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OVERVIEW

Introduction

This overview comments upon eleven administrative law cases decided by the Tenth Circuit during its 1976-1977 term. Several of these cases represent new departures by the court.

In *Rutherford v. United States*,[1] the Tenth Circuit set clear standards for the FDA and the district courts in determining whether a drug (here, Laetrile) is exempted from the "new drug" certification procedures of the Food, Drug and Cosmetics Act.[2] In the areas of exhaustion of administrative remedies and res judicata, the court used relatively recent United States Supreme Court decisions to clarify Tenth Circuit policies.[3]

In *Solomon Valley Feedlot, Inc. v. Butz*,[4] a case of first impression, the Tenth Circuit held that feedlots are not "livestock dealers" and thus are not subject to the registration and bonding provisions of the Packers and Stockyards Act of 1921.[5] In *EEOC v. Continental Oil Co.*,[6] the Tenth Circuit decided that if an individual has brought suit under Title VII for employment discrimination, the EEOC is limited to participating in the litigation by intervening in the private suit. In a Federal Tort Claims Act case, the Tenth Circuit, for the first time, held it proper to consider the effect of inflation upon future earnings.[7]

These decisions indicate a somewhat more progressive court than in the past. Compared to its prior three terms,[8] the Tenth

[1] 542 F.2d 1137 (10th Cir. 1976).
[2] *See* text accompanying notes 9-29 *infra*.
[3] *See* text accompanying notes 43-59 *infra*.
[4] 557 F.2d 717 (10th Cir. 1977).
[5] *See* text accompanying notes 60-68 *infra*.
[6] 548 F.2d 884 (10th Cir. 1977).
[7] *See* text accompanying notes 116-125 *infra*.
[8] *See* Overview (Third Annual Tenth Circuit Survey), *Administrative Law*, 54 DEN.

Circuit has become far more willing to formulate new policy in the field of administrative law.

I. JURISDICTION, ADMINISTRATIVE PROCEDURE, AND SCOPE OF REVIEW

A. Rutherford v. United States, 542 F.2d 1137 (10th Cir. 1976)

In *Rutherford v. United States*[9] the Tenth Circuit reviewed a district court order enjoining the FDA from preventing appellee Rutherford from obtaining a supply of the controversial cancer drug Laetrile for his own use. The court upheld the preliminary injunction on the ground that the issue of whether Laetrile is a "new drug," so as to bring it within the certification procedures of section 505(a) of the Food, Drug, and Cosmetic Act[10] (the Act), is a mixed question of law and fact which should be fully tried. Accordingly, the case was remanded to the district court.[11]

The FDA contended that its administrative determination that Laetrile was a "new drug" barred the drug's introduction into interstate commerce without an approved new drug application (NDA) having been filed pursuant to the Act.[12] Rutherford asserted that even if Laetrile is a drug, it is not a new drug and hence is exempt from the NDA provisions of the Act.[13]

The Tenth Circuit commenced its analysis of the question of whether Laetrile is a new drug by examining section 201(p) of the Act,[14] deciding that "[t]he effect of [the statutory definition of

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L.J. 7 (1977); Overview (Second Annual Tenth Circuit Survey), *Administrative Law*, 53 DEN. L.J. 29 (1976); Overview (First Annual Tenth Circuit Survey), *Administrative Law and Procedure*, 52 DEN. L.J. 39 (1975).

[9] 542 F.2d 1137 (10th Cir. 1976).

[10] 21 U.S.C. § 301 *et. seq.* (1970).

[11] 542 F.2d at 1140, 1144.

[12] 21 U.S.C. § 355(a) (1970) provides: "No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) of this section is effective with respect to such drug." The Secretary of Health, Education and Welfare is required by this section to review the application within a specified period on the criteria of safety and effectiveness as demonstrated by "adequate and well-controlled investigations." Such an application is reviewable directly in the court of appeals. 542 F.2d at 1140.

[13] *Id.*

[14] 21 U.S.C. § 321(p) (1970) provides:

The term "new drug" means—

(1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific train-

the term 'new drug'] is that there is a two-fold grandfather clause exemption which is capable of removing Laetrile from the new drug category even if it is not recognized by the experts as being safe and effective . . . ."[15] The first grandfather exemption, the court said, derives from transitional provisions attached to the 1962 amendment to the Act, whereas the second grandfather exemption arises from provisions attached to the 1938 Act when it superseded the original Food and Drug Act of 1906.[16]

Considering the first exemption, the court noted that prior to the 1962 amendment the only prerequisite for a drug to avoid classification as a new drug was recognition by qualified experts that it was safe, but that the 1962 amendment added the requirement of "effectiveness."[17] However, the effect of the amendment's transitional provisions,[18] according to the court, was that if Laetrile was marketed before October 10, 1962 for "exactly the same uses for which it is presently being sold and was generally recognized by qualified experts as safe for those uses, it is exempt . . . from the test of general recognition by experts as being both safe and *effective* for its claimed uses."[19] The court then directed that the questions of whether Laetrile was marketed as a cancer drug

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ing and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to enactment of this chapter it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.

[15] 542 F.2d at 1141.

[16] *Id.*

[17] *Id.* (citing Pub. L. No. 87-781, § 102(a)(1), 76 Stat. 781 (1962)).

[18] Pub. L. No. 87-781, § 107(c)(4), 76 Stat. 781 (1962), *reprinted at* 21 U.S.C. § 321 *note.*

[19] 542 F.2d at 1141 (citing Tyler Pharmacal Distributors, Inc. v. United States Dep't of HEW, 408 F.2d 95, 99 (7th Cir. 1969). The Tenth Circuit also cited its own decision in United States v. Allan Drug Corp., 357 F.2d 713, 717 (10th Cir.), *cert. denied,* 385 U.S. 899 (1966) where it had previously construed the 1938 Act's definition of a "new drug," the 1962 amendment to the Act, and the so-called "grandfather clause." The *Tyler* opinion relied heavily on *Allan.*

on October 9, 1962 and whether it was then generally recognized as safe be considered by the FDA on remand by the district court.[20]

The Tenth Circuit next considered the second grandfather exemption[21] and concluded that "a drug may escape the 'new drug' machinery if it was marketed or officially recognized as a drug at any time before June 25, 1938, but after June 30, 1906."[22] The court accordingly framed the issue for future proceedings as whether or not Laetrile was "recognized or used as a cancer drug under the same conditions of present use during the period when the Food and Drug Act of 1906 was in effect, June 30, 1906 to June 25, 1938."[23] If so, the court said, Laetrile would be exempt from the "new drug" procedures of the Food, Drug and Cosmetic Act.[24]

The Tenth Circuit considered the question, as to whether Laetrile was exempted from the new drug procedures by virtue of either of the foregoing grandfather clauses, to be "substantial, difficult and doubtful," thus supporting the grant of a preliminary injunction.[25]

The court went on to examine the adequacy of the record to support the FDA's initial determination that Laetrile is a new drug. It appeared "doubtful" to the court that the FDA had in fact developed an adequate record for court review, for to support its determination the FDA would have to present "substantial evidence . . . that Laetrile is not generally recognized among qualified experts as 'safe and effective,' and that Laetrile is not grandfathered by either of the exemptions discussed above."[26] Therefore, conforming to the procedure established by the Su-

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[20] 542 F.2d at 1141, 1143.

