STATE OF LOUISIANA

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

DOCKET NO. 502311 SECTION 21

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

VERSUS

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, HONORABLE MURPHY J. FOSTER IN HIS CAPACITY AS GOVERNOR OF LOUISIANA, ANN 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

POST-TRIAL MEMORANDUM OF THE DIVISION OF ADMINISTRATIVE LAW

NOW INTO COURT, through undersigned counsel, comes Ann Wise in her official capacity as Director of the Division of Administrative Law (hereinafter referred to as "DAL"), a defendant, who submits this Post Trial Memorandum in Opposition to Plaintiff's Rule to Show Cause for Preliminary Injunction and Petition for Declaratory Judgment.

On February 4 and 5, this Court conducted a hearing to determine the constitutionality of Acts 1995, No. 739, as well as Acts 1999, No. 1332. In recognizing the significant import of this matter, the request was made for the parties to submit post-hearing briefs that address specific issues that are of major concern to this Court.

DAL respectfully submits this post-hearing brief which will address the following issues of paramount concern to this Court:

I. The COI Failed To Establish Clearly And Convincingly That Acts 1995, No.739 And Acts 1999, No. 1332 Are Unconstitutional.

II. The COI Has Failed To Exercise All The Remedies Available Under Louisiana Law.

III. DAL Is Not An Article V Court.

IV. The Legislature's Denial Of The COI's Right To Appeal An Adverse Decision Does Not Violate The State Constitution.

I.

THE COI HAS FAILED TO ESTABLISH CLEARLY AND CONVINCINGLY THAT ACTS 739 AND 1332 ARE UNCONSTITUTIONAL

The DOI has not carried its burden of proof that it is entitled to declaratory judgment. Opponents challenging the constitutionality of statutes bear the burden of proving clearly that a particular statute is barred by a provision of the state constitution. *Matter of American Waste & Pollution Control Co.*, 588 So.2d 367 (La., 1991). Any doubt as to legislation's constitutionality must be resolved in favor of its constitutionality; the statute's opponent must establish clearly and convincingly that the constitutional aim was to deny the legislature the power to enact legislation. *Polk v. Edwards*, 626 So.2d 1128 (La., 1993).

Because there is a presumption that Acts 1995, No. 739, as well as Acts 1999, No. 1332 are constitutional, the COI has a very high burden in proving the unconstitutional nature of the subject acts. The COI has not identified a specific provision of this state's constitution which clearly prohibits the Legislature's transfer of adjudicatory functions from several agencies to the DAL.

It is the duty of the Court to uphold constitutionality of a statute whenever possible, and every consideration of public need and policy upon which the legislature could rationally have based the statute should be weighed by the Court and, if the statute is not clearly arbitrary, unreasonable and capricious it should be upheld as valid. *State v. Rones*, 223 La. 839, 67 So.2d 99, 101 (1953). Any doubt concerning alleged unconstitutionality of a statute must be resolved in favor of its validity. *Johnson v. Collector of Revenue*, 246 La. 540, 165 So.2d 466 (1964).

In this case, the only evidence the COI has submitted consists of the testimony of the Director of the DAL, the testimony of an Assistant Commissioner for Licensing and Compliance, DAL rules, decisions and orders, and a mandamus petition filed by a regulated entity of the DOI.

The testimony of Ann Wise, the Director of the DAL, confirms that she is an appointee of the Governor and that the DAL is in the executive branch of government. It was established through her testimony that the Administrative Law Judges ("ALJs") are

classified civil servants appointed by her. Additionally, the Director was adamant that DAL is not a judicial court nor has it ever been considered such.[1] She further testified that the DAL functions are executive branch functions that were transferred by legislative act from several state agencies.

