HISTORIC RESTORATION, INCORPORATED, AS	*	**NO. 2006-CA-1178**
INSURED AND ON BEHALF OF ADDITIONAL PLAINTIFFS	*	**COURT OF APPEAL**
302 JEFFERSON STREET, L.L.C., 800 CANAL STREET	*	**FOURTH CIRCUIT**
LIMITED PARTNERSHIP, 800 IBERVILLE STREET	*	**STATE OF LOUISIANA**
LIMITED PARTNERSHIP, ET AL.	*	
	*	
VERSUS	* * * * * * *	
RSUI INDEMNITY COMPANY		

TOBIAS, J., DISSENTS AND ASSIGNS REASONS.

Although I agree with the majority that a private right of action exists for HRI in this matter for the reasons assigned in *Dillard v. Lexington Ins. Co.*, 466 F.Supp.2d 723 (E.D. La. 10/2/06),[1] I respectfully dissent from the majority's

[1] The first paragraph of Emergency Rule 23 states:

> Emergency Rule 23 is issued pursuant to the plenary authority of the Commissioner of Insurance for the state of Louisiana, including, but not limited to, the following:
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> *Proclamation No. 48 KBB2005 issued on August 26, 2005 by Governor Kathleen Babineaux Blanco declaring a State of Emergency relative to Hurricane Katrina.
> *Proclamation No. 53 KBB 2005 issued on September 20, 2005 by Governor Kathleen Babineaux Blanco declaring a State of Emergency relative to Hurricane Rita
> *Executive Order No. KBB2005-70 issued on October 24, 2005 by Governor Kathleen Babineaux Blanco transferring authority over any and all insurance matters to Commissioner of Insurance J. Robert Wooley.
> *LSA R.S. 29:724
> *LSA R.S. 29:766
> *LSA R.S. 22:2
> *LSA R.S. 22:3
> *LSA R.S. 22:636
> *LSA R.S. 22:636.2
> *LSA R.S. 22:636.4
> *LSA R.S. 22:636.6
> ***LSA R.S.22:1214(12) and (14)**
> *LSA 22:1471
> *LSA R.S.49:950 [Emphasis supplied.]

decision that the trial court did not commit legal error in issuing the writ of preliminary injunction in this matter.[2]

The preliminary injunction issued by the trial court was improperly issued as a matter of law. The preliminary injunction that was issued was mandatory in nature; under Louisiana law, it is not possible to issue a mandatory preliminary injunction, because mandatory injunctions and preliminary injunctions have different procedural rules and different evidentiary burdens as a matter of law.[3] A mandatory injunction, as opposed to a prohibitory injunction, compels a party to perform a specific action. *Denta-Max v. Maxicare La., Inc.*, 95-2128, p. (La App. 4 Cir. 3/14/96), 671 So. 2d 995, citing, *Bollinger Machine Shop & Shipyard, Inc. v. U.S. Marine, Inc.*, 595 So. 2d 756, 758 (La. App. 4th Cir.), *writ denied*, 600 So. 2d 643 (La. 1992); *Maestri v. Destrehan Veterinary Hosp.*, 554 So. 2d 805, 808 (La. App. 5th Cir. 1989); *Werner Enterprises, Inc. v. Westend Development Co.*, 477 So. 2d 829, 832 (La. App. 5th Cir. 1985).

In the case at bar, the judgment rendered by the trial court contains both prohibitory orders ("RSUI is enjoined . . . from changing the terms, conditions, or premium for renewal of Policy No. NHD341277 . . .") and a mandatory orders ("and is ordered to renew the same under the same terms and conditions and for the same premium as provided for in the existing policy").[4] However, insofar as RSUI is ordered to maintain an insurance policy for one year, it is clear that the trial court

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[2] For reasons discussed *infra*, the trial court also erred in issuing the temporary restraining order.

[3] To the extent that RSUI failed to address the distinction between an ordinary injunction and a mandatory injunction, it is apparent that La. C.C.P. art. 2129 supersedes Rule 2-12.4 of the Louisiana Uniform Rules of Courts of Appeal and Rule VII, § 4(3) of Part A of the Rules of Supreme Court of Louisiana. *Rodrigue v. Rodrigue*, 591 So.2d 1171 (La. 1992) (rules of court that conflict with the Code of Civil Procedure are null and void).