[21] This exemption derives from the transitional provisions of the 1938 Act which provide that a drug not recognized by qualified experts as "safe and effective"

> shall not be deemed to be a "new drug" if at any time prior to the enactment of this chapter (the 1938 Act) it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use.

542 F.2d at 1141-1142 (citing 21 U.S.C. § 321(p)(1) (1970)). The court noted that all substances which were recognized or used as drugs at the time of passage of the 1906 Act were subject to its wide coverage. 542 F.2d at 1141-42.

[22] 542 F.2d at 1142.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 1142-43.

[26] *Id.* at 1143.

preme Court in *Weinberger v. Bentex Pharmaceuticals, Inc.*,[27] the Tenth Circuit ordered the district court to remand the case to the FDA for proceedings adequate to develop a record supportive of the agency's determination, wherein Laetrile proponents would have an opportunity to express their views.[28]

The Tenth Circuit, applying *Bentex*, has thus left to the FDA's sole determination the question of whether a drug such as Laetrile is a "new drug" and hence subject to the certification provisions of the Food, Drug and Cosmetic Act of 1938. However, the Tenth Circuit has also forcefully reminded the FDA that it cannot answer this question by administrative fiat,[29] and the court has also established clear standards for use by the FDA and the courts in determining whether a drug is exempted from the "new drug" procedures of the Act by one or both of its grandfather provisions.

B. Public Service Co. v. FPC, 557 F.2d 227 (10th Cir. 1977)

In *Public Service Co. v. FPC* and its companion case, *City of Gallup v. FPC*,[30] the Tenth Circuit reviewed two Federal Power Commission orders concerning a rate increase sought by Public Service Company of New Mexico (Public Service) for electricity sold to the City of Gallup.

In the first case, Public Service contended that the Commission erred in holding that its contract with Gallup barred Public Service's unilateral rate increase filing.[31] The Tenth Circuit noted

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[27] 412 U.S. 645 (1973). In *Bentex* the Supreme Court stated: "We conclude that the District Court's referral of the 'new drug' and the 'grandfather' issues to FDA was appropriate, as these are the kinds of issues peculiarly suited to initial determination by the FDA." *Id.* at 653.

[28] 542 F.2d at 1143.

[29] The court stated that "the FDA's record is grossly inadequate and consists merely of a conclusory affidavit of an official of the FDA which in effect declares that [Laetrile] is a new drug because the FDA says it is . . . ." *Id.* at 1140.

[30] 557 F.2d 227 (10th Cir. 1977).

[31] Public Service sells electric power to Gallup under a contract requiring payment at a monthly rate, with provisions for fuel cost and tax adjustments. Articles II and XII of the contract included other provisions which were central to this controversy. Article II contained a paragraph entitled "Change in Rate" which included an option for Gallup to terminate the agreement within 90 days after being given notice of a rate increase "should the rates charged herein to the Consumer by the Company be increased for any reason whatsoever other than fuel cost or tax adjustments . . . ." Article XII stated that the contract, including the tariff made a part thereof, was subject to "such changes or modifi-

that its primary guidelines were furnished by the United States Supreme Court's decisions in a trilogy of electric utility cases[32] which were summarized in *Richmond Power & Light v. FPC*[33] as follows: "The rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid."[34] The court examined and rejected each of Public Service's arguments in support of its claim of a right under the contract to make unilateral rate filings. The court in effect concluded that the rate filings were inconsistent with Public Service's contractual obligations, stating that had the parties intended Public Service to have the important right to file unilateral rate increases, the right would have been clearly provided for in the contract rather than being left to implication.[35]

In the *Gallup* case, the City challenged an FPC order instituting proceedings to determine a just and reasonable rate for Public Service pursuant to section 206 of the Federal Power Act.[36] The challenged portion of the Commission's order stated that the proceeding "would not entail meeting the heavy burden of proof associated with the *Mobile-Sierra* decisions."[37] On appeal, the

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cations as shall be ordered from time to time by any legally constituted regulatory body having jurisdiction to require such changes or modifications." *Id.* at 228.

[32] United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103 (1958); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

[33] 481 F.2d 490 (D.C. Cir.), *cert. denied*, 414 U.S. 1068 (1973).

[34] *Id.* at 493.

[35] 557 F.2d at 232. There was no language in the contract from which the court could reasonably imply a unilateral right to increase rates. The contract provisions at issue in this case are easily distinguishable from those considered in United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div., 358 U.S. 103 (1958), which the Supreme Court found to permit a unilateral rate increase by the power company. The agreements provided that "[a]ll gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule . . . *or any effective superseding rate schedules,* on file with the Federal Power Commission." *Id.* at 105 (emphasis by the Court). The Court held that rather than seeking unilaterally to abrogate its contractual undertaking, the seller in *Memphis* sought "simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract." *Id.* at 112. The Court therefore concluded that the seller could, consistent with its contractual undertaking, unilaterally increase its rate by filing a new tariff with the Commission.

[36] 16 U.S.C. § 824e (1970).

