Study N-112 May 23, 1996

Memorandum 96-37

Quasi-Public Entity Hearings: Comments on Tentative Recommendation

The Commission in February 1996 circulated for comment its tentative recommendation to impose the new Administrative Procedure Act (APA) provisions, including the administrative adjudication bill of rights, on hearings by private entities performing state functions. This memorandum analyzes the comments we have received on the tentative recommendation. Our objective is to make any revisions necessary to approve the proposal for submission to the Legislature as a Commission recommendation.

Nature of Comments

We received only a handful of comments on the tentative recommendation. They are attached to this memorandum as Exhibit pp. 1-8.

Typically, the comments do not address the merits of the proposal, but request that hearings of a particular quasi-public entity be exempt from application of APA provisions.

The Advisory Committee of the California Assigned Risk Plan states, "CAARP recognizes that applying the APA to certain quasi-public entities may serve a useful function by ensuring that persons subject to the administrative process are provided appropriate procedural protections." Exhibit p. 3.

Escrow Agents' Fidelity Corporation

The Escrow Agents' Fidelity Corporation (EAFC) is a trade organization that collects premiums and pays claims arising out of escrow embezzlement. The Department of Corporations argues that EAFC should not be subject to the proposed statute because it is essentially a private insurer, and any of its decisions are subject to administrative review by the Commissioner of Corporations, whose decisions in turn are judicially reviewable. Exhibit p. 1. The Department's letter does not indicate what harm would result from application of administrative procedural protections in EAFC hearings.

Presumably, the Department would be happy with the staff proposal, set out below, to make the proposed statute inapplicable to quasi-public entity action that is administratively reviewable in a state agency hearing with APA protections.

Physician and Surgeon Cooperative Corporations

The Department of Corporations notes that the proposal "may unjustifiably affect" physician and surgeon cooperative corporations, which enter into interindemnity, reciprocal, or interinsurance contracts. Exhibit p. 1. Again, the letter does not identify any specific problems.

California Automobile Assigned Risk Plan

The California Automobile Assigned Risk Plan (CAARP) is administered by the Commissioner of Insurance. Under CAARP, investigation and informal decisions may be made by a number of quasi-public entities, including an Advisory Committee, an Appeals Subcommittee, and a Producer Peer Review Subcommittee. Their concern is that application of the proposed statute to these proceedings will cause them to become unnecessarily formal; the Commissioner of Insurance is the ultimate decisionmaker and holds formal hearings when necessary under CAARP. Exhibit pp. 3-6.

The staff suggestion, set out below, is to make the proposed statute inapplicable to quasi-public entity action if the action is subject to administrative review in a state agency hearing with APA protections. This should adequately address the CAARP concern.

Foster Family Agencies

The Department of Social Services licenses Foster Family Agencies (FFA) to certify that foster homes comply with applicable state regulations. If FFA decides to decertify a foster home, there is currently no requirement that a hearing be held, but if the Department decides to decertify the home, a hearing is required. The Department is concerned that the current proposal would create a common law right to a hearing on FFA decertification where none now exists, with resultant increased costs to the foster family certification program. Moreover, an adverse decision in an FFA decertification hearing might used as collateral estoppel against the Department, which should have ultimate authority in foster home certification matters. Exhibit pp. 7-8.

This looks to the staff like the very type of proceeding that should be covered by the statute — a state agency avoids its hearing obligation by delegating authority to a private entity to perform the agency's function free of the constraints the agency would be subject to. However, the current project is not intended to second-guess legislative decisions of this type by creating hearing rights where none now exist. The proposed statute is limited so that APA protections apply only where an evidentiary hearing for determination of facts is statutorily or constitutionally required for formulation and issuance of a decision. Proposed Gov. Code § 11410.60(a)(2).

The Department's second point is a more interesting one — the possibility that a decision in an FFA decertification hearing could bind the Department. Although we think it's unlikely that would happen, the staff proposal, set out below, to make the proposed statute inapplicable to quasi-public entity action that is subject to administrative review in a state agency hearing with APA protections, may give the Department some comfort.

Staff Proposal

The staff is convinced that the agencies make a good point, when they indicate that existing informal quasi-public entity action should not be made unduly formal where full state agency administrative review of the action is available. In fact, we took this same approach when we exempted from the APA Franchise Tax Board informal and investigative tax determinations, on the basis that full administrative review is available by means of a hearing before the State Board of Equalization. (Of course, in that particular instance, the Board of Equalization managed to avoid application of the APA to its hearings; but due process is required in those hearings.)

