

10-15-2001

Legal Summaries

Joseph J.M. Orabona

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Joseph J.M. Orabona, *Legal Summaries*, 21 J. Nat'l Ass'n Admin. L. Judges. (2001)
available at <http://digitalcommons.pepperdine.edu/naalj/vol21/iss2/7>

This Legal Summary is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Pepperdine University School of Law
Legal Summaries*

Table of Cases

UNITED STATES SUPREME COURT	408
Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co., 122 S. Ct. 782 (2002).....	408
Zadvydas v. Davis, 533 U.S. 678 (2001)	409
INS v. St. Cyr, 533 U.S. 289 (2001)	410
United States v. Mead Corp., 533 U.S. 218 (2001)	412
NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706 (2001).....	413
Lujan v. G&G Fire Sprinklers, 532 U.S. 189 (2001).....	415
Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001).....	416
Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).....	417
Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).....	419
 FOURTH CIRCUIT COURT OF APPEALS	420
Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001).....	420
 SEVENTH CIRCUIT COURT OF APPEALS	421
Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001).....	421
Ester v. Principi, 250 F.3d 1068 (7th Cir. 2001).....	422

* Prepared by the editors and staff of the Journal of the National Association of Administrative Law Judges at Pepperdine University School of Law. The Legal Summaries are case briefs of recent U.S. Supreme Court, U.S. Courts of Appeal, U.S. District Courts, and selected state court rulings on issues involving administrative law. Special thanks to Joseph J.M. Orabona, Editor-in-Chief, Michael Newman, Managing Editor, Susan Christopher, Legal Summaries Editor, Jason Hilfrink, and Michael Turner for their ideas and outstanding contributions to the publication of this section of the Journal.

TABLE OF CASES (CONT.)

<i>ELEVENTH CIRCUIT COURT OF APPEALS</i>	424
Bank of Am., N.A. v. FDIC, 244 F.3d 1309 (11th Cir. 2001)	424
<i>DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS</i>	425
Air Transp. Ass'n of Can. v. FAA, 254 F.3d 271 (D.C. Cir. 2001), vacated by 276 F.3d 599 (D.C. Cir. 2001)	425
<i>UNITED STATES DISTRICT COURT</i>	426
Kokal v. Massanari, 163 F. Supp. 2d 1122 (N.D. Cal. 2001)	426
In re Methyl Tertiary Butyl Ether Products Liability Litigation, 174 F. Supp. 2d 4 (S.D.N.Y. 2001)	427
<i>CALIFORNIA STATE COURT</i>	428
McCall v. PacifiCare of Cal., Inc., 21 P.3d 1189 (Cal. 2001)	428
<i>CONNECTICUT STATE COURT</i>	429
MacDermid, Inc. v. Dep't of Env'tl. Prot., 778 A.2d 7 (Conn. 2001)	429
<i>ILLINOIS STATE COURT</i>	431
AFM Messenger Serv., Inc. v. Dep't of Employment Sec., 763 N.E.2d 272 (Ill. 2001)	431
<i>KENTUCKY STATE COURT</i>	432
Revenue Cabinet v. Lazarus, Inc., 49 S.W.3d 172 (Ky. 2001)	432
<i>OKLAHOMA STATE COURT</i>	433
Walker v. Group Health Servs., Inc., 37 P.3d 749 (Okla. 2001)	433
<i>TEXAS STATE COURT</i>	435
Subaru of Am., Inc. v. David McDavid Nissan, Inc., 2001 WL 578337 (Tex. 2001)	435
Cont'l Cas. Ins. Co. v. Functional Restoration Assocs., 19 S.W.3d 393 (Tex. 2000)	436
Occidental Permian Ltd. v. R.R. Comm'n of Tex., 47 S.W.3d 801 (Tex. App. 2001)	437

UNITED STATES SUPREME COURT

Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co., 122 S. Ct. 782 (2002). *FCC Regulations*: Attachments to utility poles for cable television systems that provide high-speed Internet access for wireless communications providers are considered “attachments” within the meaning of the Pole Attachments Act.

FACTS: Under the Pole Attachments Act (“PAA”), the Federal Communications Commission (“FCC”) sets reasonable rates, terms and conditions for certain attachments to telephone and electric poles. In this action, certain pole-owning utility companies challenged an FCC order that interpreted the PAA to cover pole attachments for cable television systems that provided high-speed Internet and for wireless telecommunications providers. These utility companies contended that the FCC’s interpretation was unreasonable.

ANALYSIS: First, the Supreme Court addressed the issue of whether the cable television system that also provided high-speed Internet access constituted an “attachment” under the PAA. There was no dispute that an attachment by a cable television company that *only* provides cable television is an “attachment” under the PAA. The Court determined that the addition of the high-speed Internet access or any other future additions to the cable television service would change the character of the “attachment.” This was the Court’s best reading of the statute – which it found to be unambiguous. The Court noted that if the statute was ambiguous, it would defer to the FCC’s reasonable interpretation of the statutory definition of “attachments” pursuant to the principle of *Chevron*-deference. Second, the Court analyzed the question of whether wireless telecommunication providers’ equipment attached to a utility pole would be subject to the PAA. The PAA applies to “telecommunications service providers,” defined as a service that offered telecommunications to the public for a fee. The Court concluded that a wireless telecommunications provider is a “provider of telecommunications,” therefore, its attachments to utility poles are governed by the PAA.

HOLDING: The Supreme Court held that cable television systems’ utility pole attachments that also provided high-speed Internet access and wireless telecommunications providers’ utility pole attachments were “attachments” as defined by the PAA. Thus, the FCC’s decision to assert jurisdiction over these attachments was reasonable.

IMPACT: This case is a loss for cable television systems with high-speed Internet and wireless communications providers because their attachments to utility poles will result in FCC regulation of rates, terms and conditions. On the one hand, increased regulation of such services may result in cost increases to consumer users. Yet regulation of these attachments may prevent abuses by these service providers thereby protecting consumers from unfair business practices.

Zadvydas v. Davis, 533 U.S. 678 (2001). *Immigration Regulations:* Supreme Court determines that resident aliens ordered removed shall NOT be held indefinitely.

FACTS: In this case the Supreme Court consolidated two immigration cases from the Fifth and Ninth Circuits concerning the same issue. First, Zadvydas was a resident alien since 1956, but suffered a long criminal record and was subsequently ordered removed from the United States in 1994. However, all other possible nations refused to acknowledge or extend citizenship to Zadvydas, and he was therefore held indefinitely in the custody of the Immigration and Naturalization Service ("INS"). Kim Ho Ma was also a resident alien with a conviction for an aggravated assault. He was ordered to be removed from the United States but found it impossible to gain admittance to any other nation and was therefore held indefinitely. The Court framed the issue as whether the post-removal period statute of the INS authorizes the Attorney General to detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal.

ANALYSIS: The Court acknowledged that no court has jurisdiction to review decisions in the discretion of the Attorney General, but emphasized that this was not a challenge to an exercise of the Attorney General's power but rather a challenge to the extent of that power. The Court affirmed the principle that when a statute enacted by Congress raises "a serious doubt" as to its constitutionality, the Court must first ascertain whether a construction of the statute is fairly possible to avoid reaching the constitutional question. The Court noted that the civil confinement here at issue is not limited, but potentially permanent, and the procedural protections available to aliens in this situation are not sufficient to protect the fundamental rights at issue here. Further, aliens inside the United States are entitled to constitutional protections. The Court also noted that there

was nothing found in the legislative history that demonstrated any intent to authorize indefinite, perhaps permanent, detention. The Court stated that whether a set of particular circumstances amounts to detention beyond a period reasonably necessary to secure removal is determinative of whether the detention is or is not pursuant to statutory authority. Furthermore, the Court indicated that the basic federal habeas corpus statute grants the federal courts authority to answer that question. The Court determined that a “reasonable” period of detention would fall somewhere between the statutory limit of ninety days and the previously revised limit of six months. After that reasonable time period, when the alien provides good reason to believe that there is no significant likelihood of removal in the reasonable foreseeable future the government must rebut that showing in order to keep the alien in detention.