[37] 557 F.2d at 229 n.3. The Tenth Circuit elucidated the burden of proof issue as follows:

Commission asserted that the court lacked jurisdiction over Gallup's petition for review because Gallup was not presently "aggrieved" within the meaning of section 313(b) of the Federal Power Act,[38] there having been no change in the rates which Gallup was required to pay.[39] The Commission contended that the earliest possible point at which Gallup would have standing was at the conclusion of the Commission's section 206 proceeding and that therefore Gallup's petition was premature.[40] The Tenth Circuit agreed that the Commission's orders with respect to Gallup were preliminary and procedural and that Gallup could not suffer any real injury unless the rates were modified by the Commisson in the section 206 proceeding.[41] The court accordingly dismissed Gallup's petition without prejudice, rejecting Gallup's further claim that the ongoing section 206 proceeding could be a "nullity" if the wrong burden of proof were used.[42]

C. *Exhaustion of Administrative Remedies:* McGrath v. Weinberger, 541 F.2d 249 (10th Cir. 1976)

In *McGrath v. Weinberger,*[43] the Tenth Circuit, citing two exceptions to the exhaustion-of-administrative-remedies doctrine, accepted jurisdiction over a due process constitutional challenge of certain Social Security Administration procedures.[44]

In *Sierra,* the Court held that although a contract for a fixed term at a fixed rate was involved so that a unilateral filing could not effect a change in rate, under the Federal Power Act the Commission could have a hearing to determine "whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."

Id. (citing 350 U.S. at 355).

[38] 16 U.S.C. § 825e(b) (1970), which provides in part: "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals . . . ."

[39] 557 F.2d at 232.

[40] *Id.*

[41] *Id.* at 233.

[42] *Id.* (citing Colorado Interstate Gas Co. v. FPC, 370 F.2d 777, 781 (10th Cir. 1967)).

[43] 541 F.2d 249 (10th Cir. 1976), *cert. denied,* 430 U.S. 933 (1977).

[44] The court upheld the constitutionality of procedures authorizing the appointment, without prior notice or opportunity to contest by the recipient, of a representative payee to manage the monetary benefits of the recipient determined incapable of so doing. 541 F.2d at 254 (construing 42 U.S.C. §§ 401, 1381 (1970)).

The court noted the Social Security Administration subsequently modified its procedures: "A ten-day advance notice of a proposed payee action is now sent to all legally competent beneficiaries and court appointed guardians." 541 F.2d at 251 n.3.

Acting upon information provided by state mental hospital personnel, a local Social Security office determined McGrath incapable of managing his benefits and appointed a representative payee. The procedures provided for a post-deprivation hearing but not a pre-deprivation hearing. McGrath sought judicial review without exhausting his administrative remedies and the government interposed a jurisdictional challenge.[45] The Tenth Circuit held that jurisdiction existed, noting two exceptions to the exhaustion of administrative remedies doctrine.[46]

The first exception addressed the distinction between the power of an administrative agency to determine the constitutional applicability of legislation and its lack of power to determine the constitutionality of legislation.[47] The second exception involved the presence of constitutional questions, coupled both with a demonstration of the inadequacy of prescribed administrative remedies and with either a threat or impending irreparable injury flowing from the delay incident to pursuing prescribed administrative procedures.[48]

The Tenth Circuit cited *Mathews v. Eldridge*[49] as controlling.[50] It stated the decision's essence as being that statutorily created finality requirements should not be construed to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.[51] The significance of *McGrath* lies in the

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[45] 541 F.2d at 251, 253-54.

[46] *Id.* at 251-53. *See* Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975); 5 U.S.C. § 702 (1976).

[47] 541 F.2d at 251 (citing K. DAVIS, ADMINISTRATIVE LAW, § 20.04 (1958)). *See also* K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, §§ 20.01, 20.04 (1976 & Supp. 1977 §§ 20.00 to 20.00-3), where Professor Davis indicates that the exhaustion doctrine recently has been subjected to radical alteration by Mathews v. Eldridge, 424 U.S. 319 (1976).

[48] *Id.* at 251-52 (citing Greene v. United States, 376 U.S. 149 (1964) and City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958)).

[49] 424 U.S. 319 (1976). Eldridge asserted that the due process clause of the fifth amendment required the Social Security Administration to provide him with notice and an opportunity for a hearing prior to terminating his disability benefits. Professor Kenneth Davis is quite upset with the import of *Eldridge*. *See* note 47 *supra*.

[50] The Tenth Circuit relied upon *Eldridge* in disposing of the constitutional challenge. 541 F.2d at 253-54. *Eldridge* provided a test mandating consideration of three interests: (1) The private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures utilized, and the probable value of any additional, substitute procedural safeguards; and (3) the governmental interest, including the function of, and the fiscal and administrative burdens imposed by, additional or substitute procedural requirements. *Id.* at 253 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[51] 541 F.2d at 252.

Tenth Circuit's refusal to permit the exhaustion-of-administrative-remedies doctrine to function as an absolute jurisdictional bar for considering a collateral constitutional due process challenge.

D. *Res Judicata*—Cooper v. United States, 546 F.2d 870 (10th Cir. 1976).

In *Cooper v. United States,*[52] the Tenth Circuit, implementing a test enunciated in *United States v. Utah Construction Co.,*[53] held that res judicata principles applied to administrative proceedings when: (1) The agency acted in a judicial capacity; (2) it resolved a factual dispute properly before it; and (3) the parties had a full and fair opportunity to litigate the factual dispute at an evidentiary hearing.[54]

Cooper arose from the denial in 1969, based upon character or behavior disorders, of an airman's medical certificate.[55] After an evidentiary hearing, a hearing examiner sustained the denial and, in turn, the National Transportation Safety Board upheld his action. Cooper did not seek judicial review[56] but rather, he applied again in 1974 for the medical certificate. The Chief Administrative Law Judge refused a hearing, noting the issues were the same as those in the prior hearing, and denied the application. In 1975 the National Transportation Safety Board upheld that decision, stating that res judicata barred reconsideration of the 1972 decision. Cooper petitioned the Tenth Circuit for review, asserting that the National Transportation Safety Board's action in granting review precluded it from using res judicata. The court affirmed the National Transportation Safety Board decision.[57]

In recognizing the propriety of res judicata, the Tenth Circuit utilized the *Utah Construction Co.* test to clarify its prior decision in *Hobby v. Hodges.*[58] In *Hobby* the court conceded the lack of a

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[52] 546 F.2d 870 (10th Cir. 1976).

[53] 384 U.S. 394 (1966).

[54] *Id.* at 422; 546 F.2d at 871-72.

[55] The court noted its jurisdiction under 49 U.S.C. § 1486(a) (1976). The airman's medical certificate is a prerequisite for obtaining or retaining either a private or commercial pilot's license. 546 F.2d at 870. *See* 14 C.F.R. § 61.3(c) (1977).

[56] 49 U.S.C. § 1486(a) (1970) permitted Cooper to seek judicial review. 546 F.2d at 871.

[57] 546 F.2d at 870-72.

