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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its eleventh annual Survey of Recent Developments in Indiana Law. This survey covers the period from May 1, 1982, through May 1, 1983. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Administrative Law

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A. Notice, Hearings, and Eldridge *Balancing*

1. Notice of Right to Counsel.—In *Berzins v. Review Board of the Indiana Employment Security Division*,[1] the Indiana Supreme Court authoritatively resolved the division of Indiana appellate authority noted in last year's Survey Article[2] respecting an unemployment compensation claimant's right to notice of her right to counsel.

The court held first that "due process does require some form of procedure reasonably calculated to provide notice to employers and claimants of the right to be represented at evidentiary hearings conducted by the Employment Security Division."[3] The court went on to hold, however, that the failure to notify a claimant of her right to representation by counsel requires a remand only if the claimant is able to make a sufficient showing of prejudice stemming from such lack of notice.[4]

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[1]439 N.E.2d 1121 (Ind. 1982).

[2]Smith, *Administrative Law, 1982 Survey of Recent Developments in Indiana Law*, 16 Ind. L. Rev. 1, 6-8 (1983).

[3]439 N.E.2d at 1123.

[4]*Id.* at 1127.

With respect to the first holding, the court's ultimate authority was the balancing test mandated by the well-known Supreme Court case of *Mathews v. Eldridge*.[5] *Eldridge*, it will be recalled, weighs the benefits of additional procedural safeguards with respect to an administrative hearing against the additional costs incurred, through balancing

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, along with the probable value, if any, of additional or substitute procedural safeguards, and; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[6]

The court's conclusion that due process, as determined by an *Eldridge* balancing, requires at least some form of notice of a claimant's right to counsel dictated the partial overruling[7] of the prior Indiana case of *Walker v. Review Board of the Indiana Employment Security Division*.[8]

On the issue of whether a showing of prejudice from lack of such notice is necessary to mandate reversal, though, the court did not choose to re-apply the *Eldridge* test. Instead, the court determined that

> if the hearing referee fulfills his duty and effectuates a complete presentation of the case, . . . there is no need to remand the cause to the Employment Security Division and impose on that agency the time-consuming exercise of another hearing. The harmless error doctrine . . . has its place in judicial review of administrative proceedings.[9]

From this point, the court concluded that the due process fairness of administrative evidentiary hearings "inherently requires a case-by-case assessment."[10]

The court thus opted for a case-by-case prejudice rule, as opposed to a per se error standard, in its approach to instances of lack of notice of a right to counsel. While this approach is almost demonstrably the less satisfactory of the two, candor requires the admission that contrary authority not addressed by the court in *Berzins* is sparse.[11]

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[5]424 U.S. 319 (1976).

[6]Wilson v. Review Bd. of the Ind. Employment Sec. Div., 270 Ind. 302, 309-10, 385 N.E.2d 438, 444 (Ind. 1979) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[7]*See* 439 N.E.2d at 1123.

[8]404 N.E.2d 1363 (Ind. Ct. App. 1980).

[9]439 N.E.2d at 1127.

[10]*Id.*

[11]Several social security disability benefit cases are of some value in evaluating the court's rationale in *Berzins*. *See, e.g.*, Echevarria v. Secretary of HHS, 685 F.2d 751 (2d Cir. 1982); Thompson v. Schweiker, 665 F.2d 936 (9th Cir. 1982); Ware v. Schweiker, 651 F.2d 408 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982); Rials v. Califano, 520 F. Supp.

The court's adoption of a case-by-case prejudice rule, with its concomitant rejection of a per se error standard, is instead inconsistent with principles of fairness and the economic conservation of judicial resources. There is no reason in logic or law not to apply the *Eldridge* balancing test factors[12] to determine the most commendable judicial response to a deprivation of due process through lack of appropriate notice.

Whether the *Eldridge* test is deemed technically applicable or not, it remains true that requiring a remand for rehearing in any case involving a lack of appropriate notice would obviate the substantial chance of an erroneous determination of lack of prejudice or of ineligibility for benefits, and would be virtually costless with respect to judicial and administrative time.

The obvious administrative response to an announced per se error rule would be to ensure that in each case, the claimant at a minimum is sent a comprehensible written notice, along with other appropriate forms, indicating the scope of the claimant's rights to representation, including the possibility of free counsel. A per se error rule undeniably establishes the strongest appropriate incentives for hearing referees to prevent the question of the optimal judicial response to a due process violation from arising in the first place.

Moreover, a case-by-case prejudice rule will result in at least occasional instances in which prejudice to the claimant passes undetected on review, even if whole record review is utilized, no matter what test for prejudice is eventually adopted. While certain sorts of prejudice, such as a missing hearsay objection, may be apparent from the record, no record can disclose, for example, that an uncounseled claimant mistakenly believed that revealing his chronic alcoholism would hurt his case.[13]

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786 (E.D. Tex. 1981); *see also* Meyerhoff & Mishkin, *Application of* Goldberg v. Kelly *Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974); Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977).

The majority of relevant foreign jurisdictional cases apparently are from Pennsylvania. *See, e.g.*, Unemployment Compensation Bd. of Review v. Ceja, 493 Pa. 588, 427 A.2d 631 (1981); Linke v. Commonwealth, 450 A.2d 312 (Pa. Commw. Ct. 1982); Snow v. Commonwealth, 61 Pa. Commw. 396, 433 A.2d 922 (1981); Robinson v. Commonwealth, 60 Pa. Commw. 275, 431 A.2d 378 (1981); Hoffman v. Commonwealth, 60 Pa. Commw. 108, 430 A.2d 1036 (1981); Katz v. Commonwealth, 59 Pa. Commw. 427, 430 A.2d 354 (1981).

Subsequent Indiana cases in other contexts that are at least arguably inconsistent with the tenor of *Berzins* would include Kennedy v. Wood, 439 N.E.2d 1367 (Ind. Ct. App. 1982) (paternity case); *In re* Turner, 439 N.E.2d 201 (Ind. Ct. App. 1982) (civil commitment proceeding).

[12]*See supra* note 6 and accompanying text.

[13]*Compare* Sotak v. Review Bd. of the Ind. Employment Sec. Div., 422 N.E.2d 445, 448 (Ind. Ct. App. 1981) *with* Foster v. Review Bd. of the Ind. Employment Sec. Div., 413 N.E.2d 618, 621 (Ind. Ct. App. 1980), *following remand*, 421 N.E.2d 744 (Ind. Ct. App. 1981). *See also* Flick v. Review Bd. of the Ind. Employment Sec. Div., 433 N.E.2d 84, 87 (Ind. Ct. App. 1982).

Finally, it should be noted that a per se error standard, by requiring notice of right to counsel in every instance, logically tends to generate a higher percentage of attorney-assisted claimants. Perhaps the most important implication of this result is reduced role conflict for the hearing referee, who otherwise is unnecessarily pushed to extremes in his conflicting roles of being a neutral, detached arbiter on the one hand, and of actively ensuring a complete presentation of the case on the other hand.[14]

2. Post-Deprivation Hearings.—In *City of Indianapolis v. Tabak*,[15] the court of appeals was confronted with a close question of *Eldridge*[16] balancing in determining that the trial court abused its discretion in granting a preliminary injunction against the city controller's suspension of the plaintiff's secondhand goods dealer's license.

In this case, the plaintiff had been arrested for several license-related crimes, including attempt to receive stolen property and failure to keep proper records. As a result, the city controller suspended the plaintiff's license. The plaintiff, however, was able to obtain a temporary restraining order and preliminary injunction against the suspension.

In view of the multifaceted nature of the *Eldridge* balancing test, and the subtlety of some of the determinations required, reference to incontestably controlling precedent is typically impossible. In this case, for example, arrest is not the same as conviction,[17] and secondhand goods dealing is not as highly regulated, or as closely tied to legal and illegal gambling, as the training of race horses.[18]

On the other hand, the loss of business revenue does not, despite the right to a post-suspension hearing within ten days, seem as grievous or as potentially health jeopardizing as the disconnection of utilities for disputed or unpaid bills despite the right to a post-disconnection hearing.[19]

It is at least arguable that the court of appeals might have avoided the difficulties inherent in such a balancing process by accepting the argument that the trial court did not abuse its discretion in enjoining the suspension. The Indianapolis city code provides for license suspension without a hearing when the licensee is accused of "an offense involving his fitness to hold a license and an emergency exists."[20] At trial, the controller had testified that he believed an emergency existed because the plaintiff had been charged with several license-related crimes.[21]

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[14] *See* 640 IND. ADMIN. CODE § 1-11-3 (1979). *See also*, in the social security disability context, Echevarria v. Secretary of HHS, 685 F.2d 751, 755-56 (2d Cir. 1982); Cowart v. Schweiker, 662 F.2d 731, 735 (11th Cir. 1981), *quoted in* Smith v. Schweiker, 677 F.2d 826, 829 (11th Cir. 1982).

[15] 441 N.E.2d 494 (Ind. Ct. App. 1982).

[16] *See* Matthews v. Eldridge, 424 U.S. 319 (1976).

[17] *See* Bell v. Burson, 402 U.S. 535 (1971).

[18] *See* Barry v. Barchi, 443 U.S. 55 (1979).

[19] *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19-20 (1978).

[20] 441 N.E.2d at 495-96 (quoting CODE OF INDIANAPOLIS AND MARION COUNTY INDIANA § 17-49(b) (1975)).