HOLDING: The Supreme Court construed the INS statute to contain an implicit “reasonable time” limitation, the application of which is subject to federal court review.

IMPACT: This case was a victory for all aliens in United States detention centers who have been held for periods longer than the period defined as reasonable by the Court. While this case technically applies only to aliens who cannot find another country to accept them, its reasoning can be used to argue in favor of release of many other aliens who have been held for more than six months.

INS v. St. Cyr, 533 U.S. 289 (2001). *Immigration Law*: Habeas review of deportation proceedings and discretionary relief under the Immigration and Nationality Act § 212(c), as amended 8 U.S.C. § 1182(c), is still available to aliens in some circumstances.

FACTS: Enrico St. Cyr was a citizen of Haiti admitted to the United States as a lawful permanent resident in 1986. Ten years later, he pled guilty in a state court to a charge of selling a controlled substance in violation of Connecticut law, a conviction that made him deportable. Prior to the 1996 amendments to the Immigration and Nationality Act (“Act”), St. Cyr would have been eligible for waiver of deportation at the discretion of the Attorney General. However, the Attorney General commenced removal proceedings after the implementation of two amendments to the Act in 1996 – the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).

Under the Attorney General's interpretation of those two statutes, he no longer had discretion to grant such a waiver. In St. Cyr's habeas corpus petition, he alleged that the restrictions on discretionary relief from deportation contained in the 1996 amendments did not apply to removal proceedings brought against an alien who pled guilty to a deportable crime before their enactment. The district court and the Second Circuit both accepted jurisdiction over his habeas corpus petition and agreed with this claim.

ANALYSIS: The issues in this case were (1) what impact the 1996 amendments to the Act had on the availability of habeas corpus jurisdiction; and (2) what impact those amendments had on conduct that occurred before their enactment – specifically, the availability of § 212(c) discretionary relief from deportation. The Court stated that for the INS to prevail in proving retroactive effect for the statute, it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas corpus. The Court maintained that implications from statutory text or legislative history are not enough to repeal habeas jurisdiction, but rather Congress must articulate specific and unambiguous statutory directives to effect a repeal. The Court then examined the issue of whether discretionary relief was available to St. Cyr. The Court noted that a statute will not be retroactively applied, unless the language of a statute requires it or it is clear that Congress considered the possible impacts on individuals should it retroactively apply the statute. Finally, the Court found that the expectations of individuals entering into plea agreements, in addition to ambiguous congressional intent, required a finding that § 212(c) relief was still available to aliens who entered such plea agreements.

HOLDING: Habeas jurisdiction under 28 U.S.C. § 2241 was not repealed by AEDPA and IIRIRA. The Court held that § 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect.

IMPACT: The Court has maintained the right of habeas corpus review under AEDPA and IIRIRA, which was a big victory for immigration attorneys seeking to help their clients get out of detention centers across America. Further, the Court has, somewhat begrudgingly, allowed discretionary waiver for convicted aliens.

United States v. Mead Corp., 533 U.S. 218 (2001). *Customs Regulations*: The Supreme Court decides that tariff regulations are NOT entitled to *Chevron* deference and that such regulations are entitled to respect according to their degree of persuasiveness.

FACTS: Mead Corporation (“Mead”) imports “day planners.” In 1993, the United States Customs Service (“Customs”) issued a ruling letter changing the tariff classification from an “other” category to “diaries. . . bound” category, subject to different tariff schedules. Mead contested the tariff change in the Court of International Trade (“CIT”). The CIT granted the United States’ motion of summary judgment. Mead appealed to the United States Court of Appeals for the Federal Circuit. The court thought classification rulings had a weaker *Chevron* claim than IRS interpretive rulings, and accordingly gave no deference at all to the ruling classifying the Mead day planners and rejected the agency’s ruling altogether. The Supreme Court granted review to determine the limits of *Chevron* deference as owed to administrative practice in applying a statute.

ANALYSIS: The issue before the Court was whether a tariff classification ruling by Customs deserves judicial deference. The Court noted that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation claiming deference was promulgated in the exercise of that authority. However, the Court noted that the fair measure of deference to an agency administering its own statute varies with circumstances, and courts should look to the degree of the agency’s care, consistency, formality, and relative expertness, as well as the persuasiveness of the agency’s position. Delegation of interpretive authority entitled to *Chevron* deference can be either implicit or explicit, according to the Court, and rules entitled to deference by the courts can be promulgated either through the use of formal adjudication or notice and comment rulemaking. The Court found that interpretive rules fall into neither of those categories and are therefore denied *Chevron* deference. The Court maintained, however, that although tariff rulings fall outside the realm of *Chevron*, *Skidmore* still allows for some deference to an agency’s interpretation, whatever its form. *Skidmore* focuses on the given specialized experience, broadness of the investigations and the information available to the agency, as well as the value of uniformity applied in its administrative and judi-

cial understandings of what a national law requires. The Court pointed out that in this situation, the regulatory scheme is highly detailed and Customs can bring the benefit of specialized experience to bear on the subtle questions in each case. A claim seeking *Skidmore* deference will gain “the merit of its writer’s thoroughness, logic and expertise, its fit with prior interpretations, and other sources of weight.” The Court remanded the case for further proceedings consistent with its opinion, holding that while the tariff ruling was not entitled to *Chevron* deference, the ruling may be entitled to some degree of respect.

HOLDING: Classification rulings are not entitled to *Chevron* deference, and instead only should be accorded “respect proportional to its power to persuade.”

IMPACT: The Court has found yet another opportunity to carve out exceptions to the application of *Chevron* deference, once again limiting an agency’s ability to create policy.

NLRB v. Kentucky River Cmty Care, Inc., 532 U.S. 706 (2001). *Federal Labor Law:* The Supreme Court held that the burden of proving an employee’s supervisory status rests with the employer, and the NLRB’s interpretation regarding what constitutes supervisory status was held to be unreasonable.

FACTS: Kentucky River Community Care operates a care facility for residents who suffer from mental illness and retardation. The Kentucky State District Council of Carpenters petitioned the National Labor Relations Board (“NLRB”) to represent all eligible employees of the care facility. The care facility objected to the inclusion of six registered nurses as supervisors and therefore excluded from the National Labor Relations Act’s (“Act”) protection. The NLRB determined that the burden is on the employer to prove an employee’s supervisory status, and since that burden was not met, it included the nurses in the bargaining unit. The NLRB refused review of the determination, and since judicial review of these types of determinations is not available, the employer refused to bargain with the union. The union responded by bringing an unfair labor practices claim against the employer. The NLRB stated that this kind of indirect review could not be predicated on an attempt to challenge a representation determination and granted summary judgment in favor of the union. The Sixth Circuit refused to enforce the bargaining order

of the NLRB, finding for the employer on review. The court held that the NLRB erred in placing the burden of proving supervisory status on the employer and rejected the NLRB's interpretation of "independent judgment" in determining supervisory status.

