No Trifling Matter: Forms, Bulletins, and Administrative Rulemaking in Louisiana After Gingles v. Dardenne

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I. INTRODUCTION

Imagine a meeting between a representative of a Louisiana insurance company and a potential client. The client is interested in purchasing an automobile liability insurance policy. Seeking to save money on her insurance premiums, the client expresses a desire to waive uninsured and underinsured motorist (UM) coverage, which would otherwise automatically be included in the policy. The representative presents a waiver form issued by the Louisiana Department of Insurance (LDOI), and the two carefully fill out all of the blanks on the form. After the client signs the form, she and the representative conclude their remaining business together, and the satisfied client leaves the office with her new insurance policy.

Several months later, the client is involved in an automobile accident with an insolvent and uninsured driver. Unable to recover damages from the accident by any other means, the client sues her insurance company, claiming that she is entitled to UM coverage under her policy. The client’s prior waiver of UM coverage is ineffective, she says, because a blank on the waiver form requiring the insurer’s company name had not been filled out. In its response, the insurance company notes that a recent Louisiana Supreme Court case held that the company name is not required for a valid UM waiver. The client counters that the case is not controlling because it dealt with an old UM waiver form that is no longer in effect, and the instructions accompanying the current version of the form specifically require inclusion of the company name.
The insurance company replies that the Louisiana Supreme Court decision should be interpreted to apply to all UM waiver forms issued under the controlling statute, not just the particular form that was before the court at the time.

The above hypothetical scenario illustrates some of the problems caused by the recent Louisiana Supreme Court case of Gingles v. Dardenne, which involved a purported waiver of UM coverage in an automobile liability insurance policy. The central issue in that case was whether the bulletins of the Commissioner of Insurance ("Commissioner") could impose additional requirements on top of the pre-existing statutory and jurisprudential requirements for an effective UM waiver. Although the Gingles court found that an effective UM waiver did not require the insurer's company name, the court did not explain its disregard of the Commissioner's bulletins. Thus, the Gingles decision muddies the waters with respect to UM waivers while also raising the broader question of whether, outside the context of UM waivers, documents such as the bulletins can have legally binding effect under Louisiana law. Is this issue a mere trifling matter, or does it have broader implications for administrative law in Louisiana?

This Comment explores the possible ramifications of the Gingles decision on the requirements that Louisiana state agencies must follow when promulgating legally binding "rules." The Comment concludes that most agency documents, which have a minimal effect on substantive rights, should be generally exempt from the notice-and-comment rulemaking procedures of the Louisiana Administrative Procedure Act (LAPA) in order to increase administrative efficiency. However, safeguards should be built into that exemption to account for documents, such as those in Gingles, that disproportionately impact the substantive rights of affected persons.

Part II provides a brief overview of the notice-and-comment rulemaking provisions of the LAPA as well as the relevant legislation and jurisprudence regarding waivers of UM coverage. Part II culminates in a detailed analysis of the Ginges case and its

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7. See infra Part II.B.3.
9. 4 So. 3d 799.
10. Id.
11. Id. at 800.
12. Whenever this Comment refers to "persons" regulated by an agency, it is also referring to any legal entities that the agency may also regulate. For the sake of brevity, the term "persons" will be used to refer to both natural persons and legal entities.
aftermath. Part III explores the question of whether the types of documents at issue in Gingles are required under Louisiana law to go through the LAPA’s prescribed rulemaking procedures before being accorded legally binding effect. Part IV discusses the various policy considerations behind requiring notice-and-comment rulemaking for these documents. Part IV also proposes possible ways to exempt certain agency documents from notice and comment, both under current Louisiana law and through amending the LAPA.

II. RULES AND WAIVERS: AN OVERVIEW

To understand the issues that the Gingles decision raises for administrative rulemaking in Louisiana, it is essential to review the pertinent provisions of Louisiana administrative law as well as the relevant Louisiana law regarding waivers of UM coverage. A careful analysis of the interactions between the two bodies of law serves to illustrate several problematic issues regarding the scope of Louisiana’s notice-and-comment rulemaking procedures.

A. Louisiana Administrative Rulemaking

The Louisiana Legislature enacted the LAPA in 1966.14 The legislation was partially based on the Revised Model State Administrative Procedure Act as well as the federal Administrative Procedure Act (APA).15 The main purpose behind the LAPA’s enactment was to “replace the myriad of rules governing agency procedure with a comprehensive and uniform system.”16 The legislation covers many facets of state administrative practice, including adjudication, rulemaking, and the scope of judicial review of agency action.17

1. The LAPA’s Rulemaking Procedures

One of the primary components of the LAPA is the enactment of various procedures that state agencies are required to follow when promulgating legally binding rules. Section 951(6) of the

15. Id. at 1227 n.1.
LAPA defines a “rule,” in part, as “each agency statement, guide, or requirement for conduct or action . . . which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency.” Following up on that definition, Section 951(7) of the LAPA defines “rulemaking” as “the process employed by an agency for the formulation of a rule.”

Section 953 of the LAPA provides detailed procedures that an agency must follow when engaging in the adoption, amendment, or repeal of a rule. Generally, the provision requires an agency to give notice of its intended action at least 90 days before taking action on the rule. The agency must publish the notice at least once in the Louisiana Register and must submit the notice, along with the full text of the proposed rule, at least 100 days before the agency takes action on the rule. Among other requirements, the notice must include a statement of the substance of the intended action as well as various statements of the intended action’s impact. During this notice period, the agency must afford all “interested persons” a reasonable opportunity to submit data, views, comments, or arguments concerning the proposed action. Upon taking the action, the agency must include a response that addresses any concerns raised by the public submissions.

Section 963(C) provides that a court shall invalidate a rule if it finds that the rule was adopted without “substantial compliance” with the required rulemaking procedures; similarly, Section 963(E) provides that if a reviewing court finds a rule has not been promulgated in accordance with the LAPA’s provisions, the court

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19. Id. § 951(7).
20. Id. § 953; see Ketchum & Olsan, supra note 17, at 1347–55.
22. Id. § 953(A)(1)(b)(i). The Louisiana Register is published at least once a month by the Department of the State Register and contains, among other things, the text of all proposed rules filed during the preceding month as well as any associated notices. Id. § 954.1(B) (2003).
24. Id. § 953(A)(2)(a). The LAPA provides that a “person” is “any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency.” Id. § 951(5). An “interested person” would presumably be any “person,” as defined by the LAPA, that wishes to provide input on the proposed action.
26. Id. § 963(C) (2003).
must declare the measure invalid and unenforceable.\textsuperscript{27} Furthermore, any proposed rule is subject to approval by an oversight subcommittee of the state legislature\textsuperscript{28} and may also be invalidated by a concurrent resolution of the legislature\textsuperscript{29} or by an executive order of the governor.\textsuperscript{30}

In summary, the LAPA requires an agency that wishes to promulgate a rule to provide prior "notice" of the proposed rule to the public and an opportunity for the public to submit "comments" on the rule prior to it becoming enforceable law. According to one court, the primary purpose behind these so-called "notice-and-comment" procedures is to ensure that all interested parties are made aware of any proposed rule that may be adopted.\textsuperscript{31} The procedures also give those parties an opportunity, prior to the rule going into effect, to articulate any concerns that the rule may raise, so that the agency might address those concerns before the final rule is promulgated.\textsuperscript{32}

2. The Scope of a "Rule"

Although Louisiana jurisprudence regarding precisely what constitutes a rule within the meaning of Section 951(6) is not extensive, one Louisiana First Circuit case is instructive on the matter. Star Enterprise v. State involved a letter that the Department of Revenue and Taxation sent to various oil

\textsuperscript{27} Id. § 963(E). The provision contemplates a rule as being a "statement, guide, requirement, circular, directive, explanation, interpretation, guideline, or similar measure." Id. (emphasis added). Thus, it is possible that the drafters of the provision expressly accounted for publications such as the Commissioner's bulletins. \textit{See infra} Part III.B; \textit{see also} ARTHUR EARL BONFIELD, \textit{STATE ADMINISTRATIVE RULE MAKING} 74–75 (1986) ("Experience has shown an inclination 'by some agencies to label as "bulletins," "announcements," "guides," "interpretive bulletins," and the like, announcements which, in legal operation and effect, really amount to rules.' The word 'statement' . . . makes it clear that all such agency pronouncements are included within the definition of 'rule,' even if they are called manuals, memos, guidelines, or otherwise." (quoting 1 FRANK E. COOPER, \textit{STATE ADMINISTRATIVE LAW} 108 (1965))).