The testimony of DOI's Assistant Commissioner Ron Henderson proved nothing relative to any alleged irreparable injury suffered by DOI from having DAL conduct its adjudications. He introduced a Petition for Mandamus filed by parties unrelated to this proceeding,[2] alleging that the DOI has failed to require certain regulated insurance companies to comply with state law. His testimony was that the DOI is not enforcing its statutes because they do not want to hold a hearing on the issue before a DAL ALJ. This failure to act and desire to avoid a fair hearing before an impartial adjudicator is a shocking admission by DOI.

The DAL decisions and orders introduced into evidence by the COI speak for themselves. The fact that some contain the words "judgment" or "administrative court", that they involve statutory construction, or that the name of the classified position is "Administrative Law Judge", are not indicia that the DAL constitutes an Article V court.

Both prior to the creation of DAL and since, the Louisiana Supreme Court has recognized and used the term "administrative law judges" to refer to ALJs who conduct the same types of hearings as DAL and who make findings of fact and law. *In the Matter of Rollins Environmental Services, Inc.*, 481 So.2d 113 (La. 1985) the Court used the term several times, and even stated that the law "...provides for the selection of administrative law judges by the governor who are empowered to collect evidence, conduct hearings, issue orders, and render decisions..." Id. at 117. In Department of Public Safety adjudications reaching our top court, the justices called the adjudicator "administrative law judge", both pre and post-DAL. See *Butler v Dept. of Public Safety*, 609 So.2d 790 (La. 1992) and *State v. Benoit*, 2001-2712 (La. 5/14/02) 817 So.2d 11.[3] DOI's pre-DAL ALJ was called "the Law Judge" repeatedly by the Supreme Court in *In re the Matter of Louisiana Health Service and Indemnity Co.*, 1998-3034 (La. 10/19/99)

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[1] Allegations cited in the COI Post Hearing Memorandum that the Director of DAL or her counsel considers the Division of Administrative Law 'a court' are patently false.

[2] *Academy Insurance Company v Robert Wooley*, #503,461, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

[3] "Administrative Law Judge Elliot B. Vega", referred to in footnote 1 therein, is and was an employee of the DAL, though the footnote incorrectly implies that he was employed by the Dept. of Public Safety.

749 So.2d 610. DAL's ALJ is the "administrative law judge" throughout the Procurement Code case, *ABL Management, Inc. vs. Bd. of Supervisors of Southern Univ.*, 2000-0798 (La. 11/28/00), 773 So.2d 131, which noted that the ALJ was in DAL, and upheld the district court's decision upholding the ALJ's interpretation of the law.

The title Administrative Law Judge has been used in Louisiana government for executive branch adjudicators for many years, both long prior to and since DAL was created. Currently there are 40 individuals in state civil service positions at different state departments with the title 'Administrative Law Judge' and only four of them are employed at the DAL. [4]

DAL's procedural rules were also offered into evidence by the DOI; however, it is unclear how this evidence provides any proof that would substantiate plaintiff's position. The rules were promulgated pursuant to La. R.S. 49:996(7)[5] and R.S. 49:950, *et seq.* They establish additional procedures for regulating adjudications conducted by the DAL. They were not intended to be a comprehensive guide for DAL hearings but are only as a supplement to the LAPA and the DAL Act. The fact that the DAL has rulemaking authority like other state agencies does not reflect upon the issue of the constitutionality of Acts 739 or 1332.

Based upon this evidence, and any law cited in their brief, the COI has not carried his burden of proving that Act 739 or 1332 violate the Louisiana Constitution.