ANALYSIS: The Court considered two issues. First, which party in an unfair labor practice proceeding bears the burden of proving or disproving an employee's supervisory status. Second, whether judgment is not "independent judgment" to the extent that is informed by professional or technical training or experience. The Act, according to the Court, does not expressly allocate the burden of proving a challenged employee's supervisory status, and therefore the Board has filled the gap in the statute with a consistent rule that the burden is borne by the party claiming that the employee is a supervisor. The Court suggested that the appellate court should have deferred to the Board's resolution of the statutory ambiguity. The Court argued that the Board's rule is supported by the general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests with the party claiming its benefits. With regard to the Board's interpretation of what constitutes supervisory status under the Act, the Court first found that the term "independent judgment" is ambiguous with regard to the extent of discretion allowed under this term, and the Court stated that it falls within the Board's discretion to determine what degree of discretion is allowed. However, the Court found the Board's determination regarding employees with the requisite degree of judgment was unreasonable. The Court suggested that this interpretation inserted exclusion into the Act that found no support in the Act itself.

HOLDING: The employer has the burden of proving the supervisory status of an employee, and the Board's interpretation of what constitutes supervisory status under the Act is unreasonable.

IMPACT: The Court has clarified an ambiguity in the Act, and the NLRB's role in interpreting certain provisions.

Lujan v. G&G Fire Sprinklers, 532 U.S. 189 (2001). *California Labor Law*: Contract rights in court are sufficient to protect Due Process Rights.

FACTS: G&G Fire Sprinklers (“G&G”) is a subcontractor on several California public works projects. The California Labor Code (“Code”) authorizes the state to order withholding of payments due a contractor on a public works project if the subcontractor on the project fails to comply with Code requirements. The Code authorizes similar withholding on the part of the contractor from the subcontractor. The Ninth Circuit held that these code provisions violated the Due Process Clause because they did not provide the subcontractor with a hearing before or after these actions were taken. The Code requires that contractors and subcontractors on such projects pay their workers prevailing wages determined by the state. If workers were not paid the prevailing wage, the contractor was required to pay each worker the difference between the prevailing wage and wages paid, in addition to forfeiting a penalty to the state. The California Department of Labor determined that G&G had failed to pay the prevailing wage to its workers on three public works projects. The awarding parties withheld from the contractors, and the contractors then withheld the money owed to G&G. G&G sued the Department of Labor claiming that the issuance of withholding notices without a hearing constituted a deprivation of property without due process of law, in violation of the Fourteenth Amendment. The district court declared the Labor Code unconstitutional, and the Ninth Circuit affirmed, stating that G&G has a property interest in being paid in full for the construction work it has completed.

ANALYSIS: The Court began by acknowledging that where a state law is challenged on due process grounds, courts must inquire as to whether the state had deprived the claimant of protected property interest and whether the state’s procedures satisfy due process requirements. The Court examined several cases in which the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, and distinguished the present case by explaining that G&G was not denied any present entitlement, but rather a contract right. The Court stated that if California makes ordinary judicial process available to G&G for resolving a contractual dispute, that process qualifies as the requisite due process.

HOLDING: The Court held that the relevant provisions of the California Labor Code do not violate the due process clause.

IMPACT: This case was an opportunity for the Court to affirm its commitment to federalism.

Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n, 531 U.S. 1 (2001). *Freedom of Information Act and Indian Tribal Law:* Communications between the Department of the Interior and Indian tribes in the form of inter-agency or intra-agency memoranda or letters are not exempt from disclosure requirements under the Freedom of Information Act.

FACTS: The Department of the Interior's Bureau of Reclamation ("Reclamation") administers a water irrigation project in parts of Oregon and California along the Klamath River Basin. In order to ensure that the Indian tribes were allocated a proper share of the water rights, the Department's Bureau of Indian Affairs ("BIA") filed a claim in Oregon state court. Thereafter, a nonprofit organization with competing interests for water rights, the Klamath Water Users Protective Association ("KWUPA"), sought production of the communications between BIA and certain Indian tribes pursuant to the Freedom of Information Act ("FOIA"). BIA turned over several documents to KWUPA, but asserted that other documents did not have to be produced because they were exempt under FOIA. KWUPA sued BIA to compel production.

ANALYSIS: Under 5 U.S.C. § 552, records held by a federal agency must be disclosed upon request, unless the documents fall within one of the enumerated exemptions. Under 5 U.S.C. § 552(b)(5), federal agencies do not have to disclose "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Court established a two-part test to determine if a document qualifies under this exemption: (1) the source must be from a federal or state government agency, and (2) the source must be protected by one of the judicially established privileges. The Court started by defining an "intra-agency memorandum" as "one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency – e.g., in a capacity as employee or consultant to the agency, or as employee or officer of another govern-

mental unit (not an agency) that is authorized or required to provide advice to the agency. The Court noted that prior case law has recognized outside consultant communications as exempt under § 552(b)(5) because their opinions are objective and not self-serving. In the present case, BIA tried to argue that the Indian tribes' communications to Reclamation were similar to communications by "outside consultants," and therefore exempt. However, the Court was not persuaded by this argument, and stated that: "consultants may be enough like the agency's own personnel to justify calling their communications 'intra-agency.' The Tribes, on the contrary, necessarily communicate with [BIA] with their own, albeit entirely legitimate, interests in mind." Because there was insufficient water for everyone, BIA's representation of the Indian tribes was adverse to other users.

HOLDINGS: The Supreme Court held that the documents at issue are not exempt under § 552(b)(5) as "inter-agency or intra-agency memorandums or letters" because the consultations between the Indian tribes and the BIA were adverse to other users. Furthermore, the Indian tribes were not consultants within the meaning of prior FOIA case law because their position in the administrative and adjudicative proceedings was self-serving and adverse.

IMPACT: The Court's decision erodes the candor between the Government and the Indian tribes. In addition, it will affect the Indian tribes' expectation of confidentiality in communications with the Government, and further hinder the Government from discharging its trust obligation. The Court specifically stated that it refused to acknowledge this "Indian trust" exemption because it was not part of the statutory text of FOIA.

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001). *Federal Environmental Law:* The Supreme Court reviews the EPA's interpretations of the NAAQS regarding Section 109 of the Clean Air Act, and determines that its interpretations are unreasonable.

FACTS: Section 109(A) of Clean Air Act ("Act") requires the Administrator of the EPA to promulgate National Ambient Air Quality Standards ("NAAQS") for each air pollutant for which "air quality criteria" have been listed under § 108 of the Act, and then review those determinations once every five years. This dispute arose when the Administrator raised the NAAQS for particulate matter and

ozone. American Trucking Associations challenged the new standards. Several questions were presented in the case: (1) whether § 109(b)(1) of the Act delegates legislative power to the Administrator of the EPA; (2) whether the Administrator may consider the cost of implementation in setting NAAQS; (3) whether the court of appeals had jurisdiction to review the EPA's interpretation of Part D of Title I of the Act with respect to implementation of NAAQS; and (4) if so, whether the EPA's interpretation of that part was permissible.

ANALYSIS: With regard to considering costs when setting NAAQS, the Court looked to precedent, the plain language of the statute and legislative history, and determined that the text of § 109(b) unambiguously bars cost considerations from the NAAQS setting process. With regard to whether the EPA Administrator was properly delegated the authority to promulgate NAAQS, the Court suggested that the scope of discretion in § 109(b) was within the outer limits of the nondelegation doctrine. The Court noted that there has never been a requirement that a statute specifically state the level of harm to be prevented and that § 109 falls well within the scope of discretion permitted by the Court's precedent. With respect to the EPA's authority to implement the revised ozone NAAQS in areas where ozone levels currently exceed the maximum level permitted by the set standard, the Court first had to dismiss the argument of the EPA that this decision was not reviewable because it was not a final action. The Court maintained that the action taken by the EPA was a final agency action subject to review under § 307 of the Act because the action affected subsequent agency actions, and the public was told that the decision regarding the NAAQS revisions was final. The Court then used a traditional *Chevron* analysis to determine which part of the statute controlled the setting of the NAAQS in nonattainment areas. The Court found that EPA's implementation policy was unreasonable and, therefore, unlawful. Consequently, the Court refused to defer to the judgment of the EPA.

