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## The End of the Agency's Second Bite at the Apple

### *Shorts on Long Term Care October 2011*

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"It ain't over 'til it's over." Since the inception of North Carolina's Administrative Procedure Act (APA) over 30 years ago, the State's executive branch agencies have been able to live by this famous Yogi Berra adage because, in most instances, they had the final say in cases challenging their actions or decisions. But no more. As part of the General Assembly's regulatory reforms in the 2011 session, legislators took this final decision authority away from the agencies (with the exception of occupational licensing board cases) and gave it instead to administrative law judges (ALJs) in the state's Office of Administrative Hearings. This change will have important legal and practical ramifications for future cases challenging state agency actions and decisions, including licensure, certificate of need and other types of disputes impacting long term care providers.

Historically under the APA, a contested case challenging a North Carolina agency's decision or action has been heard by an ALJ who is not a part of the agency that made the decision or took the action being challenged. After hearing and considering the factual evidence and legal arguments of the parties, the ALJ would determine whether the agency decision at issue was correct. However, the ALJ's decision has not been final, but rather has been a recommendation sent back to the agency for a final decision. In practice, the director of the agency whose decision was being challenged often reversed an ALJ's recommended decision that recommended overturning the agency's initial decision, frustrating litigants who thought they had

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won, only to find their “winning decision” reversed by the very agency they were suing. For many years, some advocates for businesses regulated by state agencies ridiculed this procedure as being a bit like the fox guarding the hen house. On the other side, agencies maintained it was appropriate for them to have the final say due to their expertise in the area of law at issue and their delegated role as interpreter and enforcer of that law. The political climate was ripe in the 2011 legislative session for the final decision authority to be transferred to ALJs.

Beginning with contested cases filed on January 1, 2012, the ALJ’s decision in a case will be final, subject to any further appeal to court. This substantial change in the law will apply to all executive branch agencies and all types of contested cases subject to the APA, with the limited exception of cases involving occupational licensing boards. Unlike past APA amendments aimed at strengthening the weight and force of an ALJ’s decision, there is no carve out to exclude certificate of need disputes from this momentous change.

The move to ALJ final decisions is certain to trigger a corresponding shift in the course and tactics of hearings in contested cases challenging agency actions. Agency expertise and whether the agency’s interpretation of the law is supported by controlling statutes and rules will likely become more critical aspects of contested case hearings. Agencies and private parties aligned with them will no longer have an opportunity at the final decision stage to bring ALJ decisions in line with the agencies’ perspective on the law. This will make it important for parties on both sides of the case to put on evidence regarding how the agency decision being challenged fits (or not) within the law as well as any agency expertise or lack thereof.

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