[21] 441 N.E.2d at 496.

To find an emergency in a stolen goods case, as opposed, say, to a case involving the purveying of contaminated foods, is to announce that one will nearly always find an emergency, and that the apparently distinct requirements of a crime reflecting on fitness and an emergency are in fact one, with the latter "requirement" of an emergency having no independent force or meaning. In ordinary language, "crime" and "emergency" are sufficiently distinct so as to lead one to presume the city to have intended at least partially distinct meanings. *Tabak* effectively repeals the "emergency" provision.

B. Due Process and Academic Dismissal

Neel v. I.U. Board of Trustees[22] required the reconciliation, in the context of an academic dismissal from a state-supported dental school, of traditional considerations of university autonomy and faculty discretion, with equally well established principles of the common law of contracts.

This case involved the trial court's denial of the plaintiff's request for a permanent injunction requiring his reinstatement as a dental student in good standing. The plaintiff's expulsion stemmed essentially from excessive unexcused absences from lecture and clinical classes.

On appeal, the court rejected the plaintiff's due process claim on the strength of *Board of Curators v. Horowitz*,[23] in which the Supreme Court distinguished between academic and disciplinary or conduct-based dismissals and imposed only minimal due process requirements with respect to the former.[24] In *Neel*, the court determined that a dismissal of the academic sort was involved, despite evidence that the plaintiff's failure to attend classes was psychologically rooted.[25]

The thrust of the plaintiff's contract argument focused on certain explicit provisions of the officially promulgated dental school *Bulletin*, in which an apparently exhaustive set of criteria for dismissal were listed, none of which applied to the plaintiff.[26] The school relied on a separate provision under which unexcused absences from clinics brought forth a dubiously graduated progression of sanctions featuring a pronounced gap between the sanctions for the second absence ("a discussion with the Dean") and the third ("dismissal").[27]

The plaintiff's arguments that he had insufficient notice of the school's reliance on the latter provision and that the school in any event failed to comply literally with its own stated unexcused absence policies were unsuccessful at trial and on appeal. The court on appeal held that in the

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[22]435 N.E.2d 607 (Ind. Ct. App. 1982).
[23]435 U.S. 78 (1978).
[24]*Id.* at 89-90.
[25]435 N.E.2d at 610.
[26]*Id.* at 611.
[27]*Id.*

absence of a showing of arbitrariness or unfairness, the expert application of academic or professional standards could override any necessity for the school to adhere to its own internal rules with literal precision.[28]

It is submitted that there is no necessity for the courts readily to accommodate apparent, or at least colorable, material breaches of contract by university administrations. The *Horowitz* case makes clear that the due process hearing requirements in the case of academic dismissals will be minimal.[29] Due process does not require elaborate, exhaustive specifications in advance of every circumstance under which a professional school may dismiss a student. A generalized prior public statement, reasonably and impartially applied, will suffice. There is thus no need for a school to inadvertently restrict its own disciplinary options through its published bulletin, only to circumvent those self-imposed explicit restrictions through a magisterial exercise of expert academic or professional discretion.

While more advanced educational institutions doubtless require the exercise of less readily reviewable discretion, it is also clear that the relationship between a graduate student and his university more nearly approaches the pure contract model than that between the elementary school student and his school. To the extent that the relationship between student and administration is contractual, the reasonable expectations of the parties should govern that relationship.[30] It lies within the discretion of the school administration to largely control the extent of its contractual obligations through its drafting of school bulletins, handbooks, and other materials.

C. Scope of Local Government Discretion

1. Designation of Urban Development Areas.—In a case of potential importance, the court of appeals in *St. Joseph Medical Building Associates v. City of Fort Wayne*[31] considered the denial by the Fort

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[28] *Id.* at 612.

[29] *See* 435 U.S. at 85-86.

[30] *See, e.g.*, Giles v. Howard Univ., 428 F. Supp. 603, 605 (D.D.C. 1977). The court on appeal in *Neel* took note of the *Giles* case, but applied the *Giles* "reasonable expectations" test not to interpreting the bulletin or contract in question, but more generally to the practical position of the parties. While the plaintiff might not have reasonably expected dismissal under the contract, he should, in the court's estimation, have reasonably apprehended the likelihood of his dismissal on "equitable" grounds, his contract rights aside. 435 N.E.2d at 612-13. More restrictive, and more defensible, interpretations of the *Giles* "reasonable expectations" test may be found in Pride v. Howard Univ., 384 A.2d 31, 36 n.7 (D.C. 1978) and in Marquez v. University of Washington, 32 Wash. App. 302, 306, 648 P.2d 94, 97 (1982), *cert. denied* 103 S. Ct. 1253 (1983). *See also* Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981); Zumbrun v. University of S. Cal., 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972); Basch v. George Washington Univ., 370 A.2d 1364, 1366-68 (D.C. 1977); Maas v. Corporation of Gonzaga Univ., 27 Wash. App. 397, 400, 618 P.2d 106, 108 (1980).

[31] 434 N.E.2d 130 (Ind. Ct. App. 1982).

Wayne Common Council of appellant's application to have a certain tract of its real estate designated as an "urban development area."[32]

The point of such a designation would be to encourage the development of otherwise unpromising properties or areas through the provision of property tax relief benefits to private developers. In this instance, the Fort Wayne Common Council denied such designation, at least in part on the basis of its recently adopted policy that such applications should be filed prior to the issuance of the necessary building permits.[33]

On appeal, the court affirmed the trial court's grant of summary judgment against the developers based largely on the consideration that the statute governing these matters[34] was said to grant legislative discretion in this respect to the council.[35] As the statute in question uses the permissive "may," as opposed to mandatory language, the appellant's enforceable rights were minimal. The court concluded that "it does not matter whether the council relied upon one reason or many, or whether its reasons were laudable or not. Its exercise of its discretion is not a matter for substantive review."[36]

Judge Staton, in dissent, was troubled by what he viewed as a judicial conferral of essentially unreviewable discretion to local councils to grant or withhold substantial tax deductions.[37] Judge Staton instead emphasized language in the urban development area statute apparently mandating the council's adherence to specified decision procedures required under separate provisions of the Indiana Code.[38]

It is apparent, though, that the statutes and their successors alluded to by Judge Staton were less than artfully drafted if it was their purpose, and the legislature's intention, to effectively rein in the discretion of the common council. The statutes focus on the case of an affirmative finding of eligibility for redevelopment and the appropriate procedures for such a finding,[39] rather than the denial of eligibility as in the case at bar. Procedures for denying eligibility are neither explicitly nor implicitly provided. Despite references to exceptions, "supporting data," notice, and evidentiary hearings, the statutes would be seriously overread if found to effec-

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[32]*See* IND. CODE §§ 6-1.1-12.1-1 to -6 (1982).

[33]*See* 434 N.E.2d at 133 n.3.

[34]IND. CODE § 6-1.1-12.1-2 (1982). New statutory standards and terminology in this respect were imposed by the 1983 session of the general assembly. *See* IND. CODE § 6-1.1-12.1-2.5 (Supp. 1983).

[35]434 N.E.2d at 133.

[36]*Id.* at 134.

[37]*Id.* (Staton, J., dissenting).

[38]*See* IND. CODE §§ 18-7-7-12 to -14 (1976) (current version at IND. CODE §§ 36-7-14-15 to -17 (1982)). For a generally useful discussion in the redevelopment context of permissive as opposed to mandatory statutory language, the relationship between state and municipal authority, and the ascertainment of legislative intent, the reader's attention is directed to Campbell v. First Baptist Church, 298 N.C. 476, 259 S.E.2d 558 (1979).

[39]*See* IND. CODE §§ 18-7-7-12 to -14 (1976) (current version at IND. CODE §§ 36-7-14-15 to -17 (1982)).

tively limit the discretion of the local council to deny urban development area status, along with the consequent tax advantages.

2. Reimbursement of Hospital Expenses.—The relationship between state and local authority was also explored in *Welborn Memorial Baptist Hospital, Inc. v. County Department of Public Welfare.*[40] In this case, the county limited its reimbursement to the hospital for expenses incurred in treating emergency cases involving alcoholism, drug addiction, or emotional disorder to only the first five to seven days of hospitalization. The county prevailed at trial, and on appeal cited the press of fiscal necessity, as well as implicit authority granted by the legislature, in establishing this reimbursement limitation policy.[41]

The court of appeals reversed, holding that under the applicable prior statutes,[42] the county's obligation to reimburse the hospital for the costs of care of eligible indigents, once the determination of eligibility had been made, was not subject to restriction or limitation by county department of public welfare policy.[43]

While the statutes in question are not as explicit on this point as the hospital may have maintained, there is certainly prior dicta that the court could have cited, suggesting that the county's obligation to reimburse is not subject to limitation as a matter of county policy.[44] Despite the need to exert reasonable control over the otherwise largely unpredictable and uncontrollable potential liability of the county departments of public welfare in this respect, it is difficult to read the statutes as conferring upon local governmental units carte blanche to restrict their reimbursements on any reasonable basis they choose to adopt.