The staff would make the new hearing requirements inapplicable where the action of the quasi-public entity is subject to administrative review by a state agency by means of an adjudicative hearing. This would ensure that a person adversely affected by quasi-public entity action would have a right to APA hearing protections either at the private entity level or at the state agency level, but not both. It would also protect existing informality of quasi-public entity action in situations where due process is provided by means of a de novo administrative hearing by a state agency. This should address the concerns of the various commentators on the tentative recommendation.

Gov't Code § 11410.60 (added). Application to quasi-public entities

11410.60. (a) This chapter applies to a decision by a private entity if all of the following conditions are satisfied:

(1) The entity is created by or pursuant to statute for the purpose of administration of a state function.

(2) Under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

(b) Notwithstanding subdivision (a), this chapter does not apply to a decision by a private entity if the decision is subject to administrative review in an adjudicative proceeding to which this chapter does apply

(c) For the purpose of application of this chapter to a decision by a private entity, unless the provision or context requires otherwise:

(1) "Agency" means the private entity.

(2) "Regulation" means a rule promulgated by the private entity.

(3) Article 8 (commencing with Section 11435.05), requiring language assistance in an adjudicative proceeding, applies to the private entity to the same extent as to a state agency governed by Section 11018.

Comment. Section 11410.60 applies this chapter to decisions of quasi-public entities. It is limited to decisions for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required ~~by law~~. *Cf.* Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person).

Although subdivision (b) makes this chapter inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter. Cf. Section 11410.40 (election to apply administrative adjudication provisions).

~~Examples of quasi-public entities whose decisions may be subject to this chapter include:~~

~~California Insurance Guarantee Association (Ins. Code §1063)~~

~~Escrow Agents' Fidelity Corporation (Fin. Code § 17311)~~

~~State Compensation Insurance Fund (Ins. Code § 11773)~~

~~Various agricultural produce commissions (e.g., Food & Agric. Code § 67111 *ff.*)~~

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA – BUSINESS, TRANSPORTATION AND HOUSING AGENCY PETE WILSON, *Governor*

DEPARTMENT OF CORPORATIONS
Sacramento, California

IN REPLY REFER TO:
FILE NO: ALPHA

May 7, 1996

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Proposed Legislation

Dear Mr. Sterling:

The Department of Corporations ("Department") regrets to inform you that, after preliminarily reviewing the language of proposed Government Code Section 11410.60, as it relates to the Escrow Agents' Fidelity Corporation (Financial Code Section 17311), the Department objects to the proposed language.

The Escrow Agents' Fidelity Corporation ("EAFC"), although created by statute, is not a state agency. Essentially, EAFC is a private insurer of the private escrow industry. It collects premiums and pays claims. In effect, EAFC is an entity authorized by the Legislature to ensure that the fidelity fund is used to protect licensees, and ultimately, the public, from embezzlement, theft, and mysterious disappearance of escrow funds by their employees. If not for the authorization under the Escrow Law, EAFC would be required to be licensed by the Department of Insurance. Therefore, EAFC should not be subject to the Administrative Procedure Act.

Secondly, due process is available to all parties under the current law. For example, Section 17345 of the Financial Code provides that an aggrieved member may appeal an action or decision made by the EAFC, to the Commissioner of Corporations ("Commissioner"). Since the Commissioner's decision is considered final, either party may then seek review at the Superior Court level.

Also, as stated in our November 1, 1995 letter, the proposal may unjustifiably affect physician and surgeon cooperative corporations, which enter into interindemnity, reciprocal, or interinsurance contracts complying with Section 1280.7 of the Insurance Code, as specified in Section 25100(q) of the Corporations Code.

LOS ANGELES 90010-3001
3700 WILSHIRE BOULEVARD
(213) 736-2741

SACRAMENTO 95814-2725
980 NINTH STREET
(916) 445-7205

SAN DIEGO 92101-3697
1350 FRONT STREET
(619) 525-4233

SAN FRANCISCO 94102-5303
1390 MARKET STREET
(415) 557-3787

If you have questions or comments, please do not hesitate to contact me at the number below.

Very truly yours,

GAYLE T. OSHIMA
Corporations Counsel
(916) 445-8042

GTO:jw

LEBOEUF, LAMB, GREENE & MACRAE
L.L.P.
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NEW YORK
WASHINGTON
ALBANY
BOSTON
DENVER
HARRISBURG
HARTFORD
JACKSONVILLE

ONE EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
(415) 951-1100
FACSIMILE: (415) 951-1180
TELEX: 470167

WRITER'S DIRECT DIAL:

LOS ANGELES
NEWARK
PITTSBURGH
PORTLAND, OR
SALT LAKE CITY
SAN FRANCISCO
BRUSSELS
MOSCOW
ALMATY
LONDON
(A LONDON-BASED MULTINATIONAL PARTNERSHIP)

May 9, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Administrative Adjudication by Quasi-Public Agencies

Dear Sirs:

On behalf of the Advisory Committee of the California Automobile Assigned Risk Plan ("CAARP"), we offer the following comments on the proposed recommendation to impose the adjudication provisions of the Administrative Procedure Act ("APA") on quasi-public entities administering state functions.