\textsuperscript{28} LA. REV. STAT. ANN. § 49:968(G) (Supp. 2011).
\textsuperscript{29} Id. § 969 (2003).
\textsuperscript{30} Id. § 970.
\textsuperscript{32} \textit{See} Michael Asimow, \textit{Nonlegislative Rulemaking and Regulatory Reform}, 1985 DUKE L.J. 381, 402 ("Public participation promotes fundamental democratic values by enhancing the responsiveness of agencies to the interest groups affected by regulation. . . . In short, through advance notice and comment, every constituency has an opportunity to participate in a meaningful manner in making the laws that will affect it.").
refineries. The letter announced a new method of taxation on the use of certain industrial chemicals, contravening the method previously set forth by statute and an agency memorandum. The defendant oil companies argued that the letter was a rule under the LAPA and was thus invalid because it did not go through notice and comment, while the Department argued that the letter was merely a "clarification" of the proper taxation method of use of the chemicals and thus should be exempt from notice and comment. Siding with the defendants, the court held that the letter constituted a rule under the LAPA because the letter: (1) directed affected taxpayers to disregard the Department’s previous rules; (2) was of general applicability to all manufacturers of the chemicals at issue; (3) effectuated an interpretation of substantive law; and (4) resulted in the implementation of substantive law. Because the letter had not been promulgated in accordance with the LAPA’s required notice-and-comment procedures, the court held that the rule was invalid and unenforceable.

Besides Star Enterprise, several other appellate court and Louisiana Attorney General opinions have addressed the issue of what constitutes a rule under the LAPA. These opinions have variously held that agency bulletins, advisory opinions, statements of policy, rate-setting methodologies, guidelines and guidance documents, and correctional facility regulations are rules subject to the LAPA’s notice-and-comment requirements. Many of the cases that fail to recognize the existence of a rule involve the internal procedures of universities, such as faculty tenure procedures and faculty grievance procedures.

34. Id. at 830.
35. Id.
36. Id. at 832.
37. Id.
38. Id.
Among the opinions that recognize the existence of a rule, the common thread appears to be that the rule has the effect of implementing or interpreting substantive agency policy above and beyond previously existing statutory and administrative requirements. Furthermore, the rules are invariably of general applicability to those persons that could potentially be affected by the rule. To date, the Louisiana Supreme Court has not issued an opinion providing an authoritative interpretation of the LAPA's definition of a "rule," so the lower state courts will likely continue to adjudicate the precise boundaries of that definition.

B. UM Waiver Law

Considered alone, the issue of what constitutes a rule under the LAPA may seem primarily academic in nature, without significant real-world relevance beyond isolated issues regarding individual agency actions. However, the resolution of this question could potentially have broad ramifications for Louisiana residents, given the increasingly pervasive powers that state administrative agencies exert over many aspects of state government. Perhaps

Grace v. Bd. of Trs. for State Colls. & Univs., 442 So. 2d 598 (La. Ct. App. 1st 1983). These cases relied on the LAPA provision that exempts from the definition of a rule those agency statements, guides, or requirements for conduct or action that "regulate only the internal management of the agency." LA. REV. STAT. ANN. § 49:951(6) (Supp. 2011); see infra Part IV.B.2.

46. See, e.g., Women's & Children's Hosp., 984 So. 2d at 771 (holding that an agency "rate-setting methodology" had the substantive effect of establishing rights and obligations regarding Medicaid reimbursement payments); Spine Diagnostics, 2006 WL 3804630 at *8 (holding that an agency "statement" expanded the scope of practice for nurse anesthetists into an area where they had not traditionally practiced); Liberty Mut. Ins. Co. v. La. Ins. Rating Comm'n, 696 So. 2d 1021, 1026–27 (La. Ct. App. 1st 1997) (holding that an agency bulletin interpreted the agency's substantive policy regarding the use of "wrap-up" insurance policies in Louisiana); Star Enter. v. State, 676 So. 2d 827, 832 (La. Ct. App. 1st 1996) (holding that an agency letter contained the agency's interpretation of a substantive law and implemented the substantive use tax law).

47. See, e.g., Spine Diagnostics, 2006 WL 3804630 at *8 (holding that an agency "statement" was capable of being applied to every nurse anesthetist with the requisite knowledge, skills, and abilities to perform the procedures at issue); Liberty Mut., 696 So. 2d at 1026 (holding that an agency bulletin had general applicability to all insurers that issued "wrap-up" insurance policies in Louisiana); Star Enter., 676 So. 2d at 832 (holding that an agency letter was of general applicability to all manufacturers of certain industrial chemicals).

one of the most prominent examples of an area of Louisiana law where important policy considerations hinge on the precise definition of a rule under the LAPA is the area of insurance law dealing with UM coverage provided by automobile liability insurers.

1. UM Legislation and Pre-Gingles Jurisprudence

Louisiana Revised Statutes section 22:1295 details various provisions governing the issuance of UM coverage in Louisiana. The object of the UM statute is to promote recovery of damages for innocent victims of automobile accidents by making insurance coverage available for their benefit when the tortfeasor is without insurance or is inadequately insured. This statute embodies a strong public policy of the state. In fact, the state public policy in favor of UM coverage is so strong that a valid rejection of UM coverage must meet the formal requirements of law, no matter how clearly the insured expresses a desire to waive coverage. Because of this strong public policy, UM coverage is implied in any automobile liability policy; even if the policy does not expressly provide for UM coverage, a court will nevertheless implicitly read the coverage into the policy unless such coverage is validly rejected under the law.

Since 1998, Louisiana Revised Statutes section 22:1295(1)(a)(ii) has delineated the sole method in Louisiana by which a person can waive UM coverage in an automobile liability insurance policy. The provision states, in pertinent part:

Such rejection, selection of lower limits, or selection of economic-only coverage shall be made only on a form prescribed by the [C]ommissioner of [I]nsurance. The prescribed form shall be provided by the insurer and signed by the named insured or his legal representative. The form signed by the named insured or his legal representative which initially rejects such coverage, selects lower limits, or selects economic-only coverage shall be conclusively

49. LA. REV. STAT. ANN. § 22:1295 (Supp. 2011). The UM statute has changed designations multiple times, and cases addressing the statute will reference it by its designation at the time the case was decided.
51. Id.
52. Id. at 1131.
53. Id.
presumed to become a part of the policy or contract when issued and delivered, irrespective of whether physically attached thereto. A properly completed and signed form creates a rebuttable presumption that the insured knowingly rejected coverage, selected a lower limit, or selected economic-only coverage.\(^5\)

The form prescribed by the Commissioner is the only form that may be used to waive UM coverage; use of any other form renders the waiver automatically invalid.\(^6\) From 1998 to 2008, the only form that insurers were allowed to use for UM waivers was one promulgated by the (now defunct) Louisiana Insurance Rating Commission (LIRC) within several of its informational bulletins.\(^7\) That form provides several options: (1) selection of UM coverage at or below the limits of the normal bodily injury liability coverage; (2) selection of “economic-only” UM coverage at or below the limits of the normal bodily injury liability coverage; or (3) a waiver of UM coverage altogether.\(^8\) The form also includes a blank for the printed name and signature of the insured (or the insured’s legal representative), a blank for the policy number, and a blank for the date.\(^9\) In addition to containing the form itself, the

\(^{55}\) Id.

\(^{56}\) See Gautreaux v. Dufrene, 894 So. 2d 385 (La. Ct. App. 5th 2005) (invalidating a UM waiver because the form did not meet the Commissioner’s requirements); Richardson v. Lott, 868 So. 2d 64, 73 (La. Ct. App. 1st 2003) (holding that UM waivers executed after September 6, 1998 were invalid because the Commissioner’s form was not used); Stewart v. Edwards, 784 So. 2d 740, 744 n.5 (La. Ct. App. 2d 2001) (stating that the legislature has mandated a required UM form for use by insurers).

\(^{57}\) La. Bulletin LIRC 98-01 (1998); La. Bulletin LIRC 98-03 (1998); La. Bulletin LIRC 01-05 Amended (2006). The LDOI periodically releases bulletins to provide guidance to both insurers and insureds in Louisiana. Back when the LIRC existed, it also published bulletins of the same type. In 2007, the Louisiana Legislature disbanded the LIRC and transferred its powers, duties, and functions to the LDOI and the Commissioner. Act No. 459, 2007 La. Acts 2487. In 2008, the LDOI promulgated a new UM waiver form that has now replaced the form issued by the LIRC in 1998. See infra Part II.B.3. The introductory section of Bulletin 98-03 expressly states that “[t]his Bulletin is not a directive, regulation, or rule.” La. Bulletin LIRC 98-03. It thus appears that the LIRC may have anticipated the argument that its bulletins are “rules” subject to notice and comment under the LAPA and made the disclaimer in an attempt to evade the LAPA’s notice-and-comment requirements.