Actually, this issue would pose a closer question under the current statute.[45] This statute provides in part that "[a] resident of Indiana who meets the income and resource standards established by the state department of public welfare . . . is eligible for assistance to pay for *any part of the cost of* the treatment of a disease . . . ."[46] An opinion consistent

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[40]442 N.E.2d 372 (Ind. Ct. App. 1982). Other hospital assistance cases decided during the survey period are of diminished importance in light of statutory amendments. These cases would include DeKalb County Welfare Bd. v. Lower, 444 N.E.2d 884 (Ind. Ct. App. 1983) (*see* IND. CODE § 12-5-6-3 (1982)); Marion County Dep't of Pub. Welfare v. Methodist Hosp., 436 N.E.2d 123 (Ind. Ct. App. 1982) (*see* IND. CODE § 12-5-6-11 (1982)); County Dep't of Pub. Welfare v. Baker, 434 N.E.2d 958 (Ind. Ct. App. 1982) (*see* IND. CODE § 12-5-6-2 (1982); 470 IND. ADMIN. CODE § 11-1-1 (Supp. 1983)).

[41]442 N.E.2d at 373.

[42]IND. CODE §§ 12-5-1-1 to -17 (1976) (repealed 1981) (current version at IND. CODE §§ 12-5-6-1 to -11 (1982)).

[43]442 N.E.2d at 373.

[44]*See* Marion County Dep't of Pub. Welfare v. Methodist Hosp., 436 N.E.2d 123, 125-26 (Ind. Ct. App. 1982); *see also* Lutheran Hosp. v. Department of Pub. Welfare, 397 N.E.2d 638, 644 (Ind. Ct. App. 1979).

[45]IND. CODE §§ 12-5-6-1 to -11 (1982).

[46]*Id.* § 12-5-6-2(a) (1982) (emphasis added). Section 12-5-6-11, cited by the court in *Welborn*, 442 N.E.2d at 373 n.2, applies only to counties in which a health and hospital

with *Welborn* would in some instances treat the emphasized language as surplusage.

D. Rulemaking versus Adjudication

Indiana Air Pollution Control Board v. City of Richmond[47] presented a difficult problem of rulemaking versus adjudication and an associated problem of standing. In this case, on the basis of a hearing of somewhat indeterminate scope, the Indiana Air Pollution Control Board sought to promulgate a final ruling classifying Wayne Township of Wayne County as a "nonattainment" area with respect to permissible levels of airborne pollutants.[48] This determination, or rule, would have jeopardized, but not necessarily foreclosed, EPA approval of any new pollutant emission sources.[49]

The City of Richmond filed its complaint in an effort to prevent final promulgation of the "rule" in question. The board's motion to dismiss on the grounds that the City lacked standing to challenge the properly promulgated rule was denied, and the trial court ultimately held that the "nonattainment" classification of Wayne Township was actually a case of adjudication,[50] with the attendant strict notice and hearing procedure requirements imposed by the Indiana Administrative Adjudication Act.[51] On appeal, the court reversed.

The appellate court attempted to resolve this issue first by turning to the legislative definitions of the terms in question.[52] A definitional stand-off resulted, because while a rule does not include an adjudication, and an adjudication may involve an administrative hearing of "issues or cases applicable to particular parties,"[53] a rule may take the form of a "classification . . . having the effect of law."[54] The court then cited several federal authorities for the proposition that the non-attainment classifica-

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corporation exists, i.e., to Marion County only. *See* Marion County Dep't of Pub. Welfare v. Methodist Hosp., 436 N.E.2d 123, 124 (Ind. Ct. App. 1982).

[47]443 N.E.2d 1262 (Ind. Ct. App. 1983), *vacated*, No. 1283 S 472 (Ind. Dec. 30, 1983). A choice between rulemaking and adjudicative procedures on review by the state board of tax commissioners was authorized in Board of School Comm'rs v. Eakin, 444 N.E.2d 1197, 1202 (Ind. 1983).

[48]443 N.E.2d at 1263.

[49]*Id.* at 1264 n.5.

[50]*Id.* at 1263.

[51]*See* IND. CODE § 4-22-1-5 to -8 (1982). For a brief discussion of the difference between rulemaking and adjudication with respect to resolution of controverted issues, see Indiana Sugars, Inc. v. Interstate Commerce Comm'n, 694 F.2d 1098, 1100 (7th Cir. 1982).

[52]*See* IND. CODE § 4-22-2-3 (1982).

[53]*Id.* § 4-22-2-3(d).

[54]*Id.* § 4-22-2-3(b). This definitional statute was also referred to in Jones v. Blinziner, 536 F. Supp. 1181 (N.D. Ind. 1982). In this case, three Indiana Department of Public Welfare implementation letters were asserted by the plaintiff class to amount to rules under Indiana Code section 4-22-2-3(b), not properly subjected to notice and comment procedures under section 4-22-2-4. The court determined that the implementation letters in question were not

tion is a "rule" under the federal APA,[55] while acknowledging both the greater breadth of the federal definition and the absence in its authorities of any squarely posed issue of rulemaking versus adjudication.[56]

In light of the recognition that chasing some abstract distinction between rules and adjudications tends to degenerate into a rather scholastic endeavor, the courts should be encouraged to resolve issues of rulemaking versus adjudication on a pragmatic basis, with the practical costs and benefits of rulemaking as opposed to adjudication being determinative in close cases.

Professor Davis rightly observes that "the same function may be rulemaking for one purpose or in one context and adjudication for another purpose or in another context."[57] In deciding which approach is required in a close case, the court should weigh not only such rather academic considerations as the forward-looking or retrospective approach of the agency, but also more significant factors such as the number of parties practically concerned, the financial stakes involved, the likely benefits of

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required in order to interpret federal Public Law 97-35, subsequently codified at 42 U.S.C. § 602(a)(18), as the federal statute in question required no interpretation.

In light of the fact that the court in *Jones* devoted several columns to interpreting this statute in the course of rejecting the interpretation of the department of public welfare, and that the implementaion letters could also be construed as rules implementing the federal statute in question, there is certainly a case to be made for viewing such letters as rules under section 4-22-2-3(b). While the implementation letters might have been viewed not as rules, but as internal directives without the force of law, it is quite possible that the need for *Jones* might have been avoided entirely if the department's implementation letters had been treated as rules from the beginning and subjected to appropriate notice and comment procedures.

Jones is also noteworthy for requiring the state department of public welfare to include its calculations or other means to enable AFDC claimants to check the department's non-eligibility determinations, to notify claimants that Medicaid benefits will be terminated if the claimant is terminated from the AFDC program, and for determining that "state standard of need" in 42 U.S.C. § 602(a)(18) refers to total calculated needs, as opposed to adjusted or ratably reduced needs. *See* 6 Ind. Reg. 912, 913-14 (1983) (amending 470 IND. ADMIN. CODE § 10-5-1 (Supp. 1983)).

[55]5 U.S.C. § 551(4) (1976).

[56]443 N.E.2d at 1264 n.4. Not cited in the court's opinion is PPG Industries, Inc. v. Costle, 630 F.2d 462 (6th Cir. 1980) in which the court, though still in dicta, at least poses the alternatives more self-consciously. The court in Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973), was confronted with Anaconda's request for an adjudicatory hearing and injunction against the EPA's promulgation of a proposed rule governing sulfur dioxide emissions in a particular county in Montana. The district court in this cause had found an adjudicatory proceeding, with right of cross-examination, to be required in light of Anaconda's status as the sole target of the "rule" and the contested status of the relevant "adjudicative facts." Anaconda Co. v. Ruckelshaus, 352 F. Supp. 697 (D. Colo. 1972). On appeal, the Tenth Circuit reversed, finding no due process violation and no explicit requirement in the text of the Clean Air Act for hearings "on the record." 482 F.2d at 1306. For argument for a more liberal approach to imposing hearing requirements beyond those explicitly mandated by the statute, see Utah Int'l, Inc. v. Department of Interior, 553 F. Supp. 872, 881 (D. Utah 1982).

[57]2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7:2, at 5 (2d ed. 1979).

trial-type safeguards and procedures, the cost or delay entailed by adjudication, and the ability to effectively carry out agency policy if adjudication is to be required in this and like instances.

In *City of Richmond*, the concern over adjudication versus rulemaking was largely pointed toward resolving whether the City had standing to challenge the result of the administrative proceeding.[58] Because the doctrine of standing is recognized as largely prudential in any event,[59] there is a case to be made for determining the issue of the City's standing first and independently, and then proceeding, if necessary, to tackle the rulemaking versus adjudication issue on this basis.

E. Whole Record versus Favorable Evidence Review

This survey period produced the anticipated batch of largely reconcilable pronouncements on the propriety of whole record review as opposd to review based only on evidence favorable to the judgment.

There is a superficial consensus that on direct appellate court review of unemployment compensation determinations, favorable evidence review will be employed. This consensus was reinforced during the past survey period by *Skrundz v. Review Board of the Indiana Employment Security Division,*[60] *City of Indianapolis v. Review Board of the Indiana Employment Security Division,*[61] and *Ryba v. Review Board of the Indiana Employment Security Division.*[62]

Even among these cases, there is arguably enough variance in the precise language employed by the courts for the practitioner to appreciate one more than another, depending on the facts of her case. The court in *Skrundz*, for example, indicated that "findings of the Board are conclusive unless reasonable men, considering only evidence supporting those findings, would be bound to reach a different conclusion."[63] *City of Indianapolis* determined that "[w]e may only consider the evidence, together with its reasonable inferences, most favorable to the Review Board's decision."[64] *Ryba* stated that the court "looks only to the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom."[65]

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[58]*See* 443 N.E.2d at 1265 n.7.

