

SCAARLA

SOUTH CAROLINA ADMINISTRATIVE AND REGULATORY LAW ASSOCIATION

BRIEFS

JULY 2004

What's Happening with SCAARLA?

By Malane Pike

SCAARLA is now in its fourth year and will be hosting its 4th annual educational seminar and meeting at Saluda Shoals Park on October 1, 2004. Please take note of the agenda on page two.

Over the past four years, SCAARLA's membership has grown significantly, it has established a quarterly email newsletter, and it has created a website about the organization with helpful administrative law information. With membership

renewal fast approaching, we sincerely hope that you will continue your support of SCAARLA.

In addition, we hope to see you at the annual educational seminar on October 1, 2004. This will be an "oath" seminar and will also offer two hours of MCLE credit. Brochures for the seminar registration will be mailed out to members in early August and to the general public thereafter. **Please register early because seating will be limited.** You may

also renew your membership on the registration form. As an added advantage, the South Carolina Bar plans to offer the book *South Carolina Administrative Practice and Procedure*, by Randolph R. Lowell, Esq., and Stephen P Bates, Esq., at a discount with your registration.

Please feel free to contact Gloria McSorley at (803) 791-4181 if you have questions or would like further information about SCAARLA or its activities.

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The Administrative Law Judge Division is Now the "Administrative Law Court"

By Jana E. Shealy

On April 26, 2004, Governor Sanford signed into law H.3235 (Act 202 Of 2004), which changed the name of the Administrative Law Judge Division to "Administrative Law Court." The Act further amended S.C. Code Ann. § 1-

23-600(C) to provide that all requests for a hearing before the Administrative Law Court (ALC) shall be in accordance with the Court's rules of procedure.

The name change was an effort to have a name

that more accurately reflects the way that the ALC operates. We are an independent agency in the executive branch of government. Often times, when litigants saw the word "Division" in our name, they would get the impression that we were a part of another agency, perhaps one with which they were in a dispute. The legislature created the ALC as an independent body, (continued p. 3)

Special points of interest:

- *The website has been updated: see www.scaarla.org.*
- *SCAARLA's annual conference will be October 1, 2004 at Saluda Shoals.*
- *The National Association of Administrative Law Court Judges will hold their 2004 Annual Meeting and Conference in Baltimore November 3-7.*



State of South Carolina
Administrative Law Court



SCAARLA AT THE SHOALS

“Navigating the River of Administrative Law Practice”

SCAARLA's 2004 Educational Seminar and Annual Meeting

Friday, October 1, 2004

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Saluda Shoals Park, Columbia, SC

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- Take the New Oath Administered by the Honorable Costa M. Pleicones
 - Complete Two Hours of Ethics Credit
 - Receive a Discount on the New State Administrative Law Book
 - Only \$100 for SCAARLA Members! (\$155 Non-Members)
-

8:15-8:50 Registration and Continental Breakfast

8:50-9:00 Welcome and Comments

South Carolina Administrative Law Judge Marvin F. “Buddy” Kintrell, President of SCAARLA

BREAKOUT 9:00-10:00 South Carolina Lawyers Civility Oath, *Desa A. Ballard, Esq.*

9:00-10:00 Civility Across the Professions, *Kay Crowe, Esq., et al.*

10:00-10:15 Mid-morning Break

10:15-11:15 Administering the Oath + Topic

The Honorable Costa M. Pleicones, Justice of the South Carolina Supreme Court

11:15-11:45 South Carolina Administrative Practice and Procedure

Randolph R. Lowell, Esq. and Stephen P. Bates, Esq.

11:45-12:00 Effect of Filing for Bankruptcy on Administrative Proceedings

Robert F. Anderson, Esq.

12:00-1:00 Catered Lunch; Streamlining the Administrative Appellate Process

The Honorable James H. Harrison, State Representative, House District No. 75

1:00-1:15 SCAARLA Annual Meeting

1:15-2:15 Public Service Commission Restructuring Act/Exparte Communications, Round Table Discussion

John M.S. Hoeffler, Esq., Moderator, The Honorable Dukes C. Scott, Frank Ellerbe, Esq., Michael N. Couik, Esq.