[4] I note that the plaintiffs do state a valid issue that what the renewal policy covered may have changed from the original policy. Included among these is the change of language from "buildings, personal property, business income/rental value, and extra expense" to "building contents, improvement & betterments, and business income." No definitions of these terms appear in the record before us.

has ordered it to affirmatively *do* (i.e., perform an act) something, making it a mandatory injunction.

We noted in *Denta-Max, supra,* that a mandatory injunction has substantially the same effect as a permanent injunction. *Denta-Max*, p. 3, 671 So. 2d 997. De facto, they are one and the same. A mandatory injunction may not issue absent a full evidentiary hearing, while a prohibitory preliminary injunction only requires a prima facie showing that the applicant for the writ will prevail on the merits. As the Louisiana Supreme Court has stated in *City of New Orleans v. Board of Directors of the Louisiana State Museum*, 98-1170, p. 11 (La. 3/2/99), 739 So. 2d 748, 756, citing, *Denta-Max v. Maxicare La., Inc.*, 95-2128 (La App. 4 Cir. 3/14/96), 671 So. 2d 995:

> A mandatory injunction may not be issued on a merely prima facie showing that the party seeking the injunction can prove the necessary elements; instead the party must show by a preponderance of the evidence at an evidentiary hearing that he is entitled to the preliminary injunction.

We held in *Denta-Max* that a mandatory injunction may not issue absent "a full trial on the merits in which the taking of evidence is not limited that [the petitioner] is entitled to the injunction." *Id.*, 95-2128 at p. 5, 671 So. 2d at 998.

In *Dore v. Jefferson Guaranty Bank*, 543 So. 2d 560 (La. App. 4th Cir. 1989), this court held that the requirements for a mandatory injunction were met because the trial court "conducted an evidentiary hearing at which all parties were present, represented by counsel and were afforded the opportunity to present evidence and cross-examine witnesses." 543 So. 2d at 562.

In the case at bar, the transcript on the hearing for the preliminary injunction suggests that at some point prior to the hearing, the trial judge expressed a desire to

accept only affidavits, documentary evidence, and argument by counsel on behalf of each party, even though representatives from HRI were present in court:[5]

> MR. GARNER [counsel for plaintiffs]:
>
> . . . I don't have that in the record today. I know Your Honor said you did not want to take testimony. I can put Mr. Palmer on the witness stand or I can do a supplemental affidavit to clear this issue up. However you want to handle it.
>
> COURT: Supplemental affidavit.

The trial court did not explicitly refuse to entertain live testimony at the hearing. However, issuance of a mandatory injunction without either live testimony or a stipulation by the parties that they waived a full hearing with live testimony is not permitted. That is, the trial court was not trying the issuance of a preliminary injunction at the hearing; the trial court was ruling upon a permanent injunction.

Even assuming that a preliminary injunction was being heard, and not a permanent injunction, the judgment cannot survive as a matter of law. Temporary restraining orders and preliminary injunctions are interlocutory orders designed to maintain the status quo between the parties until the ultimate issues in the case can be litigated. La. C.C.P. art. 3601; *Yokum v. Court of Two Sisters, Inc.*, 06-0732 p. 3, (La. App. 4 Cir. 11/21/06), 946 So. 2d 671, 673; *Levine v. First National Bank of Commerce,* 98-1069 (La. App. 5 Cir. 6/1/99), 738 So.2d 133; *Haughton Elevator Division v. State, Division of Administration*, 367 So.2d 1161 (La. 1979); *Ridge Park v. Police Jury of Jefferson Parish*, 210 La. 351, 27 So. 2d 128 (La. 1946); *see also, Giron v. Housing Authority of City of Opelousas*, 393 So.2d 1267, 1272 (La.1981) (A preliminary injunction is only provisional and is not intended as a resolution of the merits of a controverted issue.) "The principal demand is determined on its merits only after a full trial under ordinary process, even though

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[5] It is unclear whether a representative from RSUI was also present. At any rate, neither side was afforded the opportunity to cross-examine any witness providing testimony through an affidavit.

the hearing on the summary proceedings to obtain the preliminary injunction may touch upon or tentatively decide merit issues." *Smith v. West Virginia Oil & Gas Co.*, 373 So.2d 488, 494 (La.1979). In the case at bar, no indication appears in the record on appeal that there is any contemplation of further proceedings on the permanent injunction; indeed, it is unclear what further injunctive action the trial court could take in this matter, as the central issues raised by the petition for injunction have been adjudicated in their entirety.