\(^{58}\) La. Bulletin LIRC 98-01; La. Bulletin LIRC 98-03; La. Bulletin LIRC 01-05 Amended. “Economic losses” are payments to reimburse an injured person for documented dollar loss due to an accident. La. Bulletin LIRC 98-03. “Noneconomic losses” are losses other than economic loss, including, for example, pain, suffering, inconvenience, and mental anguish. Id.

LIRC bulletins also provide accompanying instructions that purport to impose an additional requirement for validly completing the form—that the insurer's company name be included in the lower left-hand corner of the form. Although the bulletins say that the company name is required on the form, the form itself does not provide a blank for writing in the company name. There is thus an apparent conflict between the form itself and its accompanying bulletins.

The issue of what exactly is required to validly waive UM coverage came before the Louisiana Supreme Court in Duncan v. U.S.A.A. Insurance Co. That case involved a UM waiver form where the insurer had not filled in the blank for the policy number. Rejecting the defendant's argument that the only requirements for validly waiving UM coverage should be those explicitly listed in the UM statute, the court instead held that a valid waiver of UM coverage requires six tasks:

The insured initials the selection or rejection chosen to indicate that the decision was made by the insured. If lower limits are selected, then the lower limits are entered on the form to denote the exact limits. The insured or the legal representative signs the form evidencing the intent to waive UM coverage and includes his or her printed name to identify the signature. Moreover, the insured dates the form to determine the effective date of the UM waiver. Likewise, the form includes the policy number to demonstrate which policy it refers to. Thus, the policy number is relevant to the determination of whether the insured waived UM coverage for the particular policy at issue.

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60. Bulletin 98-01 initially imposed the “requirements” for including the company name and policy number. Bulletin 98-03 qualified the policy number requirement by saying that the policy number “should” be shown at the lower right-hand corner of the form (implying that its inclusion might not be mandatory), and in the case where a policy number is not available, the space for the policy number may be left blank or a binder number may be inserted. An updated version of the form, promulgated in 2006 as part of Bulletin 01-05 Amended, includes a second blank for the date (next to the blank for the printed name of the insured) but does not include a blank for the policy number. This revision supports the idea that the Commissioner considered the policy number to be optional, rather than required.
62. 950 So. 2d 544 (La. 2006).
63. Id.
64. Id. at 552.
Because the form did not include the policy number, the court concluded that the insured had not effectively waived UM coverage and therefore was entitled to UM coverage with limits equal to the regular liability limits of the policy. The court did not indicate whether it relied on the Commissioner’s bulletins in determining the requirements for an effective UM waiver or if it rather had some independent basis for deducing those requirements.

Several subsequent Louisiana Supreme Court cases have qualified the Duncan court’s original holding. In Carter v. State Farm Mutual Automobile Insurance Co., the court, apparently relying on “the Commissioner of Insurance’s regulations,” held that the policy number is not required for a valid UM waiver if the number does not exist at the time the form is completed. The court affirmed its Carter holding in Gray v. American National Property & Casualty Co. Additionally, the Gray court held that the tasks prescribed in Duncan (as qualified by Carter) for a valid UM waiver must all be completed before the waiver form is signed by the insured, such that the signature represents an agreement with all of the information contained on the form.

In summary, a valid waiver of UM coverage requires six tasks: (1) the insured must initial the selection or rejection of coverage; (2) if lower limits of coverage are selected, the insured must enter the exact amount of coverage desired; (3) the insured must sign the form; (4) the insured must print his or her name on the form; (5) the insured must date the form; and (6) the insured must include the insurance policy number. If the policy number does not exist at the time the insured fills out the waiver form, then it does not need to be included. Before signing the form, the insured must first complete the other required tasks for a UM waiver. A question has arisen, however, as to whether these requirements are exclusive or whether a valid waiver of UM coverage also requires

65. Id. at 554.
66. 964 So. 2d 375 (La. 2007). By “regulations,” the court was presumably referring to the Commissioner’s bulletins. See infra notes 111–13 and accompanying text (Carter discussion).
67. 977 So. 2d 839, 847 n.2 (La. 2008).
68. Id. at 849. Of course, because the signing of the form is itself one of the tasks prescribed in Duncan, Gray only requires that the other tasks prescribed in Duncan, besides the signing, must be completed before the insured or the insured’s legal representative signs the form.
70. Carter, 964 So. 2d at 376.
71. Gray, 977 So. 2d at 849.
something more—namely, the inclusion of the insurer’s company name on the form.

2. The “Company Name” Requirement for UM Waivers

The state appellate courts have addressed, with varying results, the conflict between the Commissioner’s bulletins, which require that the insurer’s company name be included on the UM waiver form, and the Duncan decision, which does not list the inclusion of the company name as a requirement for a valid UM waiver. In Cohn v. State Farm Mutual Automobile Insurance Co., the Louisiana First Circuit heard a case involving a UM waiver form that included neither the insurer’s company name nor the complete policy number and that did not indicate whether the signatory was signing in her personal capacity or in a representative capacity. Because the waiver of UM coverage was not “clear and unmistakable,” the court held that the executed form did not constitute a valid waiver of UM coverage. The court did not make clear, however, which defect in the form invalidated the coverage; it merely stated that the various defects, taken together, resulted in the waiver not being “clear and unmistakable.”

By contrast, in Fescharek v. USAgencies Insurance Co., the Louisiana Fifth Circuit considered a case involving a UM waiver form that did not include the insurer’s company name but instead included an acronym and a bar code. The court commented that, despite the missing company name, there was nevertheless a “clear rejection of UM coverage.” Accordingly, the court held that the waiver of UM coverage was valid, notwithstanding the absent company name. The court noted that the acronym “clearly refer[ed]” to the insurer; however, it is unclear whether the court viewed the acronym as an effective substitution for the required company name or whether the acronym merely served as evidence of the “clear rejection” of UM coverage.

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73. Id. at 602–03.
74. Id.
75. 979 So. 2d 562 (La. Ct. App. 5th 2008).
76. Id. at 565.
77. Id.
78. Id.
a. The Gingles Decision

The Louisiana Third Circuit addressed the company name issue in *Gingles v. Dardenne*. The plaintiff in that case, Carla Ann Gingles, was involved in an automobile accident while operating a vehicle that was owned by her employer, Novartis Corp., and insured by Ace American Insurance Co. Gingles sued Ace American, claiming that Ace American had provided her with UM coverage through Novartis and that the UM waiver form that Novartis had previously executed was invalid because it did not include the insurer’s company name. The trial court granted summary judgment to Ace American, and Gingles appealed to the Louisiana Third Circuit.

The third circuit reversed the trial court and granted summary judgment to Gingles, holding that the failure to include the company name on the form rendered the waiver of UM coverage ineffective. Regarding Louisiana Bulletin LIRC 98-01, the court remarked that, because the Commissioner had issued the form and the bulletin together, the Commissioner must have intended the documents to be considered together and that “[a]n insurance company can no more reject the form’s instructions than it can reject the prescribed form in favor of its own creation.” Noting that the Louisiana Supreme Court held in *Duncan* that inclusion of the policy number is a requirement for a valid UM waiver, the court opined that if the absence of the policy number is enough to invalidate a UM waiver, then the omission of the company name should have the same effect.

Ace American appealed the third circuit’s decision to the Louisiana Supreme Court. In a per curiam opinion, the court reversed the third circuit, holding that UM coverage had been validly waived, despite the lack of the insurer’s company name on the form. Mentioning that it had previously enumerated in *Duncan* the six requirements for filling out a valid UM waiver form, the court held that, because Novartis had met all of these requirements, the UM waiver was effective—notwithstanding the

79. 998 So. 2d 795 (La. Ct. App. 3d 2008), rev’d, 4 So. 3d 799 (La. 2009).
80. Id. at 796.
81. Id.
82. Id.
83. Id. at 800.
84. Id. at 798.
85. See supra notes 62–65 and accompanying text.
86. Gingles, 998 So. 2d at 799.
88. Id. at 800.
omission from the form of the insurer’s company name.\textsuperscript{89} Conspicuously absent from the opinion is any discussion of the Commissioner’s bulletins. It is thus unclear whether the \textit{Gingles} court held that all such bulletins should be generally disregarded or whether the court merely invalidated that particular bulletin’s requirement in light of \textit{Duncan}.