[58] 215 F.2d 754 (10th Cir. 1954).

clear rule specifying when the findings and decision of an administrative body are res judicata for subsequent proceedings. The Tenth Circuit, in that decision, held the application of the doctrine appropriate where permitting the applicant to relitigate a claim after his failure to seek judicial review would run counter to the purposes and provisions of the Social Security Act.[59]

The significance of *Cooper* lies in its enunciation of the test specifying when res judicata principles apply in administrative proceedings.

II. STATUTORY INTERPRETATION

A. Solomon Valley Feedlot, Inc. v. Butz, 557 F.2d 717 (10th Cir. 1977)

In 1973 the Department of Agriculture reversed its prior position that custom feedlots were not livestock dealers within the definition of the Packers and Stockyards Act of 1921[60] and sought to bring Solomon Valley Feedlot, Inc. under those provisions of the Act which require all dealers and market agencies to register with the Secretary of Agriculture (the Secretary) and to post bonds.[61] In *Solomon Valley Feedlot, Inc. v. Butz*,[62] a case of first impression, the Tenth Circuit, affirming a declaratory judgment of the district court, held that the plaintiff feedlot and other feedlots of similar character were not livestock dealers within the definition of the Act.

The Secretary's primary contention on appeal was that Solomon was indeed a livestock dealer because it assisted its customers with the purchase of livestock which were then placed at the Solomon Feedlot for feeding until they reached the desired weight for slaughter, after which Solomon aided in the sale of the cattle to packer-buyers. The Secretary asserted that Solomon was thus engaged in the business of buying and selling livestock as the

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[59] *Id.* at 759. 42 U.S.C. § 405(g) (1976).

[60] 7 U.S.C. §§ 181-231 (1970). Section 201(c) of the Act provides that "[t]he term 'market agency' means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services . . . ." Section 201(d) provides that "[t]he term 'dealer' means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser."

[61] 7 U.S.C. §§ 203, 204 (1970); 9 C.F.R. §§ 201.10, 201.27(c), 201.29.

[62] 557 F.2d 717 (10th Cir. 1977).

employee or agent of the vendor or purchaser and hence subject to the provisions of the Act.[63]

The Tenth Circuit stated that the purpose of the Act is to protect producers and consumers, and that among the means prescribed to accomplish this purpose was the posting of bonds.[64] It noted that packers were subjected to the bonding requirement by a 1976 amendment to the Act,[65] primarily resulting from the large number of packer failures which had left livestock producers unpaid for over $43 million worth of livestock.[66] The court declared that Congress was aware of the "enhanced role of feedlots" and "if it had seen the need for including feedlots within the sweep of the Act, it could have done so on the occasion of its expanding the regulation of packinghouses."[67] Observing that feedlot operators such as Solomon do not handle the proceeds of cattle sales, the court concluded that Congress did not intend them to be subjected to the requirements of the Packers and Stockyards Act.[68]

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[63] *Id.* at 718-19.

[64] *Id.* at 720.

[65] Pub. L. No. 94-410, § 3(c), 90 Stat. 1249 (1976) (to be codified in 7 U.S.C. §§ 203, 204).

[66] 557 F.2d at 720 (citing S. REP. No. 94-932, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2267, 2270-71).

[67] 557 F.2d at 721.

[68] The court had previously noted that Solomon "handled no money and was not engaged in any activity specified in Section 201 . . . ." *Id.* at 720. This statement amounted to a finding that Solomon was not the employee or agent of the vendor or purchaser and thus fell outside the statutory definition. The court also stated that Solomon was not paid any fee in connection with the assistance afforded its customers in buying and selling livestock. *Id.* at 719. Interestingly, the Tenth Circuit had previously stated in Kelley v. United States, 202 F.2d 838 (10th Cir. 1953), a case relied upon by the Secretary, that the collection or receipt of a commission for the handling of any livestock for another was "immaterial" to the determination of whether a person was acting as a dealer within the meaning of the statute. *Id.* at 841. The court, however, appears to have correctly distinguished the *Kelley* case from the present one inasmuch as Kelley, although not collecting or remitting funds on behalf of buyers or sellers of livestock, was engaged in purchasing livestock for resale as a speculation and not for purposes of improving their value through feeding. The *Kelley* court noted in this connection that speculators who buy in their own name to resell have traditionally been considered as dealers. *Id.* In *Solomon* the court remarked that one of the Department of Agriculture's own publications had recognized that speculators in livestock fall within the statutory definition of dealers while those who make profit as a result of improving the animals do not. 557 F.2d at 720.

B. Hart v. Denver Urban Renewal Authority, 551 F.2d 1178 (10th Cir. 1977)

This case disposed of appeals from a judgment enjoining the defendants, Denver Urban Renewal Authority (DURA) and the United States Department of Housing and Urban Development (HUD), from proceeding with the sale of the Daniels and Fisher Tower in Denver, Colorado, to a local architectural firm which planned to renovate the Tower into office space as part of the HUD-funded Skyline Urban Renewal Project.[69] The district court found that neither the pertinent section of the National Historic Preservation Act of 1966 (NHPA)[70] nor the National Environmental Policy Act of 1969 (NEPA)[71] applied, but rather that the HUD-approved regulations[72] under NHPA activated the procedural requirements set out in NHPA.[73] DURA and HUD appealed, and plaintiffs, the State Preservation Officer and the State Historical Society of Colorado, cross-appealed. The plaintiffs contended that "the district court reached the right decision for the wrong reasons" and urged the circuit court to find that the two Acts, in addition to the HUD regulations, were applicable.

The Tenth Circuit agreed with the district court that NHPA was inapplicable to the case. The court stated that the Tower sale did not fall within the statute's relevant provision[74] because the Tower was not placed in the National Register of Historic Places[75]

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[69] Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977).

[70] 16 U.S.C. § 470f (1970).

[71] 42 U.S.C. § 4332 (1970).

[72] 36 C.F.R. § 800.1 *et seq.* (1976).

[73] 551 F.2d at 1179.

[74] 16 U.S.C. § 470f (1970), *cited at* 551 F.2d 1178, 1179-80:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, *prior to the approval of the expenditure of any Federal funds on the undertaking* or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking. (Emphasis by the court.)

