Eighth Circuit denies Bivens *claim against FSA agents and employees*

The Eighth Circuit has held that farm program participants whose constitutional rights are allegedly violated by USDA Farm Service Agency (FSA) agents and employees may not bring a *Bivens* action for damages against those agents and employees if the actions giving rise to the alleged violations are reviewable through the FSA and USDA National Appeals Division (USDA NAD) appeal processes. *Carpenter's Produce v. Arnold*, No. 98-3700, 1999 WL 685789 (8th Cir. Sept. 3, 1999). Relying on *Schweiker v. Chillicky*, 487 U.S. 412 (1988), for the proposition that a *Bivens* claim is not available where Congress has provided what it considers an adequate remedial mechanism for constitutional violations in the course of the administration of a federal program, the Eighth Circuit held that the USDA NAD appeal process was such a remedial scheme. The congressionally-created USDA NAD appeal process, therefore, foreclosed a program participant's ability to seek damages for constitutional violations under *Bivens*.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that money damages could be sought against individual federal officers for their alleged violation of the plaintiff's rights arising under the Fourth Amendment. The Court reasoned that a federal cause of action for money damages could be inferred directly from the Fourth Amendment, and it concluded that the judiciary had the authority and the duty to provide a remedy to ensure the necessary relief for violations of the Fourth Amendment by federal officers. *Id*. at 392. It suggested without elaboration, however, that it would not create a remedy if "special factors" counseled hesitation and if Congress had specified an alternative mechanism that Congress believed provided an equally effective substitute. *Id*. at 396-97. Subsequent Court decisions extended so-called "*Bivens* actions" to alleged violations of Fifth, Eighth, and First Amendments. *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980); *Bush v. Lucas*, 462 U.S. 367 (1983)(denying a *Bivens* remedy in that case, but accepting the existence of a *Bivens* remedy for violations of the First Amendment).

In the first of these decisions, *Davis v. Passman*, the plaintiffs had brought a *Bivens* action against a congressman for gender discrimination in violation of the Fifth Amendment. In allowing the action for money damages to proceed, the Court rejected the argument that Congress had intended to foreclose other remedies when it exempted congressional employees from the protection of Title VII. 442 U.S. at 247. In the second decision, *Carlson v. Green*, the Court considered for the first time whether the existence of an alternative remedy, the Federal Tort Claims Act, foreclosed a *Bivens* claim. It held that it did not, reasoning that *Bivens* actions allowed more effective relief than the Federal

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NFO contracts held unenforceable

In the Federal District Court, Northern District of Ohio, Eastern Division, a jury found that the National Farmers Organization could not enforce certain marketing contracts between the NFO and a family owned grain producer, the Fleck Brothers Partnership (the "Flecks"). *NFO, Inc. v. Fleck Brothers Partnership*, United States District Court for the Northern District of Ohio, Case No. 3:97CV7517 (1999). Pursuant to the underlying contracts, the NFO agreed to assist the Flecks in marketing and selling grain produced by the Flecks. The NFO represented to the Flecks that its national presence and expertise in the grain market would allow the NFO to procure the best price possible for the Flecks' grain. The marketing concept was that the NFO would use its expertise to enter into contracts on behalf of the Flecks with third-parties (i.e., grain elevators) and the Flecks would deliver grain pursuant to these third-party contracts. Pursuant to the marketing contracts with the NFO, the Flecks committed certain amounts of grain it would allow the NFO to market.

The marketing contracts at issue were identified by the NFO as "Spike-Up" and "Grain Marketing" agreements. From 1993 to 1996, the Flecks entered into nine of these marketing agreements. Six of the nine marketing agreements referenced "trigger prices". The Flecks claimed that the NFO represented to them that the trigger price was the price the Flecks would ultimately receive for their agricultural commodities if the market hit the price. If the market did not hit the price, the contract would expire. The NFO contended that hitting the trigger price only set the sale process in motion, but did not guarantee a minimum price.

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INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

- The myth of the estate planning tax

Tort Claims Act, including a jury trial and punitive damages. 446 U.S. at 22. In the third decision, *Bush v. Lucas*, the Court held that the existence of alternative remedies under Civil Service Commission regulations promulgated pursuant to the Civil Service Reform Act precluded a federal employee's suit against his superiors for allegedly demoting him for his public statements in violation of his First Amendment rights. *Id*. at 385. In so doing, the Court departed from its analysis in *Carlson* by not discussing jury trials or punitive damages. Instead, it focused on the congressional action under which "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures–administrative and judicial–by which improper action may be redressed." *Id.*

Subsequently, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court was faced with a *Bivens* action alleging a violation of the plaintiff's due process rights by one state and two federal officers as the result of an improper denial of Social Security benefits. Concluding that the available administrative and judicial remedies provided by statute were indistinguishable from the mechanisms that the Court held had displaced the *Bivens* remedy in *Bush*, the Court summarized what it had held in *Bush* and a decision rendered on the same day as *Bush*, *Chappell v. Wallace*, 462 U.S. 296 (1983), as follows: "When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of administration, we have not created additional *Bivens* remedies." 487 U.S. at 423.