2:15-3:00 Impact of Sarbanes-Oxley

Sheila Ogletree

3:00-3:15 Mid-afternoon break

3:15-3:45 Finality of Administrative Order

Celeste Jones, Esq., Clifford O. Koon, Esq., Wendy Cartledge, Esq.

3:45-4:00 Update on Environmental Administrative Law Cases

James Potter, Esq.

4:00-4:30 20% Property Tax Assessment Cap, *John A. Cloyd,*

Richland County Assessor, Harry Huntley, Richland County Auditor



*Applications to reserve seating will be mailed eight (8) weeks prior to the seminar.

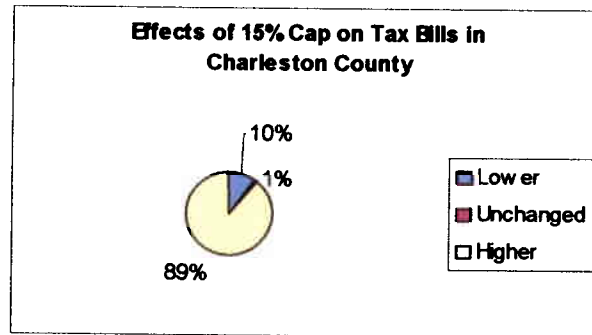
Controversial 20% Cap on Governor's Desk

By John Cloyd

On June 3, 2004, the General Assembly, in the final hours of the session, passed House Bill H.3065 which has been referred to as the South Carolina Department of Revenue's big annual tax bill. Included in H.3065 was a provision to cap values in the year of reassessment at 20 percent. This was done with very little factual information. At this point, the House and Senate have passed the bills and we await the Governor's action.

The Governor can delay vetoing the bill until five days after the Legislative Session begins on January 20, 2005. However, local government has the responsibility to fund its activities, and tax bills need to be produced certainly in September, October and November. The question that is posed to local government is, should we send tax bills based on current law, or on H.3065 which is not law. It's a big dilemma with a lot of money involved.

Most people believe that a 20 percent cap is going to solve all of the problems of property tax; however, if you were to look at Charleston for the effects of the 15 percent cap mechanism then it certainly lowers expecta-



tion. Taking into consideration all of the tax bills prepared in Charleston County, a total of 505,000, 53,000 will be lower because of the cap, 5,000 tax bills will not change, and 447,000 will be higher tax bills. Of the primary residences, 24% would be lower; 76% would be higher or the same. For commercial properties, 44% would be lower, 56% would be higher or the same. For motor vehicles: 0 would be lower, 100% would be higher.

South Carolina has struggled with taxes over the past hundreds of years; however, when Act 208 was passed it set up certain assessment ratios for the different classes of property, and it would appear we had equity. Over the last 29 years, there has been "nibbling" around the margins,

reducing the vehicle assignment ratio from 10.5% to 6%, including our motor homes for legal residence, and so forth. The cap is another intermediate step to a complete answer to how property taxes should be done. The major problem lies in the EIA and the EFA school funding mechanism which is *revenue* driven, not *results* driven, and until the Legislature comes to grips with how schools are to be funded, this State will always be tinkering in trying to do something for a particular class or property owner.

Stay tuned as questions about the constitutionality of this particular piece of legislature plays out. It looks as if local government will have to wait until this issue has been resolved in the courts.

The Administrative Law Court's New Name (con't)

"The name change was an effort to have a name that more accurately reflects the way that the ALC operates."

(from page one) separate from the agency, with judges qualified and elected by the General Assembly, to give citizens the opportunity for a fair and objective hearing. When citizens challenge an action by a state agency in the ALC, their case will be heard and decided by an impartial judge. We hope that the name of the Administrative Law Court is more indicative of the independent service we provide to the

citizens of South Carolina.

As a result of the name change, there are a few housekeeping matters which affect the ALC and the litigants that appear before the Court. First of all, any and all documents filed with the ALC should reflect the name change in the caption as well as any reference to our agency in the body or content of the document. In any of those documents where our rules are cited, the

reference should be made to "ALC Rules" or for a specific rule, "ALC Rule ____" (insert rule number). Also, the web address has been changed from www.scljd.net to www.scalc.net.

If you have any questions regarding the name change or other matters related to the ALC, please contact the Clerk's Office.