[75] The Register, established by NHPA, "recognizes and preserves objects significant in American history, architecture, archaelogy, and culture." 551 F.2d at 1179.

until 1969, whereas the Skyline Urban Renewal Project, of which the Tower renovation formed a part, was officially approved by HUD in 1968 when HUD and DURA entered into a project loan and capital contract. The court concluded that the key element in the statute is approval, and not actual expenditure, of funds, citing a similar interpretation in other jurisdictions.[76] Although the last expenditure of federal funds occurred in 1970 when DURA purchased the Tower from a private owner, the court voted that "this is not the 'expenditure' contemplated in the statute."[77]

The Tenth Circuit, although affirming the district court's findings as to the inapplicability of NHPA to this case, did not arrive at the same conclusion with respect to the applicability of NEPA.[78] The Court saw the primary issue as "whether the loan and capital grant contract's requirement that HUD approve all acquisitions and dispositions of property by the DURA . . . establishes major Federal action sufficient to mandate compliance with the Act each time that approval is given."[79] The court answered the question affirmatively, finding too restrictive the district court's holding that the loan and capital contract was the only major federal action involved in the project.[80] The Tenth Circuit followed the trend established by the First, Fourth, and Ninth Circuits[81] by holding that DURA's proposed sale of the

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[76] South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), *cert. denied*, 397 U.S. 1025 (1970); St. Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605 (W.D. Mo. 1973); Kent County Council for Historic Preserv. v. Romney, 304 F. Supp. 885 (W.D. Mich. 1969).

[77] 551 F.2d at 1180. The district court in *Kent County Council* stated that the "prior to the approval of expenditure" language in the statute (*see* text accompanying note 15 *supra*) does not mean that every time there is to be an expenditure pursuant to a prior approval the entire approval machinery must again be set in motion and the approval process repeated. 304 F. Supp. at 888. The court was emphatic in declaring that the words "prior to approval of the expenditure" do not mean "prior to the expenditure," observing that "[a]pproval of expenditure requires a judgment" whereas "the actual expenditure is a clerical, ministerial or mechanical act." *Id.*

[78] 42 U.S.C. § 4332 (1970).

[79] 551 F.2d at 1181.

[80] *Id.* at 1181-82. The court found support for its conclusion in Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972); and Boston Waterfront Residents Ass'n v. Romney, 343 F. Supp. 89 (D. Mass. 1972).

[81] *See* Jones v. Lynn, 477 F.2d 885 (1st Cir. 1973); Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973); and Arlington Coalition on Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972), *cert. denied*, 409 U.S. 1000 (1972).

Tower was sufficient federal action to require filing of an environmental impact statement, notwithstanding the fact that the loan and capital grant contract was signed prior to the effective date of NEPA.[82] The judgment of the district court was therefore affirmed but upon a slightly different rationale than that asserted by the lower court.

C. Vissian v. Immigration & Naturalization Service, 548 F.2d 325 (10th Cir. 1977)

In *Vissian v. Immigration & Naturalization Service,*[83] petitioner claimed, on appeal from a final deportation order entered by the Board of Immigration Appeals, that he was wrongfully precluded from applying to the Attorney General for a discretionary waiver of excludability under section 212(c) of the Immigration and Nationality Act.[84] Vissian also contended that the Board of Immigration Appeals erred in concluding that even if he had been eligible to apply for a waiver, a favorable exercise of discretion would not have been warranted.[85]

The Tenth Circuit disposed of Vissian's first contention by reference to the Supreme Court's recent ruling in *Immigration & Naturalizaton Service v. Bagamastad,*[86] which upheld the propriety of the Attorney General's pretermission of a ruling on eligibility to apply for discretionary relief in cases where such relief would not be granted in any event.[87] With respect to Vissian's

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[82] 551 F.2d at 1182.

[83] 548 F.2d 325 (10th Cir. 1977).

[84] 8 U.S.C. § 1182(c) (1970). This section provides:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section . . . .

(Subsection (a) specifies 31 classes of aliens to be excluded from admission to the United States, including aliens convicted of marijuana and narcotics offenses. 8 U.S.C. § 1182(a)(23) (1970)). Vissian, while on vacation from the United States in 1971, had entered a plea of guilty in a court of Australia, to a charge of importation of cannabis and cocaine. 548 F.2d at 327.

[85] 548 F.2d at 327.

[86] 429 U.S. 24 (1976), *rev'g.* 531 F.2d 111 (3d Cir. 1976).

[87] *Id.* at 25. The relief at issue in this case was that set forth in section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a) (1970), which authorizes the Attorney General in his discretion to change the status of an alien who is physically present in the United States to that of a permanent resident. *Id.* at 24.

second contention, the court ruled that the Attorney General (or his representative) "may not use this pretermission of the eligibility decision as a guise for pretermitting a hearing on the factual grounds for exercising his discretion as well."[88] The court noted that Vissian was precluded from presenting evidence in support of a favorable exercise of discretion and that, although Vissian's counsel made an offer of proof consisting of eleven letters of recommendation attesting to Vissian's value to the community, this isolated and summarily-rejected offer of proof did not satisfy the requirements of a full and fair hearing comporting with the accepted principles of due process.[89] The court cautioned that its holding "should not be misconstrued as requiring a separate hearing on the factual basis for the exercise of section 212(c) discretion, but merely a 'hearing within the deportation hearing' already required by the Act."[90]

It therefore appears that although the Attorney General (or his representative) need not make specific findings with respect to an applicant's eligibility for discretionary relief where such relief would not be granted in any event, the Attorney General must provide a full and fair hearing comporting with the accepted principles of due process on the issue of whether discretionary relief is warranted under the facts of each particular case.[91] The Tenth Circuit in *Vissian* has clearly announced that this issue is separate and distinct from the eligibility issue.[92]

D. Equal Employment Opportunity Commission v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977)

The issue presented by this case[93] is the authority of the Equal Employment Opportunity Commission (EEOC or Commission) to bring a separate civil action under Title VII, section 706(f)(1) of the Civil Rights Act of 1964[94] predicated upon the

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[88] 548 F.2d at 330.

[89] *Id.*

[90] *Id.* The Court cited Zamura v. Immigration & Naturalization Serv., 534 F.2d 1055, 1060 (2d Cir. 1976) where the Second Circuit stated with respect to a discretionary stay of deportation that, "as concerns the factfinding process upon which the discretionary decision in part depends, . . . the § 243(h) inquiry constitutes a hearing, albeit a hearing within [the deportation] hearing."

[91] 548 F.2d at 329-30.

[92] *Id.* at 330.

[93] EEOC v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977).