\textit{b. Post-Gingles Jurisprudence}

Since the Louisiana Supreme Court handed down \textit{Gingles}, a number of state and federal courts have cited the decision as binding precedent for the proposition that a valid waiver of UM coverage does not require the insurer’s company name on the waiver form.\textsuperscript{90} The Louisiana Supreme Court itself commented in a subsequent case that \textit{Gingles} allowed a UM waiver to be valid without the insurer’s company name on the form, despite the form’s failure to comply with the Commissioner’s bulletins.\textsuperscript{91} However, some courts and jurists, while acknowledging the binding nature of the \textit{Gingles} decision, have nevertheless disagreed with the \textit{Gingles} court’s reasoning. In \textit{Flores v. Doe}, for example, the Louisiana Fifth Circuit expressed its disapproval of the \textit{Gingles} decision, commenting that the Louisiana Supreme Court had relied on the Commissioner’s regulations in \textit{Carter} but had disregarded those same regulations in \textit{Gingles}.\textsuperscript{92}

\textit{3. New UM Waiver Form}

In 2008, the Commissioner issued a bulletin that included a new UM waiver form, which differs significantly from the form at issue in \textit{Gingles}.\textsuperscript{93} Before January 1, 2010, insurance companies had the option of utilizing either the “old” UM waiver form, originally issued in Louisiana Bulletin LIRC 98-01 and considered

\textsuperscript{89} Id. at 799–800.


\textsuperscript{91} \textit{Lynch v. Kennard}, 12 So. 3d 944, 945 n.4 (La. 2009).

\textsuperscript{92} 19 So. 3d 1196, 1200 (La. Ct. App. 5th 2009); see also \textit{Dixon v. Direct Gen. Ins. Co. of La.}, 12 So. 3d 357 (La. Ct. App. 1st 2009). For a discussion of the \textit{Dixon} case, see infra notes 114–17 and accompanying text.

\textsuperscript{93} La. LDOI Bulletin No. 08-02 (2008).
in *Duncan* and *Gingles*, or the “new” form issued in LDOI Bulletin No. 08-02, but now the “new” form is the exclusive instrument by which an insured can waive UM coverage. This “new” form, together with its accompanying bulletin, requires the inclusion of the insurer’s company name on the form but provides that the insurance policy number is merely optional.

The “new” UM waiver form’s requirements directly contradict the Louisiana Supreme Court’s decisions in *Duncan* and *Gingles*, which together held that the policy number is required for a valid UM waiver but that the company name is not required. It is unclear whether the court’s decisions were meant to apply just to the “old” UM waiver form or whether they apply to any form promulgated under the UM statute. If the *Duncan* and *Gingles* holdings apply to all forms prescribed under the statute, then the Commissioner has contradicted the Louisiana Supreme Court’s pronouncements by issuing a form that conflicts with *Duncan* and *Gingles*. The issue of the legally binding nature of the bulletins, as well as the forms themselves, thus takes on an even greater importance.

III. ARE THE DOCUMENTS LEGALLY BINDING?

The case law regarding UM waivers illustrates the question of the legally binding nature of the Commissioner’s bulletins. Another question that the UM waiver cases do not address, but which may become relevant with the issuance of the new UM waiver form, is the legally binding nature of the form itself. The Commissioner did not promulgate either the “old” or the “new” UM waiver forms—or the forms’ accompanying bulletins—via the notice-and-comment procedures prescribed by the LAPA. If either the forms or the bulletins meet the LAPA’s definition of a legally binding “rule,” then under the LAPA, absent some sort of exception, the documents must go through notice and comment before becoming legally binding. Hence, because neither the “new” UM waiver form nor its accompanying bulletin went

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94. *Id.* at 2.
95. *Id.*
96. *Id.*
97. *See supra* notes 62–65 and accompanying text (*Duncan* discussion); *supra* Part II.B.2.a (*Gingles* discussion).
98. The LDOI publishes its bulletins (which include the forms) on its website, but generally does not publish those bulletins in the Louisiana Register. LA. DEPT’ INS., http://www.ldi.state.la.us/ (last visited Feb. 9, 2011).
99. *See supra* notes 26–27 and accompanying text.
through notice and comment, the legality of the documents hinges on whether those documents are rules under the LAPA.

A. Legality of the UM Waiver Form

The threshold issue when analyzing whether the Commissioner’s form is legally binding is whether the form itself constitutes a rule under the LAPA. Revisiting the LAPA’s statutory definition, a “rule” includes “each agency statement, guide, or requirement for conduct or action . . . which has general applicability and the effect of implementing or interpreting substantive law or policy.”100 The Commissioner’s UM waiver form could arguably be viewed as a “requirement for conduct or action” because it is currently the only instrument under Louisiana law by which one may waive UM coverage in an automobile liability insurance policy.101 For the same reason, the form is certainly of “general applicability” to all insured persons seeking to effectuate such a waiver.

As to the question of whether the form “implement[s] or interpret[s] substantive law or policy,” it is worth noting that the statute authorizing the promulgation of the form only lists a few requirements for a valid UM waiver.102 Those requirements are: (1) the form must be provided by the insurer; (2) the form must be signed by the insured or his legal representative; and (3) the insured must either reject UM coverage entirely, select lower limits for UM coverage, or select economic-only UM coverage.103 The form itself, however, imposes several additional requirements not listed in the statute, including: (1) writing one’s initials next to the selection of coverage; (2) indicating the lower limits of coverage (if such limits are selected); (3) printing the insured’s name on the form; (4) dating the form; and (5) indicating the policy number (if it exists at the time).104 By imposing additional requirements for a valid UM waiver on top of those prescribed by statute, the form arguably “implements substantive law.” If the form comports with the LAPA’s definition of a rule, then it follows that unless some sort of exception applies, the form must go through the LAPA’s prescribed notice-and-comment procedures before it can become legally binding.

101. Id. § 22:1295(1)(a)(ii).
102. Id.
103. Id.
Even if the UM waiver form, specifically, is a rule under the LAPA, the question then becomes whether all agency forms might also be classified as rules subject to notice-and-comment. The definition of a "rule" under the LAPA is exceptionally broad, and the definition could conceivably cover even "mundane" forms that have minimal or no impact on the substantive rights of affected persons. The policy decision of whether to require notice and comment for agency forms involves competing interests: the administrative efficiency gained by exempting the forms from notice and comment versus the protection afforded to potentially affected parties by requiring the forms to go through notice and comment. Subjecting all forms to onerous notice and comment requirements could potentially paralyze state agencies; at the same time, exempting all forms from notice and comment could allow forms with a measurable effect on substantive rights, such as the UM waiver form, to become legally binding without prior public input. Because the Louisiana Legislature has not yet made this policy judgment, and because no Louisiana court has ruled on the

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105. Agencies issue innumerable forms for a variety of purposes, most of which do not involve substantive rights to the degree of the UM waiver form. Data collection is one of the most common purposes for which an agency will issue a form. See, e.g., Complaint Report Form, LA. DEP'T INS., http://www.ldi.state.la.us/consumers/generalcomplaintform.pdf (last visited Feb. 9, 2011).

106. States that have addressed this issue have reached differing conclusions. For example, Alaska has specifically exempted forms from its statutory definition of a "regulation" (the rough equivalent of a "rule" in Louisiana). ALASKA STAT. § 44.62.640(a)(3) (2007). Michigan and New York both exclude from a "rule" all forms and instructions that do not have legal effect but are merely explanatory. MICH. COMP. LAWS ANN. § 24.207(h) (West 2004); N.Y. A.P.A. § 102(2)(b)(iv) (McKinney Supp. 2011). California law generally exempts agency forms, as well as their accompanying instructions, from being "regulations" unless the contents of a form or instruction exceed existing legal requirements. CAL. GOV'T CODE § 11340.9(c) (West 2005); see In re Request for Regulatory Determination, 94 Cal. Regulatory Notice Reg. 61, 105 (Jan. 14, 1994), available at http://www.oal.ca.gov/res/docs/pdf/determinations/2000_and_Prior/1993_OAL_Determination_No_.5.pdf, at 266. Florida’s definition of a “rule” includes “any form which imposes any requirement or solicits any information not specifically required by statute or an existing rule.” FLA. STAT. ANN. § 120.52(16) (West, Westlaw through 2010 Spec. Sess.). Any Florida agency form that meets this definition must be incorporated by reference into a corresponding rule. Id. § 120.55(1)(a). The most recent Revised Model State Administrative Procedure Act excludes from its definition of a “rule” any “forms developed by an agency to implement or interpret agency law or policy.” REVISED MODEL STATE ADMIN. PROCEDURE ACT § 102(30)(E) (2010), available at http://www.law.upenn.edu/bill/archives/ulc/msapa/2010_final.pdf. See infra Part IV.A (discussing various policy considerations both for and against requiring notice and comment for agency forms).
issue of whether agency forms constitute rules under the LAPA, the legal status of these forms is currently unclear.

