NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

SECTION 21

NO. 502,311

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

POST-TRIAL MEMORANDUM
OF STATE FARM FIRE AND CASUALTY INSURANCE COMPANY

On December 10, 2002, J. Robert Wooley, Acting Commissioner of Insurance of the State of Louisiana ("the Commissioner") brought this action against State Farm Fire and Casualty Insurance Company ("State Farm") and several state officials, including those involved in the operation of the Division of Administrative Law of the Department of State Civil Service ("the DAL"). 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*").

On January 21, 2002, this Court denied State Farm's peremptory exception of *res judicata*, which was 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. On that same date, the Court also held a hearing on the Commissioner's request for preliminary

injunction. Without ruling on the preliminary injunction, the Court went forward with trial on the merits of the Commissioner's Petition on February 4 and 5, 2003.

This Post-Trial Memorandum is submitted on behalf of State Farm to provide legal authorities and argument regarding various matters raised at trial and to support State Farm's positions regarding the merits of this case. It is State Farm's position that the issues underlying the Commissioner's claims in this action are purely legal ones and that all or practically all of the evidence offered by the Commissioner at the hearing is irrelevant. Accordingly, this Memorandum discusses only incidentally the testimony and documentary evidence offered at trial. State Farm urges that all the relief requested in the Commissioner's Petition be denied as a matter of law and that the Court enter judgment in favor of the defendants.

I. BACKGROUND

State Farm spent nearly two years discussing and corresponding with the Department of Insurance seeking to obtain approval of a policy form for rental condominium unit owners ("RCU") insurance in the State of Louisiana. Finally, 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. State Farm Exhibit 10. 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.

State Farm Exhibit 9. 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 ALJs in the DAL. Following the hearing, the ALJ ruled

definitively in favor of State Farm, ordering the Commissioner to 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 requested that the Court allow him to amend his petition, apparently to seek a declaratory judgment that Act 1332 is unconstitutional. 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, as a governmental juridical person with limited rights, is not entitled to judicial review of an adverse decision of an ALJ under Article I, Section 22 of the Louisiana Constitution, which guarantees an "adequate remedy at law by due process of law and justice." The Court concluded that the provision of the amended LAPA denying the Commissioner a right of judicial review of DAL decisions is not unconstitutional.[1]

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1 With respect to the refusal to allow the Commissioner to amend his complaint, the First Circuit also affirmed the ruling of the district court. The Court held that the first ground

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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, seeking a declaration that the statutes enacted by Acts 1995, No. 739 and Acts 1999, No. 1332 ("the Subject Statutes") are unconstitutional and that the decision of the ALJ regarding the legality of the RCU policy is therefore of no effect.[2]

As the Court is aware, State Farm maintains that it should be dismissed from this action based upon the *res judicata* effect of *Brown v. State Farm* with respect to the constitutionality of the Subject Statutes. Alternatively, however, it is abundantly clear that 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. 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. ARGUMENT

A. The Subject Statutes Are Not Unconstitutional.

If State Farm is required to re-litigate the issue, it strongly contends that the Subject Statutes should be held constitutional.

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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, usurpation of judicial power and violation of the separation of powers, 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.

2 Commissioner's Original 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.

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). Article III, Section 1 of the Louisiana Constitution of 1974 vests the legislative power of the State in the Legislature. Under that provision, the Legislature is authorized to enact all laws which it is not prohibited from enacting by some specific provision of the State or Federal Constitution. *Bates v. Edwards*, 294 So. 2d 532 (La. 1974), *appeal dismissed*, 419 U.S. 811, 95 S. Ct. 297; *Ricks v. Dep't of State Civil Serv.*, 200 La. 341, 8 So. 2d 49 (1942); *State v. Cusimano*, 187 La. 269, 174 So. 352 (1937). The Louisiana Constitution, like other state constitutions, does not grant power to the Legislature but constitutes a limitation on the exercise of the plenary legislative power of the people. *Walker v. Superior Brass & Copper Foundry Co.*, 152 La. 626, 94 So. 139 (1922).

The Legislature exercised the plenary power of the people of this state when it enacted the Subject Statutes. *New Orleans Firefighters Ass'n v. Civil Serv. Comm'n of City of New Orleans*, 422 So. 2d 402 (La. 1982). Because the Legislature is entitled to exercise any power not specifically denied by the Constitution, a party questioning the constitutionality of these acts must point to a specific provision of the Constitution that clearly prohibits the Legislature from adopting them. *Polk v. Edwards*, 626 So. 2d 1128, 1132 (La. 1993); *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*, 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. Any doubt as to the legislation's constitutionality must be resolved in favor of constitutionality. *Polk v. Edwards, supra.*

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

The Commissioner has argued that the Subject Statutes are unconstitutionally infirm because they deprive the Judicial Branch of the power "to declare what the law is."[3] He offers quotes from *Marbury v. Madison* and more modern cases stating the general truism, too obvious to require citation, that the construction of statutes rests with the Judicial Branch of government.[4] These legal platitudes, articulated in contexts bearing no pertinence to the issues facing this Court, do not support the relief the Commissioner seeks.

It has long been recognized that the performance of "judicial-like" functions by executive officials, such as finding facts and interpreting and applying the law, does not infringe on the constitutional power of the Judiciary and need not be subject to judicial review. *See, e.g., Murray's Lessee v. The Hoboken Land & Imp. Co.*, 59 U.S. 272, 280-81, 15 L.Ed. 372, (18 How. 272) (1856) (that administrative duties involve inquiry into the existence of facts and the application to them of rules of law, functions in their nature "judicial," does not bring them under the judicial power); *U.S. ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 324-25, 23 S.Ct. 698, 47 L.Ed. 1074 (1903) (official duties of heads of executive departments include exercise of judgment in interpreting laws and courts have no general supervisory power to review their decisions); Bates & Guild Co. v. Payne, 194 U.S. 106, 109, 24 S.Ct. 595, 48 L.Ed. 894 (1904) ("courts will not interfere with the executive officers of the Government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, no appellate power being given them for that purpose"). *See also, Zakonaite v. Wolf*, 226 U.S. 272, 33 S.Ct. 31, 57 L.Ed. 218 (1912). The correct approach to analyzing whether there has been an infringement on the judicial power is to examine not the function being performed (*e.g.*, finding facts or interpreting the law), but the context in which the function is performed.

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." The Commissioner would like the Court to jump from this broad constitutional

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3 Commissioner's Original Memo, p. 4.

4 *Id.*

statement of principle 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 inaccuracy 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. Other sections of Article V vest jurisdiction over particular cases in the various Article V courts. For instance, 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 Courts of Appeal have jurisdiction and Article V, Section 5 provides the limits for the jurisdiction of the Louisiana Supreme Court. Unless there is a delegation of jurisdiction over a specific type of case to a specific court, no Article V court has power to exercise jurisdiction over that type of case. In other words, Article V "judicial power" only encompasses the subject matter jurisdiction specifically granted to the various Courts by particular provisions in Article V. Without such a grant, it is constitutionally permissible for other governmental officers to perform "judicial-like" functions with respect to such cases.

Here, the Commissioner contends that the provisions of the Subject Statutes disallowing judicial review by 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 in *Brown v. State Farm* of its jurisdiction. However, it is clear from Article V, Section 16, as interpreted by the Louisiana courts, that there is no constitutional delegation to the district courts of jurisdiction to review the ruling of the DAL in this matter. The Subject Statutes constitute an appropriate exercise by the Legislature of <u>its</u> 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 <u>civil</u> . . . <u>matters</u>. . . .

(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). In *Loop*, the Court concluded that review by a district court of an administrative tribunal's action is an exercise of its appellate review jurisdiction. The Court reasoned 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.[5]

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[5] 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).

The *American Waste* case has been followed consistently in subsequent decisions considering the issue of judicial review of administrative agency action.[6]

In *Boeing Co. v. La. Dept. of Econ. Dev.* 94-0971 (La. App. 1 Cir., 06/23/95), 657 So. 2d 652, the Court 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).
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> 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 concluded that 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.[7]

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6 *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.