[94] 42 U.S.C. § 2000e-5(f)(1) (1970 & Supp. II 1972).

charges of two individuals, each of whom had previously filed an action in vindication of his charge of employment discrimination. Section 706(f)(1) of Title VII sets forth the procedure for filing suit to redress alleged unlawful employment practices.[95] This procedure is summarized as follows:

> 1. A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
>
> 2. If the Commission finds reasonable cause to believe that the charge is true, and conciliation attempts prove unsuccessful, the Commission may bring suit against the respondent within 180 days of the filing of the charge. The charging party shall have the right to intervene in the Commission's suit.
>
> 3. If the Commission fails to file an action within 180 days, it shall notify the charging party.
>
> 4. Within 90 days after receipt of notice, the charing party may bring a civil action against the respondent. Should a private action be brought, the Commission may intervene, in the discretion of the court, upon certification that the case is of general public importance.[96]

Before deciding whether the EEOC could bring suit under section 706(f)(1) after the charging party had already exercised his right to sue, the Tenth Circuit examined three differing views on this point as manifested in decisions of the circuit courts interpreting section 706(f)(1). The first view appears in the cases of *EEOC v. McLean Trucking Co.*,[97] *EEOC v. Kimberly-Clark Corp.*,[98] and *EEOC v. Huttig Sash & Door Co.*[99] According to these cases, if the EEOC suit is broader in scope than the previously filed private action, the EEOC suit may proceed in vindication of further similar acts or incidents of discrimination discovered in the process of investigation of the charge which gave rise to the private action.[100] The Tenth Circuit quickly dismissed this view, stating that it was unable to find any basis within the statute for defining the right of the EEOC to sue in terms of the scope of its suit.[101]

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[95] *Id.* Section 706 in general is addressed to vindication of individual instances of employment discrimination. 548 F.2d at 887.

[96] EEOC v. Missouri Pacific R.R., 493 F.2d 71 (8th Cir. 1974).

[97] 525 F.2d 1007 (6th Cir. 1975).

[98] 511 F.2d 1352 (6th Cir. 1975).

[99] 511 F.2d 453 (5th Cir. 1975).

[100] This was the Tenth Circuit's summary of these cases. EEOC v. Continental Oil Co., 548 F.2d 884, 889 (10th Cir. 1977).

[101] *Id.*

A second interpretation of section 706(f)(1) is represented by the Third Circuit holding in *EEOC v. North Hills Passavant Hospital*[102] which construed the statute to allow the EEOC to bring suit, assuming conditions precedent are met, regardless of the fact that the charging party has previously brought an action on his charge.[103] The Third Circuit held that the EEOC's right of action is not expressly terminated by the statute when an individual commences suit. It also found that there is no basis in the legislative history of section 706(f)(1) to support such a view.[104]

The opposite conclusion was reached by the Eighth Circuit in *EEOC v. Missouri Pacific Railroad,*[105] which was followed by the Tenth Circuit, on slightly different facts, in *EEOC v. Duval Corp.*[106] The *Missouri Pacific* case held that when an individual has brought suit on his charge the EEOC may not sue but rather is limited to participation in the litigation through intervention in the private suit.[107] The Eighth Circuit relied upon the legislative history of the 1972 amendments to Title VII[108] indicating a congressional concern for duplicative remedies, as manifested by

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[102] 544 F.2d 664 (3d Cir. 1976).

[103] *Id.* at 672.

[104] *Id.* at 668 and 672.

[105] 493 F.2d 71 (8th Cir. 1974).

[106] 528 F.2d 945 (10th Cir. 1976). *Duval* presented a fact situation which was the converse of *Continental Oil.* In *Duval* the EEOC had filed suit first, and the issue was whether the aggrieved party could file a separate lawsuit or was limited to intervention in the EEOC action. The Tenth Circuit held that, after issuance of right-to-sue notice by the EEOC, the EEOC shares with the aggrieved complainant a concurrent right to sue during the 90-day statutory period. *Id.* at 948. The defendant's major argument in *Duval* was that to allow both the EEOC and the aggrieved party to sue during the same 90-day period would produce a multiplicity of suits. *Id.* The Tenth Circuit stated:

> Congress was aware of this potential problem and provided a method to avoid duplicitous actions. To protect the interests of both the EEOC and the aggrieved party in a particular complaint, Congress established the right of either party to apply for intervention in a suit filed by the other party. Multiplicity of actions is prevented during the 90-day period [during which the EEOC and the aggrieved party share a concurrent right to sue] because when one of the parties sues, the other is limited to possible participation only through intervention.

Id. at 948-49. The court further stated: "If, during the 90-day period in which the aggrieved party may also file an action, the EEOC is the first to file [as was the case in *Duval*], the proper procedure under 42 U.S.C. § 2000e-5(f)(1) is to allow the aggrieved party to intervene." *Id.* at 949.

[107] 493 F.2d at 75.

[108] Equal Employment Cpportunity Act of 1972, *H.R. Rep. No.* 238, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137-79.

the inclusion of a provision for intervention by the EEOC or the charging party into a suit previously filed by the other.[109] The reliance of the *Missouri Pacific* and *Duval* courts on this legislative history was criticized by the *North Hills* court, which asserted that the history cited by these courts did not refer to the present language of section 706(f)(1) but to bills in a quite different form which were not enacted into law.[110] Perhaps as a result of this criticism from the Third Circuit, the Tenth Circuit did not rely on its *Duval* holding or on the legislative history of section 706(f)(1) in deciding the present case.[111] Nevertheless, it adopted the *Missouri Pacific-Duval* view that the EEOC is limited to intervention once the aggrieved complainant has already filed suit. In so doing, the court stated that it placed "primary reliance . . . on the construction of the language of the statute to avoid surplusage."[112] It noted that "[s]ection 706(f)(1) provides that the EEOC may be allowed to intervene in a previously filed private lawsuit at the discretion of the trial court and upon certification that the case is of general public importance."[113] It further reasoned that under the holding of the *North Hills* case, this

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[109] 493 F.2d at 74-75, citing 1972 U.S. CODE CONG. & AD. NEWS at 2148, where the House committee reported that it

> was concerned about the interrelationship between the newly created cease and desist enforcement powers of the Commission and the existing right of public action. It concluded that duplication of proceedings should be avoided. The bill, therefore, contains a provision for termination of Commission jurisdiction once a private action has been filed (except for the power of the Commission to intervene in the private actions).

[110] 544 F.2d at 668 & n.8. In a lengthy analysis of the legislative history of the Equal Employment Opportunity Act of 1972, the *North Hills* court persuasively supported this conclusion by showing that the portion of the House committee report relied upon by the *Missouri Pacific* and *Duval* courts related to the bill as it read prior to passage of an amendment which substituted the EEOC's grant of cease and desist authority with the authority to institute suits in federal trial court. *Id.* at 668-72. The Third Circuit pointed out that the problems which may arise from duplicative administrative [*i.e.*, cease-and-desist proceedings] and judicial proceedings are entirely different from those which may be created by the duplication of separate lawsuits. *Id.* at 670.