B. Legality of the Bulletins

Assuming, for the sake of discussion, that the UM waiver form is a rule subject to notice and comment under the LAPA, the question then becomes whether the bulletins accompanying the UM waiver form are also rules subject to notice and comment. Much of the same definitional analysis that applies to the form also applies to the bulletins; an informational bulletin could be viewed as a “requirement for conduct or action” of “general applicability” and having the effect of “implementing or interpreting substantive law or policy.”107 If the information in the bulletins merely mirrored the contents of the form itself, without imposing any additional substantive requirements, perhaps the bulletins would not implement substantive law or policy.108 However, because the bulletins impose the additional requirement of including the insurer’s company name on the form, it is likely that the bulletins do, in fact, implement substantive law regarding UM waivers. The definitional analysis thus indicates that the bulletins should have to go through notice and comment before being accorded legally binding effect. Despite this, the Louisiana jurisprudence has stopped short of making such a declaration.

1. The Louisiana Supreme Court’s Stance

The Louisiana Supreme Court’s decision in Gingles, taken at face value, indicates that the court does not accord legally binding effect to the Commissioner’s bulletins accompanying the UM waiver form. After all, the Gingles court held that the form in question, which did not include the insurer’s company name, constituted a valid waiver of UM coverage, despite the requirement of the Commissioner’s bulletins that the company name be included on the form.109 However, the Gingles court did not provide a justification for ignoring the Commissioner’s bulletins, beyond citing Duncan as precedent.110 Furthermore, the Louisiana Supreme Court may have espoused a contrary view in past

108. Of course, describing the plain requirements for filling out the UM waiver form could still be seen as interpreting substantive law or policy, which would make the bulletins fall under the LAPA’s definition of a rule anyway. Id.
110. Id.
opinions regarding the legally binding effect of documents such as the bulletins, thus leaving unclear the precise scope of the *Gingles* holding.

In *Carter*, the Louisiana Supreme Court held that a valid UM waiver form does not require the inclusion of a policy number if the number does not exist at the time the form is completed.\(^{111}\) In so holding, the court noted that "the Commissioner's regulations specifically allow omission of the policy number if it does not exist at the time the UM waiver form is completed."\(^ {112}\) Presumably, the "regulations" referred to by the *Carter* court were the Commissioner's bulletins; the court therefore, at the very least, conferred some deference to those bulletins. Given the extremely short length of the opinion,\(^ {113}\) however, it is difficult to determine whether the *Carter* court actually accorded legally binding effect to the bulletins or whether the court merely relied on the bulletins as persuasive authority to support an independent, albeit unspoken, basis for judgment.

Although the *Carter* decision is not clear as to whether the Louisiana Supreme Court regarded the Commissioner's bulletins as legally binding, at least one circuit court judge believes that the Louisiana Supreme Court has, in the past, espoused such a view. In *Dixon v. Direct General Insurance Co. of Louisiana*, a case handed down after the Louisiana Supreme Court's *Gingles* decision, the Louisiana First Circuit relied on *Gingles* as binding precedent in holding that a UM waiver form that did not include the insurer's company name nevertheless constituted a valid waiver of UM coverage.\(^ {114}\) Judge Gaidry, writing separately, noted his displeasure with the *Gingles* court's rationale.\(^ {115}\) Pointing out the factual similarities between *Gingles* and *Duncan*, Judge Gaidry argued that the Louisiana Supreme Court had relied upon the Commissioner's regulations in *Duncan* but had disregarded those same regulations in *Gingles*.\(^ {116}\) Judge Gaidry's reasoning appears to be that, because the UM statute does not state a requirement for including the policy number on the form, the *Duncan* court must have relied on the Commissioner's bulletin when announcing that requirement. However, this is not necessarily the case; the UM form involved in *Duncan*, which was promulgated along with Louisiana Bulletin LIRC 98-01, clearly and expressly includes a

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112. *Carter*, 964 So. 2d at 376.
113. A writ opinion, the *Carter* decision is only three sentences in length. *Id.*
115. *Id.* at 363 (Gaidry, J., concurring).
116. *Id.*
blank for the policy number.\textsuperscript{117} The \textit{Duncan} court thus could have conceivably extrapolated the policy number requirement from a visual examination of the form itself, rather than from the Commissioner's accompanying bulletins.

Although it is unclear whether the majority in \textit{Duncan} viewed the Commissioner's bulletins as legally binding, a dissenting justice in \textit{Duncan} seems to have at least accorded these bulletins substantial deference. Justice Weimer, in his dissent from a denial of rehearing in \textit{Duncan}, cited Louisiana Bulletin LIRC 98-03 for the proposition that the policy number is merely an optional inclusion on the UM waiver form for identification purposes, rather than a requirement.\textsuperscript{118} Comparing Bulletin LIRC 98-03 to Bulletin LIRC 98-01, Justice Weimer remarked that the instruction for inserting the policy number had been changed from "must be placed" to "should be shown" and that the newer bulletin advised insurers that "the space for the policy number may be left blank" when the policy number is not available.\textsuperscript{119} Concluding his dissent, Justice Weimer argued that the court should "consider" the Commissioner's instructions regarding the Commissioner's own form because insurers are entitled to rely on those instructions.\textsuperscript{120} At least one Louisiana Supreme Court justice has thus accorded substantial deference to the Commissioner's bulletins and may have even expressed a preference for conferring upon them legally binding effect.

2. \textit{Comparing} Gingles to Liberty Mutual

Although the Louisiana Supreme Court has not directly ruled on whether the Commissioner's bulletins are rules subject to notice and comment under the LAPA, the Louisiana First Circuit has addressed a similar situation, perhaps shedding some light on the \textit{Gingles} court's reasoning. In \textit{Liberty Mutual Insurance Co. v. Louisiana Insurance Rating Commission}, the court considered a bulletin issued by the LIRC—the same agency that published the \textit{Gingles} bulletins—that provided a definition of "wrap-up" insurance policies and required insurers to obtain approval from the Commission before such policies could be issued.\textsuperscript{121} The

\textsuperscript{117} La. Bulletin LIRC 98-01 (1998). A later revision of the form removed the blank for the policy number and replaced it with another blank for the date. La. Bulletin LIRC 01-05 Amended (2006); \textit{see supra} note 60.


\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} 696 So. 2d 1021, 1023 (La. Ct. App. 1st 1997).
Commission argued that the bulletin was merely an “investigatory order” or an “interpretive directive” and therefore was not a rule because it did not impose obligations not already required by existing law.\textsuperscript{122}

Rejecting this argument, the first circuit held that the bulletin constituted a rule under the LAPA.\textsuperscript{123} According to the court, the bulletin was a rule because it had general applicability to all insurers issuing that specific type of insurance in Louisiana and because the bulletin had the effect of interpreting the Commission’s substantive policy regarding the use of wrap-up insurance policies in the state.\textsuperscript{124} In its original opinion, the court did not address the issue of whether the rule was invalid; however, on a subsequent denial of rehearing, the court affirmed the trial court’s finding that the rule was invalid because it did not go through the LAPA’s prescribed notice-and-comment procedures.\textsuperscript{125}

The initial concern one confronts when evaluating \textit{Liberty Mutual} vis-à-vis \textit{Gingles} is whether the two cases are similar enough to make the reasoning in \textit{Liberty Mutual} applicable to the \textit{Gingles} decision. At first glance, the bulletins in \textit{Gingles} seem to be far less substantive in nature than the bulletin in \textit{Liberty Mutual}, despite the fact that the same agency issued the bulletins involved in each of the cases. After all, the only additional requirement that the \textit{Gingles} bulletins impose is the inclusion of the insurer’s company name on the UM waiver form,\textsuperscript{126} which, in the abstract, hardly seems significant compared to the far-reaching effects of the \textit{Liberty Mutual} bulletin.\textsuperscript{127} But the \textit{Gingles} bulletins’ additional requirement does, in fact, have major ramifications, as evidenced by the multitude of cases involving the validity of UM waivers where the insurer’s company name is missing from the form.\textsuperscript{128} The factual backgrounds of the two cases are therefore similar enough to warrant an analysis of the \textit{Liberty Mutual} court’s reasoning as it relates to the \textit{Gingles} decision.