7 The *Boeing* court stated that there is a 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.* In his arguments to the Court, the Commissioner failed to cite *American Waste, MEDX, Loop, Angus,* or *Boeing* but, rather disingenuously, cited 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 Constitution 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)

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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 matters that traditionally have 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.

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.[8]

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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 cited *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 *Pope* was the constitutionality of the Corrections Administrative Remedy Procedure (CARP). CARP required presentation to the warden of tort claims, for physical injuries of a person incarcerated at a state correctional institution. 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.

8 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

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The failure of the Subject Statutes to extend jurisdiction to 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. There is no deprivation of constitutionally delegated judicial power.[9]

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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. 36-38, *infra*.

9 In support of his judicial branch deprivation argument, the Commissioner also cited 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 vests 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 above in that the statute in question authorized the exercise by someone other than an Article V judge of jurisdiction over subject matter within the constitutionally vested original jurisdiction of the district courts.

The Commissioner also has cited 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." Commissioner's Original Memo, p. 4-5. 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, which had denied her a pension based upon its finding that her husband's death was not the result of injuries he received during the course of his duties as a fireman. 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 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 was 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.

The *Meyer* Court does mention, as an additional basis for its conclusion that the statute being considered was unconstitutional, the conferral of judicial power under the 1921 Constitution upon 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

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In his Opposition, the Commissioner provided fragmentary quotes from Article V, Section 16, strategically employing ellipses to create the impression that the Section conveys original jurisdiction to the district courts over "administrative agency determinations." Commissioner's Opposition, p. 6. Such a reading would directly contradict the holding of *In re Am. Waste & Pollution Control Co., supra.* Such a reading by the Commissioner also is inherently inconsistent with the Insurance Department's own longstanding practice and that of virtually every other state administrative agency exercising original jurisdiction over adjudication of agency matters. Finally, an examination of the full text of Article V, Section 16, discloses the patent inaccuracy of the impression the Commissioner seeks to convey.[10]

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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 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: "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 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 jursidiction, 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)." Thus, although *Meyer* would likely be decided in the same way today based upon the 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.

10 The only "administrative agency determinations" referred to in Section 16 are those made in worker's compensation matters which, unlike traditional agency determinations, were held by the Supreme Court to be "civil matters," necessitating the amendment of Article V in order to vest jurisdiction over them in an administrative agency. *Moore v. Roemer,* 567 So. 2d 75 (La. 1990). Likewise, the reference in Article V, Section 16 to "the state, a political corporation, or political subdivisions" emphasized in boldface type in the Commissioner's Opposition and Reply Memo at p. 6, has nothing to do with extending to district courts original jurisdiction over agency matters, but refers to exclusive original jurisdiction of "civil and criminal matters" in which the State, a political corporation, or political subdivisions or a succession is a defendant.

The Commissioner also has suggested that Article V, Section 10, establishing the jurisdiction of the courts of appeal, vests in those courts appellate or supervisory jurisdiction over agency determinations. Again, this is not the case. Article V, Section 10(A) extends appellate jurisdiction to the courts of appeal in (1) civil cases, (2) matters appealed from family and juvenile cases and (3) certain criminal cases. None of these categories includes agency determinations and, thus, there is no constitutional appellate jurisdiction over such matters.[11]

Nor is there merit in the Commissioner's contention that Section 10(B)'s extension of supervisory jurisdiction "over cases which arise within its circuit" constitutionally delegates to the Court of Appeal supervisory review of agency determinations. To the contrary, "cases" refers to those matters over which the courts of appeal are delegated appellate jurisdiction under the first part of Section 10(A). This is clearly established by the constitutional history of Section 10. During the proceedings of the Constitutional Convention of 1973, the following colloquy occurred regarding the meaning of the term "cases" in this provision:

> Mr. Duval: Thank you, Mr. Henry. Judge Dennis, in the last sentence, it says, it has supervisory jurisdiction over all cases in which an appeal would lie to that court. Now, I just want to get the intent. This is purely for information. That does not, does it, take away supervisory jurisdiction over interlocutory matters in which an appeal would not lie?
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> Mr. Dennis: Wait a minute; say that again, please.
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> Mr. Duval: An appeal does not lie over an interlocutory matter, but under the supervisory jurisdiction of the appellate courts, and writs can be taken. Now . . . to the appellate court . . . This sentence does not intend to take away the right to apply for writs to the Court of Appeal in an interlocutory matter, does it?
>
> Mr. Dennis: No, sir. It grants supervisory jurisdiction over all cases in which an appeal would lie to that court.
>
> Mr. Duval: So, the appeal would ultimately lie, then, after . . .
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> Mr. Dennis: The particular ruling would not have to be appealable but it would have to occur in a case that would be ultimately appealable to the Court of Appeal. This represents no change.

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[11] Contrary to the Commissioner's suggestion, the language in Section 10(A) referring to the Court of Appeal appellate jurisdiction in "direct review of administrative agency determinations in worker's compensation matters," is the product of a constitutional amendment adopted in response to the Supreme Court's holding in *Moore v. Roemer* that worker's compensation claims are "civil matters." *See* notes 7 and 10, *supra*.

(Emphasis added). Records of the Louisiana Constitutional Convention of 1973, Convention Transcripts, Vol. VI, p. 764 (August 16, 1973). Thus, because there is no constitutional appellate jurisdiction over agency determinations, there is also no supervisory jurisdiction over such matters.

There is no constitutional delegation to any of the Louisiana courts of original, appellate, or supervisory jurisdiction over the subject matter historically adjudicated by administrative agencies. There is only a Constitutional delegation of authority to the Legislature to authorize appellate review over such matters. Thus these "adjudications" are not within the constitutional "judicial power" of the Louisiana courts. Therefore, the Subject Statutes precluding judicial review at the request of the Commissioner do not unconstitutionally deprive the judiciary of any constitutionally delegated power.

Moreover, from a purely practical perspective, merely because the Commissioner 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. For instance, any insured disadvantaged by the "Concealment or Fraud" provisions in an RCU policy issued by State Farm would be free to litigate the legality of those provisions with State Farm. Such litigation would allow the courts to have the final word on the meaning of the provisions of the Insurance Code and the legality of the policy terms under those provisions. Similarly, the Commissioner could bring an action for a declaratory judgment within the original jurisdiction of the district court, to seek an declaration of the law governing any provision of the Insurance Code with respect to which he has a live dispute with one or more insurers. Such a proceeding could be initiated rather than submitting the matter to an adjudication under the LAPA. Undoubtedly, this is what the Court of Appeal meant 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.

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

The Commissioner's recent arguments in this case have focused primarily upon the contention that the Subject Statutes violate Article II, Section 2, the separation of powers provision of the Louisiana Constitution. The precise contours of the Commissioner's position on this issue remain hazy. He appears to urge that the Legislature's transfer of decision-making power in one particular circumstance (conducting and deciding "adjudications" between the Department of Insurance and private parties) from an agency headed by an official whose office is created by the Constitution (the Commissioner) to a non-constitutionally created agency in the Executive Branch (the DAL), without allowing the first agency to request that the courts review decisions of the second agency, violates separation of powers. However, the Commissioner offers no pertinent authority or logic to support this proposition.

The Commissioner also has continued to suggest that the courts somehow are deprived of their power as a result of this statutory scheme and he may contend as well that agency adjudication involving legal interpretation without universal judicial review *ipso facto* violates separation of powers. Again, there is no precedent supporting these propositions. To the contrary, for at least 150 years it has been held that many decisions made on a daily basis by persons in the Executive Branch involving interpretation of law, need not be presented to the courts for their review. See text at p. 6, *supra*. It is not, nor has it ever been, the function of the courts to pass upon every legal interpretation an executive officer might render in the course of performing his duties, much less to become embroiled in differences within the Executive Branch as to how a statute should be interpreted. It is simply a mischaracterization to suggest that a loss of judicial power is at stake here. It is also a mischaracterization to suggest that the exercise of power reserved to the judiciary, by an executive officer, is involved here.