[59]*See id.* at 1265; *see also* Minority Police Officers Ass'n v. South Bend, 555 F. Supp. 921, 929 (N.D. Ind. 1983); Jones v. Blinziner, 536 F. Supp. 1181, 1191 (N.D. Ind. 1982).

[60]444 N.E.2d 1217 (Ind. Ct. App. 1983).

[61]441 N.E.2d 36 (Ind. Ct. App. 1982).

[62]435 N.E.2d 78 (Ind. Ct. App. 1982).

[63]444 N.E.2d at 1220 (citing Marozsan v. Review Bd. of the Ind. Employment Sec. Div., 429 N.E.2d 986 (Ind. Ct. App. 1982); Jean v. Review Bd. of the Ind. Employment Sec. Div., 429 N.E.2d 4 (Ind. Ct. App. 1981)).

[64]441 N.E.2d at 37 (citing Skirvin v. Review Bd. of the Ind. Employment Sec. Div., 171 Ind. App. 139, 355 N.E.2d 425 (1976)).

[65]435 N.E.2d at 81.

It therefore remains for the practitioner to determine whether, in a given case, she can draw some effective distinction between evidence supporting a finding and evidence supporting a decision or judgment, whether inferences from the evidence of record are permissible grounds of judgment, and even whether there may be some difference between evidence favorable to a judgment and evidence "most favorable" to a judgment.

The practitioner who remains dissatisfied with the favorable evidence standard—and who may indeed be wondering why the courts of appeal systematically apply their most restrictive scope of review precisely where no intervening trial court decision has reviewed the administrative determination—may perhaps find a sympathetic hearing for an argument that, for example, a search for prejudice stemming from a procedural error makes no sense if such a search is confined to the evidence supporting the decision appealed from.[66]

Ultimately, what may be least satisfactory about a favorable evidence standard is not that, literally applied, it would virtually ensure affirmance, but that evidence favorable to a finding or judgment may be inseparable from, or susceptible of meaningful evaluation only in the context of, evidence not so favorable. Perhaps the standard persists because of its usefulness in steeling the court's resolve not to reweigh the evidence on appeal.[67]

In the matter of direct review by trial courts of determinations by the Indiana Public Service Commission, it is whole record review that is well entrenched, despite the absence of any explicit statutory mandate.[68] During this survey period, this consensus was reinforced by *AFL-CIO, Central Labor Council v. Southern Indiana Gas & Electric Co.*,[69] *Office of Utility Consumer Counselor v. Indiana Cities Water Corp.*,[70] and *State Employees' Appeals Commission v. Brown*.[71]

When a trial court reviews a determination by an Indiana zoning appeals board, the court of appeals has, in contrast, indicated that "the trial court reviews the evidence and inferences supporting the Board's

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[66]Prejudice hunts have been conducted most recently in the unemployment compensation cases of Berzins v. Review Bd. of the Ind. Employment Sec. Div., 439 N.E.2d 1121 (Ind. 1982); Flick v. Review Bd. of the Ind. Employment Sec. Div., 443 N.E.2d 84 (Ind. Ct. App. 1982); Ryba v. Review Bd. of the Ind. Employment Sec. Div., 435 N.E.2d 78 (Ind. Ct. App. 1982).

[67]Note that in each one of the principal cases, the court explicitly stated that it was not its function to weigh or reweigh the evidence. *See Skrundz*, 444 N.E.2d at 1220; *City of Indpls.*, 441 N.E.2d at 37; *Ryba*, 435 N.E.2d at 81.

[68]*See* State Employees' Appeals Comm'n v. Brown, 436 N.E.2d 321, 330 (Ind. Ct. App. 1982) (citing City of Evansville v. Southern Ind. Gas & Elec. Co., 167 Ind. App. 472, 339 N.E.2d 562 (1975); IND. CODE § 8-1-3-1 (1982)).

[69]443 N.E.2d 1243, 1247 (Ind. Ct. App. 1983).

[70]440 N.E.2d 14, 17 (Ind. Ct. App. 1982).

[71]436 N.E.2d 321, 330 (Ind. Ct. App. 1982).

decision."[72] This view was supported by *Martin County Nursing Center, Inc. v. Medco Centers, Inc.*,[73] which urged that "[a] trial court . . . must look at the evidence most favorable to the party who prevailed in the administrative proceeding,"[74] but which also observed that "the trial court must examine the whole record to determine whether an agency's decision lacks a reasonably sound basis of evidentiary support."[75] A certain flexibility in the scope of review in such instances thus remains.

A final development during this survey period on the scope of review, and certainly not the least significant, was the supreme court's declaration that in its appellate review of workers' compensation claim determinations by the Indiana Industrial Board, "we may consider only that evidence which tends to support its determination, *together with any uncontradicted adverse evidence.*"[76] Counsel may wish to argue that the supreme court has intended to establish a hybrid, middle-ground scope of review standard to be broadly applied, or, in contrast, that the supreme court has intended by implication to preclude the marshaling of inferences from evidence to support administrative determinations.

F. Specificity and Comprehensiveness of Required Findings of Fact and Statements of Reasons

During the past survey period, the Indiana courts of appeal extended and refined recent expositions of what may be required in the way of

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[72]Porter County Plan Comm'n v. Burns Harbor Estates, 437 N.E.2d 1053, 1055 (Ind. Ct. App. 1982).

[73]441 N.E.2d 964 (Ind. Ct. App. 1982).

[74]*Id.* at 968 (citing Indiana Civil Rights Comm'n v. Holman, 177 Ind. App. 648, 380 N.E.2d 1281 (1978)).

[75]441 N.E.2d at 967 (citing Natural Resources Comm'n v. Sullivan, 428 N.E.2d 92 (Ind. Ct. App. 1981)).

[76]Talas v. Correct Piping Co., 435 N.E.2d 22, 26 (Ind. 1982) (emphasis added).

For the period of this survey, the most interesting federal pronouncements on the scope and standard of appellate review of administrative decisions are found in Indiana Sugars, Inc. v. Interstate Commerce Comm'n, 694 F.2d 1098 (7th Cir. 1982). This case explores the arcane balancing tests imposed in the case of non-deregulated rail line abandonment proceedings, in which the public's interest is held as an article of faith to lie with non-abandonment of even unprofitable lines. *See id.* at 1100.

The court of appeals in *Indiana Sugars* began by essentially equating for their present purposes the "arbitrary and capricious" and substantial evidence tests. *Id.* In reversing the Commission's decision, the court then provided a graphic illustration of the thinness of the line between vigorous "arbitrary and capricious" review and reweighing the evidence on appeal. The court determined that the commission should have focused "greater attention upon the serious need for rail service by the shipper," and that the commission's decision was in other respects "extremely unpersuasive," "speculative," and unconvincing. *Id.* at 1101. Rightly or wrongly, in *Indiana Sugars* the Seventh Circuit essentially treated substantial evidence review as requiring substantial evidence persuasive to the court on review. *See id.*

administrative findings of fact[77] and statements of agency reasoning processes[78] in decisionmaking.

In *Charles W. Cole & Son, Inc. v. Indiana & Michigan Electric Co.*,[79] the court of appeals had indicated that once a certain threshold level of subject matter complexity and quantity of evidence is exceeded, intelligent appellate court review of administrative determinations requires not only statements of agency findings and conclusions, but also a statement of reasons for the agency's decision, a statement of the law thought applicable by the agency, relevant policy considerations, and "an explanation of the processes followed" by the agency in arriving at its decision.[80]

While a complex utility case might be the prototypical instance in which these requirements would be imposed, the court of appeals within the past survey period indicated that statements of reasons and of reasoning, or of the linkage between findings of basic and of ultimate fact, may be necessary outside the context of Public Service Commission decisions.[81] Counsel appealing administrative decisions of some complexity, therefore, may wish to examine not only the adequacy of the agency's findings of fact and conclusions of law, but also the degree to which the former is determinative of the latter.

A second theme of *Cole* taken up within the past survey period is that the "quantity and complexity of the evidence introduced" will, in part, determine "what degree of specificity is required of basic findings."[82] While this language from *Cole* was cited almost verbatim during the past survey period,[83] the implication is presumably not that relatively simple cases require only generalized, vague statements of basic facts found, and conversely, but that the degree of complexity of a given case should be

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[77]*See* Perez v. United States Steel Corp., 428 N.E.2d 212 (Ind. 1981); Talas v. Correct Piping Co., 426 N.E.2d 26 (Ind. 1981). It is unclear whether the court of appeals retains jurisdiction when it remands for further findings of fact. *Compare* Hidden Valley Lake Property Owners Ass'n v. HVL Utils., Inc., 441 N.E.2d 1388, 1389 (Ind. Ct. App. 1982) (jurisdiction should be retained to ensure compliance) *with* Pierce Governor Co. v. Review Bd. of the Ind. Employment Sec. Div., 435 N.E.2d 274, 276 (Ind. Ct. App. 1982) (jurisdiction not retained since clear directions were given to the agency).

[78]Charles W. Cole & Son, Inc. v. Indiana & Michigan Elec. Co., 426 N.E.2d 1349 (Ind. Ct. App. 1981).

[79]*Id.*

[80]*Id.* at 1353.

[81]*See* State Employees' Appeals Comm'n v. Brown, 436 N.E.2d 321, 331 (Ind. Ct. App. 1982) (citing the same underlying authority, V.I.P. Limousine Service, Inc. v. Herider-Sinders, Inc., 171 Ind. App. 109, 355 N.E.2d 441 (1976), as is relied upon in *Cole*, 426 N.E.2d at 1353-54)).

