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Recent Developments: Darby v. Cisneros: Courts Are Not Free to Require Exhaustion of Administrative Remedies before Seeking Judicial Review if It Is Not Mandated by Either the Enabling Statute or Agency Rules

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on the theory that race is a "suspect classification," such strikes are subject to "strict scrutiny." *Id.* Therefore, since gender is a "suspect classification" under Maryland law, the court permitted *Batson's* requirement of strict scrutiny to be extended to strikes based upon gender. *Id.*

Finally, in applying its analysis to the case at bar, the court concluded that the trial court had erred by denying defense counsel the opportunity to litigate the use of peremptory strikes on the basis of gender. *Id.* at 270, 623 A.2d at 653. The court also ruled that

the prosecutor should not be permitted to attempt to propound a gender-neutral explanation in any later proceeding. This peremption is based on the fact that the prosecution freely admitted, in the first trial, to exercising peremptory challenges to exclude women from the jury. *Id.* at 271, 623 A.2d at 653. The court remanded to the case to the circuit court for a new trial.

In *Tyler v. State*, the Court of Appeals of Maryland expanded the Supreme Court's ruling in *Batson v. Kentucky*. The court re-examined the

Batson framework and found that under Articles 24 and 46 of the Maryland Declaration of Rights, the prosecution cannot peremptorily challenge jurors on the basis of gender. Although the decision strips the prosecution of broad discretion in jury selection, it heightens the State's accountability to the defendant. Moreover, it encourages both women and men to serve on juries by discouraging the use of traditional stereotypes about female and male jurors.

-Kelly A. Casper

Darby v. Cisneros

COURTS ARE NOT FREE TO REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES BEFORE SEEKING JUDICIAL REVIEW IF IT IS NOT MANDATED BY EITHER THE ENABLING STATUTE OR AGENCY RULES.

The Supreme Court of the United States resolved a conflict between the judicially created doctrine of exhaustion of administrative remedies and the statutory requirements of section 10(c) of the Administrative Procedure Act ("APA") in *Darby v. Cisneros*, U.S. , 113 S.Ct. 2539 (1993). The Court held that when the APA applies, courts are not free to require exhaustion as a rule of judicial administration where the agency action has already become final under section 10(c).

Petitioner, R. Gordon Darby ("Darby") was a South Carolina real estate developer who developed and managed multi-family rental projects. Darby worked with a mortgage banker, Lonnie Garvin, who developed a plan to permit multi-family developers to obtain single-family mortgage insurance from the respondent, the Department of Housing and Urban Development ("HUD"). Garvin's plan allowed Darby to avoid HUD's "Rule of Seven" which prevented rental properties from receiving single family mortgage insurance if the mortgagor already had financial interests in seven or more similar rental properties in the same project or subdivision.

Darby obtained the financing for three separate multi-unit projects and although he successfully rented the units, a combination of factors forced him to default. As a result, HUD

acquired responsibility for the payment of over \$6.6 million in insurance claims.

In June of 1989, HUD issued a limited denial of participation prohibiting petitioners from taking part in any program in South Carolina administered by respondent, Assistant Secretary of Housing, for one year. During a hearing on the consolidated appeals, an Administrative Law Judge issued an "Initial Decision and Order" and found good cause to debar petitioners for a period of eighteen months.

Neither petitioner nor respondent sought further administrative review although they were entitled to request a review by the Secretary according to 24 C.F.R. § 24.314(c) (1992). Instead, petitioners filed suit in the United States District Court for the District of South Carolina seeking an injunction or declaration that the administrative sanctions were imposed for purposes of punishment in violation of HUD's own debarment regulations. The respondents moved to dismiss the complaint on the grounds that petitioners failed to exhaust administrative remedies. The district court denied respondents' motion to dismiss reasoning that the administrative remedy was inadequate. In a subsequent opinion, the court granted petitioners' motion for summary judgement.

On appeal by the respondents,

the Court of Appeals for the Fourth Circuit reversed. *Darby v. Kemp*, 957 F.2d 145 (4th Cir. 1992). The court concluded that there was no evidence to suggest that further review would have been ineffective or that the Secretary would have abused his discretion by indeterminately extending the fifteen day time limitation for review. The Supreme Court granted certiorari after the Fourth Circuit denied petitioners' petition for rehearing.

The Court began its review by analyzing the plain language of the APA, 5 U.S.C. § 704. Section 10(c) provides that judicial review is available for final agency action when there is no other adequate remedy in a court, and that preliminary, procedural, or intermediate agency action . . . is subject to review on the review of the final agency action Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. 5 U.S.C. § 704.

It was this text of the APA itself that the Court used as the foundation for its opinion. The Court gave deference to Congress' power to establish the basic rules under which a claim may be heard in a federal court and to fashion those exhaustion principles in a manner compatible with congressional intent. *Cisneros*, 113 S. Ct. at 2543 (citing *McCarthy v. Madigan*, 112 S. Ct. 1081 (1992)). Section 10(c) of the APA codifies the doctrine of exhaustion of administrative remedies. Under section 10(c), "[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." *Id.* at 2544 (quoting 5 U.S.C. § 702). Section 10(c) then establishes the standards for the availability of review

and limits the application of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates. *Id.* at 2545. The Court concluded that it would be inconsistent to require the litigants to exhaust optional appeals when the plain language of section 10(c) explicitly requires exhaustion only when mandated by statutory or agency rule. *Id.*

Legislative history supports this position as well. In a letter written to the Judiciary Committee from Attorney General Tom C. Clark, dated October 19, 1945, Clark maintained that section 10(c) was intended to set forth existing law. *Id.* at 4682. While the law at the time allowed federal courts to require exhaustion as a prerequisite to review, the Court noted that those cases preceded the enactment of the APA. *Id.* The pre-APA cases stated that until an administrative appeal was taken, the agency action was unreviewable because it was not yet final. The decision was not final because at that time, administrative agencies did not authorize hearing officers to make final agency decisions prior to the enactment of the APA. *Id.* at 4683.

The dicta in pre-APA cases concerning section 10(c) also reinforces the Court's holding. In *Vandalia R. Co. v. Public Service Comm'n*, 242

U.S. 255 (1916), the Court held that state law provided only that the Railroad Commission had the authority to grant a rehearing but did not require that rehearing be requested. *Id.* at 4682. In another pre-APA case the Court stated that it was not necessary for the defendant to apply to the Commission for a rehearing before resorting to the court because the law does not require such an application be made, and granting a rehearing is entirely within the discretion of the Commission. Therefore, there was no basis for making the application to the Commission a prerequisite to judicial review. *Id.* (citing *Prendergast v. New York Telephone Co.*, 262 U.S. 43 (1923)).

As a result of *Darby v. Cisneros*, the Supreme Court settled a conflict among the courts of appeals and defined the boundaries of the Administrative Procedure Act and the judicially created doctrine of exhaustion. *Darby v. Cisneros* strengthens the APA by forcing the courts to adhere to the plain language of section 10(c) rather than formulating contradictory policies. The decision, however, also allows any petitioner to ignore the convenient, efficient, and less costly administrative review process by seeking judicial review in our overcrowded judicial system.

-Laura J. Mann