HOLDINGS: The EPA may not consider implementation costs in setting NAAQS under § 109 of the Act; section 109 is a lawful delegation of power to the EPA; the EPA's interpretations were reviewable; and the EPA's interpretations were unreasonable.

IMPACT: The Court here provided clarity to the EPA, and once again carved away at the *Chevron* doctrine.

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001). *Environmental Law*: The Supreme Court decides whether the Army Corps' rule extending the definition of "navigable waters" is permissible under its authority pursuant to the Clean Water Act.

FACTS: The Solid Waste Agency of Northern Cook County ("Solid Waste") in Chicago, Illinois wanted to develop a disposal site for baled hazardous solid waste. The City wanted to purchase an abandoned gravel pit and applied for all local, state, and federal permits. The U.S. Army Corps of Engineers ("Army Corps") asserted jurisdiction over the balefill after finding out that the fill was a habitat for several species of migratory birds, and instituted the "Migratory Bird Rule." All local and state authorities granted the required permits, but the Army Corps refused to do so. Solid Waste filed suit under the Administrative Procedures Act challenging the jurisdiction of the Army Corps as well as the merits of the permit denial.

ANALYSIS: The issue was whether § 404(a) of the Clean Water Act ("Act") could be extended to these waters, and if so, whether Congress could exercise such authority under the Commerce Clause. The Court found that this interpretation of the statute exceeded the Army Corps' power for several reasons. First, the interpretations were based upon a failed legislative proposal, and the Court found this to be a dangerous ground on which to rest an interpretation. Further, the Court said that § 404(g) does not conclusively determine the construction to be placed on the term "waters" as it appears elsewhere in the Act. The Court stated that when an administrative interpretation of a statute invokes the outer limits of Congress' power, there must be a clear indication that Congress intended that result. According to the Court, there is a prudential desire not to needlessly address constitutional questions, as well as an assumption that Congress does not casually authorize administrative agencies to interpret in such a manner as to intentionally push the limit. The Court suggested that this concern is heightened when the administrative interpretation alters the federal-state framework. The Commerce Clause is not unlimited. The Court stated that permitting the Army Corps to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant infringement of the states' traditional and primary power over land and water use.

HOLDING: The “Migratory Bird Rule” exceeds the authority granted the Army Corps of Engineers under § 404(a) of the Clean Water Act.

IMPACT: The Court has limited the discretion of the Army Corps by clarifying provisions of the Clean Water Act, and has once again limited a statute founded in the Commerce Clause.

FOURTH CIRCUIT COURT OF APPEALS

Miller v. AT&T Corp., 250 F.3d 820 (4th Cir. 2001). *Federal Labor Law*: Secretary of Labor’s interpretations of FMLA upheld.

FACTS: Kimberly Miller (“Miller”) had taken numerous days off of work as a result of illnesses over the course of her employment with AT&T, eventually culminating in disciplinary action and a notice that she may be terminated if further absences occurred. In December of 1996, Miller began to feel ill while at work. Though she did not feel well, she finished the workday. The next day, however, she was unable to work and went to see a doctor. She was diagnosed with the flu and dehydration as well as low white blood cell and platelet counts. Miller missed work from December 28 to January 1 due to her illness, but her doctor provided her with work-excuse slips. Miller then requested leave under the Family Medical Leave Act (FMLA) for the dates of her illness. AT&T subsequently denied her request and terminated Miller in March for her excessive absenteeism. The denial of leave was due to AT&T’s understanding that the flu was not a serious medical condition sufficient to qualify for leave under FMLA. Miller spent several months seeking employment and eventually went to school and acquired training to become an operating room technician. However, her earnings in this employment were \$30 less per day than her earnings with AT&T. Miller then filed suit, alleging that AT&T violated her rights under FMLA by denying her leave, resulting in her termination. The lower court found in her favor and AT&T appealed. AT&T claimed that if the flu was found to be sufficient to be a serious medical condition under FMLA, then the Act was invalid because such an interpretation was contrary to legislative intent.

ANALYSIS: The court granted *Chevron* deference to the language of FMLA as put forth by the Secretary of Labor through delegation by Congress. However, the court affirmed its role as the final inter-

preter of statutory language. The court examined the language as a whole and the policy of the act as described by Congress at the time of delegation. The court held that the flu was a sufficiently serious medical condition where it also met the language requiring three consecutive days of incapacity with two days of treatment.

HOLDING: The court held that the language of the FMLA as put forth by the Secretary of Labor was not contrary to Congress' intent in delegating this power.

IMPACT: The Court has affirmed its own power to be the ultimate interpreter of statutory language, and thus has affirmed its ability to review and reverse action taken by administrative agencies.

SEVENTH CIRCUIT COURT OF APPEALS

Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572 (7th Cir. 2001). ***IRS Interpretations of ERISA***: Court declines to defer to IRS interpretation of ERISA statute using deference principles set forth in *United States v. Mead*.

FACTS: Robert Matz ("Matz"), filed an action under the Employee Retirement Income Security Act ("ERISA") alleging that he was entitled to benefits as a result of a partial termination of his retirement plan. The district court held that both vested and non-vested participants should be counted in making the determination of partial termination and that multiple plan years could be aggregated. Representatives of the plan contested the holding on an interlocutory appeal. The court of appeals upheld the rulings. The Internal Revenue Service ("IRS") filed an *amicus curiae* brief putting forth a statutory interpretation. The court of appeals afforded *Chevron* deference requiring that the statutory interpretation of the IRS be given deference. The court also concluded that this interpretation was reasonable. The representatives of the plan appealed to the United States Supreme Court, which vacated and remanded to the Seventh Circuit for further consideration in light of the Court's ruling in *United States v. Mead*, 533 U.S. 218 (2001).

ANALYSIS: The issue before the Seventh Circuit on remand was the extent to which the courts must defer to the interpretation of

“partial termination” by the IRS found in the *amicus curiae* brief, which is one of the agencies responsible for administering the partial termination statute. The court in this case relied heavily upon the *Mead* case in determining what level of deference should be given to the IRS interpretations of the regulations governing the ERISA calculations involved. The *Mead* Court held that *Chevron* deference is mandatory when Congress has expressly or implicitly indicated an intent that an agency have the power to speak with the force of law on a given matter and the agency’s position on the matter is reasonable. The Supreme Court in *Mead* stated that the intent of Congress could be found when it provides for relatively formal procedures, such as notice and comment rulemaking or formal adjudication. In comparing the present position of the IRS with a long line of cases, the court found that the *amicus curiae* brief was not a result of formal policymaking procedure, but rather was based upon “some” revenue rulings and an agency manual. The court concluded that only *Skidmore* deference was appropriate because the position set forth by the IRS in its *amicus curiae* brief was supported only by “some” revenue rulings and an agency manual. In applying *Skidmore* deference, the court held that the IRS position in the *amicus curiae* brief was not persuasive such as to be granted deferential treatment. The court of appeals reversed and remanded to the district court for further proceedings.