[82]426 N.E.2d at 1353.

[83]*See* Indiana Bell Tel. Co. v. T.A.S.I., Inc., 433 N.E.2d 1195, 1200 (Ind. Ct. App. 1982); *cf.* ATS Mobile Tel. Inc. v. Northwestern Bell Tel. Co., 330 N.W.2d 123, 129 (Neb. 1983) (sufficient evidence to deny mobile telephone service license); *see also* Mobilfone of Northeastern Pa., Inc. v. Pennsylvania Pub. Util. Comm'n, 40 Pa. Commw. 181, 397 A.2d 35 (1979) (sufficient evidence of need and capacity).

reflected in the lengthiness and sheer magnitude of the findings of basic fact.

The Indiana Supreme Court determined in *Perez v. United States Steel Corp.*[84] that the appellant from an administrative determination has "a legal right to know the evidentiary bases upon which the ultimate finding rests."[85] Two cases from the past survey period, however, indicate that while an appellant may have a right to a finding on every disputed material issue, or on every possible theory of recovery, the court on appeal may look to implications from the explicit findings, or to documents aside from those denominated as findings of fact, in order to supply the necessary findings.

In *Sloan v. Review Board of the Indiana Employment Security Division*,[86] the unemployment compensation claimant-appellant asserted on appeal, in essence, that a finding of a breach on the part of the claimant of a duty reasonably owed did not substitute for a finding of the reasonableness of the duty in question. The court of appeals disagreed, noting that the former implies, or necessarily entails, the latter.[87] While this is doubtless true as a matter of logic, it would seem that a requirement, within practical limits, of separate findings as to breach of duty and of the reasonableness of the duty in question would tend to better ensure their separate consideration by the agency. There may be more that is logically implied in an explicit finding than that which the fact finder has consciously weighed.

In the case of *Hardesty v. Bolerjack*,[88] the court of appeals upheld the trial court's affirmance of the decision of the county sheriff's merit board to discharge the officer-appellant. The court approved what amounted to the incorporation into the findings of various reasonably detailed written allegations lodged against the appellant.[89] In finding the existence of the violations as charged, the board was said to find, by

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[84]426 N.E.2d 29 (Ind. 1981).

[85]*Id.* at 32. *See* Office of Util. Consumer Counselor v. Indiana Cities Water Corp., 440 N.E.2d 14, 17 (Ind. Ct. App. 1982); Sosa v. Review Bd. of the Ind. Employment Sec. Div., 433 N.E.2d 29, 30 (Ind. Ct. App. 1982) ("[T]he findings of fact must exclude every possibility of recovery."); Jones v. Review Bd. of the Ind. Employment Sec. Div., 405 N.E.2d 601, 604-05 (Ind. Ct. App. 1980); Wolfe v. Review Bd. of the Ind. Employment Sec. Div., 176 Ind. App. 287, 291-92, 375 N.E.2d 652, 655-56 (1978).

[86]444 N.E.2d 862 (Ind. Ct. App. 1983).

[87]*Id.* at 865. Missing explicit findings were supplied by inference as well in City of Frankfort v. FERC, 678 F.2d 699, 707 (7th Cir. 1982). In contrast, no supportive inferences were drawn in Trigg v. Review Bd. of the Ind. Employment Sec. Div., 445 N.E.2d 1010 (Ind. Ct. App. 1983), in which the court on appeal reversed and remanded a denial of unemployment compensation benfits where there was no finding that the work rule allegedly violated by the claimant was uniformly enforced, even where the board might have found discharge for just cause under other statutory definitions of just cause. *See* IND. CODE § 22-4-15-1(e) (1982).

[88]440 N.E.2d 490 (Ind. Ct. App. 1982).

[89]*Id.* at 494.

necessary implication, the required facts constituting or underlying each alleged violation.[90] Intelligent review on appeal was therefore said to be possible.

This procedure provoked a dissent from Judge Staton,[91] who argued that a reiteration of even detailed charges was inconsistent with the mandate of *Perez* and could not reveal the board's method or reasons for its resolution "of the relevant sub-issues and factual disputes."[92]

It is possible for a charging document to be so elaborate, specific, and detailed in its pleading and analysis of the evidence to be adduced, that if it were conscientiously incorporated into a set of findings of fact and conclusions of law, intelligent appellate review would be possible. To encourage the unnecessary extension of this procedure, though, is to encourage impressionistic administrative decisionmaking and ineffective judicial review.

G. The Liberal Construction of Remedial Statutes

It is well established in Indiana that social legislation such as the Employment Security Act should be construed liberally in favor of the claimant in order to accomplish the legislation's social purposes.[93] The actual weight attributed to this policy varies according to context, and several cases decided within the past survey period explored the force and limitations of this policy.

In *City of Indianapolis v. Review Board of the Indiana Employment Security Division*,[94] the policy of liberal interpretation of the Employment Security Act in the claimant's favor came into play in the appellate court's determination that the claimant was entitled to unemployment compensation benefits, despite his resignation, by virtue of the medically substantiated health-related nature of his departure.[95]

The same policy provided guidance to the court on appeal in *Potts v. Review Board of the Indiana Employment Security Division*.[96] In *Potts*, the court determined that the board had acted contrary to law in allocating

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[90] *Id.* at 493-94. The court noted that because the Industrial Board and the Employment Securities Division do not use charging documents as a Merit Board does, the incorporation-by-reference procedure approved here would not be possible in workers' compensation or unemployment cases. *Id.* at 494.

[91] *Id.* at 494-95 (Staton, J., dissenting).

[92] *Id.* at 495 (quoting Perez v. United States Steel Corp., 426 N.E.2d 29, 33 (Ind. 1982)).

[93] *See, e.g.*, City of Indianapolis v. Review Bd. of the Ind. Employment Sec. Div., 441 N.E.2d 36, 39 (Ind. Ct. App. 1982); Potts v. Review Bd. of the Ind. Employment Sec. Div., 438 N.E.2d 1012, 1016 (Ind. Ct. App. 1982); Bowen v. Review Bd. of the Ind. Employment Sec. Div., 173 Ind. App. 166, 168, 362 N.E.2d 1178, 1179 (1977); Hacker v. Review Bd. of the Ind. Employment Sec. Div., 149 Ind. App. 223, 231, 271 N.E.2d 191, 195 (1971); Schakel v. Review Bd. of the Ind. Employment Sec. Div., 142 Ind. App. 475, 478, 235 N.E.2d 497, 500 (1968).

[94] 441 N.E.2d 36 (Ind. Ct. App. 1982).

[95] *Id.* at 39.

[96] 438 N.E.2d 1012 (Ind. Ct. App. 1982).

vacation pay wage credits to the week paid rather than the week the vacation occurred, thus leaving the claimants without sufficient wage earnings to qualify for the quarter in which their vacation occurred.[97]

The policy of liberal construction, however, was of little efficacy in *Smith v. Review Board of the Indiana Employment Security Division.*[98] The claimant's petition for judicial review had been dismissed as untimely in view of her failure to file notice of her intention to appeal within fifteen days of the mailing of the adverse decision. What lent special interest to this appeal were the circumstances of a week's delay, due to the logistics of mail delivery, in the claimant's receipt of the board's decision, and the claimant's mailing of her notice of appeal by certified mail, return receipt requested, on the last day of the statutory appeal period.[99] Justice Hunter's reasonable recommendation that this unnecessary trap for the unwary be statutorily overturned[100] was not acted upon by the past session of the Indiana legislature.

The liberal construction policy was also without effect, though apparently applicable, in *Frost v. Review Board of the Indiana Employment Security Division.*[101] *Frost* centered on the proper interpretation of an Indiana statute[102] relevant to the issue of the state's right to recoup certain unemployment compensation benefits paid to the recipient following her discharge from employment for which the recipient later received an arbitration award.

On appeal, the court upheld the review board's determination "that the retroactive wages paid pursuant to an order of the grievance arbitrator were the legal equivalent of an award of back pay by the National Labor Relations Board."[103] The difficulty lay in determining how much weight to allocate, respectively, to the statute's explicit reference to only NLRB back pay awards, and to the prefatory language of the statute, which makes the categories of income sources that follow, including NLRB awards, not necessarily exclusive and exhaustive.[104]

In *Frost*, the policy of liberal construction in favor of the claimant (or more specifically in this case, an awardee), was trumped by the countervailing policy, bearing the presumed authority of the legislature, of preventing the retention of windfall benefits.[105]

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[97]*Id.* at 1016.

[98]439 N.E.2d 1334 (Ind. 1982) (Hunter, J., dissenting to denial of transfer).

[99]*Id.* at 1334. *See* IND. CODE § 22-4-17-11 (1982); Smith v. Review Board of Ind. Emp. Sec. Div., 159 Ind. App. 282, 306 N.E.2d 140 (1974) (construing IND. CODE § 22-4-17-11 (1971) to require that notice of appeal be in the actual physical custody of the review board within the statutory fifteen day period).

[100]*See* 439 N.E.2d at 1338.

[101]432 N.E.2d 459 (Ind. Ct. App. 1982).

[102]IND. CODE § 22-4-5-1 (1982).

[103]432 N.E.2d at 460.

[104]IND. CODE § 22-4-5-1 (1982).