It is folly to view the Subject Statutes as implicating checks and balances between or among the branches. Prohibiting judicial review at the instance of one agency of the executive in order to overturn a decision in favor of a private party made by another executive agency in no manner enhances the power of the Executive Branch as a whole or decreases the power of the judiciary. If anything, it increases the checks on the Executive Branch by

preventing an agency having a dispute with a private party from dragging that party through the courts when a neutral decision-maker from a different agency in the Executive Branch has determined that the private party's position is correct.

(a) The Text of the Louisiana Constitution Eliminates Any Separation Of Powers Concerns.

In his scattered arguments regarding separation of powers, the Commissioner ignores a fundamental premise that greatly simplifies the separation-of-powers analysis here. The issue before this Court is whether the Subject Statutes violate the Louisiana Constitution, not federal separation-of-powers principles. Although federal case law and commentary thereon may be useful and enlightening in interpreting the Louisiana constitutional provisions and applying them to particular circumstances, the Louisiana constitutional text is controlling and may eliminate the need or advisability of resorting to federal materials.

Article II, Section 2 of the 1974 Louisiana Constitution 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 is not against members of one branch of the government exercising powers of the same nature as those primarily delegated to another branch. Rather, this constitutional provision prohibits one branch of government from exercising a specific power that the Constitution actually has vested exclusively in another branch. As discussed above, the Subject Statutes do not allocate to the Executive (or to any other branch of government) power that the Constitution has vested the Judicial Branch. Article II, Section 2 is simply not implicated.

Article V, Section 1 states that "the judicial power" is vested in a supreme court, courts of appeal, district courts, and other courts authorized by Article V. The Constitution does not define the term "judicial power," but by examining the other sections of the Constitution vesting jurisdiction in the various courts established by Article V, Section 1, it becomes apparent that matters traditionally adjudicated by administrative agencies are not within the constitutionally dedicated "judicial power." *See* text at pp. 6-14, *supra*.

The Louisiana Constitution is a modern document, drafted and adopted at a point in time post-dating the development and universal acceptance of modern blended-function

administrative agencies. Adjudications involving the subject matter of typical agency determinations have been excluded by the Constitution from the original jurisdiction of the district courts and it has been left to the Legislature to determine if and when any of the Article V courts will have appellate jurisdiction over that subject matter. Accordingly, based on the specific text of the Louisiana Constitution, such matters are not within "the judicial power" of the Judicial Branch. Adjudication with respect to such matters by an agency, whether the Department of Insurance, the Department of Administrative Law or any other department, with or without universal judicial review, does not constitute the "exercise [of] power belonging to" the Judicial Branch in violation of Article II, Section 2. *In re Am. Waste & Pollution Control Co.*, 580 So. 2d 392, 406 (1st Cir. 1991).

(b) Leaving Aside The Specific Text Of The Louisiana Constitution, The Subject Statutes Do Not Violate Separation Of Powers Principles.

The separation-of-powers issue can be resolved by resorting to the express constitutional text. However, it is apparent—from Louisiana case law, historical practice, application of analogous federal precedents, and analysis of the substantive effect of the Subject Statutes—that the Subject Statutes do not violate the principle of separation of powers. This is because applicable law clearly distinguishes between agency determinations and the judicial power delegated to the Louisiana courts.

(1) The Subject Statutes Do Not Alter Allocations of Power Among the Branches of Government.

First, the Subject Statutes do not alter the allocation of power among the branches. Act 739 of 1995 did not expand or contract the authority of the Executive Branch to conduct adjudications in matters involving administrative agency determinations.

Prior to the effective date of Act 739, when the Constitution or a statute required that a hearing be held for an agency to take a particular action affecting a private party, an agency employee would conduct an adjudication pursuant to the terms of the LAPA. In conducting such an adjudication, the agency employee would make findings of fact and interpretations of law. In most instances, the agency employee would then report his determination to the head of the agency and the agency head would decide whether to agree or disagree with his employee's determination. If the agency head accepted his employee's

determination and the determination was in favor of the private party to the adjudication, that was the end of the process. On the other hand, if the agency employee found in favor of the agency and against the private party (and the agency head agreed with the agency employee) the agency employee's determination became final. The private party had the choice under the LAPA to seek judicial review of the determination or not. Finally, if the agency employee made a determination in favor of the private party and the agency head disagreed with the agency employee's determination, the agency head could override the decision of the agency employee, reversing the decision in favor of the private party and reinstating the agency's original decision. Again, the private party then had the option to seek judicial review of the adverse decision.

Act 739 replaced the agency employee/hearing officer conducting administrative adjudications with an ALJ appointed from a panel maintained by the DAL. The Act also eliminated the ability of the agency head to veto the ruling of the officer who actually conducts the hearing and receives the evidence. In substance, then, the effect of Act 739 is to transfer from one agency to another **within the Executive Branch** the power and authority to conduct adjudications. The Act also transferred, from one individual official to another individual official, both **within the Executive Branch,** the final authority to determine the outcome of an adjudication.

The failure to revise the LAPA to provide for judicial review of adjudications at the instance of the agency head does not transfer from the Judicial Branch to the Executive Branch judicial review of any matters previously within the purview of the Judicial Branch. Under the challenged law, if the agency head were allowed to seek judicial review of a decision of an ALJ, the courts would then be resolving a disagreement between two officials of the Executive Branch. This resolution would determine the appropriate outcome, of an adjudicated dispute in an administrative matter, between a private party and the Executive Branch. Prior to adoption of Act 739, if there were such a disagreement within the Executive Branch (between the hearing examiner/agency employee and the agency head), the Judiciary also did not become involved in resolving the dispute. Rather, the law provided that the agency head's decision on the matter prevailed. Under the laws enacted by Act 739 and Act 1332, the Judicial Branch still

does not become involved in resolving disagreements within the Executive Branch; the only thing that has changed is the identity of the official within the Executive who has final say as to the outcome of the adjudication.[12]

Thus, the Subject Statutes do not redistribute or reallocate power or authority between separate branches and therefore do not implicate separation of powers at all. If the exercise of "judicial-like" functions by the individual agencies prior to Act 739 did not violate separation of powers, there is no reason why the exercise of such functions—by means of a centralized panel of ALJs in the Division of Administrative Law—should violate that provision now.

(2) It Is Well Established That Traditional Administrative Agency Adjudication Does Not Violate Separation Of Powers.

It has been recognized from the earliest days of our Republic that separation of powers does not mean that each branch cannot exercise any powers in the nature of the primary power vested in another branch. For instance, it was held early on that the Judiciary has what is technically "legislative" authority to "'make and establish all necessary rules for the orderly conducting business in the said Courts, provided such rules are not repugnant to the laws of the United States . . . .'" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825), quoting Judiciary Act of 1789, Ch. 20, Section 17, 1 Stat. 73, 83.[13]

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12 Of course, because the Commissioner of Insurance no longer has veto power to determine the outcome of an adjudication, he is understandably dissatisfied with the change in the law. However, dissatisfaction of the agency head does not render the law unconstitutional.

13 Interestingly, the Commissioner has made much of the rules adopted by the DAL to facilitate the Division's efficient performance of adjudications, presumably to argue that the DAL is exercising "judicial" powers. However, these activities, properly analyzed, involve the exercise of legislative rather than judicial authority and the courts themselves would be in violation of a literalist separation of powers concept in adopting such rules. Other examples of judicial recognition of the exercise by the judiciary of "legislative" powers include *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86 n.7 (1970) (approving Congress' decision to vest administrative authority in circuit judicial councils); *In re Fid. Mortgage Investors*, 690 F.2d 35, 39 (2d Cir. 1982) (United States Judicial Conference acting "as an auxiliary of the courts" is exempt from the rulemaking provisions of the Administrative Procedure Act), *cert. denied*, 462 U.S. 1106 (1983); *In re Imperial "400" Nat'l. Inc.*, 481 F.2d 41, 45 (3rd Cir.), *cert. denied*, 414 U.S. 880 (1973). *See also Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), upholding the right of the judiciary to promulgate rules pursuant to the Rules Enabling Act of 1934.