In *Carpenter's Produce*, the action before the Eighth Circuit was against agents and employees of the Arkansas State FSA Committee who had allegedly violated the plaintiffs' Fifth Amendment rights by discriminating against them on the basis of their race in connection with the Committee's review of their eligibility for disaster assistance benefits. Though they eventually received their benefits following their administrative appeals, the plaintiffs sought money damages under *Bivens*.

In affirming the district court's dismissal of the plaintiffs' action, the Eighth Circuit relied on *Chilicky* to hold that the combined FSA and USDA NAD appeal processes precluded the plaintiffs' action. In response to the plaintiffs' arguments that these appeal remedies were inadequate because they did not provide the opportunity for monetary relief other than program benefits, the Eighth Circuit noted that the Court in *Chilicky* had counseled that the adequacy of a separate remedy "was a policy decision best made by Congress, and not by the Court." *Carpenters Produce* at *2 (citing *Chilicky*, 487 U.S. at 428-29). The Eighth Circuit also distinguished an earlier decision in *Krueger v. Lyng*, 927 F.2d 1050 (8th Cir. 1991), in which the separate remedy was created entirely by regulation, and not by statute. The USDA NAD remedial scheme, the court noted, was created by Congress, and the scheme added steps to the appeal process that existed under the regulatory appeal process of the FSA.

The Eight Circuit's decision follows the trend evidenced by recent Supreme Court and lower court decisions to decline to expand the *Bivens* remedy into "new contexts." *See* 3 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 19.5 (3rd ed. 1994 & Supp. 1998). One of these new contexts now appears to be actions by FSA agents and employees in connection with matters administratively appealable to the USDA NAD.

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Life estate in growing crops

In *Heinold v. Siecke*, 257 Neb. 413 (1999), a farm couple owned a tract of farmland and deeded the land in fee to a son reserving for themselves a life estate. The father then entered into an oral lease agreement with a third party to farm the property on a share-crop basis with the father to receive a 40% share. Mother died and then father died after crops had been planted in the spring of 1996 but before they were harvested in the fall of 1996. The father's will devised his property equally between his two children - the son that held the remainder interest in the farm and a daughter. The son claimed title to the growing corn and soybean crops as the remainderman under the deed, but the daughter claimed that the crops were property of the father's estate to be distributed under the will equally between her and her brother.

The court held that the growing crops were property of the father's estate in accordance with the doctrine of emblements and prior Nebraska case law. The court noted that the result would have been different if the decedent had held the life estate in joint tenancy, otherwise the termination of a life estate by reason of the death of the life tenant does not transfer any property interest to the remainderman. The court also noted that the language in the warranty deed did not cut off the life tenant's right to emblements. Accordingly, the father's 40% crop share was estate property to be distributed under the terms of the father's will.

Note: The Kansas Supreme Court reached a similar result in *Finley v. McClure*, 222 Kan. 637, 567 P.2d 851 (1977) (where a life tenant leases land on shares and dies before crop is harvested, life tenant's estate is entitled to entire crop share rent; under Kansas law, life tenant's ownership in landlord's share of crop attaches after crop planted - growing crop is considered on the death of the life tenant as personal property).

—Roger A. McEowen, Kansas State University

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NFO Contracts/*Cont. from page 1*

Once the NFO received the commitment from the Flecks pursuant to the marketing agreements, it proceeded to enter into many rolling Hedge-to-Arrive ("HTA's") contracts on the Flecks behalf with third-parties such as grain elevators. The Flecks did not sign the HTA contracts, and they were never consulted prior to the HTA contracts being agreed to by the NFO.

As many involved in the agricultural industry are well aware, HTAs are more speculative than straight delivery contracts as the delivery price can spiral downward greatly if the market spiked up unexpectedly. Due to margin calls, the price will decline most sharply if the contract is not delivered on and the contract "rolled" until the next delivery period, as is the case with a rolling HTA.

In the *Fleck* situation the worst case scenario did occur when the price of grain rose dramatically in 1995 and 1996. The price the Flecks were entitled to pursuant to the contracts was reduced greatly due to the market conditions. As a result, the Flecks did not deliver the grain required by the third-party contracts. When prices continued to maintain a high level during this time period, the delivery price provided for in the third-party contracts continued to plummet and the Flecks continued to refuse to deliver grain as allegedly required by the third-party contracts. As such, the NFO claimed that it incurred $150,000.00 in damages because of the fact that the entities with which it had entered into contracts pursuant to the marketing agreements now demanded payment for the grain which was not delivered.

Pursuant to its complaint against the Flecks, the NFO sought to enforce the marketing agreements, claiming that the NFO was entitled to enter into rolling HTA's on the Flecks' behalf and it was proper to do so under the circumstances. This claim was made even though only a few of the marketing agreements even mentioned HTA contracts, and none of the contracts expressly authorized the NFO to enter into HTA contracts without permission from the Flecks.

