (La. 1990) and, presumably today would so distinguish *Pope*, Id.

for the 'left hand' to seek judicial review of the 'right hand's' acts. The Acts do not limit the access to the courts for the 'persons' affected by the adjudication – the participants other than the agency; they do not limit the jurisdiction of our courts. What the acts do is clearly delineate, within the Executive branch, the responsible party to adjudicate matters of administrative law.

Before Act 739 of 1995, the Commissioner of Insurance was the adjudicatory officer for the Department of Insurance. Pre-1995, could the deputy commissioner or an employee of the Department or the Insurance Rating Commission have appealed an adjudication by the Department of Insurance? The answer, of course, is NO. The status of judicial review has not been changed by these legislative Acts and, moreover, this illustration further supports Amicus' line of reasoning in Paragraph IV(A) regarding separation of powers.

With specific respect to Acts 1999, No. 1332 which precludes a governmental agency from seeking judicial review of an adverse adjudication, the issue of the constitutional authority and powers of the judicial branch of government is irrelevant to the instant case in that **the law** does not authorize such judicial review. That is not to say that the powers and duties of the Judicial Branch, as enumerated in Article V, are unimportant ~ quite the contrary. They are very important and the potential consequences of this court's decision are testament to that importance. Under the facts of this case, however, the Department of Insurance has no more legal capacity than the **law** allows and the law does not allow the executive branch to invoke the powers and duties of the judicial branch with respect to an adjudication adverse to the executive branch by the executive branch. The law, as provided in the Louisiana Administrative Procedures Act, does allow the Commissioner to argue its position before the ALJ and as stated in *Brown*, "[I]n so doing, the legislature apparently has concluded that the Commissioner's remedy before the ALJ is adequate to protect the interests entrusted to him by law", Id at 45. The court went on to say "As a matter of law and of Constitutional interpretation, however, we cannot say the legislature has afforded the Department of Insurance an inadequate remedy when the Department as a juridical person has no more rights than the law allows", *Brown*, at 45, 46. Hence, the judicial power of the courts is spared from this executive difference in interpretation of the law.

V. CONCLUSION

It is from the people of this state that individual legislators are empowered to serve and it is from the constitution that the legislature as a body is empowered to act.

The Louisiana House of Representatives asks this Court to recognize two absolute truths: (1) the legislature is vested with the plenary power of the people, and (2) the exercise of the plenary power is unfettered but by specific provisions of our constitution. In the exercise of its plenary powers the legislature enacted two Acts to protect the public good of our state. Representatives Accardo and Bruneau testified in committee regarding the public good of these Acts, namely removing department influence in the APA process, bestowing a measure of independence to the ALJ, and keeping the public from having to compete in the judicial system against the power and unlimited financial backing of the state.

The exercise of legislative plenary power in the enactment of Acts 1995, No. 739 and Acts 1999, No. 1332 is appropriate, of great benefit to the people of Louisiana, and constitutional.

Respectively submitted,

ALFRED W. SPEER
La. Bar No. 12328
900 Third Street
State Capitol Building
Baton Rouge, LA 70804
(225) 342-7259
Counsel for Amicus Curiae,
Louisiana House of Representatives

MARY F. QUAID
La. Bar No. 17098
900 Third Street
State Capitol Building
Baton Rouge, LA 70804
(225) 342-6125
Counsel for Amicus Curiae,
Louisiana House of Representatives