Member Profile: Linda McDonald



Linda McDonald and her Education Committee Co-Chair, John Hoefler, are planning this year's annual seminar.

The South Carolina Administrative and Regulatory Law Association is pleased to spotlight Linda McDonald.

Linda is a very active SCAARLA board member who co-chairs our Education Committee. In that capacity, she and her co-chair determine the seminar topics and speakers, secure commitments from the speakers, organize the seminar agenda, obtain written materials from the speakers, and coordinate with the South Carolina Bar with regard to all aspects of the educational portion of the seminar.

In her life apart from SCAARLA, Linda is Chief Counsel for

the South Carolina Department of Transportation. She has held that position since 2000. Linda graduated from the University of South Carolina School of Law and was licensed to practice law in 1979. She practiced with the firm of McDonald, McKenzie, Fuller, Rubin, and Miller from 1979 to 1990. She became Assistant Chief Counsel with the South Carolina Department of Transportation in 1990. Thereafter, she was promoted to Deputy Chief Counsel and then, to Chief Counsel.

On a more personal level, Linda resides in Columbia. She is an avid tennis player and also enjoys gardening.

South Carolina Ranked at Top in Tax Administration

By Danny Brazell

South Carolina is ranked as one of the top states in the nation in its "fair, efficient, and customer focused" tax administration, says a national tax watchdog group that ranks the states in those categories. Making that achievement even more impressive is that South Carolina was listed near the bottom in the same ranking just four years ago.

South Carolina is tied with Arizona, Kansas, and Missouri at the top of the national ranking as states that administer the most fair and equitable income tax program, said the Council on State Taxation (COST) in their 2004 ranking. In 2000, COST ranked South Carolina 40th in the same listing.

COST, a Washington, DC-based tax watchdog group made up of corporate executives, ranks states each year for their tax administration proficiency, looking at elements such as a state's ability to attract industry with their corporate tax programs, their fairness and balance in the tax appeals process and the state's overall tax administration performance by their revenue department.

"Our rapid rise to the top of this ranking in just four years reflects our General Assembly's efforts to make South Carolina an attractive business and corporate location and the Department of Revenue's initiatives to improve overall customer service," said the Department of Revenue Di-

rector, Burnie Maybank. "The fact that we were able to reach the top of the ranking in the midst of four years of very difficult economic and budget hardships is, in fact, quite an achievement and reflects the hard work of the state's tax officials and the state employees responsible for administering South Carolina's tax program."

COST calls their annual ranking, based on a point system, the "Best and Worst of State Tax Administration." In their review of the states' tax programs, the council also looks at the way states administer tax deadline extensions, their working relationship with the Internal Revenue Service and their treatment of taxpayers in an audit.

"South Carolina is ranked as one of the top states in the nation in its 'fair, efficient, and customer focused' tax administration"



Legislation Adds New Special Purpose Financial Captive Section

By Michael Molony

The South Carolina captive insurance program, administered by the Department of Insurance's Alternative Risk Transfer Section, has taken a giant leap forward through enactment of new legislation which will put the jurisdiction as a worldwide leader in the use of captives for sophisticated financial transactions.

This article will focus on this new legislation which creates a new chapter in the captives law, captioned Special Purpose Financial Captives ("SPFC").

The SPFC was created, in large part, as a result of increased interest by many insurance companies in securitizations. An insurance securitization is a means of converting insurance risk into securities which are sold to sophisticated investors. Securitizations are a means of accessing capital through alternative sources, such as global financial markets. Initial securitization inquiries received by the Department were driven by the NAIC's Triple X Reserve Requirement for life insurers. The SPFC statute, however, envisions many other types of securitizations.

Under the terms of a typical securitization transaction, the SPFC sells securities to institutional investors. The securities are similar to a bond, and pay interest or dividends until a specified maturity date at which time the principal is returned unless a specific event has occurred. Insurers cede certain risks to the SPFC for a specified premium. The proceeds from the sale of securities are held in a specially drafted trust, administered by a third party financial institution. The trust funds are available to pay the obligations, which have been ceded by insurers in the event a triggering event occurs, or to repay the principal to the investors in the event that a triggering event does not occur.