[111] The Tenth Circuit acknowledged that "the most often quoted portions of legislative reports refer to the bill as originally proposed, granting cease and desist authority" and that "[c]ertainly different considerations are involved indealing with conflicts between administrative and judicial proceedings, as opposed to potentially overlapping civil litigation." 548 F.2d at 890 (footnote omitted). Refusing to admit any error in relying on legislative history in *Duval* however, the Tenth Circuit concluded: "The best that can be said of the legislative history on the point is that it is inconclusive." *Id.*

[112] *Id.*

[113] *Id.* at 889.

provision is rendered superfluous, for if the EEOC is permitted to duplicate a previously filed individual lawsuit, it can participate in the private suit with the permission of the trial court by way of a motion to consolidate the suits, without regard to the certification of the case as to general public importance.[114] The court concluded that the "statutory provision for intervention must be read as the exclusive procedure by which the EEOC may participate in a previously filed private lawsuit under § 706(f)(1) in order to give it significance." Allowing a second suit to proceed on the charge would emasculate the provision.[115]

In short, the *Continental Oil* case represents little more than an affirmance of the Tenth Circuit's *Duval* holding. The court, however, modified its rationale in order to answer the criticism directed at *Duval* by the Third Circuit in the intervening *North Hills* case.

III. Federal Tort Claims Act

A. *Future Damages:* Steckler v. United States, 549 F.2d 1372 (10th Cir. 1977)

In *Steckler v. United States,*[116] the United States Court of Appeals for the Tenth Circuit held, for the first time, that it was proper to consider the effect of inflation upon future earnings. The opinion resulted from a medical malpractice action brought under the Federal Tort Claims Act[117] against the Veterans Administration Hospital in Denver.[118] The trial court awarded damages for permanent disability, present and future pain and suffering, and present and future lost earnings.[119] It refused, however, to consider the influence of inflation upon future earnings. Instead, the trial court applied a discount factor to future earnings, thus reflecting the present value of the amount awarded.[120] On appeal, the Tenth Circuit remanded the case to the district court and directed the trier of fact to consider the effect of inflation upon future earnings.[121]

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[114] *Id.*

[115] *Id.*

[116] 549 F.2d 1372 (10th Cir. 1977).

[117] 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (1977).

[118] 549 F.2d at 1373.

[119] *Id.*

[120] *Id.* at 1375.

[121] *Id.* at 1378. Another interesting issue concerned whether the collateral source rule

The Tenth Circuit noted that a majority of courts have discounted future earnings to present value without considering the effect of inflation upon future earnings. The majority's rationale, and also that of the district court, emphasized the speculative nature of considering anticipated inflation.[122] The Tenth Circuit adopted the approach of the Ninth Circuit, stated in *United States v. English*.[123] This method required, first, determining future income by estimating future changes in purchasing power. The estimate of future inflationary trends, however, must be supported by solid economic evidence. The final step of this approach discounted the estimated future income to its present value.[124]

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applied to Social Security and Veterans Administration benefits. The Colorado Supreme Court in Kistler v. Halsey, 173 Colo. 540, 545, 481 P.2d 772, 774 (1971), said: "Simply stated, it is that compensation or indemnity received by an injured party for a collateral source, wholly independent of the wrongdoer and to which he has not contributed, will not diminish the damages otherwise recoverable from the wrongdoer."

On the collateral source issue, the Tenth Circuit held that Veterans Administration benefits were a noncollateral source. 549 F.2d at 1379 (citing United States v. Gray, 199 F.2d 239 (10th Cir. 1952)). However, the Social Security benefits attributable to employer and employee contribution, as differentiated from government contribution, should be regarded as a collateral source. 549 F.2d at 1379. The court stated:

> There is a dearth of authority on whether Social Security disability payments are to be regarded as income from a collateral source insofar as they represent payments made by the injured person and his employer. Logically they are collateral. We do know that the government has supplemented the fund from time to time where this has been necessary. The extent to which the payments under Social Security disability can be traced to the government is questionable. The part contributed by the worker and the employers has the aspects of social insurance and as such is collateral to monies contributed by the government. However, no authorities have been presented to us on this issue and our research has failed to produce any case dealing with the subject. It may be impossible to ascertain the part or percentage of funds attributable to the government which would be deductible since the monies are commingled. Nevertheless, some effort to ascertain the percentage or part contributed by the government should be made so as to permit a determination of the contributions of the employer and employee and their exclusion as collateral sources.
>
> Since the cause is to be remanded, this subject ought to be considered. The onus should be placed on the plaintiffs . . . .

Id.

[122] 549 F.2d at 1376-77.

[123] 521 F.2d 63 (9th Cir. 1975). *English* was a wrongful death action brought under the Federal Tort Claims Act.

[124] 549 F.2d at 1378. For recent articles addressing this area see, *e.g.*, Note, *Inflation and Future Loss of Earnings*, 27 BAYLOR L. REV. 281 (1975); Comment, *Consideration of Inflation in Calculating Lost Future Earnings*—Feldman v. Allegheny Airlines, Inc., 524

The Tenth Circuit noted three other approaches. The first, the offset method, rejected both the consideration of inflation and the discounting of future earnings to present value. The second approach ignored evidence of future inflationary trends because of their speculative nature. The jury, however, would be permitted to consider any diminution or increase in "purchasing power." Thus, inflation is considered; its effect, however, cannot be established through expert witnesses. The third method applied an inflation factor thereby reducing the discount factor.[125]

B. *Immunity:* Jackson v. Kelley, 557 F.2d 735 (10th Cir. 1977)

In *Jackson v. Kelley,*[126] the Tenth Circuit refused to grant absolute immunity through judicial decision to a former United States Air Force physician.[127] Although the opinion was not brought under the Federal Tort Claims Act,[128] the Tenth Circuit relied upon the discretionary-ministerial distinction, as applied under the Act, to reach its decision.[129] *Jackson* involved a medical malpractice diversity action. The trial court had dismissed plaintiff's action, holding that an Air Force physician was a federal official and thus immune from suit for actions arising within the scope of his employment.[130] On appeal, the Tenth Circuit remanded the case to the district court.[131]

The court believed that *Doe v. McMillan*[132] compelled the use

F.2d 384 (2d Cir. 1975), 72 CORNELL L. REV. 803 (1977); Note, *Future Inflation, Prospective Damages and the Circuit Courts,* 62 VA. L. REV. 105 (1977); 17 S. TEX. L.J. (1976).