We now examine DAL's evidence:

DAL Exhibit #1 consists of pre-1996 decisions of an ALJ hired by the COI. Interestingly, it is the same ALJ transferred to the DAL in October of 1996, who issued the decision at issue in this case before the Court. Since the DOI complains that the language of DAL decisions implies that it is a "court", these decisions were offered to

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[4] There are 40 current incumbents in job titles called Administrative Law Judge in state government, not including Office of Worker's Compensation judges. According to public information available from the Department of Civil Service there are 21 incumbents in a job title called "Administrative Law Judge", 15 incumbents in a job title called "Administrative Law Judge--Advanced", 2 incumbents in a job title called "Administrative Law Judge-- Entry", 1 incumbent in a job title called "Administrative Law Judge Assistant Director" and 1 incumbent in a job title called "Administrative Law Judge Director". The Division of Administrative Law employs 4 persons in the job title "Administrative Law Judge--Advanced", this being the job title they had when they were grandfathered into the DAL from the Department of Public Safety. (See DAL exhibit 10.) All of the other incumbents mentioned are employed by the Louisiana Dept. of Labor-Office of Workforce Development, and the Department of Social Services –Office of Family Support and Office of the Secretary. Attorney ALJs in the DAL are classified "Attorney III" even though La. R.S. 49:994 calls them "administrative law judges".

[5] La. R.S. 49:996 **Duties of the Director.** The director of the division shall take the following actions: ... (7) Promulgate and enforce rules for the prompt implementation and coordinated administration of this Chapter as may be appropriate.

show that the format of DOI decisions prior to the existence of the DAL were almost identical; including the objectionable language that "IT IS HEREBY ORDERED, DECREED AND ADJUDGED . . .", the signature above the words Administrative Law Judge, and a stamp by a person who calls herself a "Deputy Clerk of Court". The individual who certified the decision as "Deputy Clerk of Court" was also an employee transferred to the DAL in October of 1996. She resigned from the DAL and returned to the DOI.

DAL Exhibit #2 consists of two decisions, one signed by a Dept. of Environmental Quality ALJ in 1995 and the other signed by the same person in 1997, now a DAL ALJ. These exhibits show that decision language prior to DAL and post-DAL are almost identical. While these issues are peripheral to the major issues in this case, DAL introduced these documents to rebut the allegations raised by the COI that DAL is conducting adjudications and issuing findings of fact and conclusions of law differently than agencies did before Act 739 was enacted.

DAL Exhibit #9 is a set of Department of State Civil Service (DSCS) job descriptions in existence prior to the creation of the DAL and which are still used by non-DAL state agencies. Exhibit #9, in conjunction with DAL Exhibit #10, which are "Personnel Action Forms" from the DSCS transferring employees to the DAL, were offered to show that that some of the employees transferred to the DAL in 1996-including DOI's ALJ-had the title of "Administrative Law Judge" before the enactment of Act 739. The job descriptions show that ALJs throughout state government have for years been authorized to make findings of facts and interpret the law-both state and federal law-and that DAL ALJs merely continue the tradition. These ongoing ALJ jobs were merely picked up and transferred to DAL from other agencies.

DAL Exhibit #3 consists of sample decisions of the DAL in numerous areas of law. They are offered to show the Court some typical decisions that are issued within the jurisdiction of the LAPA and DAL Act.

DAL Exhibit #4 is a public document generated monthly by the DAL with statistical information for the month, fiscal year and running totals from 1996. It is offered to show the Court the kinds of work done by DAL, and the number, volume and types of executive branch adjudications that could be impacted by the decision of this

Court. DAL continues to reiterate that this case impacts not just the DOI, but virtually all executive branch boards and agencies. Act 739 affects all the agencies for which DAL conducts adjudications, and Act 1332 impacts all State agencies, boards and commissions.

As mentioned in an earlier brief and in oral argument, Act 1332 amended the LAPA, La. R.S. 49:964 as well as the DAL Act, so any adjudication under the LAPA is affected, and that includes all state agencies, boards and commissions, and not just those for which DAL conducts adjudications.

Minutes of the May 23, 1995 meeting of the House Committee on House and Governmental Affairs on Senate Bill 636 (Act 739) by Senator Bankston reflect that an amendment to exempt the DOI from Act 739 failed in committee after a long discussion concerning expertise and independence of the ALJs from undue agency influence.