HOLDING: The Seventh Circuit held that the IRS’ position in the *amicus curiae* brief was an informal agency policy pronouncement that is not entitled to *Chevron* deference.

IMPACT: The court took an opportunity to further clarify and limit the circumstances in which *Chevron* deference would be applied. Agencies must beware, as deference will only be given in strict regulation and official interpretation situations.

Ester v. Principi, 250 F.3d 1068 (7th Cir. 2001). ***Agency Procedures:*** If agencies make a ruling on the merits they waive their right to timeliness objections.

FACTS: McArthur Ester (“Ester”) was denied a promotion by his employer, the Department of Veteran’s Affairs (“the VA”). Ester brought suit on the grounds that the failure to promote him was in violation of Title VII of the Civil Rights Act. The VA advertised the availability of a position that was one level above Ester’s current position with the VA. Mr. Ester applied for the promotion but was

sition with the VA. Mr. Ester applied for the promotion but was later informed that a female applicant filled the position. Mr. Ester filed a complaint and had a series of meetings with a counselor from the Equal Employment Opportunity Commission ("EEOC"). Prior to Ester's final meeting with the EEOC investigator, he received a notice of final meeting which stated that he had fifteen days to file a complaint. After the final meeting, the issue had not been resolved to his satisfaction but he waited until thirty-three days after the notice to file his complaint. The EEOC investigated the complaint without noting the lateness of the complaint. The investigator at first found in Mr. Ester's favor, but later reversed and ruled that there was no Title VII violation. Further, the investigator specifically found that all procedural requirements had been met. Three and a half years later, the VA formally ruled that there was no violation and issued a right to sue letter. Mr. Ester then filed suit in federal court. The VA did not mention the procedural requirements. In response to the suit, the VA asserted for the first time that the original complaint after the investigation was untimely. Ester responded that the VA had waived its right to assert procedural defect because they had not raised the issue until the federal suit. The lower court rejected the waiver argument and awarded summary judgment to the VA. Mr. Ester appealed the decision.

ANALYSIS: The Seventh Circuit analogized this instance to situations where a party to a suit fails initially to raise an issue, but later attempts to do so. In following prior decisions, the court consistently ruled that such an act cannot be done. The Seventh Circuit held that the EEOC's situation was not distinguishable. The court continued, noting that administrative agencies are required to fully state the reasons for their findings. Finally, the court analogized to other federal and state actions where all procedural issues must be ruled upon in order to prevent automatic waiver.

HOLDING: The Seventh Circuit held that when an agency decides a case on the merits, without addressing the question of timeliness, the agency has waived the timeliness defense in a subsequent suit.

IMPACT: The Court holds agencies to the same requirements of justice as all other individuals and organizations, making the message clear, once again, that the Court will be scrutinizing the actions that administrative agencies take.

ELEVENTH CIRCUIT COURT OF APPEALS

Bank of Am., N.A. v. FDIC, 244 F.3d 1309 (11th Cir. 2001). **FDIC Regulations**: Interpretive letter issued by FDIC was given *Chevron* deference.

FACTS: Congress established a two-system insurance deposit scheme for banks to protect depositors. As a result of the numerous bank failures in the 1980's, Congress implemented a series of regulations that prevented banks from shifting money to accounts that had a lower deposit rate. Among the regulations was a five-year moratorium on account transfers to the lower deposit rate accounts from the higher rate accounts. Further, the moratorium affected mergers between banks and branches of banks that would result in lower deposit premiums. The Federal Deposit Insurance Corporation ("FDIC") issued an interpretive letter clarifying the details of a specific type of transaction between branches of different classifications. The FDIC later codified this interpretation and stated that the codification was unambiguous. The FDIC later pursued action against the Bank of America ("BOA") stating that they owed a large sum of money as a result of the manner in which they had transferred funds. BOA filed suit against the FDIC claiming that the action taken was beyond the powers of the FDIC because they had exceeded their statutory authority under the plain meaning of the above noted statute.

ANALYSIS: The Eleventh Circuit found that while the supporting language of the statute (the preamble) did speak to the issue, the statute itself did not. The court did not accept BOA's claim of inconsistency between the preamble and the later interpretation because it was not a post-hoc interpretation, but rather a later clarification of an unaddressed point in the code. Thus, the court held there was ambiguity that necessitated the later interpretation which was allowed by *Chevron* deference.

HOLDING: The Eleventh Circuit held that *Chevron* deference was applicable to the present case because the language of the statute did not speak directly to the present issue.

IMPACT: The court shows that it will uphold the traditional *Chevron* doctrine. As long as there is an interpretation of a statute containing ambiguities, the agency will be granted deference by courts.

DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS

Air Transp. Ass'n of Canada v. FAA, 254 F.3d 271 (D.C. Cir. 2001), *vacated by* 276 F.3d 599 (D.C. Cir. 2001). ***FAA Regulations:*** The FAA fee schedules for international flights were reasonable.

FACTS: Under the Federal Aviation Reauthorization Act of 1996 (“Act”), the Federal Aviation Administration (“FAA”) has the authority to charge fees to foreign airlines that fly into American airspace. The Act requires that all fees for foreign overflights be directly related to the costs incurred by the FAA in assisting with the overflights. The FAA established a fee schedule for foreign overflights based on a formula including the value of the airline services provided. Air Transportation Association of Canada (“ATAC”) contested this action as being beyond the scope of powers given to the FAA to establish fees because the enabling act specifically required that the fees must be based upon the service costs incurred by the FAA. The FAA amended the fee schedule to reflect different fees for flights over land and flights over American ocean space. The amended rule did not contain an explanation of how the FAA arrived at the fee schedule but the FAA did later provide two reports explaining the difference and how the schedule was developed.

ANALYSIS: The District of Columbia Circuit Court of Appeals addressed two issues raised by ATAC. First, ATAC argued that notice and comment procedures were not used to pass the amended rule. Second, the court analyzed whether the amended rule was within the FAA’s delegated powers. The court reasoned that the amended rule establishes only an initial fee schedule and is thus not subject to the full notice and comment procedures. The court reasoned that the FAA failed to sufficiently justify the connection between the rate charged and the costs to the agency in providing services.

HOLDING: The court held that because it vacated the initial rule, there was no requirement that the amended rule also utilize notice and comment procedures. Thus, the court held that the amended rule was simply an interim rule. In addressing the fee schedule proposed by the FAA, the court held that it could not be directly linked to the costs of providing services. Thus, it was arbitrary and capricious.

IMPACT: This court followed the Supreme Court’s lead, making room for deference to administrative decisions only where it sees fit.

UNITED STATES DISTRICT COURT

Kokal v. Massanari, 163 F. Supp. 2d 1122 (N.D. Cal. 2001). *Social Security Law*: The District Court closely reviewed the ALJ's decision regarding Social Security Administration regulations.

FACTS: Tammy Kokal ("Kokal") suffered from an ankle injury and obesity which also caused various other health problems. As a result, she claimed social security disability benefits. Kokal had visited numerous doctors and hospitals due to pains in her legs and back; the doctors recommended weight loss to lessen the pain. The Social Security Administration ("SSA") and the Appeals Council denied benefits, finding that Kokal was capable of menial occupations as noted by the Department of Rehabilitation.

ANALYSIS: The issue was whether the Social Security Administrative Law Judge ("ALJ") erred in failing to consider whether Kokal was disabled due to the combination of her obesity and other physical impairments, either under the obesity listing in place at the time of her administrative hearing, or under the regulations on obesity that replaced that listing while her case was pending before the Appeals Council. The court found that obesity should have been used as a factor to analyze the general physical impairments in "step three" of the SSA's five-step disability analysis. The court concluded that obesity as a factor from the then-applicable list would have conclusively deemed Kokal disabled. Additionally, the court maintained that the ALJ should not have considered the amended obesity listing while Kokal's claim was pending on appeal with the Appeals Council. Based upon precedent, the court rejected the argument that newly amended rules and legislations had retroactive effect on pending cases or appeals.