[105]432 N.E.2d at 461. Among the federal cases decided during this survey period, a similar conflict between a liberal construction and the avoidance of arguable windfalls was

The general inference to be drawn from these cases would seem to be that in instances in which a flat denial of benefits impends, a careful statement by the claimant of the applicability and judicial pedigree of the policy of liberal construction may help tip the balance where case authority is mixed or absent.

H. Standing

The court of appeals in *Stokes v. City of Mishawaka*[106] was confronted with the interesting issue of whether nonresidents of a city who own property contiguous with, but outside, city limits have standing to challenge the city's zoning ordinance on the grounds that the ordinance may adversely affect their property values. Certainly the standing requisites of sufficient individualized stake in the outcome and concrete adverseness were present.[107]

While no Indiana cases precisely on point were detected, the Missouri case of *Allen v. Coffel*[108] was favorably cited for the availability of standing in such circumstances.[109] Actually, standing under the circumstances in *Stokes* has been granted with some regularity.[110]

What is less clear is the appropriate scope of this rule of standing. As long as the requirement of contiguous land ownership is maintained,

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resolved in favor of the claimant in Jackson v. Schweiker, 683 F.2d 1076 (7th Cir. 1982) (refusing to impute to supplemental security income recipient, as unearned income, the excess of fair rental market value over actual rent paid by the recipient, where most of such excess was not "actually available" to recipient for conversion to the satisfaction of basic needs).

The court in *Jackson* distinguished four court of appeals cases dealing with the same regulations, and would have had a difficult time in distinguishing Nunemaker v. Secretary of HEW, 679 F.2d 328 (3d Cir. 1982) (decided six weeks before *Jackson*). *But see* Young v. Schweiker, 680 F.2d 680, 682-83 (Farris, J., concurring) (noting the typical non-convertibility of "extra" rental housing into food or cash in an equivalent sum); Summy v. Schweiker, 688 F.2d 1233, 1235 (9th Cir. 1982) (favorably citing *Jackson*). *See generally* Annot., 69 A.L.R. Fed. 230 (1983). For a case under the amended current regulations, see Bormey v. Schweiker, 695 F.2d 164 (5th Cir. 1983).

[106] 441 N.E.2d 24 (Ind. Ct. App. 1982).

[107] *See id.* at 24-25. Plaintiffs brought their action under the Uniform Declaratory Judgment Act, IND. CODE §§ 34-4-10-1 to -16 (1982). The issue in this case was whether the plaintiffs are "[persons] . . . whose rights, status or other legal relations are affected by . . . municipal ordinances." 441 N.E.2d at 26 (quoting IND. CODE § 34-4-10-2 (1982)).

[108] 488 S.W.2d 671 (Mo. Ct. App. 1972).

[109] *See* 441 N.E.2d at 27-28.

[110] *See, e.g.*, Schweig v. City of St. Louis, 569 S.W.2d 215, 220-21 (Mo. Ct. App. 1978) (citing Dahman v. City of Ballwin, 483 S.W.2d 605, 609 (Mo. Ct. App. 1972) (dicta)); Orange Fibre Mills, Inc. v. City of Middletown, 94 Misc. 2d 233, 404 N.Y.S.2d 296 (Sup. Ct. 1978). A number of the directly applicable cases are cited in Annot., 69 A.L.R.3d 805 (1976). *See also* 4 R. ANDERSON, AMERICAN LAW OF ZONING § 28.03, at 358 (2d ed. 1977).

A standing problem of a different sort was addressed in County Dep't of Pub. Welfare v. Stanton, 545 F. Supp. 239 (N.D. Ind. 1982). In this case, the Lake County Department of Public Welfare sought payments from and a prospective injunction against the Indiana

imprudent overextension of standing would seem to be avoided. It seems apparent, though, that a municipality's zoning determinations can have readily demonstrable and substantial effects on the value of remote property. In a case in which a downwind property owner seeks to object to a city's zoning ordinance, conflicts arise among values such as municipal autonomy and self-determination, the ability of a municipality to effectuate its own policies, and the broader public interest, including an interest in discouraging local units of government from simply externalizing certain disamenitites without regard to the costs involuntarily imposed.

I. Utility Rates and Appropriate Notice

The case of *AFL-CIO, Central Labor Council v. Southern Indiana Gas & Electric Co.*[111] featured an appeal of a Public Service Commission order granting an electric utility rate increase. Issues of both substance and procedure were decided on appeal.

On the substantive side, the court determined that the PSC did not err in including, for rate-making purposes, certain power plant and pollution control devices as "used and useful" property even though the devices were not actually utilized, because of testing requirements, for the entire period of the selected test year.[112]

For this point, the court referred generally to the major Indiana utility rate case, *City of Evansville v. Southern Indiana Gas & Electric Co.*[113] While the jurisdictions nationally vary significantly in their willingness to include such items as property held for future use or construction work in progress in the rate base, there is ample authority for the position adopted by the court on appeal.[114] This approach would seem to offer the best accommodation of the widely accepted principle that current

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Department of Public Welfare respecting unreimbursed county department administrative expenses. The plaintiff raised challenges on supremacy clause and equal protection grounds to the applicable reimbursement statute. *See* IND. CODE § 12-1-18-2 (1982).

The court, in ruling on the defendant's motion to dismiss, noted that "[c]ounty departments of public welfare have a unique and frequently confusing position in Indiana." 545 F. Supp. at 243. The court determined that while the plaintiff county department might be viewed either as a political subdivision of the state, or as a subordinate local agency, under neither characterization did it have standing to challenge the statute in question. *Id.* at 243, 245. This result followed from holding the county department to be a creature of the state, and under the authority and control of the state department of public welfare. *Id.* at 245. *See, e.g.*, Smythe v. Lavine, 76 Misc. 2d 751, 351 N.Y.S.2d 568 (Sup. Ct. 1974).

[111]443 N.E.2d 1243 (Ind. Ct. App. 1983).

[112]*Id.* at 1247-48.

[113]443 N.E.2d at 1247 (citing City of Evansville v. Southern Ind. Gas & Elec. Co., 167 Ind. App. 472, 339 N.E.2d 562 (1975)).

[114]In Appalachian Power Co., 22 Pub. Util. Rep. 4th 548 (1977), the Virginia State Corporation Commission found that

> [i]nstallation of pollution control equipment at the Amos Unit No. 2 and Kanawha River generating plants imposes a considerable financial burden on company while simultaneously reducing plant productivity. In our opinion, pollution control equip-

ratepayers should bear the costs allocable to the provision of the benefits in service they currently enjoy. This principle would also, in consistency, require the *exclusion* from the rate base of property recently retired from service.

On the procedural side, the court agreed that noncompliance by the utility with the strict terms of the applicable public notice requirements[115] authorizes, but does not require, the commission to dismiss or continue the hearings in question.[116] In a related matter, the court determined that the commission did not abuse its discretion in denying the petition of the City of Evansville, filed on the last day of the hearing, to intervene in the proceedings.[117] Evansville explained its apparent laxity on the grounds that while it had early notice of the utility's petition, the proposed rate schedule sought no rate increase for street lighting, and that such an increase materialized as an issue only at a late stage in the proceedings.[118]

On appeal, the court observed that "our cases have long held that a party given notice of a ratemaking proceeding is bound to know that its rates may be affected by the Commission's final order whether or not any changes in its rates are initially proposed or petitioned for."[119] Potential intervenors may therefore wish to avoid unfortunate outcomes by intervening in a timely fashion in any case holding any prospect of an adverse rate impact, but limiting their expenditures in connection with the hearing until their interests become jeopardized in some concrete fashion.

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ment installed by electric utilities during a test period should be treated as "in service" plant for the entire test period . . . .

Id. at 552.

In a Nevada commission case, Trans-Service Water Serv., Inc., 37 Pub. Util. Rep. 4th 536 (1980), a filtration system was included in the rate base where it had been out of service for an extended period of time, but was due back in actual operation shortly. Pennsylvania has determined that non-operational property may be considered "used and useful" for inclusion in the utility's jurisdictional rate base where the return to service of the property in quesion is imminent and certain. Pennsylvania Pub. Util. Comm'n v. Metropolitan Edison Co., 37 Pub. Util. Rep. 4th 77 (1980). In certain instances, adjustments have been ordered to reflect significant additions to a plant coming on line after the test year in question. *See, e.g.*, Edgartown Water Co., 41 Pub. Util. Rep. 4th 106 (1980).

The commissions involved adopted less liberal approaches under somewhat different circumstances in Carolina Power and Light Co., 41 Pub. Util. Rep. 4th 315 (1981) and Cleveland Elec. Illum. Co., 38 Pub. Util. Rep. 4th 494 (1980).

[115]Specifically, in this case, 170 IND. ADMIN. CODE § 4-1-18(c) (1979).

[116]443 N.E.2d at 1245.

[117]*Id.* at 1248 (citing 170 IND. ADMIN. CODE § 1-1-9(b) (1979)).

[118]443 N.E.2d at 1248.

[119]*Id.* (citing Indiana authority). *See also* Hawaiian Elec. Co., 45 Hawaii 260, 535 P.2d 1102 (1975); Bethlehem Steel Corp v. NIPSCO, 397 N.E.2d 623 (Ind. Ct. App. 1979); Gary Transit, Inc. v. Indiana Pub. Serv. Comm'n., 161 Ind. App. 7, 314 N.E.2d 88 (1974); Checkasha Cotton Oil Co. v. Corporation Comm'n, 562 P.2d 507 (Okla.), *cert. denied*, 434 U.S. 829 (1977).