CAARP is a statutorily created program administered by the Insurance Commissioner to ensure that automobile liability insurance is available to drivers who are in good faith entitled to coverage but are unable to procure insurance through ordinary methods. (Insurance Code section 11620 et seq.) CAARP's Advisory Committee, which consists of 15 insurer and non-insurer members, assists the Commissioner in carrying out the program's statutory purpose. (Insurance Code section 11623.) In fulfilling that responsibility, CAARP has two subcommittees that undertake preliminary review of fact situations that could be deemed to be a quasi-adjudicative exercise, and the Advisory Committee itself engages in certain such activities.

CAARP recognizes that applying the APA to certain quasi-public entities may serve a useful function by ensuring that persons subject to the administrative process are provided appropriate procedural protections. CAARP believes, however, that for the reasons described below, the APA should not apply to activities of entities such as CAARP's Advisory Committee, Appeals Subcommittee or Producer Peer Review Subcommittee, which

principally make an investigation and submit recommendations to the Commissioner. Because decisionmaking authority rests with the Commissioner and not with CAARP's subcommittees, CAARP believes the APA should not apply to its review and recommending activities.

CAARP's Appeals Subcommittee reviews written submissions by aggrieved parties (typically, cases where an accident occurred before the effective date of a policy) and reports its recommendations to the Commissioner.[1] The Appeals Subcommittee typically conducts its meetings by telephone based upon written submissions to enable it to act promptly and efficiently in response to appeals. In many cases where the Subcommittee favors the consumer's request, this expedited procedure enables the coverage question to be favorably resolved promptly. At the same time, no adverse action is taken by the Commissioner without affording the party the opportunity for a hearing.

If the formal procedural rules of the APA were to apply to these preliminary reviews, the process would be significantly delayed and made more complex, to the detriment of the parties and CAARP's administration. The efficiency of this preliminary review ensures that matters that reach the Commissioner are limited to significant disputed matters that more appropriately warrant formal proceedings.

Similarly, the activities of the Producer Peer Review Subcommittee (a newly created subcommittee)[2] will consist of preliminary review and investigation to assist in a subsequent, more formal proceeding before the Commissioner if one is ultimately necessary. The Subcommittee consists of five certified producers (licensed insurance broker-agents) whose

---

[1] Prior to 1991, CAARP was operated by a Governing Committee, which heard appeals by aggrieved parties and issued decisions, subject to review by the Commissioner. (See Cal. Code Regs., title 10, section 2495.) Since 1991, the Commissioner has operated CAARP, the Governing Committee was reconstituted and renamed the Advisory Committee (Insurance Code section 11623(b)), and the functions of the Advisory Committee's Appeals Subcommittee is limited to making recommendations to the Commissioner.

[2] See Cal. Code Regs., title 10, section 2341.1.

charge is to investigate complaints against producers who have failed to meet performance standards. The Subcommittee conducts a review of the producer's records and submits a recommendation to the Advisory Committee. The Advisory Committee then issues a decision, which is subject to review by the Insurance Commissioner. Like the Appeals Subcommittee, the Producer Peer Review Subcommittee cannot issue final, binding decisions, and the Advisory Committee's action is to be reviewed by the Commissioner. Significantly, no producer can suffer adverse action without the right to a hearing before the Commissioner. (Cal. Code Regs., title 10, section 2431.1(l)(1).)

Imposing the provisions of the APA on such CAARP activities poses two problems: (1) it would unnecessarily impair the productivity of the subcommittees and (2) it would undermine the confidentiality of the proceedings, which is intended to protect the parties.

For example, the Appeals Subcommittee reviews many appeals every month and, in an effort to offer prompt resolution, works under severe time constraints. Likewise, CAARP expects that the Producer Peer Review Subcommittee may also have a significant workload and be required to function under time constraints similar to the Appeals Subcommittee. To impose a more formal procedure for these preliminary reviews could seriously degrade the efficiency of the subcommittees and delay final resolution of many matters.

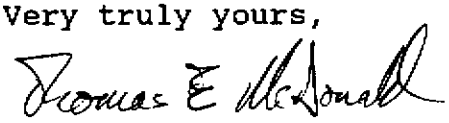
Maintaining confidentiality is especially critical in the proceedings of the Producer Peer Review Subcommittee. The Subcommittee is responsible for reviewing the producer's file and making a recommendation regarding that producer's conduct. This is a highly sensitive area, which, no matter what the result, could cause embarrassment to the producer if made public unnecessarily or prematurely. The Subcommittee's preliminary review should be as prompt and discreet as possible. (Cal. Code Regs., title 10, section 2431.1(i)(3).) Opening the process to a public hearing and public notice would serve to impede the review and could unnecessarily damage the reputation of producers.