\begin{itemize}
\item 122. \textit{Id.} at 1025.
\item 123. \textit{Id.} at 1026–27.
\item 124. \textit{Id.}
\item 125. \textit{Id.} at 1031.
\item 126. In fact, it is arguable that the bulletins also \textit{remove} a requirement, because the bulletins’ wording, taken together, suggests that the policy number is merely for identification purposes and is not required. \textit{See supra} notes 118–20 and accompanying text. This viewpoint is supported by the Commissioner’s latest revision of the form. \textit{See supra} Part II.B.3. However, the viewpoint is contradicted by the Louisiana Supreme Court in \textit{Duncan}. \textit{See supra} notes 62–65 and accompanying text.
\item 127. \textit{Liberty Mut.}, 696 So. 2d at 1023 (requiring insurers to submit their “wrap-up” insurance policies to the agency for pre-approval).
\item 128. \textit{See supra} Part II.B.2.
\end{itemize}
The *Liberty Mutual* court held that the bulletin regarding wrap-up insurance policies constituted a rule under the LAPA in part because the bulletin was of "general applicability" to insurers seeking to issue those types of policies.\(^{129}\) Similarly, the bulletins in *Gingles* were of general applicability, both to insureds seeking to waive UM coverage and to insurers providing the automobile liability policies.\(^ {130}\) The *Liberty Mutual* court also held that the bulletin in that case was a rule because it interpreted the agency's substantive policy regarding the use of the wrap-up insurance policies.\(^ {131}\) Following that reasoning, the *Gingles* bulletins arguably also "interpreted" the agency's substantive policy regarding the requirements for an effective UM waiver by delineating those requirements. Thus, it would seem that under either branch of analysis, the reasoning propounded by the first circuit in *Liberty Mutual* to classify the bulletin in that case as a rule under the LAPA would also, when applied to the facts in *Gingles*, establish the *Gingles* bulletin as a rule subject to notice and comment.

Because the Louisiana Supreme Court did not provide a sufficient explanation for its holding in *Gingles*, state agencies have been left in the dark about whether, or under what circumstances, notice and comment is required for their informational bulletins. If, in a subsequent case, the court adopted the reasoning of *Liberty Mutual* to explain its *Gingles* decision, then agencies would have a clearer picture regarding when they must subject their bulletins or similar documents to the notice-and-comment process. An agency would be able to match its bulletin against the LAPA's definition of a "rule," using the factual situations in both *Liberty Mutual* and *Gingles* as jurisprudential guidelines. Persons regulated by the agency would thus be able to place greater reliance on any bulletins that an agency promulgated; with clearer jurisprudential direction, an agency would be less likely to issue a bulletin that would later be struck down by a court because it had not gone through notice and comment.

\(^{129}\) *Liberty Mut.*, 696 So. 2d at 1026.


\(^{131}\) *Liberty Mut.*, 696 So. 2d at 1026.
IV. SHOULD NOTICE AND COMMENT BE REQUIRED FOR THESE DOCUMENTS?

An analysis of LAPA's "rule" definition, along with the related jurisprudence, suggests that it is very likely that the documents at issue in Gingles are rules subject to notice and comment. The question then becomes whether such documents should be required to go through notice and comment. The Gingles documents had a substantial effect on the rights of both insurers and insureds due to the potentially major consequences of having or not having UM coverage. However, agencies issue many other documents that have far less of an effect on the substantive rights of affected persons than did the Gingles documents.132 There are policy considerations both for and against requiring notice and comment for these documents, and several possible exceptions exist under current Louisiana law that may allow the documents to evade notice and comment in limited circumstances.

A. Policy Considerations

Regardless of whether a legal analysis suggests that a form authorized by statute for agency promulgation should go through the LAPA's notice-and-comment procedures, the Louisiana Supreme Court has some strong policy justifications for not recognizing such a requirement in the foreseeable future. The UM statute is only one of numerous Louisiana statutes that direct an agency to prescribe a form or similar document.133 Furthermore, even when not specifically directed by statute, agencies issue countless forms for a variety of purposes, and most of those forms do not affect substantive rights to the degree of the UM waiver form.134 If the Louisiana Supreme Court were to suddenly announce that all such forms lacked legal effect because they had not been promulgated via the LAPA's notice-and-comment procedures, then many aspects of state government could grind to a screeching halt. Even if such a ruling were to apply prospectively only, the resulting time delay in promulgation of the forms as a result of the notice-and-comment process,135 as well as the

132. See supra note 105.
133. See, e.g., LA. REV. STAT. ANN. § 6:211(B) (2005) (Commissioner of Financial Institutions authorized to prescribe a form for the incorporation and operation of state banks); id. § 18:18(A)(3) (Supp. 2011) (Secretary of State directed to prescribe a form for voter registration applications).
134. See supra note 105.
135. See supra notes 20–25 and accompanying text (summarizing the notice-and-comment process).
associated administrative costs in both funds and manpower, would significantly decrease the overall efficiency of state administrative agencies.

Similar issues arise regarding the instructional bulletins accompanying these forms. If the forms should be exempt from notice and comment for policy reasons, then the bulletins providing clarification and instruction regarding the forms should also be exempt. The argument for an exemption from notice and comment for a particular bulletin is weakened, though, when the bulletin imposes additional substantive requirements not present or clearly apparent in the form itself, as with the bulletins in Gingles. Lack of notice and comment in that case would allow agencies to promulgate such bulletins without any prior input from the persons whom the bulletins would affect, to those persons’ potential detriment. Nevertheless, most agency bulletins do not include these substantive elements and would therefore seem to be prime candidates for a notice-and-comment exemption.

Although there may be legitimate policy arguments for not requiring notice and comment for some agency forms and bulletins, at the same time agencies should not be allowed to ignore the LAPA’s mandated notice-and-comment procedures whenever those procedures would be burdensome to the agency. Notice-and-comment procedures, whether found in the LAPA, the federal APA, or other state administrative procedure acts, allow interested parties, prior to an agency’s enactment of proposed rules that would affect those parties, to submit meaningful comments—in effect, allowing their voices to be heard in the rulemaking process. Although ignoring notice and comment for seemingly trivial matters like agency forms and bulletins may not at first appear to be a serious problem, such behavior by agencies could eventually lead to more egregious

136. See Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1379 (1992) (“Legislative rulemaking procedures can levy upon limited agency funds, people, and other resources.”); Asimow, supra note 32, at 404 (“To produce any new rule . . . an agency must incur the substantial bureaucratic costs of overcoming inertia. . . . The financial and psychological costs of forging consensus within an agency on the contents of a new rule may be quite substantial.”).
140. See supra notes 31–32 and accompanying text.
violations of the LAPA’s rulemaking provisions. And as the Gingles case aptly illustrates, even an apparently innocuous rule can turn out to have major consequences. Consequently, allowing such rules to “slip through the cracks” of notice and comment could result in potential detriment to the public, without the public having a prior opportunity for input.

B. Possible Solutions Under Existing Louisiana Law

There may be legitimate policy justifications for not forcing some agency forms and bulletins to go through the LAPA’s required notice-and-comment procedures, but there are also legitimate policy reasons for not allowing agencies to flout those requirements. The question then becomes whether either the LAPA or another area of Louisiana law provides a mechanism by which forms and documents with a minimal effect on substantive rights could evade notice and comment without violating the LAPA’s express provisions. The LAPA itself provides two possibly applicable exceptions to the normal notice-and-comment requirements, and a line of cases from one of the state appellate courts suggests a third possibility.

1. “Emergency Rule” Exception

The LAPA’s rulemaking provisions allow for temporary “emergency rules” that can circumvent the normally prescribed notice-and-comment procedures. An agency can only promulgate these “emergency rules” when it finds that such a rule is necessary due to “an imminent peril to the public health, safety, or welfare,” or in certain other limited circumstances. An emergency rule goes into effect as soon as it is promulgated, with no requirement for prior notice and comment, and the rule can be invalidated within 60 days of its promulgation by the governor or

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142. LA. REV. STAT. ANN. § 49:953(B) (Supp. 2011).