The Flecks' position was that to the extent HTA contracts were authorized in the marketing agreements, the NFO could not enter into the HTA contracts without the Flecks' permission. This same argument was even more applicable to the contracts which did not even mention HTA contracts. Furthermore, the Flecks contended that the NFO breached fiduciary duties owed to the Flecks and that the NFO negligently misrepresented the terms of, and failed to disclose known risks associated with, both the marketing agreements and the third-party contracts.

In responding to the parties' motions for summary judgment, the court found that the NFO had a duty to disclose material facts to the Flecks (including known risks with respect to HTA contracts) relevant to all of the marketing agreements. This decision was based on the fiduciary relationship owed to the Flecks by the NFO since the NFO was acting as the Flecks' agent.

At the trial of the matter, the jury found that as to six of the nine marketing agreements, the NFO was not authorized to enter into rolling HTA contracts and that the Flecks did not breach those marketing agreements. As to the remaining three marketing agreements, the jury found that the Flecks technically breached those agreements, but further found that the Flecks were excused from performing these marketing agreements as a result of the NFO's breach of fiduciary duties owed to the Flecks. The jury even went so far as to find that as a result of the breach of fiduciary duties owed to the Flecks, it was the NFO that actually breached the marketing agreements. However, the Flecks did not recover any damages because of a failure to establish that any damages had been suffered as a result of the NFO's breach.

If you would like any further information regarding the *Fleck* case you may contact David Meyer or Matthew LaBuhn of Ricketts & Onda Co., L.P.A., 300 S. Second St., Columbus, Ohio 43215; (614) 229-4100.

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There's no free lunch

It's been a difficult morning but it's almost over. The day started with a visit from agents of the U.S. Environmental Protection Agency (EPA) and the State Department of Natural Resources. The agents inspected your swine operation in response to a complaint about an alleged violation of the Clean Water Act.

When the four agents first arrived at your farm you tried to call your nephew, the lawyer. Gone hunting.

It turns out not being able to reach your newphew, the lawyer, was a good thing. Everything seems to have gone well and you saved on legal fees. Besides, the four agents are actually very nice. You remember meeting of them years ago in college when you were in a biology class together.

It is almost noon and you know the agents must be hungry. To let them know there are no hard feelings, you graciously offer to buy them lunch at the local diner. At first you get only stunned silence in response. One agent, however, your old college acquaintance, is clearly agitated. The agents huddle and you hear the words "cheap bribe." You silently ask yourself, "where is my nephew?"

Pork producers often come into contact with federal and state employees as the government workers perform their official duties. Personal contact with U.S. Department of Agricultural (USDA) employees, EPA agents, and Packers and Stockyards representatives are relatively common.

Social interaction with many of these same government employees may also occur, especially in rural communities. Church, civic, and school activities may frequently bring together pork producers and government employees. Friendships, or at least friendly acquaintances, may develop over a period of time.

Given the social interaction between the parties and the natural friendliness and courtesy of many pork producers, a producer may be inclined on occasion, to offer to buy lunch for a government employee. If the producer feels that he or she has a particularly good relationship with a government worker, they may even be tempted to give the government employee or a member of the employee's family a gift at Christmas or on some other special occasion (i.e., birthday, wedding anniversary or a child's high school graduation).

Unfortunately, the gift or offer of common courtesy, such as lunch, places the government employee in an awkward and embarrassing position. It also exposes the pork producer to criminal prosecution as the gift or courtesy may be construed as a bribe or illegal gratuity.

Gift-giving rules

The federal government has strict rules governing gifts to government employees. The generous but unwary pork producer can potentially violate a number of federal statutes with a single gift, including the Federal Bribery Statute, the Federal Anti-Gratuity Statute, the Agricultural Marketing Act, and even mail and wire fraud statutes.

Many state laws prohibiting gifts to state employees model the federal statutes. In some instances, the state laws are more restrictive than their federal counterparts.

Federal statute 18 U.S.C.section 201 is the general federal prohibition against bribing or attempting to bribe a public official. A bribe is simply an offer to exchange something of value in return for an official act.

In legal jargon, it is known as a "quid pro quo exchange." Section 201 prohibits the giving or promising of "anything of value" to a public official with the intent to influence an official act. The statute defines "public official" to include all federal employees. "Anything of value" includes money, lodging, transportation, tickets to sporting events, meals and virtually any other gift, service or common courtesy.

The monetary value of the bribe is irrelevant, except in determining the amount of the criminal fine. Besides a criminal fine, a violator of the statute may also be imprisoned for up to fifteen years. Federal law also prohibits the giving or offering of illegal gratuities to public officials. Unlike a bribe, an illegal gratuity does not require proof of a quid pro quo. In other words, the government doesn't need to prove that the illegal gratuity was given in exchange for a specific act.

Until the recent U.S.Supreme Court decision in United States vs. Sun-Diamond, in prosecuting an illegal gratuity case, federal prosecutors only had to prove that a gratuity was given or offered to a public official. For example, in this article's opening scenario, the mere offer of lunch was an illegal gratuity.