J. Utility Rates and Consolidated Tax Returns

During the past survey period, the court of appeals again addressed the difficult question of how a consolidated income tax return, filed by a utility's parent company, should be treated when the utility subsequently requests a rate increase.

Specifically, in *Office of Utility Consumer Counselor v. Indiana Cities Water Corp.*,[120] the court on appeal was confronted by a situation in which the utility paid to its parent company the amount for which the utility would have been liable in income taxes had it filed a tax return on a separate entity basis. As it developed, the holding company that owned the parent company filed a consolidated return under which the holding company paid no tax because of loss carry forwards attributable to non-jurisdictional subsidiaries. On appeal, the court determined the utility's tax liability expense to be merely hypothetical, and the transfer from utility to parent to be an expense not lawfully to be borne by the utility's ratepayers.[121]

In reversing on this issue, the court reasoned that

> [t]he Commission's own findings state that the result of the participation of [the utility] in a consolidated tax return is that no income taxes are paid to the U.S. government. Given that finding, we fail to understand how [the utility] can be said to have an *actual* income tax expense.[122]

The dictates of equity in such instances are often not unequivocal. There is a basis in equity for suggesting that consistency would require ratepayers to bear an actual income tax expenditure paid on a separate entity basis, even if the utility might have paid less had its parent filed a consolidated return.[123] It should be recognized as well that the benefits accruing to jurisdictional customers under the *Indiana Cities* rule may bear no relation to the share of the costs borne by such customers in generating the losses carried forward. Ultimately, should the courts recognize the consolidated filing status of utility subsidiaries only when it is most tempting as a practical matter to do so, a conflict with the regulatory objective

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[120]440 N.E.2d 14 (Ind. Ct. App. 1982).

[121]*Id.* at 15.

[122]*Id.* at 17. *See* City of Muncie v. Public Serv. Comm'n., 378 N.E.2d 896, 898-99 (Ind. Ct. App. 1978); United Tel. Co. v. Public Serv. Comm'n, 402 N.E.2d 1013, 1015-16 (Ind. Ct. App.), *reh'g denied in part*, 406 N.E.2d 1268 (Ind. Ct. App. 1980). A fuller statement of the commision's order in this cause is found in Indiana Cities Water Corp., 45 Pub. Util. Rep. 4th 55 (1981). The leading authority cited by the commission is Muncie Water Works Co., 44 Pub. Util. Rep. 4th 331 (1981).

[123]*See generally* Public Serv. Comm'n v. Indiana Bell Tel. Co., 235 Ind. 1, 28-29, 130 N.E.2d 467, 480 (1955).

of providing investors with a competitive compensatory return would be expected.[124]

K. Primary Jurisdiction and Interstate Commerce

In a careful opinion, the Seventh Circuit during the past survey period, in *Hansen v. Norfolk & Western Railway Co.*,[125] invoked the doctrine of primary jurisdiction,[126] but stayed rather than dismissed the plaintiff's complaint in order to preclude statute of limitations problems.

The plaintiff's complaint in *Hansen* alleged Interstate Commerce Act as well as antitrust violations. The plaintiff claimed that the defendant railroad had offered improper rebates, preferences, and kickbacks to its customers and had conspired with the other defendants to avoid certain tariffs.[127] On appeal, the court determined that the plaintiff's claims were appropriate for a judicial referral to the Interstate Commerce Commission of issues within its scope of particular expertise and of issues which might impinge on the Commission's uniform and consistent scheme of regulation.[128]

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[124]*See* 440 N.E.2d at 15 (citing City of Evansville v. Southern Ind. Gas & Elec. Co., 167 Ind. App. 472, 339 N.E.2d 562, 568 (1975)).

During the past survey period, the Seventh Circuit issued several substantive holdings of importance specifically affecting Indiana public utilities. In Indianapolis Power & Light Co. v. Interstate Commerce Comm'n, 687 F.2d 1098 (7th Cir. 1982), the court on appeal indicated the circumstances under which tariff rates respecting intrastate rail shipment of bituminous coal fell within the jurisdiction of the Interstate Commerce Commission and the Indiana Public Service Commission, respectively.

In Public Serv. Co. v. United States Envtl. Protection Agency, 682 F.2d 626 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 762-63 (1983), the Seventh Circuit held that the EPA was statutorily empowered to partially approve Indiana's adopted revisions of its state implementation plan regarding ambient air quality, despite PSI's contentions that this result would allow the EPA to "approve something never actually adopted by the state." *Id.* at 632.

Finally, in City of Frankfort v. Federal Energy Regulatory Comm'n, 678 F.2d 699 (7th Cir. 1982), the Seventh Circuit held that Public Service Company of Indiana had discharged the burden, squarely placed on it by the court, to factually justify substantial disparities in rates charged to different municipal customers of the same class. Such justification in this case depended on PSI's discontinuance of fixed rate contracts, but the court indicated more broadly that a utility charged with price discrimination may defend on grounds other than cost of service differentials. *Id.* at 706. As to the burden of proof issue, compare *City of Frankfort* with Park Towne v. Pennsylvania Pub. Util. Comm'n, 61 Pa. Commw. 285, 433 A.2d 610, 614 (1981) (placing burden of showing discrimination on the challenging party).

[125]689 F.2d 707 (7th Cir. 1982).

[126]The court explained the doctrine of primary jurisdiction as applicable "when a claim is cognizable in a court but adjudication of the claim 'requires the resolution of issues which, under a regulatory scheme have been placed within the special competence of an administrative body.' " *Id.* at 710 (quoting United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956)). The appropriate judicial response to such a case is to hold its action until the administrative body has expressed itself on the matter. 689 F.2d at 710.

[127]689 F.2d at 709.

[128]*Id.* at 710-11.

The plaintiff's assertion of a statute-based, unqualified right to select its forum was dealt with by reference to the landmark Supreme Court case of *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*[129] Once the propriety of invoking the primary jurisdiction doctrine was established by the court,[130] the court of appeals was faced with the issue of whether to affirm Judge Holder's dismissal of the complaint without prejudice, or instead, to order a stay pending ICC action.

The court on appeal opted for the latter course even though the alternative of a stay had never been raised by the plaintiff in the court below, but had been raised in the defendant's district court brief.[131] Parties in the position of the plaintiff are urged to raise the possibility of a stay in the alternative, to avoid limitations of action problems, even though this procedure is referred to by the Seventh Circuit merely as "better practice."[132]

L. Statutory Utility Reforms

The 1983 session of the General Assembly overwhelmingly passed a comprehensive utility reform package as House Bill 1712.[133]

Among the more significant features of the Act are sections establishing a low income household energy cost assistance program,[134] increasing the number of public service commissioners from three to five,[135] substantially increasing the annual salaries of the commission chairperson and members,[136] requiring that a commissioner rather than an administrative law judge conduct rate hearings in which an increase of more than twenty million dollars is sought,[137] upgrading the commission's professional staffing authority and authority to acquire necessary technical equipment,[138] prohibiting ex parte contacts in connection with evidentiary

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[129]*Id.* at 710 (citing Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)). *See also* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22:3 (2d ed. 1983).

[130]The Eighth Circuit has recently stated that "the ICC has primary jurisdiction over any matter that 'raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the Interstate Commerce] Act.' " Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R., 685 F.2d 255, 259 (8th cir. 1982) (quoting United States v. Western Pac. R.R., 352 U.S. 59, 65 (1956)). *See also* Burlington N., Inc. v. United States, 103 S. Ct. 514 (1982); Bartlett & Co. Grain v. Union Pac. R.R., 528 F. Supp. 1234 (W.D. Mo. 1981). *But see* Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086 (5th Cir. 1973) (inappropriateness of invoking primary jurisdiction doctrine in light of obvious violations by freight forwarders, absence of threat to regulatory uniformity, and need for speedy enforcement determination).

[131]689 F.2d at 714 n.10.

[132]*Id.*

[133]*See* Act of Apr. 22, 1983, Pub. L. No. 43-1983, §§ 1-14, 1983 Ind. Acts 407, 407-29.

[134]IND. CODE §§ 4-27-5-1 to -13 (Supp. 1983).

[135]*Id.* § 8-1-1-2(a) (effective January 1, 1984).

[136]*Id.* § 8-1-1-3(b).

[137]*Id.* § 8-1-1-3(e).

[138]*Id.* § 8-1-1-3(h).

proceedings,[139] providing for the appointment of a deputy consumer counselor for Washington affairs,[140] and establishing a committee for the purpose of nominating candidates for vacant public service commission positions to the governor.[141]

The Act also bars, with certain specified exceptions, general rate increase requests within fifteen months of the utility's previous such filing,[142] and establishes a gas cost pass-through provision.[143] Utilities providing electric or gas service are prohibited from terminating service between December 1 and March 15 to any person who is eligible and has applied for home energy assistance under newly added Indiana Code sections 4-27-5-1 to -13.[144] Subject to this provision, utilities must in most cases provide fourteen days notice of the disconnection of heating or energy service because of failure to pay bills, if the disconnection would fall within the period between November 1 and the following April 1.[145]

A final significant change effected by the Act requires public utilities to obtain a certificate of public convenience and necessity before beginning any construction of an electric generating facility, requires the commission to develop and appropriately utilize an analysis of long-term electric generating facility expansion needs, and makes other provisions with respect to powerplant construction.[146]

Noteworthy by its absence from this reform package is any reference to the widely-debated issue of recovery of the costs of construction work in progress.