143. Id. The other circumstances where emergency rules may be promulgated include when they are necessary to avoid sanctions or penalties from the United States, to avoid a budget deficit for medical assistance programs, or to secure new or enhanced federal funding for medical assistance programs. Id.
Emergency rules are designed to take effect quickly and to "fill . . . gap[s]" during a time of need before an agency can enact a permanent rule through the normally prescribed notice-and-comment procedures.\(^{145}\)

Louisiana case law regarding the precise meaning of "an imminent peril to the public health, safety, or welfare" is not extensive, but two Louisiana First Circuit cases are instructive on the matter. In *Cressey v. Foster*, the state Department of Social Services promulgated an emergency rule that provided for distribution of child support collections in response to a change in federal legislation that had left the state without a legislative framework for such distribution.\(^{146}\) The court held that the undue financial hardship that welfare recipients would have suffered if the emergency rule had not been disseminated constituted "an imminent peril to the public health, safety, or welfare" that justified the rule's promulgation.\(^{147}\) By contrast, in *Premier Games, Inc. v. State*, the state Department of Public Safety and Corrections issued emergency rules to provide for the non-prorated collection of video gaming device operation fees.\(^{148}\) A Department declaration stated that emergency rulemaking was necessary to ensure the collection of video gaming revenues and to regulate the industry for the purposes of maintaining public confidence and "protecting the health, welfare and safety of the public."\(^{149}\) Dismissing the Department's argument that the declaration of emergency met the LAPA's requirements for an emergency rule, the court remarked that such a declaration requires "more than a conclusory statement, but contemplates a description of the facts and circumstances which justify the conclusion that imminent peril exists."\(^{150}\) The court thereby held that the rule was not an emergency rule and was thus invalid because it had not been promulgated via notice and comment.\(^{151}\)

The emergency rule exception might seem enticing to an agency that wants to circumvent notice and comment for its documents, but in most cases it is unlikely that those documents will comport with the exception's fairly stringent requirements.

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144. Id.; see Ketchum & Olsan, *supra* note 17, at 1352–53.
147. Id. at 1024.
148. 761 So. 2d 707.
149. Id. at 711.
150. Id. at 712.
151. Id.
Using the documents at issue in *Gingles* as examples, the LDOI would be hard-pressed to argue that promulgation of a UM waiver form or its accompanying bulletin without notice and comment would somehow negate "an imminent peril to the public health, safety, or welfare." The exception would be even harder to apply to more mundane agency documents that have less of an effect on substantive rights than do the *Gingles* documents. Overall, imagining a situation where an agency would be able to utilize the emergency rule exception to evade notice and comment for the promulgation of a document would be difficult. Perhaps the only situation where this might work would be if a defect is discovered in a pre-existing document, and the defect is so detrimental to the public that an immediate publication of an amended document without notice and comment is necessary to protect the public from significant harm.

2. "Internal Agency Management" Exception

Although it is unlikely in most cases that agency documents can meet the requirements of the LAPA’s emergency rule exception to notice and comment, that exception is not the only method under the LAPA by which to bypass notice and comment. The LAPA also provides that agency statements, guides, or requirements for conduct or action that would otherwise fall under the LAPA’s definition of a “rule” are exempt from that definition (and thus from notice and comment) when they “regulat[e] only the internal management of the agency.”

Louisiana cases interpreting this provision have mainly applied it in the context of university regulations. In *Mix v. University of New Orleans*, an ex-employee of the University of New Orleans claimed that the university did not follow its own grievance procedures when firing him and that those procedures were administrative “rules” binding on the university. The court found that those grievance procedures regulated only the internal management of the university and were consequently not legally binding rules. Similarly, in *Jones v. Southern University & A&M College System*, a nontenured law professor fired by Southern University claimed

152. Regarding UM waivers in particular, one could argue that the public health, safety, and welfare might actually be enhanced by the lack of a valid method for insured persons to waive UM coverage, due to Louisiana’s strong public policy favoring UM coverage. See supra notes 50–53 and accompanying text.


155. *Id.* at 960.
that the university had violated its own tenure procedures and that those procedures were administrative rules binding on the university.\textsuperscript{156} The court, employing reasoning very similar to that used by the Louisiana Fourth Circuit in Mix, held that the university's tenure procedures pertained only to the internal management of the university and, therefore, were not legally binding rules under the LAPA.\textsuperscript{157}

The Louisiana jurisprudence offers little guidance as to the exact boundaries of the "internal agency management" exception beyond the university context. Nevertheless, it is fairly clear that the exception would probably not apply to documents, such as those at issue in Gingles, that affect the substantive rights of persons outside the agency. Using the Gingles documents as examples, it would be hard to say that when a form comprises the sole method by which one can waive UM coverage, then that form regulates only the internal management of the agency. The same reasoning applies to bulletins that impose an additional requirement for a valid UM waiver. It is certainly possible, however, that some documents that do not affect the substantive rights of others could fall into this exception. A public bulletin announcing a change in an agency's daily hours of operation, for example, would likely escape notice and comment under this exception because the bulletin only involves the internal management of the agency and does not affect the substantive rights of persons that the agency regulates. Many agency documents with little or no effect on the substantive rights of regulated persons could potentially fall under this exception, allowing the documents to lawfully evade notice and comment and thereby increasing administrative efficiency. However, a Louisiana court has yet to interpret the internal agency management exception in this manner, thus leaving these myriad "mundane" documents at risk of a challenge to their legality.

3. \textit{Implied Agency Powers?}

Assuming that none of the LAPA's existing exceptions to notice and comment apply to agency documents that fall under the LAPA's definition of a "rule," there may yet be another method by which these documents could lawfully evade notice and comment. The Louisiana First Circuit initially recognized the existence of an "implied agency powers" doctrine in \textit{Realty Mart, Inc. v. Louisiana}

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156. 693 So. 2d 1265 (La. Ct. App. 1st 1997).
157. \textit{Id.} at 1268.
\end{flushright}
Board of Tax Appeals. That case addressed whether the Louisiana Board of Tax Appeals had the power to compel a party to answer written interrogatories propounded by another party. The court noted that "[a]n administrative board or agency only has the power and authority expressly granted by the constitution or statutes. Nevertheless, some power and authority may be implied as necessary or appropriate in order to effectuate the express powers granted to, or imposed upon, such board or agency." However, because the Board had not been granted any express power that could have given rise to the implied powers alleged, the court found that the implied agency powers doctrine did not apply.

Since the Realty Mart decision, several other Louisiana First Circuit cases have acknowledged the implied agency powers doctrine while simultaneously finding the doctrine inapplicable to the facts before the court. Thus far, only one case has utilized the doctrine to validate an agency action that may not have otherwise been allowed. In Devillier v. State, the Division of Charitable Gaming Control initiated disciplinary proceedings against a number of persons who had allegedly violated state gaming law while conducting a charitable bingo operation. In an administrative hearing, the administrative law judge deemed the parties unsuitable for involvement in charitable gaming in any capacity. On appeal, the affected parties argued that the Division had exceeded its statutory authority because the only allowable penalties under the governing statute were fines, suspensions of licenses, and revocations of licenses. The court, after invoking the implied agency powers doctrine, recited the governing statute's declaration of purpose, which stated that the policy of the state of Louisiana is to decrease the potential for fraud in charitable games of chance. The court thereby held, in light of that public policy, that the agency's actions were "necessary and appropriate" to effectuate the agency's statutory mandate and to carry out its policies and were, therefore, a proper exercise of agency authority.

159. Id.
160. Id. at 54 (emphasis added).
161. Id.
164. Id. at 886.
165. Id. at 889.
166. Id.
167. Id.
The first circuit is the only Louisiana court to have expressly recognized the existence of implied agency powers. However, it is possible that the Louisiana Supreme Court implicitly recognized the existence of such powers in *Duncan*, where the court—while holding that a valid UM waiver required more than just the few requirements delineated in the UM statute—remarked that “[i]n directing the [C]ommissioner of [I]nsurance to prescribe a form, the legislature gave the [C]ommissioner the authority to determine what the form would require.”\(^\text{168}\) One might argue that the Louisiana Supreme Court, through the aforementioned phrase in *Duncan*, was thereby recognizing the existence of implied agency powers in Louisiana. Then again, it is also possible that the court was merely acknowledging the well-known “Chevron doctrine” of federal administrative law where, in the absence of legislative guidance, an agency interpretation of a governing statute is entitled to deference by a reviewing court.\(^\text{169}\) Despite the attractiveness of the idea that the Louisiana Supreme Court has recognized the existence of implied agency powers in Louisiana, it is more likely that the court, in that single phrase in *Duncan*, was simply restating a pre-existing legal principle rather than introducing an entirely new dimension to Louisiana administrative law.

However, if the *Duncan* court did, in fact, recognize the existence of implied agency powers in Louisiana, then an agency seeking to exempt its documents from notice and comment could theoretically attempt to utilize the implied agency powers doctrine for that purpose. In the LDOI’s case, the agency could argue that requiring it to promulgate its UM waiver form via notice and comment would lead to absurd results due to the costs in time and resources associated with the process.\(^\text{170}\) Therefore, the LDOI

\(^{168}\) Duncan v. U.S.A.A. Ins. Co., 950 So. 2d 544, 552 (La. 2006); see supra notes 62–65 and accompanying text.