The Sun-Diamond decision, however, has now

Free lunch/Cont. on page 7

Notes on the judicial review of federal agency action

By Christopher R. Kelley

Judicial review of final federal agency action is presumptively available under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967); *see also* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Moreover, the presumption favoring review is strong. *See, e.g., Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227, 2231-33, 2236 (1995).

APA review, however, is not a vehicle for recovering monetary damages because APA § 702 excludes relief in the form of "money damages." Following the United States Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), however, it is now clear that "money damages" does not include relief of a restitutionary nature. *See* David A. Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 Ohio St. L.J. 725 (1988).

In addition to being unavailable when "money damages" are sought, the APA's judicial review provisions also do not apply when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (2). The latter exception is a narrow one, for the APA permits courts to review an agency's exercise of discretion under the "abuse of discretion" standard. 5 U.S.C. § 706(2)(A). Judicial review is not available under the APA § 701(a)(2) exception only when the applicable statute "'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *North Dakota ex rel. Bd. of Univ. & School Lands v. Yeutter*, 914 F.2d 1031, 1034 (8th Cir. 1987) (quoting *Webster v. Doe*, 486 U.S. 592, 599-600 (1988)). Also, the Court has held that an agency's refusal to take enforcement actions is presumptively unreviewable under APA § 701(a)(2), *Heckler v. Chaney*, 470 U.S. 821 (1985). *See generally* Ronald Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 687 (1990). Finally, agencies cannot seek judicial review of their own decisions. *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278 (1995). Under APA § 702, an agency is not a "person" who can be "adversely affected" or "aggrieved" by its own actions.

Judicial review of agency action raises issues of timing. The timing of judicial review involves two doctrines: (1) primary jurisdiction and (2) exhaustion of administrative remedies. Both doctrines involve the reconciliation of the proper roles of agencies and the courts.

Primary jurisdiction

"Primary jurisdiction is a doctrine used by court to allocate initial decisionmaking responsibility between agencies and courts where such overlaps and the potential for conflict exists." 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 14.1 (3rd ed. 1994)[Davis & Pierce]. If a dispute or an issue in a dispute that is within the primary jurisdiction of an agency is brought before a court, the court will dismiss the action or defer any decision until the issue is resolved by the agency. *See* Bernard Schwartz, *Administrative Law* § 8.27 (3rd ed. 1991)[Schwartz]. The doctrine does not apply "when the issue involved is purely a legal question and does not involve fact-based matters requiring agency expertise or experience," *Id*. § 8.27 at 529 (citing *Great Northern Railway v. Merchants Elevator Co.*, 259 U.S. 285 (1922)), and "the key factor is still what it was when the primary jurisdiction doctrine was first announced early in the century: to give effect to `a desire for uniform outcomes.'" Bernard Schwartz, *Administrative Law Cases During 1996*, 49 Admin. L. Rev. 519, 533 (1997)(footnotes omitted).

Exhaustion of administrative remedies

The exhaustion of administrative remedies doctrine dictates that judicial review of agency action is unavailable unless the affected party has taken advantage of all the corrective procedures provided by the agency. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). The doctrine's "basic proposition is that the courts should not interfere with the job given to an agency until it has completed its work." Schwartz, *supra*, at § 8.33; *see also Jersey Shore Broadcasting Corp. v. FCC*, 37 F.3d 1531, 1533 (D.C. Cir. 1994).

The doctrine has several pragmatic exceptions, including inadequacy of the administrative remedy and futility. Under the futility exception, exhaustion is not required when the agency's decision can be stated in advance. *See Atlantic Richfield Corp. v. Department of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984). Exhaustion may also be excused when constitutional issues are raised, *see McCarty v. Madigan*, 112 S. Ct. 1081 (1992), or when the administrative tribunal is biased, *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). Relying on an exception is risky. Because the United States Supreme Court's "opinions on exhaustion do not form a consistent and coherent pattern" and "are difficult to reconcile," it is "impossible to describe the law of exhaustion in a manner that is both helpful to lawyers and judges and consistent with *all* of the Supreme Court's many exhaustion decisions." 2 Davis & Pierce, *supra*, § 15.2.

When Congress has statutorily required exhaustion, "courts are not free simply to apply the common law exhaustion doctrine with its pragmatic, judicially defined exceptions. Courts must, of course, apply the terms of the statute." *Id*. § 15.3 at 318. Since 1994, a statutory exhaustion requirement has applied to determinations made by the Secretary of Agriculture. 7 U.S.C. § 6912(e). At least one court has recognized a constitutional exception under this statute, *Gliechman v. United States Dep't. of Agric.*, 896 F. Supp. 42, 45-47 (D. Me. 1995), while another has refused to recognize a statutory interpretation exception. *Calhoun v. USDA Farm Serv. Agency*, No. 4:95cv365-D-B, 1996 WL 142666 (N.D. Miss. Mar. 12, 1996). As to constitutional exceptions to statutory exhaustion requirements, the law is summarized in *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989).