Securitization transactions are important to the insurance industry since they allow the industry to transfer risks by direct access to the financial markets and thereby expand and diversify capacity (i.e. they allow them to access alternate sources of capital). A securitization transaction can be used where coverage in the traditional reinsurance market is either unaffordable or unavailable.

Securitizations generally involve two facets. The first element involves the creation of the securitization vehicle which is essentially a state regulated function. The other aspect of the securitization involves very sophisticated financial transactions, usually administered through an underwriter familiar with the capital markets primarily in New York and other capital markets. The Special Purpose Financial Captive provisions will significantly reduce the amount of risk involved in the securitization which drives the process. Further, and equally as important, the Special Purpose Financial Captives law will reduce, significantly, "friction costs" which involve the numerous fees charged by legal counsel, underwriters, and financial guarantors.

Last year, the Department of Insurance reported that South Carolina completed its first securitization via a special purpose captive insurance company. South Carolina is the first on-shore jurisdiction to receive, approve and finalize an insurance securitization through the captive platform. The securitization involved use of the captive solution for transformation for transformation of the risk portfolio into money market securities. These transactions involve substantial monetary amounts resulting in significant economic advantages to the state, including additional premium taxes and fees.

The new statute addresses

many of the issues the Department encountered in the initial transaction. The effect of the SPFC will be to give investors greater certainty and specificity with respect to the transaction, thereby reducing risk and the ultimate cost of the transaction.

Among other things, the new SPFC legislation establishes minimum capital requirements; procedures for rehabilitation and liquidation; ensures longevity of orders of the Director and requires strict requirements for the safekeeping of the securitized funds.

There are twenty different definitions contained in the new legislation which define, clarify, and delineate various aspects the securitization proc-

"[They have] taken a giant leap forward through enactment of new legislation which will put the jurisdiction as a worldwide leader in the use of captives for sophisticated financial transactions."

ess. This entity, which although regulated and established through a plan of operation, contains general corporate powers under South Carolina law.

One of the most important provisions relate to the Director's powers as reflected in his orders. An order specifically authorizes under the Special Purpose Financial Captive law to be regulated in a manner that is tailored to the nature of the securitization. Without the statute, there was inherent imprecision of an order in a securitized transaction. (continued p. 6)

SPFC (con't from p. 5)

The Director's orders needed permanency and reliability. Uncertainty with respect to the transaction translates into greater risk and higher costs. More specifically, if an order can be rescinded, modified or revoked, as in the normal case, this injects an unusual element of risk in a securitized securitization which often spans over a number of years. The Special Purpose Financial Captive provision addresses this in a unique way.

An order of the Director cannot be rescinded, modified or revoked unless, and until, a specific and particular finding is made, utilizing an evidentiary standard that is the highest burden of proof in the civil laws arena.

Further, the law defines securitization in a manner that will allow the general practitioner to more fully understand all of the components which are necessary to perform and complete the securitization transaction. Additionally, another definition is that of a "Surplus Note" which is essentially the financial instrument utilized by the SPFC to facilitate the initial capital flow for the securitization transaction. These Surplus Notes are specifically defined to include those that conform with the NAIC requirements and accounting rules.

While the application process for a Special Purpose Financial Captive remains essentially that same as that for a traditional captive, there are several specific and new requirements set forth under this provision.

First, there is the requirement of the NAIC background check.

Additionally, the applicant is required to represent that it is in compliance with South Carolina law, specifically, and is exempt as either an exempt security or exempt transaction for purposes of compliance with the securities law.

Further, the application requires a detailed plan of operation

which forms the roadmap for the securitization process itself. The provisions of the Special Purpose Financial Captive statute were carefully drafted to ensure that securitized funds would be given credit for reinsurance to the counterparty or reinsured. Without credit for reinsurance, the securitization transaction would make no economic sense. To ensure validity of credit for reinsurance, the SPFC legislation provisions afford the counterparty's domicile regulatory authority a review of the proposed securitization to ensure that it will allow the counterparty credit for reinsurance.