\(^{169}\) The United States Supreme Court, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), held that when Congress implicitly delegates power to an agency regarding a specific issue, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844. Although the Louisiana Supreme Court has not expressly recognized the *Chevron* doctrine as a matter of Louisiana law, the Louisiana First Circuit appears to have done so. *See State v. La. State Riverboat Gaming Enforcement Div.*, 694 So. 2d 316, 324 (La. Ct. App. 1st 1996) (“The reviewing court should determine if the agency’s construction and interpretation of the statute is a permissible reading of it; not the only permissible reading of it.”) (emphasis added); *In re Recovery I*, Inc., 635 So. 2d 690, 696 (La. Ct. App. 1st 1994) (“Considerable weight should be afforded to an administrative agency’s construction of a statutory scheme that it is entrusted to administer and deference must be awarded to its administrative interpretations.”).

\(^{170}\) See supra notes 135–36 and accompanying text.
would argue, the agency must have implied power to prescribe the form without using notice and comment because such power would be "necessary and appropriate" to fulfill the statutory mandate imposed upon the agency by the legislature through the UM statute. Similar arguments could be made for the promulgation of other such documents, where the time and resources consumed by the notice-and-comment process would, in the agency's view, drastically outweigh any potential benefits to be gained from public input.  

Then again, even if implied agency powers do exist in Louisiana, the LAPA's express statutory provisions regarding rulemaking may override any implied powers that an agency might have. If an agency document was found to meet the LAPA's definition of a rule, then the LAPA's notice-and-comment requirements should apply to that document, notwithstanding any utility that an agency could gain by evading notice and comment via the implied agency powers doctrine. Thus, although implied agency powers might allow an agency to engage in numerous activities not directly permitted by statute, the agency would nevertheless likely need an express statutory exception in order to exempt its documents from notice and comment.

C. Suggestion for Change

Despite the recognition of the implied agency powers doctrine by at least one Louisiana court, the use of the doctrine to exempt "mundane" agency documents from notice and comment remains theoretical at best and wildly speculative at worst. If no other method can be found under Louisiana law by which such documents can evade notice and comment, then agencies will be faced with the difficult choice of either putting all of their forms and related documents through lengthy notice-and-comment procedures or continuing to disregard the LAPA's rulemaking provisions. To avoid such a situation, the Louisiana Legislature should amend the LAPA to provide for an exception to notice and comment for agency documents that have a minimal effect on the substantive rights of affected persons. Such a change could be adapted from existing approaches in federal law or the law of other states, or the legislature could adopt its own novel approach.

171. See supra note 105.
172. It is worth noting that the court that recognizes the doctrine, the Louisiana First Circuit, is also the circuit court where cases dealing with state administrative law are most often brought.
One effective method would be to provide an exception to notice and comment for documents that an agency designates as "routine" or "mundane." Such documents would be conferred legally binding effect immediately, without going through any pre-adoption procedures, but would be subject to an expedited form of post-adoption notice and comment for a specified period of time, such as six months or one year. This post-adoption notice-and-comment procedure could be implemented simply by making each document available for public viewing on the agency's website and allowing the public to submit comments via the website itself; alternatively, each agency's documents could be uploaded to a single, state-administered website for increased efficiency. At the end of the specified time period, the agency would be required to re-promulgate the document in final form after addressing any suggestions or concerns raised by the public during the notice-and-comment period. An agency's publication of a document without notice and comment would be subject to legislative or executive oversight; this would ensure that documents, such as those in Gingles, that have an inordinately large impact on substantive rights could be summarily invalidated before the end of the notice-and-comment period if the documents' effects became unacceptably detrimental.

This post-adoption notice-and-comment approach would strike a balance between the competing needs of administrative efficiency in state government and protection of the substantive rights of affected persons. An agency would be able to issue most of its documents immediately, without the delay inherent in notice-and-comment procedures, and the post-adoption notice-and-comment period would give the public the opportunity to shed light on any potential problems with the document. The requirement of mandatory re-promulgation of the document would ensure that any problems identified during the notice-and-comment period would be quickly remedied, and the legislative or executive oversight would guarantee that any significant problems caused by a defective document would be dealt with expeditiously. Agencies

173. This proposal is heavily influenced by Michael Asimow, Guidance Documents in the States: Toward a Safe Harbor, 54 ADMIN. L. REV. 631 (2002). Professor Asimow proposes a similar exception to pre-adoption notice-and-comment procedures for agency guidance documents, which are documents expressing an agency's view about the meaning of language in statutes or regulations or explaining how staff or agency adjudicators should exercise their discretionary or enforcement powers. Id. at 632, 655–57.

174. This proposal assumes that most interested parties would have some sort of access to the Internet, either at home, school, or work, or via a public library or similar institution.
and the public would collectively benefit from the increased administrative efficiency resulting from the general exception, and the public would be sufficiently protected by the various safeguards built into the exception.

If the above regulatory scheme had been in effect at the time the Commissioner promulgated the UM waiver form, then the series of disputes that culminated in the Gingles decision could very well have been avoided. Assuming that the LIRC would have regarded the waiver form as a "mundane" document, then upon publication of the form, the LIRC would have simultaneously made the form available for public viewing. An interested observer could have quickly noticed the discrepancy between the waiver form itself, which included no blank for the insurer's company name, and the form's accompanying bulletin, which required the inclusion of the company name on the form. Any observer who noticed the problem could then have submitted comments via the website, thus bringing the problem to the attention of the LIRC and enabling the agency to swiftly re-publish the documents in order to rectify the discrepancy between the form and the bulletin. Public display of the documents would also have allowed an interested party to challenge the documents as being "rules" under the LAPA; this would have allowed the question of the documents' legal status to be resolved in the courts relatively early, decreasing the risk that a court would invalidate the waiver form for not going through notice and comment only after a significant number of persons had already relied on the form. An early resolution of these various disputes, enabled by the expedited post-adoption notice-and-comment procedures, could have reduced both legal uncertainty and the dockets of Louisiana courts.

V. CONCLUSION

Ultimately, it is unlikely that the Gingles documents can escape being classified as rules subject to notice and comment under the LAPA. This result is probably best, due to the significant real-world consequences of a valid or invalid UM waiver. If the bulletins in particular had been accorded legally binding effect—despite the lack of prior notice and comment—then any person desiring to waive UM coverage, but who failed to learn of the bulletin's company name requirement, would end up executing an ineffectual waiver. The person executing the invalid waiver would then have unintended UM coverage. While on one level this result might be preferable to the state, considering Louisiana's strong
public policy in favor of UM coverage,\textsuperscript{175} it also goes against the intent of the insured (who desired the UM waiver) and forces the insurance company to provide coverage for which the insured has not paid. Such a result could establish an unfavorable precedent in Louisiana where agreements desired by both parties are subsequently invalidated due to minor formal deficiencies that may have been difficult to foresee.

At the same time, there are innumerable other documents issued by Louisiana agencies, and most of these documents do not carry nearly as heavy consequences for minor omissions or other mistakes as does the UM waiver form.\textsuperscript{176} Requiring notice and comment for each of these documents prior to according them legally binding effect would impose an onerous burden in time and resources on the agencies.\textsuperscript{177} This burden could potentially drive the agencies to flout the required notice-and-comment procedures entirely, whether openly or covertly.\textsuperscript{178}

To avoid this undesirable result, the Louisiana Supreme Court should either provide a definitive interpretation of the LAPA's "rule" definition that exempts from notice and comment agency documents that have a minimal effect on the substantive rights of affected persons or interpret the existing "internal agency management" exception so as to provide for such an exemption. If the court is unable or unwilling to do so, then the Louisiana Legislature should amend the LAPA to include that exemption. The amended law could provide safeguards such as post-adoption notice and comment for documents, like the Gingles bulletins, that measurably affect substantive rights. But sometimes, an agency's promulgation of documents really is just a trifling matter, and Louisiana law should treat it as such.

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\textsuperscript{175} See \textit{supra} notes 50–53 and accompanying text.
\textsuperscript{176} See \textit{supra} note 105.
\textsuperscript{177} See \textit{supra} notes 133–36 and accompanying text.
\textsuperscript{178} See Asimow, \textit{supra} note 141, at 55–62 (commenting that California agencies employ various methods to circumvent burdensome notice-and-comment requirements); Thomas O. McGarity, \textit{Some Thoughts on "Deossifying" the Rulemaking Process}, 41 DUKE L.J. 1385, 1386 (1992) ("[T]here is recent evidence that agencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process.").

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