Likewise, it has long been established that the courts may exercise "executive" functions, for instance, by appointing subordinate officials to aid in their work. *See, e.g., In re: Hennen*, 38 U.S. (13 Pet.) 230 (1839) (appointing clerk of court). The same principle has been recognized under the Louisiana Constitution's separation of powers provision. *McGee v. Lee*, 328 So. 2d 159 , *on remand*, 330 So. 2d 383, *on remand*, 330 So. 2d 391 (La. App. 3d Cir. 1976) (Legislature may authorize courts or judges in connection with the exercise of judicial powers, duties and functions, to appoint officers for performance of duties which are not strictly judicial). Thus, each branch may, within limits, in carrying out the branch's duties, exercise functions in their nature similar to the primary function vested in another branch.

Congress began authorizing adjudication by agencies in 1789, when it empowered the Comptroller within the Treasury Department to resolve all disputes concerning claims against the Treasury. Kenneth Culp Davis and Richard J. Pierce, ADMINISTRATIVE LAW TREATISE, 3rd Ed., Section 2.8, p. 90. Madison characterized this function as "of a judiciary quality." 12 THE PAPERS OF JAMES MADISON, 265 (C. Hobson and R. Rutland Eds., 1989). Over the years, the Supreme Court has upheld numerous statutory delegations of adjudicatory power to administrative agencies.[14] Indeed, the Supreme Court has never seriously questioned the validity of the commingling of legislative, executive and judicial functions in modern administrative agencies. Brown, SEPARATED POWERS AND ORDERED LIBERTY, 139 U. Pa. L. Rev. 1513 (1991).

An important category of subject matter recognized by the United States Supreme Court to be outside the strict definition of the Judicial Power vested by Article III of the U.S.

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[14] *See, e.g., Zakonaite v. Wolf*, 226 U.S. 272 (1912) (adjudication regarding exclusion of aliens by Secretary of Commerce & Labor); *United States v. Williams*, 194 U.S. 279 (1904) (exclusion of aliens by board of inquiry made up of executive offices and the Secretary of Commerce & Labor); *Monongahela Bridge Co. v. United States*, 216 U.S. 177 (1910) (adjudication regarding unreasonable obstruction of navigation by Secretary of War); *Arver v. United States*, 245 U.S. 366 (1918) (adjudication regarding selective service by administrative officers); *Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177 (1938) (adjudication regarding whether railroad was "interurban" line by Interstate Commerce Commission); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940) (adjudication regarding whether company produced "bituminous coal" under the Act by the Bituminous Coal Commission; "Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law.").

Constitution in the Judicial Branch is that involving "public rights." In *Murray's Lessee v. Hoboken Land & Imp. Co, supra*, the Court explained:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

59 U.S. at 284.

The particular "public right" involved in the *Murray's Lessee* case was equitable claims to land by the inhabitants of ceded territories. By 1932, as explained in *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598, the "public right" subject matter had grown to encompass a wide array of governmental decision-making, including that engaged in by Executive Branch agencies composing the modern "administrative state." The *Crowell* Court, after citing a portion of the above quotation from *Murray's Lessee*, and noting the "public rights" category of subject matter, stated:

> Thus, the congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of the territories or the District of Columbia or to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ex parte Bakelite Corp.*, 279 U.S. 438, 451. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.

285 U.S. 612. *See also, Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (Breyer, J., *dissenting*) ("The Court long ago laid to rest any constitutional doubts about whether the Constitution permitted Congress to delegate rulemaking and adjudicative powers to agencies.")

The reason for this development of the law is that it is inevitable that agencies carrying out regulatory or administrative functions will make decisions that affect individual

private interests. Because statutes as well as due process constitutional mandates require that certain procedures be followed before such deprivations occur, there must be some mechanism for conducting adjudications. Although it is theoretically possible that some such adjudications could have been assigned to the courts,[15] administrative adjudication of agency matters offers enormous advantages over court adjudication, including less expense, superior results in terms of accuracy and consistency, and relieving the courts of a burden they could not possibly assume.[16] Davis and Pierce, ADMINISTRATIVE LAW TREATISE, Section 2.8, p. 90. Even advocates of the purest "formalist" construction of federal separation of powers recognize that the "administrative courts" are one of the few exceptions, founded on "the Constitution" or "historic consensus," to the rule against vesting "judicial" powers in the Executive Branch. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 859, 106 S.Ct. 3245 (1986), Brennan, J. *dissenting*.[17]

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15 Some agency determinations may not qualify for judicial determination if they are not cases or controversies

16 Federal agencies adjudicate far more disputes involving individual rights than do federal courts. The Social Security Administration alone adjudicates over 280,000 cases per year, more than ten times the total number of cases tried to all federal judges. Davis and Pierce, ADMINISTRATIVE LAW, Section 2.7, p. 90. As Ann Wise testified at trial, the Division of Administrative Law handled nearly 12,000 adjudications last year which, if shifted to the state courts, would create an immense burden.

17 At the federal level there exists a great deal of confusion regarding the proper analysis to be employed when confronted with a separation of powers challenge to a particular exercise by one branch of powers traditionally assigned primarily to another branch. Harold J. Krent, SEPARATING THE STRANDS IN SEPARATION OF POWERS CONTROVERSIES, 74 Va. L. Rev. 1253 (1988). The modern Supreme Court cases have generally adopted either a "formalist" approach, holding that the branches of government should be kept as distinct as possible or a "functionalist" view, which is more flexible and allows one branch to exercise functions primarily in the province of another if it does not result in an impermissible intrusion into the core function of the second branch. *Id.* A number of commentators have attempted to make sense of the Supreme Court cases and to extract some unifying principle underlying the results reached and the widely varying rationales enunciated by the Court from case to case. *See, e.g.*, Krent, *supra*; Keith Werhan: NORMALIZING THE SEPARATION OF POWERS, 70 Tul. L. Rev. 2681 (1996). However, properly analyzed in historic context, a convincing case can be made that because the underlying purpose of the separation of powers concept is to protect individual rights and assure due process, this value should inform the courts' analysis in individual cases. Brown, SEPARATED POWERS AND ORDERED LIBERTY, 39 U. Pa. L. Rev. 1513 (1991). Thus, the "ordered liberty" approach suggests deciding whether a particular arrangement violates separation of powers by determining whether it damages or threatens to damage individual rights or to deny private citizens due process. *Id.*

Whether using the formalist or functionalist approach, the federal courts would find that traditional administrative adjudication does not violate separation of powers because agency subject matter is outside the Article III judicial power. The Subject Statutes do

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In fact, the Supreme Court now even recognizes the appropriateness under separation of powers principles of agency adjudication of *private* rights under appropriate circumstances, a much more extensive delegation of Article III judicial power than is involved in the traditional agency adjudication context or in the arrangement now existing in Louisiana following enactment of the Subject Statutes. For instance, in *Commodity Futures Trading Commission v. Schor*, *supra*, the Court found no separation-of-powers violation in Congress assigning to an administrative agency the power to adjudicate a common law claim between two private individuals. The basic controversy being adjudicated in *Schor* was a reparations claim brought by a customer against his broker before the Commodity Futures Trading Commission ("CFTC"). The propriety of the CFTC adjudicating the customer's claim was not challenged; rather, the issue was whether the CFTC could constitutionally exercise jurisdiction over a *counterclaim* filed against the claimant who had invoked the jurisdiction of the agency. The counterclaim was a typical common law claim that otherwise clearly would have been within the jurisdiction of the federal Article III judiciary.

The Court recognized that the judicial independence (*i.e.*, separation of powers) contemplated by Article III serves to protect "primarily personal, rather than structural, interests." 478 U.S. at 848. Because the claimant had waived his personal right to Article III protection by choosing to file his claim with the CFTC, the Court found the arrangement did not infringe upon the personal interest protected. *Id.* at 849. The court then turned to the separate "structural" issue, which it approached from a functional viewpoint. The Court found that the scheme allowing adjudication of common law counterclaims by the CFTC did not

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not cause the investiture in the Louisiana Executive Branch of any greater judicial power than was invested therein under the prior law or increase separation of powers concerns when compared to the arrangements that existed prior to enactment of those statutes. If anything, they ameliorate those concerns.