> "Representative Accardo pointed out that Mr. Shorter's [DOI Assistant Commissioner] 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." (*Minutes of the May 23, 1995 meetings of the House Committee on House and Governmental Affairs, page 8.*)

Further, there was a discussion that receivership and conservation matters would not be handled by the ALJs, but would remain a function of the DOI. Incidentally, the DOI has failed to mention in this case that the DAL Act did not divest the COI of all adjudicatory functions, such as the ability to adjudicate receivership and conservation matters. SB 636 was reported favorably out of committee, by a vote of 10-0.

The Senate Committee on Senate and Governmental Affairs considered Senate Bill No. 636 on May 25, 1995. Herman Robinson, of the Louisiana Association of Administrative Law Judges, and two individuals representing Waste Management, spoke in favor of the bill. Amendments exempting the Department of Labor and the Department of Agriculture were reported out of committee. Senate Bill 636 passed the House by a vote of 95-3. It passed the Senate 35-3.

On May 6, 1999, the House Committee on House and Governmental Affairs considered:

> "House Bill 2206 (Act 1332) which amended both the LAPA and the DAL Act to provide that no governmental agency, public official, or other person on behalf of any such agency or person is entitled to judicial review of an adjudication proceeding.
>
> 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.

Noel Wertz, counsel representing the DOI, offered information to the committee suggesting that the bill could present problems in denying agencies the right to appeal. However, the author of the bill, Representative Lancaster, responded to her concerns by stating that:

> "The current situation provides no protection for state agencies against other people or entities who insist on appealing judicial decisions time and time again. 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 the administrative law judge. ...Representative Bruneau stated that the present system places individuals in the position of having to compete against the power and unlimited financial backing of the state." (*Minutes of the May 6, 1996 meetings of the House Committee on House and Governmental Affairs, page 12*)

The Senate Committee on Senate and Governmental Affairs considered House Bill 2206 (Act 1332) on June 9, 1999. The author of the bill explained,

> "The bill puts the law back the way it was until a court of appeals decision allowed an appeal by the individual rather than the agency in an insurance matter. He said it was his opinion that people who are regulated by the state should not be treated any worse than is a person who is acquitted of a crime at a lower court level, the state should not have a right to come back and appeal that acquittal."

Ms. Wertz testified for informational purposes and advised the committee that the rationale that the agencies be held to the same restraints as a prosecutor, one bite at the apple, is not appropriate. Representative Lancaster replied that,

> "... the power of government is so overwhelming that if government is allowed to take any case they want to the Supreme Court, no one will be able to afford to even begin to participate."...

The bill was reported out of the committee favorably. The bill unanimously passed both Houses: the House by a vote of 38-0; the Senate by a vote of 101-0.

II.

THE COI HAS FAILED TO EXERCISE ALL THE REMEDIES AVAILABLE UNDER LOUISIANA LAW

The COI has asserted that Act 1332 is unconstitutional because the subject Act denies an agency the right to appeal. Although the DOI does not have the right to appeal the decisions of DAL, agencies, including the DOI, are not without other legal remedies. There are numerous other procedural vehicles available to the COI under Louisiana law, however, the DOI has chosen not to pursue these potential remedies for reasons that are yet to be understood or explained.

In the instant matter, DOI had the option of pursuing a rehearing of the ALJ decision based upon "error of law" under La. R.S. 49:959. Uncertainty as to what the ALJ would have ruled is irrelevant; one certainty does exist: DOI never took the time or effort to request the rehearing.

Another option for DOI in this case would have been to engage in rulemaking. For example, had DOI issued a rule in this case relative to the fire policy issues, the result before the ALJ may have been different. Another remedy is that State Farm could have tested the rule in a *Petition for Declaratory Order*[6] under La. R.S. 49:962; however, DOI failed to do so. These options exist before and during the administrative adjudication. The DAL does not perform other agencies' rule-making nor does it conduct declaratory hearings. If this declaratory remedy had been used, there would have been access to the district court. (See *Liberty Mut. Ins. Co. v. Louisiana Ins. Rating Com'n*, (La.App. 1 Cir., 12/14/97, 696 So.2d 1021). The DOI, for whatever reason, chose not to proceed with their ability and right to promulgate a rule.

