

**IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

The AMERICAN INSURANCE	:	
ASSOCIATION and the PROPERTY	:	
AND CASUALTY INSURERS	:	
ASSOCIATION OF AMERICA, INC.,	:	
	:	
Plaintiff,	:	C.A. No. 05C-10-309 SCD
	:	
v.	:	
	:	
	:	
DELAWARE DEPARTMENT OF	:	
INSURANCE,	:	
	:	
	:	
Defendant.	:	

**Application for Certification of Interlocutory Appeal  
Refused**

Defendant has made an application pursuant to Rule 42 of the Delaware Supreme Court for an order certifying an appeal to the Delaware Supreme Court from the interlocutory order of this Court, dated October 3, 2007. The order granted standing to plaintiffs, American Insurance Association and the Property and Casualty Insurers Association of America, Inc. Plaintiffs oppose the application.

The plaintiffs are trade organizations representing a substantial percentage of the insurers writing homeowners insurance policies in the State of Delaware. It is undisputed that the members write such coverage and that such coverage is the subject of Regulation 703.<sup>1</sup>

The only issue presented by this declaratory judgment action is whether Regulation 703, adopted by the State Insurance Commissioner, is legal.

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<sup>1</sup> 9 Del. Reg. Regs. 593 (Oct. 1, 2005).

The defendant has consistently sought dismissal of this action on the ground that the plaintiffs lack standing. I concluded that plaintiffs have standing.

Supreme Court Rule 42 provides that no interlocutory appeal will be certified by the trial court or accepted by the Supreme Court unless the order of the trial court determines a substantial issue, establishes a legal right and meets one or more additional criteria.

The defendant supports its application with the following argument:

The Court's October 3, 2007 Order satisfies the requirements for interlocutory appeal because not only did it determine a substantial issue and establish a legal right by holding – over the Department's challenge and without the benefit of a shred [of] discovery – that Plaintiffs met the organizational standing requirements to challenge Regulation 703, but the Order also satisfies at least three of the five criteria listed in Rule 42(b). First, the order “reversed or set aside a prior decision of the court...which had determined a substantial issue and established a legal right” when it reversed Judge Jurden's November 29<sup>th</sup> Order permitting the Department to issue discovery related to Plaintiffs' standing in this matter. Second, the Order “has sustained the controverted jurisdiction of the trial court” when it summarily ruled that Plaintiffs are an “aggrieved party” without factual discovery on that issue being permitted. If there is no standing, the case is not justiciable, and the Court has no jurisdiction to consider Plaintiffs' claims. Third, a review of the interlocutory order “may terminate the litigation, substantially reduce further litigation, or otherwise serve the considerations of justice” because it will (1) end the case if Plaintiffs have no standing; (2) prevent a ruling regarding an administrative regulation when the Court lacks a justiciable case before it; and (3) prevent the issuance of an advisory opinion, should it be determined that the Department is entitled to discovery on the threshold issue of standing.<sup>2</sup>

The statute conferring a right of appeal administrative agencies is found in the Administrative Procedures Act.<sup>3</sup> The State Insurance Commissioner is governed by the Act.<sup>4</sup> The standing provision states that “[a]ny person **aggrieved** by and claiming the unlawfulness of any regulation may bring an action in the [Superior] Court for

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<sup>2</sup> Def's. Application for Interlocutory Appeal at 3.

<sup>3</sup> 29 Del. C. §§ 10141.

<sup>4</sup> 29 Del. C. § 10161(a)(7).

declaratory relief.”<sup>5</sup> Contrary to the defendant’s contentions, the statute does not require the appeal to be limited to a party that can demonstrate injury in fact.<sup>6</sup> That standard is applicable only when a standing provision requires that the party seeking relief be **substantially affected** by the conduct of the agency in question.<sup>7</sup> Injury in fact is, to a large degree, the focus of the defendant’s discovery requests.