Courts are also constrained by APA § 704 when applying the exhaustion doctrine. In *Darby v. Cisneros*, 113 S. Ct. 2539 (1993), the Court relied on § 704 to hold that when an agency takes otherwise final agency action, a court cannot require the aggrieved party to exhaust *optional* administrative appeals. *Darby v. Cisneros* held that the federal courts could not make exhaustion of available administrative remedies a prerequisite for judicial review of otherwise final agency action unless a statute mandated exhaustion or the agency had promulgated a legislative rule requiring exhaustion and making the adverse determination inoperative pending the administrative appeal. *Id*. at 2548.

Finality and ripeness

Judicial review is only available for "final agency action." 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). In other words, the agency's action must have "ripened" to finality. While the distinctions between finality and ripeness are often blurred, "ripeness" requires a court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In broad terms, "[t]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Port of Boston Marine Terminal v. Rederiaktiebolaget*, 400 U.S. 62, 71 (1970). Ripeness issues typically arise in action for pre-enforcement review of agency rules, *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), and the lack of "ripeness" has been used to deny review of agency "programs."

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Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

Jurisdiction

The APA does not confer jurisdiction on a court; instead, it waives the government's sovereign immunity. *Califano v. Sanders*, 420 U.S. 99 (1977). Jurisdiction must be found elsewhere. In some instances, jurisdiction is conferred on a circuit court. If a statute provides for review in a circuit court, that grant of jurisdiction is exclusive. *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965). For example, the Hobbs Administrative Orders Review Act, 28 U.S.C. §§ 2342-2350, confers exclusive jurisdiction on particular courts of appeal to review certain determinations made by several major agencies, including the USDA. With respect to the USDA, however, the Act applies only to decisions made by the USDA's Judicial Officer; it does not apply, for example, to decisions made by the Director of the USDA National Appeals Division.

In the absence of a statute providing for a review in a federal circuit court, the general federal question statute, 28 U.S.C. § 1331, confers on federal district courts the authority to review reviewable agency actions. In some instances, another statute, such as 28 U.S.C. § 1337, may apply.

The APA does not provide a time limit for seeking review. The Hobbs Act, however, requires the filing of the petition for review within sixty days of the agency's final order. 28 U.S.C. § 2344. When actions are brought under general federal question jurisdiction, the time limit is imposed by either the agency's organic legislation or the general federal statutes of limitation.

Venue may be established specifically by statute or by the general venue statutes. Under the Hobbs Act, venue is in the judicial circuit in which the petitioner resides or has its principal office or in the United States Court of Appeals for the District of Columbia. 28 U.S.C. § 2343. Under the general venue statute applicable to the federal district courts, 28 U.S.C. § 1391(e), there may be a choice of venue—either in the District of Columbia, where the agency head resides, in the state where the cause of action arose, or in the state where the plaintiff resides.

Declaratory judgments and injunctions are the most common forms of action in the absence of a specific statutory remedy. *See Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1320 (7th Cir. 1995) ("In the federal system, when no specific method of obtaining judicial review of final orders by administrative agencies is prescribed by statute, an aggrieved party can still obtain judicial review, by bringing a declaratory or injunctive suit against the agency."). However, the Declaratory Judgments Act, 28 U.S.C. § 2201, 2202, "does not itself confer jurisdiction on a federal court where none otherwise exists." *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 822 (10th Cir. 1981) (citations omitted). While the federal courts have the inherent authority to grant injunctive relief, the APA authorizes injunctive relief pending judicial review. 5 U.S.C. § 705; *see Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Scope of review

The APA provides the applicable scope of review. The pertinent APA provision is 5 U.S.C. § 706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall —
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The APA's scope of review favors the agency. Moreover, agency action is presumed valid on judicial review. *See, e.g., Department of State v. Ray*, 112 S. Ct. 541, 550 (1991)("We generally accord government records and official conduct a presumption of legitimacy."). Thus, the burden is on the challenger. *Maryland-National Capital Park and Planning Comm'n v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

Review on the record

Judicial review of agency action is generally confined to a review of the administrative record. In other words, "[t]he reviewing function is one ordinarily limited to consideration of the decision of the agency . . . and of the evidence on which it was based." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963). This rule is not absolute, but the exceptions are limited. *See generally* Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review "On the Record,"* 10 Admin. L.J. 179 (1996); Stephen Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 Admin. L. Rev. 333 (1984).

Review is not confined to the record evidence supporting the agency's decision. Instead, the court must review the "whole record." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). This does not mean that the entire record must be submitted to the reviewing court. APA § 706 expressly provides that "the court shall review the whole record or *those parts of it cited by a party*...." 5 U.S.C. § 706 (emphasis supplied).

Review is limited to the issues raised before the agency, however. *NLRB v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961). This means that the practitioner must develop every factual and legal issue in the record made before the administrative agency with a view toward ultimately arguing, if the administrative appeal is unsuccessful, that the agency's decision was unlawful under one or more of the standards established by APA § 706.