As noted in the text, even strict formalists recognize the exercise of judicial powers by administrative agencies in traditional agency adjudications as an exception to the tenet that Article III powers should not be exercised by other branches. *Schor*, 478 U.S. at 861, Brennan J., *dissenting*. Likewise, advocates of functionalism would find that the Subject Statutes do not cause any greater intrusion by the Executive Branch into the core function or domain of the Judicial Branch than does the traditional form of agency adjudication, as shown *a fortiori* by the majority opinion in *Schor*.

"impermissibly intrude on the province of the judiciary." *Id.* at 851-52. This conclusion was based upon the reasoning that the power given to the CFTC was limited to that which was necessary to make the reparations procedure workable and that the magnitude of the intrusion on the Judicial Branch was *de minimis*. *Id.* at 856.

Two other statements by the *Schor* Court are relevant here in light of arguments and issues that have been raised in this case. First, the Court stated:

> In this litigation, however, "**[looking] beyond form to the substance of what" Congress has done**, we are persuaded that the congressional authorization of limited CFTC jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers.

478 U.S. at 854 (emphasis added). Thus, it is clear that, when conducting the separation of powers analysis, the Supreme Court of the United States looks beyond the form that arrangements might take, such as the title given to hearing officers and whether an adjudication tribunal is called a "court," to analyze their true substance.[18]

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[18] There are innumerable examples in the case law and statutes echoing the essential modern legal principle that substance must prevail over form. A few illustrative instances from Louisiana law follow: Under La. C.C.P. art. 865 ("Every pleading shall be construed so as to do substantial justice"), it is the relief sought, not the title or caption given to the pleading, that controls. *Peterson v. Ward*, 36,370 (La. App. 2 Cir. 08/16/02), 823 So. 2d 1146; *Revere v. Reed*, 95-1913 (La. App. 1 Cir. 05/10/96), 675 So. 2d 292; *Roddy v. Crawford*, 618 So. 2d 1229 (La. App. 3d Cir. 1993); *Cox v. W. M. Heroman & Co.*, 298 So. 2d 848 (La. 1974); *Polk v. Hunt*, 282 So. 2d 614 (La. App. 1 Cir. 1973); *Griffith v. Roy*, 263 La. 712, 269 So. 2d 217 (1972). "Motion for Appeal" from interlocutory judgment should be considered as application for supervisory writs. *Smith v. Doody*, 96-1260 (La. App. 4 Cir. 09/11/96), 681 So. 2d 419. Substance not form of transaction determines tax liability. *Marathon Pipe Line Co. v. Crawford*, 2000-2753 (La. App. 1 Cir. 02/15/02), 808 So. 2d 873, *writ denied*, 2002-0804 (La. 06/07/02), 818 So. 2d 774. Substance of a charge determines whether it is a tax. *Caddo-Bossier Parishes Post Comm'n v. Arch Chems., Inc.*, 36,605, pp. 5-6 (La. App. 2 Cir. 10/23/02), 830 So. 2d 498, 502 ("The nature of a charge is determined not by its title, but by its incidents, attributes, and operational effects; thus, the nature of a charge must be determined by its substance and realities, not its form"). In determining whether a plaintiff has abandoned an action, "[f]orm does not prevail over substance." *State Dept. of Transp. & Dev. v. Cole Oil & Tire Co.*, 36,122, p. 8 (La. App. 2 Cir. 07/17/02), 822 So. 2d 229, 232. In determining whether a corporation is an alter ego, the court looks to substance of the corporate structure, not its form. *Grayson V.R.B. Ammon & Assoc.*, 99-2597 (La. App. 1 Cir. 11/03/00), 778 So. 2d 1, *writ denied*, 2000-3270 (La. 01/26/01), 782 So. 2d 1026, *writ denied*, 2000-3311 (La. 01/26/01), 782 So. 2d 1027. "Form should not be elevated over substance," and thus insurers are not required to disclose payment installment fees as cost of premium. *Blanchard v. Allstate Ins. Co.*, 1999-2460, p. 7 (La. App. 1 Cir. 10/18/00), 774 So. 2d 1002, 1006.

A second matter of note in the *Schor* opinion is the following statement undermining the Commissioner's argument here that the limitation of a right to judicial review which will "prevent" the courts from interpreting the law somehow violates separation of powers:

> . . . [I]t seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may at their option, elect to resolve their differences.

478 U.S. at 855. Indeed, the Louisiana Arbitration Act, other state arbitration acts and the Federal Arbitration Act "deprive" the courts of opportunities to interpret the law and to "declare what the law is" as much as barring agencies from seeking judicial review of ALJ adjudications. Yet, as the Supreme Court stated, these laws do not violate separation of powers.

Certainly, there are no Louisiana cases holding that administrative adjudication of traditional agency matters violates the separation of powers provision of the current or any prior State Constitution by investing judicial power in the Executive Branch. Indeed, the opposite was strongly suggested by the Court in *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 contemplated by the redactors of the Constitution.

Significantly, the Louisiana Supreme Court considered the *Schor* decision in *Pope v. State*, 99-2559 (La. 06/29/01), 792 So. 2d 713, 719-20. The *Pope* Court stated that it recognized that the U.S. Supreme Court in *Schor* and other cases had approved Congress' delegation of quasi-judicial power to agencies to adjudicate even common law claims. But the *Pope* court noted that the issue considered in *Schor* was separation of powers rather than usurpation of judicial power specifically delegated to the courts by the Constitution. In striking down the scheme calling for administrative adjudication of standard tort claims brought by state prisoners, which traditionally have been litigated in the district courts, the *Pope* Court held that the dispositive inquiry was whether such claims were "civil matters" under Article V, Section 16(A) of the Louisiana Constitution. The *Pope* decision's treatment of the federal jurisprudence

strongly suggests that the Louisiana Supreme Court would find no separation of powers problems with the legislative delegation to an agency of the power to adjudicate with respect to subject matter that is not a "civil matter."

The Louisiana Insurance Department has for many years, if not from its inception, engaged in countless adjudications of matters within the Department's jurisdiction. Since this is true, 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. Once it is accepted that agency adjudication of traditional agency matters does not violate separation of powers, whether under the "public rights" theory developed in federal law or under the plain text of the Louisiana Constitution, the conclusion is inescapable that Act 739 also does not violate separation of powers.[19] That Act did not increase in the least the power of the Executive Branch to adjudicate agency matters.

There is no logical reason, and no principle is stated in the case law, that would distinguish, for separation-of-powers purposes, an adjudication by an agency official who is a member of a central panel from one conducted by a hearing examiner employed by the agency. Likewise, it should make no difference that the decision of the central panel adjudicator is determinative and cannot be overruled by the head of the agency that has the substantive dealings with the private party. Nor should the current preclusion of judicial resolution of intra-Executive Branch disagreements regarding the appropriate outcome of an adjudication offend separation of powers any more than the *de facto* preclusion that resulted from the agency head's power to control the outcome of all adjudications under the prior law.[20]

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19 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 violation of the separation of powers provision.

20 If the Commissioner contends the exercise by the DAL of functions that are "judicial" in nature violates Article V, Section 1 or Article II, Section 2 simply because its adjudications are not subject to universal judicial review, again, 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

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(3) The Subject Statutes Lessen Any Separation of Powers Objections There May Be to Traditional Agency Adjudications.