Under the La. Code of Civil Procedure Art 1871 the DOI could have sought a declaratory judgment from the district court in advance of the adjudicatory hearing.

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[6] **La. R.S. 49: 962. Declaratory orders and rulings**
Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders and rulings as to the applicability of any statutory provision or of any rule or order of the agency. Declaratory orders and rulings shall have the same status as agency decisions or orders in adjudicated cases.
LA R.S. 49:963 Judicial review of validity or applicability of rules
D. An action for a declaratory judgment under this Section may be brought only after the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question and only upon a showing that review of the validity and applicability of the rule in conjunction with review of a final agency decision in a contested adjudicated case would not provide an adequate remedy and would inflict irreparable injury. See *Liberty Mut. Ins. Co. v. Louisiana Ins. Rating Com'n*, 696 So.2d 1021, 96 0793, (La. App. 1 Cir.,2/14/97)

It is clear that all agencies, including the DOI, have access to the court system. DOI failed to exercise those procedural remedies available.

III.

THE DAL IS NOT AN ARTICLE V COURT

There has been much discussion, argument, and debate as to whether DAL is and/or operates as a 'court' in violation of Article V of the Louisiana Constitution. DAL now takes this opportunity to navigate the reader through the distinctions and differences between DAL and the judiciary. The DOI has taken every opportunity to twist and manipulate certain actions, functions, jargon, procedure, and terminology of DAL to imply that DAL's existence and operations encroach upon the power solely afforded to and enjoyed by the judiciary.

"While hearing examiners and administrative law judges may hear and determine facts, and from those determinations make conclusions with respect to law, the agency adjudicator is part of the executive branch of the government, and is not a "court."[7] DAL serves and exists under the executive branch of Louisiana government and its existence and functions are limited and dedicated solely to the confines of administrative law and procedure. DAL does not deny that if it were to be placed under a legal magnifying glass one could see some generalized similarities and mimicry of the judiciary; however, DAL is not a "court" as defined under our constitution and, more importantly, DAL's functions and operations do not encroach upon the judicial branch as the DOI would have the reader believe.

An adjudicatory hearing before DAL is a quasi-judicial proceeding in which factual determinations are made and, thus, is considered adjudicatory in nature. DAL operates within the statutory parameters of the LAPA and the DAL Act. Courts have upheld the delegation of quasi-judicial authority to administrative agencies and tribunals. Their ascertaining the facts and law in an adjudication are quasi-judicial acts which are not to be regarded as usurpation of judicial power. Administrative proceedings are generally simple, informal, and direct, and proceedings are not normally subject to strict and technical rules. An administrative body may generally conduct its proceedings in a manner as conducive to the proper dispatch of its business and to the ends of justice. It is

[7] 20 Am. Jur. 2d Courts § 1 (1995).

generally permitted discretion and latitude in procedural details and may establish its own rules as to practice and procedure, although it must conform to standards of fairness, reasonableness and statutory authority.

One of the most prominent differences between administrative adjudication and courts is that administrative adjudicators only impose remedies that are corrective or remedial in nature, rather than punitive. It has no power to enforce its subpoenas or decisions. It cannot punish for contempt or issue sanctions.