HOLDING: The court found that the SSA erred by only considering the ankle injury as a disability when there were other concomitant physical impairments, including obesity.

IMPACT: This case serves as a reminder that deference to administrative agency determinations only goes as far as a court will allow it, especially with regard to questions of law.

In re Methyl Tertiary Butyl Ether Products Liability Litigation, 174 F. Supp.2d 4 (S.D.N.Y. 2001). *Environmental Law and Civil Procedure*: A New York District Court interprets the Clean Air Act.

FACTS: Water-well owners brought products liability claims against petroleum companies for contamination of ground water caused by the use of methyl tertiary butyl ether ("MTBE") to oxygenate petroleum products as required under the Clean Air Act ("Act"). The petroleum companies claimed preemption under the Act.

ANALYSIS: The issue was whether there were substantial grounds for differences of opinion in the courts, with regards to the use of MTBE under the Act as the only method to oxygenate petroleum, so as to make an interlocutory appeal appropriate. The court considered three factors and created six additional factors for determining a controlling question of law. The court cited to the fact that "great care" should be used in granting a certification, and that § 1292(b) of the Act should be "narrowly construed." Furthermore, the court noted that certification should be granted only in "exceptional circumstances." Additionally, the court recognized that it has "unfettered discretion to deny certification" for an interlocutory appeal. The court also noted that an interlocutory appeal would be inappropriate where it could bring an end to all litigation concerning a particular matter.

HOLDING: The New York District Court held that the Act did not specifically require the use of MTBE, but merely required that all petroleum fuels be oxygenated without prescribing a specific methodology. The court determined that there was no substantial ground for differences of opinion as to whether the Act required the use of MTBE. Thus, the interlocutory appeal was inappropriate.

IMPACT: Attempting an interlocutory appeal in administrative law matters in New York, at least according to this court, may be a losing battle.

CALIFORNIA STATE COURT

McCall v. PacifiCare of California, Inc., 21 P.3d 1189 (Cal. 2001).

Preemption Doctrine: The exhaustion of administrative remedies is not required in all circumstances under Medicare Act.

FACTS: This case involved a health maintenance organization (“HMO”) that denied George McCall (“McCall”), now deceased, medical referrals and lung transplants when Medicare supplemented the coverage. McCall filed suit, citing nine tort claims and twenty violations of statutory duties owed. PacifiCare of California, Inc. (“PacifiCare”) filed motions for summary judgment and motions to dismiss the suit based on lack of subject matter jurisdiction of the state courts. The trial court held that it had no jurisdiction. The court of appeals reversed, stating that McCall was not seeking review of benefits coverage or reimbursement but was seeking tort damages and therefore McCall’s claim did not arise under the Act.

ANALYSIS: The issues were (1) whether common law tort claims are preempted by the Medicare Act (“Act”), such as to bar a suit from being presented to a state court; (2) whether an administrative agency would be able to provide adequate remedies to plaintiffs claiming tort damages and not medical payment, coverage, or reimbursement; and (3) whether a plaintiff must exhaust all administrative reviews before a damages claim can be brought in court. In the instant case, based upon the statutory construction of the Act, the California Supreme Court found that there was no preemption or exclusive jurisdiction and found that the agency only exercised a limited jurisdiction in regards to denial of benefits and amount of benefits. Additionally, the court found that the agency would only be able to grant civil monetary penalties against PacifiCare, and that this would be insufficient to cover any damage claims. The court suggested that because the plaintiff was not seeking review of benefit coverage, amount of coverage, or reimbursement, the plaintiff’s cause of action did not arise under the Act; therefore, the claim was properly brought before the trial court. Additionally, the court reasoned that the Medicare agency did not have the power or authority to grant the plaintiff damages. Because the award of damages was limited to the judiciary, a requirement that plaintiffs exhaust all administrative review was unnecessary and inadequate.

HOLDING: The California Supreme Court held that a plaintiff must exhaust all administrative review if the claim has standing and substantive basis in the Act or if non-administrative claims are inextricably intertwined with the Medicare claim. Additionally, if the statutory language clearly provides the agency with exclusive jurisdiction, then a plaintiff must exhaust the administrative review procedures before the claim can be brought for judicial review. However, the court created some exceptions to this rule. If the claim arising under the Act is only collateral to the main components of a claim, or if a plaintiff can show colorable arguments that administrative review would cause harm to the plaintiff, the court may review the claim before all administrative procedures are complete.

IMPACT: The agency will not be able to exercise any jurisdiction if the court decides to hear the claims. In essence, if the statute does not clearly preempt the state courts or provide exclusive jurisdiction over such issues, then the court may exercise jurisdiction over the matter. If judicial review of the claim is preempted, then the plaintiff must first exhaust all administrative review before seeking a judicial review.

CONNECTICUT STATE COURT

MacDermid, Inc. v. Dep't of Env'tl. Prot., 778 A.2d 7 (Conn. 2001). ***Uniform Administrative Procedure Act:*** The court addresses the proper standard of review applied under the Uniform Administrative Procedure Act for questions of fact.

FACTS: MacDermid, Inc. ("MacDermid") sought a declaratory judgment that its spent etchant, a chemical product, was not a solid waste; that its premises were not a waste treatment facility; and that etchant was exempt from the Department of Environmental Protection's ("DEP") regulations. If exempt, MacDermid would not have been required to obtain a permit to receive its used etchant, could recycle the product without regulation, and properly sell or dispose of its recycled products. The DEP determined that the spent etchant was a solid waste and was a hazardous material that needed to be regulated, thereby requiring a permit subject to review every five years. The DEP further concluded that MacDermid was conducting waste management which would come within the purview of its regulations. MacDermid argued that it was not in the enterprise of

waste management but instead was manufacturing new products and was merely using the spent etchant as an ingredient in that manufacturing. After an extensive finding of facts regarding the chemical processes and statutory interpretations, the Board concluded that MacDermid was a waste management firm and that it was merely recycling or reclaiming the byproducts. After exhausting all administrative review, MacDermid appealed to the trial court, which simply affirmed the determination of the DEP based on a “substantial evidence” standard of review.

ANALYSIS: The issue was whether the “substantial evidence” standard of review found in the Uniform Administrative Procedure Act (“UAPA”) should be generally applicable. The Connecticut Supreme Court reasoned that agencies which have been given the duty of applying and interpreting special legislation requiring experience, expertise or technical knowledge in specialized fields require the “substantial evidence” standard in order to extend a good deal of deference. Based on the findings of the DEP, the court found that there was substantial evidence to support the conclusion that MacDermid was engaged in waste management. Additionally, the court found that the statutory interpretation of the DEP was not unreasonable, arbitrary, illegal, or an abuse of discretion. The court reasoned that the DEP’s interpretation was well supported by the statutory language, precedent, and public policy. The court found the reasoning of the DEP that some violators might escape the permit requirement by simply redefining their chemical processes and stages was a legitimate basis to support the interpretation and to adhere to the intent of the statute.

HOLDING: The Connecticut Supreme Court held that the “substantial evidence” standard was appropriate for reviewing factual determinations and that the trial court appropriately applied the standard.