Under *SEC v. Chenery*, 318 U.S. 80, 87 (1943), "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." "Even if the court can uphold the agency on other grounds, it may not do so. The rationale of the *Chenery* rule is that a reviewing court cannot be sure that the agency would have acted for any other reason than on which it relied." Schwartz, *supra*, § 10.4(citing *Time, Inc. v. Postal Serv.*, 667 F.2d 329, 335 (2d Cir. 1981)).

"Arbitrary or capricious"

The "arbitrary or capricious" standard of APA § 706(2)(A) tests the sufficiency of factual determinations made in informal rulemaking and adjudication and the rationality of the decisionmaking process with respect to all agency action, informal and formal. *See Association of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984). Under this standard, the judicial review of agency action is for "reasonableness," not "correctness." So long as the agency's determination is reasonable, it must stand. The court cannot substitute its judgment for that of the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.402, 416 (1971). The court, however, cannot supply a reasoned basis where the agency has failed to do so, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983), and government counsel is not permitted to do so through post hoc rationalizations, *id*. at 50.

The Court's decision in *State Farm* essentially

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Judicial review/*Cont. from page 5*
reformulated the "hard look" doctrine that lower courts had developed and applied in varying degrees in the late 1970s. The "hard look" doctrine has two components. "First, the court insures that *the agency* has taken a "hard look" at the problem.... Second, the court takes a "hard look" at the substance of the decision under review...." Arthur Earl Bonfield & Michael Asimow, *State and Federal Administrative Law*, 621-22 (1989).

Even under the "hard look" doctrine, review is for reasonableness. The agency's action must be reasonable in two respects. First, the reasonableness standard measures the adequacy of the agency's evidentiary support for its findings. *See* 2 Davis & Pierce, *supra*, § 11.4. Second, "an agency must engage in 'reasoned decisionmaking,' defined to include an explanation of how the agency proceeded from its findings to the action it has taken." *Id.* (relying on *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974)).

Testing the lawfulness of agency behavior under a "reasonableness" standard is deferential to agencies. "Reasonableness" as a standard extends to mixed questions of law and fact, including the application of a statutory term such as "employee" to a particular individual. *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1944). Agency statutory interpretations are now measured by a reasonableness standard under the *Chevron* doctrine discussed below.

"Substantial evidence"

Under APA § 706(2)(E) findings of fact made in formal rulemaking and adjudication are tested under the "substantial evidence" standard. "The substantial evidence rule under the Administrative Procedure Act tests the rationality of agency findings of fact, taking into account all of the evidence on both sides." Schwartz, *supra*, § 10.8. "The substantial evidence test presupposes that there is a zone of choice for the agency decisionmaker; it is a test of *reasonableness*, not of *rightness*, of agency findings of fact. The question under it is whether the evidence is such that reasonable minds could have reached the agency's conclusion." *Id*. (footnotes omitted).

In *American Paper Institute v. American Electric Power Serv. Corp.*, 461 U.S. 402, 412 n.7 (1983), a unanimous Court characterized the arbitrary or capricious test as "more lenient" than the "substantial evidence" test. If there is a difference between the "arbitrary or capricious" and the "substantial evidence" tests, however, the Court has never explained what that difference is. 2 Davis & Pierce, *supra*, § 11.4 at 202. Therefore, "[c]ircuit courts frequently treat the two tests as identical, referring to their 'tendency to converge' and to the distinction between the two as 'largely semantic.'" *Id*. (citations omitted). Thus, notwithstanding the Court's decade-old assertion that the "arbitrary or capricious" test is somehow "more lenient" than the "substantial evidence" test, Professors Davis and Pierce conclude, "If a difference exists, it is too subtle to explain in a manner that is useful to agencies, courts, or practitioners." *Id*. § 11.4 at 200.

Since the "substantial evidence" test applies to judicial review of formal agency adjudications and rulemaking, the issue of the weight to be given to Administrative Law Judge (ALJ) findings of fact occasionally arises. The issue arises because formal agency decisions are often preceded by hearings before an ALJ. The agency may or may not accept the ALJ's findings of fact. If the agency's decision rejects the ALJ's findings of fact and adopts its own findings, it is the agency's findings that are due deference on judicial review. 2 Davis & Pierce, *supra*, § 11.2 (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), and *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358 (1955)). The ALJ's findings cannot bind the agency because APA § 557(b) provides that "on appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). The reviewing court is permitted to take into account the ALJ's contrary findings for it must consider the whole record, not just those portions of the record supporting the agency's decision. Also, when credibility is at issue, the ALJ's findings may be given special weight because the ALJ conducted the hearing and observed the demeanor of the witness. *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1305 (9th Cir. 1970).

"Abuse of discretion"

The APA provides that reviewable exercises of discretion are review under the "abuse of discretion" standard. 5 U.S.C. § 706(2)(A). Discretion can be abused in many ways. For example, an unexplained departure from agency precedent is an abuse of discretion. "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored...." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971). Similarly, "[t]here may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case." *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964), *rev'd on other grounds*, 382 U.S. 46 (1965).