The plaintiffs were free to proceed in this matter for injunctive relief, even though the relief sought sounds as a matter declaratory judgment relief. La. C.C.P. arts. 1871, *et seq.* The function of a declaratory judgment is to establish the legal rights, duties, or status of the parties involved in the litigation. *Dazet v. French Market Homestead,* 533 So.2d 115, 116 (La. App. 4th Cir.1988). The declaratory judgment articles afford relief from uncertainty and insecurity with respect to legal obligations. *Id.* at 116. But declaratory actions are tried like other ordinary proceedings. La. C.C.P. art. 1879. Moreover, the trial of permanent injunctions like declaratory actions are not tried as summary proceedings. La. C.C.P. art. 2592. It therefore follows that mandatory injunctions that are permanent in nature likewise are tried as ordinary proceedings. As our jurisprudence noted above makes clear, a mandatory "preliminary" injunction is de facto and de jure a permanent injunction that must be tried as an ordinary proceeding. If the trial court had elected to issue a declaratory judgment, it would have been litigated by ordinary process, and the trial court could have more explicitly entertained the factual issues before it.[6]

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[6] It therefore follows that the trial court erred issuing the mandatory temporary restraining order in the case at bar. The reasoning for this is best illustrated by the following example:

Plaintiff files suit for a temporary restraining order, preliminary injunction, and, in due course, a permanent injunction. The plaintiff seeks from the court an order directing the defendant to pay a sum certain of money. If the court issues the order to pay the money solely upon the sworn petition of the plaintiff, the defendant is in contempt of court if the defendant does not pay the money as ordered even though the defendant has not been afforded an

The failure to implement the proper trial procedures in hearing the motion for mandatory injunction has implications on the substantive factual issues underlying the petition for injunction. In particular, the majority agrees with the trial court that a showing of irreparable harm was not necessary in light of an alleged violation of ER 23, which has the legal effect of a statute. Indeed, where injunctive relief is sought to prevent the violation of a statute, the jurisprudential rule is that no showing of irreparable harm is necessary. However, the violation of law must be clear and not speculation. While the trial court rejected RSUI's testimony by affidavit as offering a merely conclusory statement and not sufficient evidence to support the change in premium, the facts underlying this dispute were required to have been more fully vetted in a complete trial on the merits of the request for a mandatory injunction.[7] ER 23 did not prevent RSUI from raising its premium; it merely required RSUI to offer objective reasons for its increase. In light of the fact that HRI added new properties to the policy that was in effect from 31 May 2005 through 31 May 2006, it is follows that RSUI more likely than not was entitled to increase the premium as it assumed greater risks of loss.

I would also address RSUI's seventh assignment of error relating to the constitutionality of ER23. As a preliminary matter, the constitutionality of a statute must first be alleged in the trial court, and the alleged unconstitutionality must be specifically pled to be considered by the trial court. *Vallo v. Gayle Oil Co.*, 94-1238 (La. 11/30/94), 646 So. 2d 859. While RSUI alleged that ER 23 violated the Takings Clause of the Fifth Amendment of the U.S. Constitution as an

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opportunity to be heard. Similarly, at the hearing of the preliminary injunction, the defendant is not afforded the right, unless the court elects to have a full evidentiary hearing, to prove the why it should not pay the plaintiff the sum of money sought. That a bond might be posted by the plaintiff in an amount to be determined by the court (La. C.C.P. art. 3610) does not protect the defendant for he is being deprived of property without a hearing.