IMPACT: Essentially, The Uniform Administrative Procedure Act standard was applied in this case. This standard will be applied in technical or specialized fields where the court does not have the requisite expertise, and courts applying it will grant substantial deference to the agency’s determination. The standard of review is important because it provides an agency with wide latitude as to its fact-finding ability in respect to its expertise.

ILLINOIS STATE COURT

AFM Messenger Serv., Inc. v. Dep't of Employment Sec., 763 N.E.2d 272 (Ill. 2001). *Illinois Labor Law*: The court addressed the “clearly erroneous” standard of review used in addressing mixed questions of law and fact.

FACTS: Several former employees of AFM Messenger Service, Inc. (“AFM”), a messenger service company that conducts same-day delivery of packages, filed for unemployment benefits. However, AFM did not carry any unemployment insurance as required by law because it had considered its drivers to be independent contractors. When the Department of Employment Security (“DES”), an unemployment benefits agency, could not provide the requested benefits, it triggered an audit of AFM. The referee determined at an administrative hearing that the drivers were not independent contractors but were employees of AFM under the statute and fined AFM based on the premiums it should have paid. The Board of the DES adopted the determination. The trial court held that the determination was neither against the manifest weight of the evidence nor contrary to law. The appeals court affirmed that AFM failed to establish that its drivers were independent contractors.

ANALYSIS: The issue was what standard of review was appropriate when an administrative agency makes a determination based upon a mixed question of law and fact. The Illinois Supreme Court defined mixed questions of law and fact as involving an examination of the legal effect of a given set of facts. The court defined the “clearly erroneous” standard of review as a hybrid between the “manifest weight of the evidence” standard and *de novo* review. The court maintained that due to the experience and expertise of the administrative agency, it should be accorded with a “clearly erroneous” standard of review, rather than the “manifest weight of the evidence” standard that is applied by appellate courts in matters involving mixed questions of law and fact.

HOLDING: The Illinois Supreme Court held that the “clearly erroneous” standard was appropriate for mixed questions of law and fact and affirmed the agency’s determination.

IMPACT: The deference that determinations of administrative agencies in Illinois will receive has been tempered in the sense that in mixed questions of law and fact the courts in their review will use a somewhat less deferential standard.

KENTUCKY STATE COURT

Revenue Cabinet v. Lazarus, Inc., 49 S.W.3d 172 (Ky. 2001). *Taxation and the Doctrine of Contemporaneous Construction:* An administrative agency's long-standing interpretation of a statute that incorrectly applies the law is not shielded by the doctrine of contemporaneous construction.

FACTS: Lazarus, Inc. ("Lazarus") operates retail stores throughout Kentucky, and distributes pre-printed newspaper inserts and catalogs. In 1994, the Kentucky Revenue Cabinet ("Cabinet") audited Lazarus's operations. During the audit, Cabinet discovered that Lazarus used an out-of-state printing company to produce the inserts and catalogs. The out-of-state printer performed the creation, design and printing of the inserts and catalogs. In addition, the out-of-state printer occasionally mailed the catalogs directly to Lazarus' customers in Kentucky. As a result, the Cabinet assessed a use tax on Lazarus for the activities of the out-of-state printer.

ANALYSIS: The Kentucky Supreme Court had to determine if Lazarus was liable for use tax when the out-of-state printer (1) created, designed and printed the inserts and catalogs, and subsequently shipped them back to Lazarus in Kentucky and (2) directly mailed the catalogs from the out-of state printer to potential customers in Kentucky. The court relied on the doctrine of contemporaneous construction to prohibit the Cabinet from assessing the use tax. The doctrine states that when an administrative agency applies a policy over a long period of time, that agency cannot unilaterally revoke it. Thus, the doctrine precludes "internal policy changes by the administrators to reverse and overturn long-standing interpretations that have, over time, become part and parcel of the fabric of the law being administered." In the present case, the Cabinet has continuously adhered to the policy against taxing inserts for over thirty years. However, the court determined that the Cabinet was required by law to assess a use tax on inserts over the past thirty years. The court stated that "contemporaneous construction cannot be founded upon an administra-

tive agency's failure to correctly apply the law." Thus, the inaction of the Cabinet over thirty years cannot be treated as contemporaneous construction.

HOLDING: The Kentucky Supreme Court held that an administrative agency cannot change the law by mistakenly applying it over a long period of time. Thus, the court concluded that the newspaper inserts and catalogs were subject to the "use tax" imposed by Kentucky because they qualified as "tangible property store, used, and consumed in Kentucky."

IMPACT: Administrative agencies in Kentucky that have relied upon long-standing internal policy interpretations that fail to correctly apply laws will not be protected by the doctrine of contemporaneous construction.

OKLAHOMA STATE COURT

Walker v. Group Health Servs., Inc., 37 P.3d 749 (Okla. 2001).
Administrative Remedies: Exhaustion of administrative remedies is not required to obtain judicial review.

FACTS: Cynthia Walker ("Walker") fainted while she was teaching in her class and was rushed to the emergency room. Walker was a member of a health maintenance organization ("HMO"), Group Health Services, Inc. The emergency medical treatment and all subsequent treatment were denied coverage and reimbursement by her HMO. Walker requested review. Based on the contract, the HMO was required to respond within thirty days; however, the HMO failed to respond for more than three months and also failed to provide appeals information. For failure to pay medical expenses, the emergency service provider garnished Walker's wages and froze and acquired her "escrow" account. As a result, Walker's attempt to purchase a home failed. Walker retained an attorney to obtain grievance-appeals information from the carrier which caused the carrier to immediately reimburse insured. After the reimbursement, her attorney brought suit for bad faith and breach of contract. The carrier succeeded in dismissing the suit for lack of subject matter jurisdiction of the court based on State and Education Employees Group Insurance Act ("Act"), which required any complaints or disputes to be resolved by the Grievance Panel. The Act created and empowered

the State and Education Employees Group Insurance Board (“Board”) to promulgate grievance procedures. Under the delegated authority, the Board created the Grievance Panel to resolve all disputes with regard to insurance allowance, payment of claims, eligibility for coverage, and provision of services. The trial court sustained the motion and dismissed the suit for lack of jurisdiction.

ANALYSIS: The issue was whether an insured is required to exhaust all administrative remedies before seeking judicial review when such a requirement cannot provide adequate remedies of compensatory and punitive damages for (1) breach of implied covenant of good faith and fair dealing and (2) bad faith breach of insurance contract. The court also examined whether administrative remedies must be exhausted where the suit does not pertain to disputes of insurance allowance, payment of claims, eligibility for coverage, and provisions of services. The Oklahoma Supreme Court found that, because the suit was not initiated to recover reimbursement, such actions were not precluded by the Act. Based on various precedents, statutory interpretation, and legislative intent, the court found that the Grievance Panel’s primary jurisdiction only encompassed insurance allowance, payment of claims, eligibility for coverage, and provision of services. The court decided that compensatory and punitive damages could not be remedied by an administrative proceeding.

HOLDING: The Oklahoma Supreme Court held that an insured may bring such suits for judicial review and is not required to exhaust all administrative review procedures under the Act.

IMPACT: If, by reimbursing, the protection of the Act is not applicable, the effect of this ruling would be that carriers will simply and continuously deny coverage, reimbursement, and services so as to preclude a litigation. This will force a plaintiff to bring a complaint to an administrative body rather than court. By simply exhausting the financial reserves of poor insured plaintiffs, the carrier will be substantially benefited both as to cost of services as well as expenses of litigation. However, the realities of exhausting all administrative remedies make this an unlikely option.