Other forms of agency inconsistency may be either an abuse of discretion, including treating similarly situated parties differently without a reasonable basis for doing so. *Golightly v. Yeutter*, 780 F. Supp. 672, 678-79 (D. Ariz. 1990). Actions based on an improper purpose, erroneous and extraneous considerations, and inaction or delay may also be an abuse of discretion. Schwartz, *supra*, § 10.6. The standard is "reasonableness."

***Chevron* deference**

The "*Chevron* deference doctrine" is problematic for the nongovernmental litigant. Deference is problematic because Congress rarely enacts unambiguous statutes, and, under the doctrine, the "rule" is that reasonable agency interpretations of ambiguous statutes prevail:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

The *Chevron* deference doctrine runs counter to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803), where the Court announced that it is "emphatically the province and duty of the judicial department to say what the law is." Moreover, the APA provides that "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Court, however, justified the doctrine on democratic principles. According to the Court, if Congress left "gaps" in its statutes, the executive branch with an elected President overseeing its actions was more "accountable to the people" than the unelected judiciary. *Chevron*, 467 U.S. at 865-66. *See generally* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992); Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 Rutgers L. Rev. 313, 316 (1996).

Deference must also be given to an agency's interpretation of its ambiguous regulations. *Stinson v. United* States, 508 U.S. 36, 42-46 (1993); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). The following expression of the standard is typical: "We accord an agency's interpretation of its own regulations a 'high level of deference,' accepting it 'unless it is plainly wrong'.... Under this standard, we must defer to an agency interpretation so long as it is `logically consistent with the language of the regulations and ... serves a permissable regulatory function.'" *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995)(quoting *General Carbon Co. v. OSHRC*, 860 F.2d 479, 483 (D.C. Cir. 1991), and *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991))(other citations omitted). *See generally* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 517 (1989)).

Professors Davis and Pierce point out the relationship between *Chevron* and the requirement of "reasoned decisionmaking" imposed by the Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983). Professors Davis and Pierce see a complete overlap between step two in *Chevron* and *State Farm*:

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Free Lunch/*Cont. from page 3*
modified the old standard. The case arose from gifts provided by Sun-Diamond to former Secretary of Agriculture Mike Espy. The company and two of its executives were successfully prosecuted under the Federal Anti-Gratuity statute on the basis that the gifts to a government official violated the statute, regardless of whether there was evidence linking the gifts to official conduct.

The U.S. Supreme Court, in reversing the company's conviction, held that there must be evidence of some connection between the gratuity and official's conduct. The illegal nature of the gratuity can be established by proving that it was a reward for past favorable treatment by the official or was given for future, favorable treatment.

For example, to convict our generous pork producer of offering an illegal gratuity when he offered to buy lunch for the agents investigating an alleged Clean Water Act violation, the prosecution would have to establish a link between the offer and past lax enforcement of environmental standards, or that the regulators were supposed to go easy on him as to any future violations.

Regardless of the strict bribery and gratuity standards, some things are deemed permitable to officials. The rules, however, are very restrictive.

For example, a pork producer can give a government employee a gift appropriate to the occasion if there exists between the parties a family or obvious personal relationship. For example, do marriage or longtime personal friends relate the parties? The circumstances must make it clear, however, that it is the relationship that motivated the gift and nothing more.

Some common social courtesies are also permissible, at least under federal law. Offers of soft drinks or coffee being the most common examples. But the value of the courtesy must be trivial, as well as wholly free of any embarrassing or improper implications. Promotional items of trivial value, such as pencils and note pads with a farm's name on them can also be given out. Some promotional items, however, such as meat products, alcoholic beverages, fruit backets, boxes of candy and jewelry should never be offered. (See Food Safety Inspection Directive 4735.3 Part Six.)

No gifts policy

The best policy is one of absolutely no gifts or gratuities to public officials, unless the official is a relative and the item given is appropriate to the occasion. Extreme caution must be exercised at all times to protect the pork producer and the government officials with whom the producer comes in contact.

Regardless of whether the producer's offer of a gift or gratuity violates federal or state law, government officials have strict codes of ethics under which they must operate. The official's acceptance of seemingly trivial items could result in disciplinary action being taken against the official by the agency for which he or she works. It is best for everyone to keep relationships with government officials professional and to avoid even the appearance of impropriety.

—John Copeland, Executive Vice President, Ethics Food Safety and Environmental Compliance, Tyson Foods, Inc. Reprinted from November 26, 1999 National Hog Farmer.