DAL offers the following listing of its functions, powers, limitations, and differences as opposed to those enjoyed, exercised, and exclusively mandated to the judiciary and court system:

- DAL exercises quasi-judicial functions
- DAL is not a judicial court
- DAL has no power to enforce its decisions or orders
- DAL does not have the power to issue warrants of arrest
- DAL does not have the power to enforce subpoenas
- DAL does not have the power to punish for contempt
- DAL cannot declare the judgment of a court void
- DAL does not determine the constitutionality of statutes
- DAL's proceedings do not incorporate the jury system
- DAL's proceedings are always brought by an executive branch agency
- DAL's decisions are not binding to the judiciary
- DAL's decisions are not penal in nature, punitive, or compensatory
- DAL's decisions are preventive and remedial
- DAL's proceedings have relaxed evidentiary rules and procedures
- DAL's proceedings are not obligated to the strict rules regarding hearsay
- DAL does not have a position entitled "clerk of court"
- DAL's ALJ's are not elected
- DAL's ALJ's are not established by the Constitution
- DAL's ALJ's have supervisors
- DAL's ALJ's are subject to periodic performance reviews
- DAL's ALJ's are a part of the governor's executive branch
- DAL's ALJ's are not a part of the judicial branch
- DAL's ALJ's do not have flexible hours (minimum 40 hour work week)
- DAL's ALJ's do not have a personal staff
- DAL's ALJ's do not have staff court reporters
- DAL's ALJ's do not have minute clerks
- DAL's ALJ's do not have secretaries
- DAL's ALJ's do not have bailiffs
- DAL's ALJ's do not wear judge's robes
- DAL's ALJ's do not have judge's chambers
- DAL's ALJ's are civil service employees
- DAL's ALJ's operate under civil service rules
- DAL's ALJ's are paid pursuant to civil service pay schedule
- DAL's ALJ's can be removed for cause pursuant to civil service rules
- DAL's ALJ's are not overseen by the Louisiana Supreme Court in their capacity as administrative law judges
- DAL's ALJ's are non-political appointments
- DAL's ALJ's are prohibited from participating in political activity
- DAL's ALJ's have no judicial fund or spending authority
- DAL's ALJ's are not part of the judicial retirement system
- DAL's ALJ's do not operate under the Judicial Code of Ethics
- DAL does not exercise judicial functions

- DAL does not usurp the authority of the judicial court
- DAL does not interfere with the court's functions

IV.

THE LEGISLATURE'S DENIAL OF THE COI'S RIGHT TO APPEAL AN ADVERSE DECISION DOES NOT VIOLATE THE STATE CONSTITUTION

The legislative power of the State is vested in the legislature La. Const. Art. III §1; plenary power is the rule and prohibition is the exception. *Board of Commissioners of Orleans Levee District v. Department of Natural Resources*, 496 So2d 281(La. 1986). The legislature can enact any legislation that the state constitution does not prohibit. *Meredith v Ieyoub*, 96-1100 (La. 9/9/97) 700 So.2d 478.. It is a fundamental principle of state constitutional law that the legislature is supreme except when specifically restricted by the Constitution. *Louisiana Department of Agriculture and Forestry v Sumrall*, 95-1587 (La. 3/2/99), 728 So2d 1254, 1259, citing *Guillory v. Department of Transportation and Development*, 450 So2d 1305, 1308 (La. 1984).

Louisiana recognizes two kinds of persons: a natural person and a juridical person. La. C.C. Art. 24. The subject article further states that: "[A] natural person is a human being. A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership. The personality of a juridical person is distinct from that of its members."

La. C.C. Art 27 provides that "natural persons" enjoy general legal capacity to have rights and duties. A juridical person, as a creature of the law and by definition, has no more legal capacity than the law allows. *Brown v. State Farm,2000-0539* (La. App. 1 Cir, 06/22/01), 804 So.2d 41, *writ denied* 2001-2504 (La.12/7/2001); also see *City of Baton Rouge, et al v. Larry Bernard, et al* (La. App 1 Cir. 01/22/03).

Pursuant to La. Const. Art. V §16(B) appellate jurisdiction is provided to the district courts as provided by law. "With Acts 1999, No. 1332, however, the legislature specifically has chosen to deny state agencies any entitlement to judicial review under the LAPA, La. R.S. 49:964(A)(2), denying these agencies even status as "persons" under its terms. La.R.S. 49:951(5). In so doing the legislature has concluded that the Commissioner's remedy before the ALJ is adequate to protect the interests entrusted to him by law". Id at 4.