Finally, to the extent legislation would be limited to entities required by the constitution or statute to render a decision pursuant to an evidentiary hearing, the legislation should not be applicable to these CAARP proceedings, as no statutory or constitutional provision requires an evidentiary hearing before CAARP. Rather, any such hearing would be available before the Commissioner, who is the ultimate decision-maker in these matters. Further, the matters presented in these CAARP proceedings do not constitute a state function that should trigger APA application.

Because the Advisory Committee, Appeals Subcommittee and Producer Peer Review Subcommittee do not render final, binding decisions, because they hear a significant number of cases and are expected to make their recommendations expeditiously, because the parties are entitled to a formal hearing before the Commissioner, because no statutory or constitutional provision requires an evidentiary hearing and because CAARP's bodies do not administer a state function, CAARP suggests that any legislation be drafted to permit such existing processes to continue without the imposition of APA requirements.

We appreciate your consideration of these comments, and we would be happy to discuss this issue with you further.

Very truly yours,



Thomas E. McDonald

SF2 13590 125 SF65329.1
5/9/96 3:27pm

STATE OF CALIFORNIA - HEALTH AND WELFARE AGENCY

DEPARTMENT OF SOCIAL SERVICES
744 P Street, MS 4-161
Sacramento, CA 95814-6413
Telephone: (916) 657-2398
FAX: (916) 654-1171

May 13, 1996

VIA FAX

California Law Revision Committee
4000 Middlefield Road, Room D-1
Palo Alto, CA 94393-4739

Re: ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES,

Dear Commissioners:

The California Department of Social Services' (CDSS) comments concerning this proposal involve whether the California Law Revision Commission (Commission) intends to create hearing rights when no statute or regulation authorize a right to a hearing?

Currently, CDSS licenses Foster Family Agencies. (Health and Safety Code (HSC) §§ 1502(a)(4) and 1506.) The Foster Family Agency recruits prospective foster parents and certifies that the foster homes it supervises comply with the applicable provisions of the Health and Safety Code and California Code of Regulations, Title 22. The regulations that govern Foster Family Agencies are in California Code of Regulation, Sections 88000-88087. If a foster home was not certified by a Foster Family Agency, the foster home would be required to be licensed by CDSS. CDSS retains the ultimate authority over foster homes certified by Foster Family Agencies and may order a Foster Family Agency to deny or revoke certification to a Foster Family Agency foster home. (HSC § 1534(b).) CDSS may revoke the license of a Foster Family Agency if the Foster Family Agency fails to ensure that its foster homes meet CDSS licensing laws and regulations.

Currently, no statute or regulation exists that requires a Foster Family Agency to provide a certified home a hearing if the Foster Family Agency decides to deny or revoke certification. A certified foster home is only provided a hearing if CDSS orders that the Foster Family Agency deny or revoke certification. To the best of CDSS' knowledge, no court decision has required a Foster Family Agency to provide a hearing to a foster home that the Foster Family Agency sought to decertify.

CDSS' interpretation of proposed Government Code § 11410.60 is that this section would require that a Foster Family Agency provide a hearing that complied with the requirements of the Administrative Procedures Act if the Foster Family Agency decides to deny or revoke certification. CDSS' interpretation is based on the fact that Foster Family Agencies enforce CDSS licensing laws and regulations and if the foster home was licensed by CDSS, the foster home would be entitled to

a hearing. (HSC § 1550.) CDSS is concerned that any decision adverse to the Foster Family Agency could be used as collateral estoppel against CDSS if the certified foster parents sought a license with CDSS after prevailing in a hearing against the Foster Family Agency. The Commission's proposal would also increase the cost to the State and Counties for using foster homes certified by Foster Family Agencies.

CDSS is concerned that Proposed Government Code § 11410.60 would create a common law right to a hearing anytime a private entity ensures that private individuals meet state laws and regulations. Also, decisions adverse to a quasi-public agency could be used as collateral estoppel against the state agency that oversees that quasi-public agency.

If you have any questions, please contact me.

Sincerely,

Peter P. Castillo
Staff Counsel

c: Martha Lopez, MS 17-17
Dave Dodds, MS 17-17
Dennis Walker, MS 19-50
Licensing ACCs, MS 4-161
Mike Krug, MS 4-161
Penny Weisz, MS 4-161

(C:\WPWIN60\WPDOCS\LAWREV\QUASI1.LTR)