TEXAS STATE COURT

Subaru of Am., Inc. v. David McDavid Nissan, Inc., 2001 WL 578337, 44 Tex. Sup. Ct. J. 779 (Tex. 2001) (note that this case has not yet been published in the official reporters as of the publication date of this issue, and therefore, the opinion is subject to modification or withdrawal). ***State Motor Vehicle Board Jurisdiction***: The court addressed the fact that courts maintain secondary jurisdiction over administrative agency proceedings.

FACTS: David McDavid Nissan, Inc. (“McDavid”), an automobile dealer, sued Subaru of America, Inc. (“Subaru”) for refusing to allow the dealer to relocate after Subaru orally consented to the relocation. McDavid wanted to relocate its two facilities between the Oldsmobile and Subaru locations. McDavid allegedly obtained an oral permission from the Vice-President of Subaru. After near completion of the relocations, Subaru reneged, stating that it would never permit relocation at that particular site. No written request or permission for relocation was obtained or granted. After relationships became tenuous, McDavid sold all of its Subaru dealerships. Thereafter, Subaru permitted another dealer to relocate at the site where McDavid desired to relocate. McDavid brought suit, claiming various code violations and torts; Subaru tried to summarily dismiss the suit claiming that the cause of action arose before the Texas Motor Vehicle Board (“TMVB”) in the administrative proceedings. The trial court claimed that it had no concurrent jurisdiction to try or review such matters and dismissed the suit. The appeals court held that the legislature gave the TMVB exclusive jurisdiction over dealership-manufacturer code violations and that to dismiss such claims would close off access to the courts, right to jury trial, and open trial and would be unconstitutional based on the Texas constitution.

ANALYSIS: The issue is whether the TMVB had exclusive jurisdiction or merely primary jurisdiction over such matters as dealer-relocation disputes. Upon de novo review, the Texas Supreme Court applied the “primary jurisdiction doctrine,” maintaining that if an administrative agency has sole primary jurisdiction, then the judicial system may review the matter only after the administrative agency has an opportunity to hear the matter and make specific findings of fact. The court also reasoned that allocation of exclusive and primary jurisdiction is statutorily driven and therefore requires judicial interpretation. The court noted that in this case the statute granted

limited judicial review of TMVB holdings. Additionally, the court reasoned that the limited remedies available to an injured party from an administrative review implies that an administrative proceeding cannot be the only recourse for the injured party and that the courts are open to redress these shortcomings of the administrative process.

HOLDING: The Texas Supreme Court held that the administrative agency, TMVB, had primary jurisdiction, and the trial court had secondary jurisdiction after the agency's review.

IMPACT: This is an important decision for Texas administrative agencies because it ensures their ability to have first review of cases in their jurisdiction, while the rights of the parties are still protected from arbitrary agency decisions through review in the courts.

Cont'l Cas. Ins. Co. v. Functional Restoration Assocs., 19 S.W.3d 393 (Tex. 2000). *Texas Labor Law:* There is no right to judicial review of administrative orders unless the ruling affects a vested property right.

FACTS: James Hood ("Hood") suffered an on-the-job injury compensable under the Workers' Compensation Act ("Act"). At the time, Continental Casualty Insurance Company ("Continental") was the workers' compensation insurance carrier for Hood's employer. Hood received medical care, including some rehabilitation and specific treatment, from Functional Restoration Associates and Productive Rehabilitation Institute of Dallas for Ergonomics (collectively, "FRA"). Continental required FRA to forward all preauthorization forms that would be reviewed by Continental's doctor. If a service was found by Continental's doctor not to be reasonable or necessary, then the benefit or payment was denied to FRA. In this case, Continental denied payment after the service was performed on Hood based on its finding that the service was not necessary. FRA brought suit for reimbursement before the Workers' Compensation Commission ("WCC") which found in its favor. Continental sought judicial review of the WCC's determination at the trial court. The trial court dismissed the suit for lack of jurisdiction. The appellate court reversed, finding that even though Continental did not have a statutory right of judicial review, the court found that it was entitled to a right to judicial review because it was an inherent right based on the state and federal constitution, as well as due process rights in vested property rights.

ANALYSIS: The issues were: (1) whether the Act provides a statutory right of judicial review for carriers such as Continental; and (2) whether there is an inherent right of judicial review in administrative proceedings. The Texas Supreme Court engaged in an extensive analysis of the statutory construction, analysis of legislative intent, and interpretation of the Act. The court noted that even though the legal area of dispute committed to the purview of the WCC is “small,” it is nonetheless exclusive and must be exhausted before a party can claim a right to judicial review unless the statute remains silent or denies a right of judicial review. The court maintained that if a right vested in property is adversely affected, a party is not required to first exhaust administrative review before a claim can be brought before the court. Since Continental did not raise this inherent right of judicial review at the trial court level, the Texas Supreme Court declined to address it.

HOLDING: The Texas Supreme Court held that there is no right to judicial review of an administrative order unless there is a statute providing a right, an order or determination that adversely affects a vested property right, or a violation of a constitutional right. Further, there was no statutory right of judicial review in matters involving payment and benefit disputes under the Workers’ Compensation Act.

IMPACT: Based on Texas law, unless a party is specifically granted a statutory right of judicial review, the party must first exhaust the administrative review process before seeking judicial review. No deviation from the three-level administrative review would be permitted, unless there is an inherent right that is being adversely affected. Thus, even if the legislature removes a right to judicial review or grants an agency exclusive jurisdiction, a party could bypass the agency if it claims that its vested or inherent right is being adversely affected. Thus, parties can bypass the agency by claiming that a property right is being adversely affected and gain access to the court.

Occidental Permian Ltd. v. R.R. Comm’n of Texas, 47 S.W.3d 801 (Tex. App. 2001). *Judicial Notice Requirements:* Judicial notice is required for all administrative determinations and regulations regarding retroactive tax benefits.

FACTS: Occidental Permian Ltd. (“Occidental”) brought suit to reverse the Railroad Commission’s (“RRC”) decision to deny them retroactive tax benefits. Occidental initially requested approval for an expansion of its “enhanced oil recovery project.” The expansion program required water and carbon dioxide to be pumped underground so as to flood the oil reserves and to force oil to the surface. If approved for an expansion, Occidental would have gained substantial tax benefits under the Texas Tax Code, but Occidental was denied after application. However, Occidental began its expansion operation despite the disapproval and continued its operation because it deemed it profitable enough even without the tax benefit. Two other petroleum companies also applied for an expansion and were also denied. However, these two companies requested an appeal and hearing. Subsequent to the hearings, the denial was reversed and permission was granted. Occidental did not appeal nor request a hearing. After several years, Occidental requested a hearing before RRC for “retroactive” tax benefits for the expansion. The state tax examiners denied retroactive tax benefits and RRC adopted the ruling of the examiners.

ANALYSIS: The issue was whether the Texas Court of Appeals is required to take judicial notice of all administrative determinations and regulations to permit introduction of “outside” information in an administrative proceeding. The court stated that administrative determinations are to be examined under a “substantial evidence” standard of review. RRC ruled against Occidental because the statute and rules explicitly required that all tax benefits be approved before commencing an expansion plan. The court maintained that even though RRC had reversed itself in two prior cases upon appeal, this did not entitle Occidental to a retroactive application and did not entitle them to a hearing after it had commenced operations. The court also ruled that RRC’s actions were not arbitrary, capricious, or an abuse of discretion because nothing in the administrative precedent prevented the denial of benefits.

HOLDING: The Texas Court of Appeals held that the courts must take judicial notice of all administrative regulations and determinations.

IMPACT: This case provides Texas administrative agencies with a bit more deference from the courts.