Moreover, the 1st Circuit stated: "We do not believe the Louisiana Constitution imbues a juridical person, the Department of Insurance through its commissioner, with the same constitutionally protected rights reserved to the individual and for the good of the whole. The Louisiana Constitution provides in art. 1, §1 that government is founded on the will of the people alone. The Legislature, speaking for the people, has elected to limit the right to seek judicial review by the Department of Insurance under the circumstances of this case." Id at 5. The 1st Circuit concluded that the legislature has manifested a clear intention to limit the Department of Insurance's right to seek judicial review under the LAPA.

In furtherance of the argument that the DOI does not enjoy the protections of the equal protection clauses of the United States and Louisiana Constitutions, DAL cites the very recent Louisiana Supreme Court case of *Louisiana Assessor's Retirement Fund v. City of New Orleans*, 02-1435 (La. 2/7/03), wherein the Court stated:

> "To the contrary, it is well established the City, as a political subdivision of the state rather than a "person," is without the protections of LA. CONST. ANN. Art I, the declaration of rights Article, or the Due Process and Equal Protection Clauses of the United States Constitution. The jurisprudence has long held that municipalities are not entitled to Fourteenth Amendment protections . . . [C]onsequently, Article I of the Louisiana Constitution protects only the rights of the "persons" and does not protect **government entities** against unjust government action."... (emphasis added)

The Department of Insurance is a juridical person and therefore has no more legal capacity than Louisiana law provides. The legislative decision to restrict the Department's ability (or inability) to seek judicial review is clearly within its authority and legal right.

CONCLUSION

The COI has not overcome the presumption that Acts 1995, No. 739 and Acts 1999, No. 1332 are unconstitutional. The 19th JDC and the First Circuit have already ruled and rejected plaintiff's arguments that Act 1332 violates the Constitution. Act 739 has not been shown to violate the Constitution, as the Legislature only transferred executive branch functions to another executive branch agency. Neither Act violates the rights of the COI or the DOI since they are juridical persons and they only have the rights

provided to them by law. These rights do not include the right to conduct adjudications nor to appeal LAPA or DAL decisions. Neither state agencies nor political subdivisions of the state are entitled to equal protection under the Louisiana or the U.S. Constitutions.

DAL's executive branch adjudications are executive, not judicial functions. Neither Act 739 nor Act 1332 impinges upon the constitutional grant to the district court of original jurisdiction of 'civil matters'.[8] The 'adjudications' conducted under the DAL Act and the LAPA are not 'civil matters' under La. Const. Art. V §16(A) but have historically been a function of executive branch agencies. This case presents a challenge between two executive branch agencies over executive functions, not matters that fall within the original jurisdiction of the judiciary. *In the Matter of American Waste & Pollution Control*, 588 So.2d 367 (La.1991); *Loop, Inc. v Collector of Revenue*, 523 So.2d 201 (1987); *Peterson v Toffton*, 36,372 (La. App 2 Cir 9/18/02); 828 So.2d 160; *Boeing Co., Inc. v. Louisiana Dept. of Economic Development*, 94-0971 (La. App. 1 Cir., 6/23/95) 657 So.2d 652. Because this case concerns executive branch functions, the doctrine of separation of powers is not violated.