[125] 549 F.2d at 1377-78.

[126] 557 F.2d 735 (10th Cir. 1977).

[127] *Id.* at 741. The Tenth Circuit recognized the contrary holding of Martinez v. Schrock, 537 F.2d 765 (3d Cir. 1976), *cert. denied,* 97 S. Ct. 1339 (1977).

[128] 28 U.S.C. §§ 1346(b), 2671-2680 (1976).

[129] The Tenth Circuit stated:

> Generally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required . . . . The key is whether the duty is mandatory or whether the act complained of involved policy-making or judgment.

557 F.2d at 737-38.

[130] *Id.* at 736.

[131] *Id.* at 741.

[132] 412 U.S. 306 (1973). The Tenth Circuit stated:

> Thus, the Court [in *Doe*] mandates the use of the discretionary function test and a direct balancing of the policies underlying the immunity doctrine in the context of each fact situation . . . . Mindful of these principles, the first step here is to decide whether defendant's functions were discretionary.

of the discretionary function test. For the first step of the test the court determined whether the physician's functions were discretionary. For guidance, it examined the discretionary-ministerial distinction applied under the Federal Tort Claims Act.[133] The key to the distinction lies in whether the act involved a mandatory duty or discretionary policymaking and judgment. To subject the government to liability the act must be nondiscretionary.

In *Jackson*, the Tenth Circuit characterized the physician's duty as nondiscretionary. It noted the presence of a ministerial duty and the absence of a planning or policymaking function. Furthermore, although the medical treatment required some judgment and discretion, it did not necessitate governmental discretion. Immunization of official conduct required governmental discretion.[134]

For the second step the court balanced the harm to the patient with the threat to effective government.[135] The Tenth Circuit held that awarding monetary damages to an injured party would not hinder effective government because neither politically sensitive decisions nor discretionary governmental functions were involved.[136]

Finally, the court noted that its refusal to grant absolute immunity was reinforced by a statute[137] enacted after this cause of action arose. That statute affords indemnification or insurance to military physicians assigned to foreign countries. The Tenth

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> Secondly, the consideration of harm to the individual citizen must be balanced with the threat to effective government in the context of this case.

557 F.2d at 737.

[133] 557 F.2d at 737-38.

[134] *Id.* at 738-39. The Tenth Circuit cited with approval Henderson v. Bluemink, 511 F.2d 399 (D.C. Cir. 1974). In *Henderson*, the court stated:

> [T]he significant factor is that the discretion exercised might have been medical rather than governmental. The chief policy underlying the creation of immunity for lower governmental officials is mainly that which stems from the desire to discourage "the fearless, vigorous, and effective administration of policies of government." However, that policy is not applicable to the exercise of normal medical discretion since doctors making such judgments would face the same liability outside of government as they would face if the complaint below is upheld.

Id. at 402-03.

[135] 557 F.2d at 737.

[136] *Id.* at 739-40.

[137] Act of Oct. 8, 1976, § 1(b), 10 U.S.C.A. § 1089(f) (West Supp. 1977).

Circuit reasoned that, since a finding of liability must precede the need for indemnity or insurance, the granting of absolute immunity would render the statute superfluous.[138]

C. *Discretionary Function Exception:* First National Bank v. United States, 552 F.2d 370 (10th Cir.), cert. denied, 98 S. Ct. 122 (1977)

First National Bank v. United States[139] involved one of the tragic fact situations facing the Tenth Circuit in the past term. Four children suffered permanent mental and physical impairment resulting from organic mercury poisoning.[140] After the denial of an administrative claim, petitioners brought suit under the Federal Tort Claims Act.[141] The suit alleged negligence on the part of the Pesticides Regulation Division of the Department of Agriculture with regard to registration for interstate sale and approval for the labeling of the fungicide causing the poisoning.[142] The district court held that the government was immune from suit under the discretionary function exception.[143] On appeal, the Tenth Circuit affirmed.[144]

The court focused on the regulations and statutory require-

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[138] 557 F.2d at 740-41.

[139] 552 F.2d 370 (10th Cir.), *cert. denied*, 98 S. Ct. 122 (1977).

[140] The court stated:

> [I]t was determined that the Huckleby children were suffering from organic mercury poisoning as a result of their eating the meat from the hog which had been fed the grain treated with Panogen 15. Thus a "food-chain" poisoning was involved.
>
> Alkyl mercury poisoning does irreversible damage to the central nervous system. It affects sight, speech, locomotion and the ability to grasp objects or otherwise use one's hands properly.

552 F.2d at 371 (footnotes omitted).

[141] 28 U.S.C. §§ 1346(b), 2671-2680 (1976).

[142] 552 F.2d at 372.

[143] *Id.* at 372. The discretionary function exception, 28 U.S.C. § 2680(a) (1976), provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
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> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency of an employee of the Government, whether or not the discretion involved be abused.

552 F.2d at 374.

[144] 552 F.2d at 377.

ments of the Pesticide Regulation Division and noted that they obligated the agency to engage in discretionary policy judgments in evaluating the adequacy of labeling. The Tenth Circuit asserted that the pertinent statute and regulations provided only generalized policy standards. It conceded that a scientific function was involved but since the function was not narrow in scope, discretionary judgment predominated.[145] The court also decided that the judgment whether to suspend or cancel registration fell within the discretionary function exception, since a policy choice was involved.[146]

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[145] *Id.* at 375-76. The Tenth Circuit stated: "[T]he functions on which the negligence claims are founded are within the words and reason of the exception. Evaluation of the labeling did involve scientific as well as public policy considerations, but it was not confined to a narrow scientific function . . . ." *Id.* at 376.

[146] The Tenth Circuit made two further holdings:

> We note first that the decision-making as to possible suspension or cancellation does implicate a policy choice based on substantive standards of product safety . . . . Whether such discretion is exercised and possibly abused, or whether there is a failure to exercise the discretion, such acts or omissions related to the cancellation function are within the terms of the exception provided by § 2680(a).
>
> We feel the claims and proof relating to alleged failure to marshall and submit data to the Secretary or to his surrogate, the Director of PRD, fall in the same category. These actions are an integral part of the process for any possible cancellation or suspension of a registration.

Id. at 377 (footnote omitted).