The SPFC statute contains organizational requirements to ensure financially sound new captives in South Carolina. Section 38-90-440 contains many of these requirements:

- A SPFC may only insure or reinsure counterparty risks, and that it may only purchase reinsurance as approved by the director.
- A SPFC is required to obtain a license from the director, hold one management meeting each year in SC, maintain its principal place of business in SC, and appoint a registered-resident-agent for service of process.
- A SPFC is required to file with the director: certified copy of its organizational documents, and the president's and secretary's sworn statement showing the SPFC's financial condition. In addition, it must present evidence showing the amount and liquidity of its assets relative to the risks assumed, the adequacy of management's expertise, expertise and character, the overall soundness of its plan of operation, and any other factors the director considers relevant.

The SPFC statute allows for the creation of protected cells; however, additional disclosure requirements are placed on this sophisticated business structure. When a protected cell is utilized, a SPFC must also file:

- A business plan accounting for the loss and expense experience of each protected cell, and how it reports that experience to the director.
- An acknowledgement that all financial records must be made available for examination by the director.
- All protected cell contracts and sample contracts.
- Evidence showing an equitable division of expenses between its protected cells.

The SPFC statute also provides that information submitted in compliance with the filing requirements is confidential and subject to strict compliance with disclosure provisions. The statute also sets forth required examinations, investigations, and ongoing review processes conducted by the Department.

Since 2000, the General Assembly has passed several pieces of legislation to facilitate insurance securitization transactions in South Carolina. In 2000, the protected cell legislation was enacted; the Special Purpose Reinsurance Vehicle Model Act in 2001; the Special Purpose Captive Insurance Company in 2002.

The South Carolina captive program has been known for an innovative, flexible, responsive approach to the formation and development of alternative risk transfer mechanisms. The Special Purpose Financial Captive Section continues that tradition. Because the transactions may span a period of thirty years, it is expected that the present value of the premium taxes to be paid could be important to the state's economy. For example, the present value of expected tax payments for the securitization transactions could exceed \$1 million for each transaction. By adopting this statutory addition, South Carolina will have the most efficient statutory framework in place for the ever-growing securitization market and will be recognized as a global leader in this market.

From the President

By Judge Marvin "Buddy" Kittrell

Summer is here. As we enjoy this time with our families and take respite from the stresses of our work, it is good to reflect on our country and our freedoms.

On July 4, we flew our national flag, shot fireworks and sang our national anthem "The Star Spangled Banner." I get goose bumps every time I hear it, thinking of our history and those who have fought to preserve it.

Francis Scott Key, its author, was a lawyer of the first rank. He graduated first in his class at St. John's College in Maryland. While there, he met 13 year old Mary Taylor Lloyd and began his courtship with her by writing love poems.

Years after he wrote "The Star Spangled Banner," Key told of the events concerning its writing to his

brother-in-law, Roger Brooke Taney (who later became Chief Justice of the United States Supreme Court). The story began soon after the British had burned down Washington. Angered by the actions of some American citizens, the British seized some of them, one of them being a prominent physician, Dr. William Beanes. They were held aboard a British ship.

At the urging of some of his friends, Key sought approval from President James Madison to contact the British and obtain the release of Dr. Beanes. The approval was given, and on the night of September 13, 1814, Key went on board the British ship. After obtaining the release of Dr. Beanes, Key returned with Dr. Beanes to his vessel. However, they were unable to land. From the deck of their vessel they watched all

night as the British bombarded Fort McHenry. Notwithstanding, the fort never surrendered.

In the fervor of the moment, Key began the poem, finished on the way to the shore and wrote it out in his hotel room in Baltimore. It was quickly printed on handbills and distributed to the crowds who celebrated the victory. It was first sung in a tavern in Baltimore by young volunteer soldiers.

By the time of the Civil War, it had become our most favored national song. However, it was not until March 3, 1931, while Herbert Hoover was our President, that it was made our national anthem.

I encourage each of you to take time to listen to the words of this song this summer and tell the story to family and friends.



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scaarla MISSION

The South Carolina Administrative and Regulatory Law Association (SCAARLA) is a non-profit organization dedicated to fostering the development of Administrative Law and improving the administrative justice system in South Carolina. Through its educational initiatives, SCAARLA offers commissioners, hearing officers, attorneys, certified public accountants, judges, public officials and others a forum for the exchange of ideas and opinions on administrative law issues and promotes uniformity in the administrative procedures throughout South Carolina.