Acts 739 and 1332 transferred administrative hearings authority from several agencies into one new agency, the Division of Administrative Law. Some agencies and boards are completely exempt from the Act such as the Department of Agriculture, the Public Service Commission and state professional and occupational licensing boards. Other agencies are only required to send some of their adjudications to the DAL, and retain some authority to conduct their own adjudications. For example, adjudications by the Assistant Secretary of the Office Of Conservation for the Department of Natural Resources are exempt, but determinations of violations of laws, rules, regulations and orders, and determinations of penalties for such violations, are not exempt from the provisions of the DAL Act.[9] The Acts apply to adjudications of the Department of Insurance, with the exception of receivership and conservation hearings.[10]

The Legislature is entitled to exercise any power not specifically denied by the constitution and plaintiff cites no specific provision which clearly prohibits the legislative action. The Legislature transfers powers and consolidates executive branch agencies' powers routinely. This causes no violation of the separation of powers doctrine unless

[8] La. Const. Art. V §16(A)
[9] LSA R.S. 49:992
[10] There may other types of hearings that are exempt.

one branch of government exercises powers that belong to another branch. This case involves a challenge by one executive branch agency against another executive agency within the same branch. If handling executive branch adjudications is only reserved to the judicial branch, then declaring the DAL Act unconstitutional will result in these cases being transferred to the district courts, not back to the DOI to handle internally, as the Commissioner wishes. If it is unconstitutional for DAL to handle these cases then isn't it also unconstitutional for the COI to handle them? Importantly, a favorable ruling for DOI would leave intact LSA-R.S. 49:964 which prohibits judicial review of adjudications under the LAPA no matter who hires the ALJ.

DOI bears the burden of proving clearly that a particular statute is barred by a provision of the state constitution and it has failed to carry its burden of proof.

Concerning Act 1332, the 19th JDC and the First Circuit have already ruled in the earlier stage of this case that Act 1332 does not violate the Department's or the Commissioner's constitutional rights. *Brown v. State Farm Fire & Cas. Co.*, 2000-0539, (La.App. 1 Cir., 6/22/01), 804 So.2d 41. That Court concluded that the legislature has manifested a clear intention to limit the Department of Insurance's right to seek judicial review under the LAPA." *Id* at 45.

In the alternative, if this Court finds any part of these Acts violate the Constitution, the Court should sever that part and leave the remaining law intact. "The unconstitutionality of one portion of a statute does not render the entire law unenforceable if the remaining portions are severable from the offending portions. *State v. Brazley*, 00-0923, p. 6 (La.11/28/00), 773 So.2d 718, 722; Pierce *v. Lafourche Parish Council*, 99- 2854, p. 9 (La.5/16/00), 762 So.2d 608, 615; Perschall *v. State*, 96-0322, p. 10 (5/15/01), 785 So.2d 768, 775." *State v O'Reilly c/w State v Brewster*, 2000-2865, p. 10 (5/15/01), 785 So.2d 768, 775.

"The test for severability is whether the unconstitutional portions of the law are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention of the legislative body enacting the law. To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. The test is whether

the legislature would have passed the statute had it been presented with the invalid features removed. Where the purpose of the statute is defeated by the invalidity of part of the act, the entire act is void. Conversely, however, when the general objectives of the act can be achieved without the invalid part, the remaining parts of the act will be upheld. *Perschall*, 96-0322 at 29, 697 So.2d at 260 (internal citations omitted)."

State v O'Reilly c/w State v Brewster, 2000-2865, p. 11 (5/15/01), 785 So.2d 768, 776.28 (La.7/1/97), 697 So.2d 240, 259." *State v O'Reilly c/w State v Brewster*, 2000-2865, p. 10 (5/15/01), 785 So.2d 768, 775.

Injunction is a harsh, drastic, and extraordinary remedy which should only issue where the petitioner is threatened with irreparable harm and has no adequate remedy at law. Where a petitioner seeks to preliminarily enjoin a public body from performing its statutorily authorized function and that petitioner has an adequate remedy at law without utilizing the extraordinary procedure of preliminary injunction, he should be required to proceed accordingly. *Kruger v Garden Dist. Association, et al. 1999-3344 (La. 3/24/00), 756 So.2d 309.*

RESPECTFULLY SUBMITTED:

Ann Wise, in her official capacity as
Director of the Division of Administrative Law

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Post-Hearing Memorandum has been faxed or hand delivered to all counsel of record in this proceeding on the 18th day of February, 2003.

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