Contrary to the Commissioner's rhetoric, the changes in the system of agency adjudication brought about by the Subject Statutes lessen rather than exacerbate any separation of powers concerns arising from the vesting of adjudicatory and legislative functions in executive administrative agencies. The underlying rationale for separation of powers is to limit government, to protect individual liberty and to enhance the availability of due process to private citizens. *See, Brown, supra*, at p. 22, n.17. The early American proponents of the separation of powers theory also advocated the concept as a safeguard against government officials acting in their own interest rather than in the interest of the public as a whole. Cass R. Sunstein, CONSTITUTIONALISM AFTER THE NEW DEAL, 101 Har. L. Rev. 421, 434 (1987). The concern that rulers, elected or not, might have independent interests, and use them to oppress the public, played an important role in the framing of the Constitution.[21] The term "self-interested representation" describes the phenomenon of representatives seeking to promote their own interests rather than those of the public.

> If authority were concentrated in one branch, that branch would be more likely enabled to increase its own power at the expense of the governed. By allowing each branch to check the others, the distribution of national powers was intended to act as a partial solution to this problem, increasing democratic control over representatives and safeguarding both liberty and private property against governmental action.

Sunstein, 101 Harv. L. Rev. at 434.

The very same concerns expressed by separation of powers theorists regarding the risk of unfairness to individuals and the abuses threatened by excessive concentration of authority when all three types of governmental powers are vested in the same officials motivated

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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. 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.

[21] *See* The Federalist, No. 51 (J. Madison).

the Louisiana Legislature to adopt the Subject Statutes. The Commissioner glibly quotes from the Federalist Papers and other statements of the Founding Fathers cautioning against the tyranny that could result from the vesting of all forms of power in a single organ of government. However, he fails to recognize that the potential tyrant that James Madison feared was a powerful government official like the Commissioner himself, not the ALJs with highly circumscribed authority and discrete powers.

The Legislature adopted Act 739 of 1995 and Act 1332 of 1999 to disburse the adjudicative power within the Executive Branch. Those acts do not reallocate authority among the branches, but effect structural changes within a single branch to lessen the detrimental impact on private parties of the consolidation of governmental power that has been accommodated in the modern administrative agency.

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 a 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 that has 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). 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.

The Court has indicated an interest in an article written by Christopher B. McNeil, which was cited in a footnote in the Commissioner's Original Memorandum.[22] Relevant to the current topic is the fact that the particular administrative organ referred to in that article, the National Appeals Division of the United States Department of Agriculture, is a panel of administrative law judges that is structurally separated from the agency whose adjudications it handles. McNeil states:

> The separation is not complete, however: Congress has elected not to separate the Division from the Department entirely; rather it retained in the Department the administrative adjudicator, choosing only to separate the adjudicator from the individual agencies. This choice by Congress forces us to recognize that the hearing officers of the National Appeals Division are, by design, not independent of the Department. . . . Contrast this to the successful implementation in a majority of our states, where a core of hearing examiners or administrative law judges is created as an entity unto itself – the central panel of hearing examiners recommended by the Model Act Creating a State Central Hearing Agency, adopted by the House of Delegates of the American Bar Association in 1997. Under the Central Hearing Plan, a cadre of hearing examiners or administrative law judges is created as a stand-alone department of state government. Panel adjudicators then preside over agency hearings and render decisions through a process that retains in the Executive Branch ultimate control over the hearing officer, but which more fully insulates the hearing officer from agency pressure or influence.

19 J. NAALJ at 87-88 (emphasis added). That this concept has been adopted by half of the states and endorsed by the House of Delegates of the ABA attests to its legitimacy.

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22 Christopher B. McNeil, the Administrative Hearing Officer in the National Appeals Division of the United States Department of Agriculture: A BRIEF HISTORY, A CONTEMPORARY PERSPECTIVE AND SOME THOUGHTS FOR THE FUTURE, 19 J. NAALJ 75 (1999). The Commissioner cited the McNeil article for the proposition that "most ALJs cannot render decisions on questions of law or interpret the law. Rather, their purpose is to make findings of fact." Commissioner's Original Memo, p. 6, n.9. Mr. McNeil's comments on this subject relate to certain agencies of the federal government and not to ALJs generally or to their activities in state administrative practice. Nonetheless, "adjudication" necessarily involves, in some instances, interpreting the law and there is no indication in any of the case law that agencies violate separation of powers when they interpret the law. On the contrary, such interpretations are recognized as essential to the process. The question of whether it is the agency head or the administrative law judge conducting the adjudication who has the determinative role in interpreting the law does not have separation of powers implications. Moreover, there is nothing in the Subject Statutes that prevents agencies from adopting rules interpreting law governing matters administered by the agency to which the ALJ would be required to accord deference.

Mr. McNeil's article also explains the reason for the move toward central administrative law judge panels. Speaking of the traditional method by which federal adjudicators are chosen, he states:

> The appointment of an administrative adjudicator is accomplished by a wide variety of vehicles, where some are selected through organized applications like those used by the Office of Personnel Management in the selection of Social Security ALJs; at the other end of the spectrum there are those holding the title of ALJ or hearing examiner who are screened by the agency they serve, hired by the agency, evaluated by the agency, subject to discipline by the agency, and rewarded by the agency. This latter approach carries with it the very real aura of dependence, not independence. As we have heard in the past, the public looks at this captive ALJ and asks: "How can I expect to win this case when the [agency] is my accuser, prosecutor, and judge?" One commentator wrote that this statement exemplifies the public perception of administrative law judges being biased and partial to their employing agencies.

19 J. NAALJ at 87. The article concludes:

> With the 1994 legislation that expanded the role of the Division, Congress has moved the agricultural community a step farther along the road toward creating a system that not only is fair to the appellants but in all ways appears fair. No doubt more than a few appellants have left a proceeding feeling the disappointment that comes from not prevailing against a government agency, and with that disappointment there was probably the sense that the government's adjudicator was an employee of the Department being charged with errors in judgment. Ideally, as each new state moves toward the creation of a stand-alone central panel of hearing examiners, members of Congress will likely take notice of these trends, and see how the streamlining of executive adjudications that have saved money for the states might likewise be a good move for the federal administrative judiciary. So you might well watch for the further evolution of the federal executive judiciary.

19 J. NAALJ at 95. Certainly, nothing in Mr. McNeil's article suggests that the central ALJ concept is an affront to separation-of-powers principles or to the authority of the judiciary.

The stated concerns regarding fairness and impartiality were precisely the same ones that prompted the Legislature to adopt Act 739 of 1995. As stated in the minutes of the House Committee considering that Act:

> Representative Accardo stated that he concurs with Senator Bankston's assertion 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. . . . Mr. Joseph Shorter, III, Department of Insurance, informed the committee that . . . matters that come before the Department's ALJs are highly technical relative to insurance as well as fiscal concerns. Expertise in the relevant areas is crucial to the fairness of adjudicatory proceedings, he said. He pointed out that the disputes that are heard range from the status of an insurance company to the status of an agent relative to violations of the Insurance Code. Mr. Shorter noted that the insurance ALJ is a Nineteenth Judicial District Court judge assigned by the Supreme Court and expressed concern that a judge assigned from the new Administrative Law Section might not have sufficient experience to

> handle any given proceeding. Representative Accardo pointed out that Mr. Shorter's example illustrates that an ALJ would be more independent if set apart from his respective agency. He stated that he expects a competent division administrator would assign appropriately experienced ALJs to handle matters before the various departments. He repeated that the intent of the legislation is to assure independence and fairness in deciding the rights of private and corporate individuals. Representative Boller pointed out that a judge assigned to the Department of Insurance recently left the Nineteenth Judicial District after having found in favor of the Department in 100% of the proceedings in that court, during which time he routinely met ex parte with department personnel. She stated that there should be no special dispensation from a fairer form of judicial proceeding.

State Farm Exhibits 3 and 6, Committee on House and Governmental Affairs, Minutes of Meeting, 1995 Regular Session, May 23, 1995, pp. 4-6.

A similar concern underlay the Legislature's decision to pass Act 1332 of 1999, confirming the lack of availability of judicial review at the instance of the agency head:

> Representative Lancaster said that in his opinion, it is not reasonable for state agencies to have the ability to appeal subsequent to the rendering of a favorable decision on the administrative law level. . . . Representative Lancaster said that in his opinion the process has to have some definite place to end and it should be with the decision of an administrative law judge. . . . Representative Bruneau said that the present system places individuals in the position of having to compete against the power and unlimited financial backing of the state. Representative Bruneau also indicated his support of the Bill.