[7] This is especially true in light of the mandate on trial courts to try a motion for preliminary injunction within ten days of its service on the adverse party. *See*, La. C.C.P. art. 3602. Indeed, the mandatory preliminary injunction, which as noted in the body of this dissent is a permanent injunction, must be heard within ten days of service of the petition.

affirmative defense in its answer, it did not discuss the issue in any further pleadings. Although the Louisiana Attorney General must be served a copy of the pleading that contests the constitutionality of a statute, it is clear that the attorney general need not be served when one is contesting the constitutionality of a *regulation*. *Id.* at 864; La. R. S. 13:4448.[8] Nothing in the record before us indicates that the attorney general was served with the plaintiffs' lawsuit or the defendant's answer asserting the unconstitutionality of the Insurance Commissioner's regulation. Although one might argue that the issue of the Takings Clause is not properly before this court according to La. R. S. 13:4448, I find that the attorney general did not have to be notified of the suit under the clear, unambiguous language of La. R.S. 13:4448.

I find that RE 23[9] does not violate the Takings Clause of the Fifth Amendment. The Taking Clause of the Fifth Amendment states, in pertinent part,

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[8] La. R.S. 13:4448 states:

> "Prior to adjudicating the constitutionality of a **statute** of the state of Louisiana, the courts of appeal and the Supreme Court of Louisiana shall notify the attorney general of the proceeding and afford him an opportunity to be heard. The notice shall be made by certified mail. No judgment shall be rendered without compliance with the provisions of this Section; provided where the attorney general was not notified of the proceeding, the court shall hold adjudication of the case open pending notification of the attorney general as required herein." {Emphasis supplied.]

[9] Six exceptions to ER 23 are listed in ER 23 § 4307 for cancellation or non-renewal of a policy:

1. Non-payment of the premium after providing the insured with notice of cancellation in accordance with the applicable statutory time period mandated by the Louisiana Insurance Code for that type of insurance.
2. Fraud or material misrepresentation related to the Hurricane Katrina or Hurricane Rita claim, but only after the insurer has provided the insured with a 60-day written notice of cancellation setting forth the specifics with regard to the alleged fraud or material misrepresentation.
3. The insured causes an unreasonable delay in the repair or reconstruction of the dwelling, residential property, or commercial property, but only after the insurer has provided the insured with a 60-day written notice of cancellation setting forth the specifics with regard to the insureds unreasonable delay with regard to the repair or reconstruction.
4. The insured has been paid the full policy limits and the insured has evidenced the intent to not repair or reconstruct the dwelling, residential property or commercial property.
5. The insured has not been paid the full policy limits but the insured has evidenced the clear intent to not repair or reconstruct the dwelling, residential property or commercial property.
6. The insured violates a material provision of the policy, including, but not limited to, performing illegal activity or failing, without just cause, to make reasonable efforts to protect the

"nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V; *see also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 121-23, 98 S.Ct. 2646, 2658 (1978) (applying the Fifth Amendment to the States through the Fourteenth Amendment). "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569 (1960).

The current standard for evaluating a regulatory taking is found in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986). In *Connolly*, the Supreme Court recognized three factors that should be considered to identify a regulatory taking: (1) the economic impact of the challenged rule, regulation, or statute on the plaintiff; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the nature of the challenged action. *Id.* at 224-26, 106 S.Ct. at 1026 (citations omitted). *See also Vesta Fire Insurance Corp. v. State of Florida*, 141 F. 3d 1427, 1431 (11th Cir. 1998). I do not find that these factors are present under the facts of this case.

In conclusion, I am reminded of Benjamin Franklin's comment appearing in the *Historical Review of Pennsylvania* in 1759, to-wit, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Applied to the case at bar, one can say that the failure of a court to afford an insurer a full evidentiary hearing as required by existing law and jurisprudence in order to temporarily give a person the right to retain his/her/its insurance policy on the same terms and conditions without any increase in premium may result in

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insured dwelling, residential property or commercial property that results in an increased risk to the material detriment of the insurer.

no one being able to obtain any insurance. The rush to judgment was unwarranted and sounds clearly in a denial of procedural, if not also substantive, due process.

For the foregoing reasons, I respectfully dissent and would vacate the injunction and remand the matter to the trial court for a full trial on the merits of the injunction where all facts might be properly ascertained.