The law on standing, as governed by the Administrative Procedures Act, was considered in President Judge, now Justice, Ridgely’s decision in *American Auto. Mfrs. Ass’n v. Public Service Comm’n of State*.<sup>8</sup> *Public Service Commission* sought dismissal of the action. The Court held as follows:

It is well established that there is a strong policy in favor of review on the merits. There are advantages in pre-enforcement review of challenged regulations not only to those who will be subject to them, but also to the Commission itself. When the validity of a regulation is in issue, those subject to it must choose between making changes to comply with the regulation they believe to be invalid or take the risk that sanctions will be imposed.<sup>9</sup>

It is uncontested that the members of plaintiff’s organizations are subject to the regulations at issue.

This court has not determined a substantial issue or established a legal right. The law on standing to appeal an administrative ruling is developed.

Procedurally, the anomaly in this case arises from the fact that a ruling on the standing issue, made by a Judge who subsequently chose to recuse herself, was followed by a different ruling on the same issue by me. My initial exposure to the case came in the

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<sup>5</sup> 29 Del. C. § 10141 (*emphasis supplied*).

<sup>6</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 903-04 (Del. 1994).

<sup>7</sup> 7 Del. C. §§ 6008, 7210. See generally *Swann Keys Civic Ass’n v. Bd. of Adjustment of Sussex County and Michael Schuchman*, 2001 WL 167869 at \*3 (Del. Super.).

<sup>8</sup> *American Auto. Mfrs. Ass’n v. Public Service Comm’n.*, 1997 WL 718656 (Del. Super.).

<sup>9</sup> *Id.* at \*1.

context of a motion for a protective order wherein the plaintiffs sought protection from twenty interrogatories addressed to each member of their organization.<sup>10</sup> Defendant sought to compel one or more members of the plaintiff organizations to admit that it has engaged in a practice which has now, by regulation, been defined as an unfair trade practice. As the defendant noted in footnote 6 of its filing, the discovery request intended to do far more than address the threshold issue of standing.<sup>11</sup>

In order to rule on the permissible scope of the discovery, I had to determine the relevance of the discovery to the issue at hand, an issue which both parties concede is purely legal. In doing so, and with the benefit of expanded submissions from the parties and an opportunity to make inquiries at oral argument, it became clear to me that it was necessary to modify the earlier ruling by the predecessor Judge. Such a change does not constitute the type of “prior decision of the court” contemplated by Supreme Court Rule 42(b)(iii). The law of the case is a flexible standard, and circumstances required a different ruling.<sup>12</sup>

As to the defendant’s other contentions, they are without merit. The Superior Court has jurisdiction over appeals from the State Insurance Commissioner.<sup>13</sup> Permitting expansive and expensive discovery into facts which have no probative value to the legal issue at hand will not serve considerations of justice.

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<sup>10</sup> Def.’s Mot. for Disc. on Def.’s Fifth, Sixth, and Seventh Affirmative Defenses (Aug. 17, 2006).

<sup>11</sup> “[T]he Department believes it is also entitled to discovery which will aid in the resolution of the merits of this matter, including the presence of policies and procedures which the Insurance Commissioner has deemed contrary to the public interest with respect to the denial of homeowner’s insurance solely based on claims history or inquiries by customers.” Def’s. Application for Interlocutory Appeal at n.6.

<sup>12</sup> *Hamilton v. State*, 831 A.2d. 881, 887 (Del. 2003).

<sup>13</sup> 29 *Del. C.* § 10142.

IT IS SO ORDERED this 1<sup>st</sup> day of November, 2007, that the Court refuses to certify the interlocutory appeal of the order of October 3, 2007.

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Judge Susan C. Del Pesco

Original to Prothonatary

xc: Michael W. Teichman, Esquire  
David E. Sellinger, Esquire  
Stuart M. Grant, Esquire  
Peter Andrews, Esquire  
Cathy L. Howard, Clerk of the Supreme Court