State Farm Exhibits 1 and 6, Committee on House and Governmental Affairs, Minutes of Meeting, 1999 Regular Session, May 6, 1999.

Ann Wise testified at trial that over 95% of the adjudications conducted by the DAL involve individuals affected by state governmental action, as opposed to regulated corporations. The subject matter of these adjudications includes driver's license suspensions and revocations, student loan infractions, child support default penalties, hunting and fishing violations and a multitude of other controversies between state agencies and individuals. These statistics underscore the importance of the Subject Statutes as modern innovations that provide additional safeguards against the kind of concentration of power that the separation-of-powers doctrine was designed to avoid.

The Subject Statutes reduce the separation of powers concerns that exist under the standard agency adjudication regime. These laws are designed to afford a fairer, more independent and impartial adjudicator and eliminate the ability of an interested agency official to veto a decision favorable to a private party made by the hearing officer who actually conducts the proceeding and hears the evidence. They also prevent a well-financed agency with readily

available in-house counsel from forcing private parties through an arduous appellate process after the private party has prevailed before an impartial hearing officer at the agency level. Although an out-of-state insurance company may seem a less than sympathetic victim, the Court should bear in mind that the great majority of the private parties involved in agency adjudications in Louisiana are individuals, often of limited means and resources. Agency heads are less able to use adjudications to further their own interests. The rights of private parties are safeguarded, under the current system, by affording neutral, impartial and independent decision-makers.

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

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

The Commissioner also urges that the Subject Statutes "unconstitutionally diminish the powers of the Commissioner."[23] The Commissioner has contended 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 also has posited 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.)[24]

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 Commissioner of Insurance within the Executive Branch, along with several other statewide offices. Article IV, Section 11 of the Constitution provides:

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23 Commissioner's Original Memo, pp. 8-9.

24 Commissioner's Original Memo, p. 9.

> 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.

No other provision of the Constitution addresses the functions, powers or duties of the Commissioner or the Department of Insurance. Thus, the only constitutional investiture 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. Neither Article IV, Section 11 nor any other provision of the Constitution delegates to the Commissioner of Insurance any specific powers or functions. Thus, the Commissioner only has such powers and duties as are "provided by law."

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.[25] (Emphasis added.)

Contrary to the impression the Commissioner seeks to create by his selective quotation of this provision in his Memorandum,[26] the only diminution of powers prohibited by Section 1(B) is reduction of constitutionally delegated powers, functions and duties in the course of reducing the number of state agencies. This constitutional provision has no application here, since the Commissioner has no constitutional powers, duties or functions and the Subject Statutes have nothing to do with reducing the number of state agencies.[27]

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25 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.

26 Commissioner's Original Memo, p. 9.

27 This consolidation of the bureaucracy was an innovation of the 1974 Constitution.

The Original *Amicus Curiae* brief of the Louisiana House of Representatives demonstrated that the proceedings in the Louisiana Constitutional Convention of 1973 clearly underscored the intent of the delegates. These proceedings made it clear that the powers and duties of the Commissioner and the Department of Insurance were to be entirely at the discretion of the Legislature. As originally proposed to the Convention, Article IV, Section 11 would have included the statement that the Commissioner "shall administer the Insurance Code." Senator Casey proposed an amendment to that provision eliminating the reference to the Insurance Code. That amendment was ultimately adopted by the Convention and is the current Article IV, Section 11 in the Constitution today. Senator Casey explained his amendment as follows:

> Now, let's not leave anything to our imagination in this particular amendment. 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 else in this constitution, will enunciate those duties and functions of the commissioner of insurance and will enunciate the functions of the department of insurance .... If you wish, on the other hand, that the commissioner of insurance would have regulatory functions, let it be clearly understood that you don't vote for my amendment.

Records of the Louisiana Constitutional Convention of 1973; Convention Transcripts, Vol. VI, p. 654.

In explaining why he was opposed to constitutional language charging the Commissioner with responsibility to administer the Insurance Code, Senator Casey explained:

> I frankly am not sure what that meant and how far that concept went and how much more authority we gave to the insurance commissioner under that amendment – or any greater power than exists today under present law. All we are saying right now is that there will be an insurance commissioner and an insurance department and those functions and duties will be set by the legislature.

Id. During the discussion of the Casey amendment, the following colloquy occurred:

> Mr. Arnette: So, if your amendment is adopted, what we've got is a situation of a statewide elected official with no power. Is that as it is now? Is that what we've got?
>
> Mr. Casey: Mr. Arnette, if this amendment is adopted, it merely says that the legislature by statute will establish the duties and functions of that officer and of that department. That is done in many, many other cases, that we are giving the legislature the prerogative to establish the duties and functions of certain activities or agencies of the state.

Id. at 654-655.

In supporting the amendment, Mr. Jenkins stated:

> 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.

Id. at 655. The Casey amendment was adopted by a vote of 67-48 (*id.* at 657). It is clear that the Constitution of 1974, ultimately ratified by the people of the State, gave the Legislature 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.

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 are unpersuasive. His misguided attack on the Subject Statutes is typical of the institutional aggrandizement that very likely helped lead to the Legislature's enactment of the Subject Statutes in the first place. While there is room for disagreement from a policy standpoint regarding the wisdom of the procedural innovations wrought by the adoption of the Subject Statutes, there should be no question that they are constitutional.

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

Finally, State Farm addresses an argument that the Commissioner may be raising in this case – 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.* The court's holding there that the Department of Insurance, as a state agency, is not entitled to judicial review of the ruling of the DAL under Article I, Section 22 is binding upon this Court and is clearly correct.

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 legal conclusion that an agency is not a "person", for due process purposes, is clearly correct. However, putting that aside, the value at stake here, from a functional perspective, is whether the Legislature should be permitted to preclude an executive agency from asking a court to adopt its interpretation of the law over that of a second agency which has adopted a contrary legal interpretation favorable to a private party with whom the first agency has a dispute. The very purpose of the Bill of Rights to the Louisiana Constitution is to protect private parties from governmental intrusion and deprivation of protected property and liberty interests. The *Brown* court, in effect, correctly treated the Commissioner's claim to protection under the state due process clause as no more than an improper and inappropriate effort to prevent the Legislature from providing greater protection to private parties in their dealings with the government.

Brown v. State Farm is not the first case to hold that the due process clause does not extend a right to state executive agencies to seek judicial review of determinations made by other state executive 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).

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. Many of these examples address the situation in which 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. The Supreme Court concluded that the virtually unanimous rule adopted by the courts was that one executive agency does not have a 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.

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.

Finally, 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.[28]

It is true that *Riverboat Gaming Commission* and *Lee* did not specifically consider whether preclusion of judicial review upon the application of a governmental agency would be subject to constitutional impediments. However, the apparent failure of the parties to even raise the question and the virtual unanimity of the numerous courts following the rule that agencies have no right to judicial review absent specific statutory authorization raise substantial doubts that any serious constitutional issues of any type exist. Accordingly, this Court should reject the Commissioner's invitation to declare the Subject Statutes unconstitutional.

B. In The Alternative, State Farm's RCU Policy Form Should Be Declared In Compliance With Louisiana Law.

If the Court determines that either Act 739 of 1995 or Act 1332 of 1999 is violative of the Louisiana Constitution, the Court must decide the merits of the underlying dispute between the Commissioner and State Farm regarding the Rental Condominium Unit Owners policy form filing (the "RCU Policy"). The RCU Policy should be declared to be in compliance with Louisiana law.

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.[29] 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").

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28 The First Circuit Court of Appeal on January 22, 2003, held again in *City of Baton Rouge v. Bernard*, 2001-2468 (La. App. 1 Cir. 01/22/03), 2003 La. App. LEXIS 63, that governmental agencies have no right to seek judicial review of agency decisions unless that right is specifically conferred by law.

29 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.

The only dispute in this matter of RCU Policy form approval 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. (Emphasis supplied).