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> In both cases the issue is the reasonableness of an agency's interpretation of ambiguous language in a statute. In both cases, the criteria relevant to answering the question are the same: (1) whether the agency adequately discussed the plausible alternatives, (2) whether the agency adequately discussed the relationship between the interpretation and pursuit of the goals of the statute, (3) whether the agency adequately discussed the relationship between the interpretation and the structure of the statute, including the context in which the language appears in the statute, and (4) whether the agency adequately discussed the relationship between the interpretation and any data available with respect to the factual predicates for the interpretation. The tests are the same whether the analysis is stated with reference to *Chevron* or *State Farm.*

1 Davis & Pierce, *supra*, § 7.4 (Supp. 1998).

Relief

Also problematic for the nongovernmental litigant is the relief the court can ordered. The nongovernmental litigant's goal is to obtain a "closed" remand, i.e., a remand instructing the agency how to decide the matter. *See Justice v. Lyng*, 716 F. Supp. 1570, 1579-80 (D. Ariz. 1989). The alternative is an "open" remand that permits the agency to fully reconsider the matter. However,

> [a] reviewing court can order an agency to provide the relief it denied only in the unusual case where the court concludes that the underlying law and facts are such that the agency has no discretion to act in any other manner, and then only when the court concludes that a remand to the agency would produce substantial injustice in the form of further delay of the action to which the petitioner is clearly entitled. This extreme judicial reluctance to order an agency to award substantive relief it previously denied is based on the same considerations that underlie the doctrines of primary jurisdiction, exhaustion, ripeness, and finality....

Judicial review/Cont.
3 Davis & Pierce, *supra*, § 18.1. *See also Faucher v. Secretary of Health & Human Services*, 17 F.3d 171, 176 (6th Cir. 1994).

Price for potatoes

In *Licklyey v. Herbold, Inc.*, No. 24615, 1999 Ida. LEXIS 78 (Idaho Sup. Ct. Jul. 21, 1999), the plaintiff, a potato grower, entered into a preseason potato growing contract with the defendant. The plaintiff agreed to plant, cultivate, harvest and deliver 12,000 cwt. of Russet Burbank potatoes. The contract set a base price of $6.15/cwt. The contract set minimum quality standards that provided that any load or combination of loads inspecting below fifty percent well-shaped U.S. No. 1, 2 inch or four ounce minimum would be rejected. The contract also contemplated that an inspection might not be completed until after a load had been delivered and the potatoes commingled. In that event, the price for any load or combination of loads subsequently determined by inspection to be rejectable was to be renegotiated between the plaintiff and the defendant.

Over six days, the plaintiff delivered twenty-three truckloads totaling just over 12,000 cwt. of potatoes. The defendant accepted the shipments and commingled the potatoes with deliveries from other growers. Results from the inspections showed that the combination of loads delivered on each of the first four days failed to meet the minimum standards. Taking all six days deliveries as a whole, eighty-five percent of the potatoes graded below the minimum contract standard. Under the pricing formula set forth in the contract, the defendant calculated a net price of $3.22/cwt. The plaintiff disagreed with the defendant's price calculation and sued for the amount of the market value of potatoes at the time of delivery. The defendant argued that it was required only to pay the contract price.

The trial court determined that the plaintiff was entitled to $7.55/cwt., the market price at the time of delivery. As a result, the trial court awarded the plaintiff damages based on the market price for the rejectable potatoes and $4.11/cwt. for the conforming potatoes. The Idaho Supreme Court affirmed, noting that, under Idaho Code section 28-2-305(1), where a contract leaves the price open for negotiation and the parties fail to agree, the price is to be a reasonable price at the time for delivery. The court upheld the trial court's determination that the market price of $7.55/cwt. was a reasonable price at the time of delivery. The court noted at the time the plaintiff delivered potatoes to the defendant, he also sold potatoes from the same field on the open market and received between $7.50 and $8.00/cwt.

Note: A dissenting justice argued that the court's holding that the market price was the reasonable price for the rejectable potatoes was contrary to the purpose of the contract and commercially unreasonable in that it awarded the plaintiff more for rejectable potatoes than he would have received had he delivered conforming potatoes. The dissent argued that the majority opinion changed the allocation of risk between the contracting parties in a manner that the parties could not have anticipated.

—Roger A. McEowen, Kansas State University

20th Annual Educational Symposium

The 20th Annual Educational Symposium of the American Agricultural Law Association was held October 15-16, 1999 in New Orleans, LA. Sponsoring organizations in addition to the AALA were the University of Arkansas School of Law, the Farm Foundation, Capital University School of Law, and Drake University Law School. Over 200 practitioners, educators, and farm representatives attended the two-day program.

Patricia Conover, Montgomery, AL, assumed her duties as in-coming president of the Association. President-elect, Dean Steven Bahls, Capital University Law School, was introduced to the membership. He invited the members to communicate with him concerning ideas for next year's conference, to be held in St. Louis, October 20-21, 2000.

Outgoing Board members, Stephen F. Matthews, Dona J. Merg, and Paul L. Wright, Past-President, were recognized and thanked for their dedicated service to the Association. New directors, Steven A. Bahls, President-Elect, David A. Pryor, and Steven A. Halbrook, were introduced to the membership.

At the Friday luncheon, the Distinguished Service Award was presented to Michael T. Olexa, University of Florida. The Professional Scholarship Award went to Jesse Richardson and Leon Geyer for their article entitled ___. The Student Scholarship Award went to ___ for his article entitled _____.