The words "**you**" and "**insured**" are defined terms in the policy form used to describe the named insureds under the policy form, or the spouse of a named insured.

This clause mirrors the SFP's Concealment/Fraud Clause required by 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.

The Department's arguments ignore distinctions between canceling, or non-renewing, policies that are in place continuously for three years, and voiding a policy, as to named insureds, for fraud by those insureds. By law, the insurer must provide its insureds with advance notice of cancellation. Cancellation or non-renewal is governed by the Insurance Code.

The right to declare an insurance policy void is a matter of contract law. This right 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 has been 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 means to avoid providing further coverage to an insured 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.[30] The Department's argument is based solely on the facts that § 636.2D mentions fraud as one of the several permissible grounds for cancellation and that 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 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."[31] Accordingly, unless the proposed insurance policy form conflicts with law, it must be approved.

If the Commissioner disapproves a policy form he is required to "state the grounds therefor." La. R.S. 22:620(C). The allowable 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.

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30 Commissioner's Memo, p. 11.

31 *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. 1 Cir.), *writ denied*, 620 So. 2d 880 (La. 1993).

(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.

State Farm urges the Court to declare that its proposed 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). 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.

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). Therefore, determination of this issue requires application of the rules of statutory interpretation and a search for the Legislature's intent in enacting Subsection D of § 636.2. The legislative history belies any intent to prohibit an insurer declaring a policy void, as to named insureds, for fraud by such insureds. See Senate Insurance Committee, May 13, 1995, as to Senate Bill 195, which became § 636.2D.

The Department's argument that § 636.2D does not permit an insurer to void a policy for fraudulent submission of a claim involving non-fire perils is legally incorrect. This misguided argument ignores the longstanding law in effect at the time Subsection D was enacted. This misguided argument runs afoul of two well-settled rules of statutory interpretation. (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, as to a named insured, for fraud committed by the insured, either in the negotiation of an insurance contract or the submission of a claim, violates the public policy of 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.[32] Louisiana's public policy, based on the Insurance Code and case law, supports an insurer's right to deal with fraudulent claims by voiding the policy, as to named insureds, regardless of the risks assumed in such policy.

(b) Statutory Law Permitted, And Still Permits, Declaring A Policy Void 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

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32 *Cf. First Guar. Bank v. Pelican State Mut. Ins. Co.*, 590 So. 2d 1306 (La. App. 1 Cir. 1991), *writ denied*, 592 So. 2d 1303 (La. 1992); *Shelter Ins. Co. v. Cruse*, 446 So. 2d 893 (La. App. 1 Cir. 1984); *Green v. Pilot Life Ins. Co.*, 450 So. 2d 406 (La. App. 3 Cir. 1984); *Page v. United Ins. Co. of Am.*, 286 So. 2d 188 (La. App. 4 Cir. 1973); *St. Paul Fire & Marine Ins. Co. v. St. Clair*, 193 So. 2d 821 (La. App. 1 Cir. 1966), *writ denied*, 250 La. 375, 195 So. 2d 646 (1967).

> 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 that 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, as to named insureds, in the case of fraud by an 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." Subsection E of § 691 recognizes that coverage for the risk of fire may be combined with coverage for other risks in a single policy. Therefore, 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, as to named insureds, in the instance of a 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. 1 Cir. 1991). In *Williams*, the plaintiffs submitted a claim for losses due to theft of personal belongings from their home. The policy assumed fire risk in addition to theft risk. The policy included the SFP language required by law, including 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. 1 Cir. 1991), *writ denied*, 592 So. 2d 1303 (La. 1992). The Court held that false statements (fraud) are a defense to a claim even without detrimental reliance.

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. 1 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.

The above-cited cases were decided based upon the law as it existed prior to the 1992 addition of Subsection D to § 636.2. Since there is no doubt that La. R.S. §§ 691-692 apply

to the RCU Policy, requiring the Concealment/Fraud language, the Department's position must be based on an argument that the addition of Subsection D to § 636.2 in 1992 effected a repeal of §§ 691-692, as it relates to the RCU Policy.

(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. A legislative repeal of existing law may only be accomplished by what has been denominated "**positive enactment**" or by "**clear repugnancy**." Repeals of existing statutory law "will not be indulged if there is any other reasonable construction" of the later legislation. *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 to La. R.S. 22:636.1 is neither a positive enactment repealing the prior statutory law requiring the Concealment/Fraud clause, nor is it clearly repugnant to that existing law.

(f) § 636.2D 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. If that result had been intended by the Legislature, it would have been simple to clearly state that intent. They did not.

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."[33]

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. It is not uncommon for the Legislature to explicitly state, in new legislation, its intent to repeal or overrule prior law. The language the Legislature chose to use in the 1992 enactment of § 636.2D is not "positive enactment" repealing any existing law.

The reasoning used by the Department for 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, derived from § 1220, 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 a 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. Had the Legislature intended to repeal § 691, that intention would have been made clear.

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33 *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).

(g) § 636.2D Is Easily Reconcilable With The Law That Allows Voiding A Policy, As To Named Insureds, For Fraud.

There is a lack of any positive enactment by the Legislature either repealing La. R.S. 22:691, as to homeowners' policies. There is no statutory provision declaring "cancellation" to be 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. Therefore, 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 p. 1120. There is no irreconcilable conflict between § 636.2D and the SFP and RCU Concealment/Fraud Clauses as embodied in § 691 because the provisions can easily operate in harmony.

For example, assume an insured commits fraud in the application for a policy insuring property against fire and other perils. If 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 legitimately choose instead to cancel the policy under § 636.2D.

Similarly, if § 636.2D was "**clearly repugnant**" to, and therefore repealed, the law applying concealment/fraud clauses to non-fire perils, then R.S. 22:619 would have also been repealed. § 619 allows an insurer to void a policy *ab initio*, as to named insureds, if the insurer later discovers the insured committed fraud in the application. Surely the insurer should be able to void *ab initio*, as to named insureds, and not simply cancel coverage. There is nothing in the § 636.2D to suggest a legislative intent to prohibit an insurer from voiding a policy based on a fraudulent application. Since other provisions of the Insurance Code permit an insurer to

void a property policy for fraud, as to named insureds, the Legislature most surely would have repealed those statutes had it intended that § 636.2D have repealing effect.

Subsection D, enacted in 1992, was a brand new addition to § 636.2, and it had entirely different purposes, related solely to cancellation and/or non-renewal. 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 intended to repeal portions of § 691 is insupportable. In fact, in 1996, by Act 71 of the First Extraordinary Session, § 636.2D was amended to remove the introductory clause "[n]otwithstanding any other provision of law to the contrary". Again, the Legislature did not evidence intent to repeal § 691, but rather made it clear that § 636.2D was not to be read to have any effect on other legislative acts. *See* Legislative History to § 636.2D as amended.

The most reasonable interpretation of the Legislature's intent in adding Subsection D to § 636.2 is that the provision was designed simply 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. That right is to continue to renew, and avoid cancellation except for certain stated grounds (non-payment of premium, fraud, material change in the risk, two or more claims within a three year period, or if the insurer's solvency is in danger). There is no rational way that § 636.2D can be read to remove a right long held by insurers to deal swiftly with fraudulent insureds. For an insured who meets the qualifying language of the subsection (§ 636.2D), 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. This enactment provides 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, as to those very named insureds.

The rights of "innocent third parties" are not compromised by an insurance company declaring the policy void **"as to you and any insured"**, as those terms are defined in

the RCU Policy. The law disfavors repeal by implication and requires that all laws be harmonized if possible.

III. CONCLUSION

For the foregoing reasons, State Farm urges that judgment be entered in favor of the defendants and that (1) Acts 739 of 1995 and 1332 of 1999 be held constitutional; (2) the ruling of the ALJ be held valid and binding; and, alternatively, (3) that the RCU Policy proposed by State Farm be declared to be in compliance with Louisiana law.

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Post-Trial Memorandum of State Farm Fire and Casualty Insurance Company has been served upon all counsel of record by facsimile, this 18th day of February, 2003.