M. Textbook Assistance and Statutory Construction

Under what circumstances does the amendment of a federal statute, which has been incorporated by reference into a state statute, work a modification of the latter? In *Doe v. Indiana State Board of Education*,[147] the Indiana textbook assistance standard statutes[148] were to be keyed to food stamp program eligibility standards. The issue was whether the food stamp eligibility formula operative at the time of enactment of the Indiana statute, or as subsequently modified by Congress, would control eligibility for the state textbook assistance program.[149]

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[139] *Id.* § 8-1-1-5(e).

[140] *Id.* § 8-1-1.1-9.

[141] *Id.* §§ 8-1-1.5-1 to -10.

[142] *Id.* § 8-1-2-42(a).

[143] *Id.* § 8-1-2-42(g).

[144] *Id.* § 8-1-2-121.

[145] *Id.* § 8-1-2-122. The general involuntary disconnection notice period of seven days is established by 170 IND. ADMIN. CODE § 4-1-16(E)(1) (1979). The notice requirements of the new section 122 generally track those of 170 IND. ADMIN. CODE § 4-1-16(E)(2) (1979).

[146] IND. CODE §§ 8-1-8.5-1 to -7 (Supp. 1983).

[147] 550 F. Supp. 1204 (N.D. Ind. 1982).

[148] *See* IND. CODE §§ 20-8.1-9-1, -2 (1982) (amended 1983).

[149] 550 F. Supp. at 1205 (citing 7 U.S.C. § 2014 before and after the 1981 eligibility amendment).

The district court in this instance rejected the board of education's argument that the Indiana legislature had incorporated by reference only discrete provisions from the federal statute, as opposed to "the general law."[150] The court therefore rejected the inference that subsequent food stamp eligibility amendments were not to be considered incorporated. The court's reasoning rested in part on Indiana statutory references to federal food stamp eligibility standards in effect in any given year.[151]

The specific force of the court's decision in this case persisted until precisely April 4, 1983, on which date new amendments to the Indiana statutory standards for assistance to schoolchildren took effect.[152] The new standards attempt to pin assistance eligibility to a fixed sum income cutoff[153] or official "poverty line" cutoff,[154] as compared to the "maximum monthly or annual gross income available to a family."[155] The statute makes no provision for a method of calculating "gross income available to a family."[156]

N. Blind Assistance and Federal Supremacy

In *Kellum v. Stanton*,[157] the court granted summary judgment in favor of a class of Indiana blind persons less than eighteen years old on their claim that the operation of the Indiana Blind Assistance Statute[158] contravened the applicable federal social security statutes[159] and regulations[160] by imposing an impermissible eighteen year age eligibility requirement on potential recipients.[161]

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[150]550 F. Supp. at 1205 (quoting Meunich v. United States, 410 F. Supp. 944, 946 (N.D. Ind. 1976)).

[151]550 F. Supp. at 1205-06; *see* IND. CODE § 20-8.1-9-2 (1982) (amended 1983).

[152]Act of Apr. 4, 1983, Pub. L. No. 214-1983, §§ 1-5, 1983 Ind. Acts 1351, 1351-54 (codified at IND. CODE §§ 20-8.1-9-1 to -11 (Supp. 1983)).

[153]IND. CODE § 20-8.1-9-2(a), (b) (Supp. 1983).

[154]*Id.* § 2(c), (d).

[155]*Id.* § 1(a).

[156]The vagueness of this standard may in a given case be remedied ad hoc through the exercise of the township trustee's discretion to pay for an ineligible child's school books, supplies, or other fees "[u]nder extraordinary circumstances." *Id.* § 11.

It should be noted that a challenge to an Indiana public school textbook rental policy, based not on equal protection, but on the "common schools" provision of the Indiana constitution, was rejected in Chandler v. South Bend Community Schools Corp., 160 Ind. App. 192, 312 N.E.2d 915 (1974) (strictly construing the requirement in IND. CONST., art. VIII, § 1 of "tuition" without charge). For a collection of the disparate authorities in this general area, see Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 611 n.1, 264 S.E.2d 106, 109 n.1 (1980). *See also* Johnson v. New York State Educ. Dep't, 449 F.2d 871 (2d Cir. 1971), *vacated and remanded*, 409 U.S. 75, 76-77 (1972) (Marshall, J., concurring).

[157]537 F. Supp 1237 (N.D. Ind. 1982).

[158]*See* IND. CODE § 12-1-6-1 to -20 (1982).

[159]*See* 42 U.S.C. §§ 1201, 1206 (Supp. IV 1980).

[160]45 C.F.R. § 233.30(b)(1)(iii) (1980) (presently codified at 45 C.F.R. § 233.39(b)(1)(iii) (1982)).

[161]537 F. Supp. at 1241.

The key to the court's supremacy clause analysis was a line of Supreme Court cases to the effect that " 'at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.' "[162] Finding an absence of such authorization with respect to blind persons under the age of eighteen, state coverage of such persons was determined to be mandatory.

Perhaps the fullest recent Seventh Circuit supremacy clause analysis is found in *Raskin v. Moran*,[163] where the court, using federal preemption and supremacy as interchangeable and essentially synonymous terms,[164] emphasized the validity of state law unless "the clear and manifest purpose of Congress" runs to the contrary.[165] But the court recognized the necessity to void state laws that are not merely inconsistent with, but operate as an "obstacle" to, congressional policy.[166] The court in *Raskin* refused to balance even an important and good faith independent state policy against an arguably less than crucial federal social security policy, and struck down the state regulation in question.[167]

It would thus appear that there is room for proponents of the validity of state statutes to argue for "mere" inconsistency of the state and federal statutes, and for an analysis under which congressional intent to preempt the area, or to trump inconsistent state law, must affirmatively appear.

O. Social Security and Equitable Estoppel

The District Court for the Northern District of Indiana ventured into poorly charted water in *McDonald v. Schweiker*.[168] The claimant in this case was deprived of the opportunity to receive retirement insurance benefits from her sixty-second birthday in November of 1978 by her reliance on a misstatement of fact by a representative of the Social Security Administration (SSA) to the effect that she needed more calendar quarters of work in order to qualify. The SSA agreed to pay the claimant benefits from the time she actually applied for them in August, 1979, when the prior misstatement was discovered, but denied her claim to payments dating back to the time of her actual eligibility.

The court granted the claimant's motion for summary judgment and found the SSA estopped from relying on the absence of the required writ-

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[162] *Id.* at 1239 (quoting Townsend v. Swank, 404 U.S. 282, 286 (1971)).
[163] 684 F.2d 472 (7th Cir. 1982).
[164] *See id.* at 474-75.
[165] *Id.* at 475 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
[166] 684 F.2d at 475 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[167] 684 F.2d at 479.
[168] 537 F. Supp. 47 (N.D. Ind. 1981).

ten benefit application in denying benefits as of November, 1978. On the analysis in *McDonald*, once the elements of traditional estoppel are established, the question becomes whether "affirmative misconduct" on the part of the government is also present.[169] The court stated that "a finding of affirmative misconduct and the applicability of estoppel can only be determined through careful examination of the mistake made by the government, the claimant's ability to prove that the government made a mistake, and whether the claimant could have identified the mistake and avoided its consequences."[170] Having found that the government's mistake was one of fact rather than law; that the incident of the mistake, if not the precise error, was well-documented; and that the claimant could not have identified the mistake and avoided its consequences, the court held the government estopped and awarded the claimant back-payment.[171]

Easily the most problematic element of the *McDonald* test of affirmative government misconduct is the question of whether the government's error is properly characterized as one of fact or one of law. The logic of attaching significance to this distinction derives from the duty on the part of private persons to be independently familiar with the applicable law, undercutting the estoppel element of reasonable reliance. While the result, and apparently the test applied, in *McDonald* may be satisfying, the value of *McDonald's* contribution to clarifying the law of government estoppel may be modest.

In any given instance, it is notoriously difficult to characterize an erroneous statement on the part of the government as one of law or of fact. It becomes tempting to view such representations as mixed statements of law and fact. Are claimants to be charged with the knowledge of the truth or falsity of mixed legal-factual representations?

It seems clear as well that borderline cases are not the only troublesome ones. Some factual representations, based on erroneous records exclusively within the government's possession, may be so patently questionable as to put a prospective claimant on inquiry notice.

But it seems equally reasonable, if less well-grounded in the case law, to wonder whether holding all claimants, regardless of their sophistication, or the sums involved, to a knowledge of the law in all its complexity genuinely serves the public interest. Admittedly, this policy frees the SSA to make useful informal representations as to matters of law without fear of adverse fiscal consequences.

It is questionable, however, whether a rational disappointed applicant can be expected to seek out and pay for expensive legal advice con-

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[169] *Id.* at 50. *See, e.g.*, Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam); Community Health Servs. v. Califano, 698 F.2d 615, 621-24 (3d Cir. 1983); Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981); *see also* Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979).

[170] 537 F. Supp. at 50.

[171] *Id.* at 50-52.

firming or questioning the agency's representations if the probability of the SSA's being correct, in view of its accumulated experience, is generally high. If it does not generally pay to check up on SSA's legal representations, should parties in effect be required to do so? Is this the least costly way of ensuring accurate and uniform eligibility determinations?[172]

P. Uncompensated Hill-Burton Costs as Non-Reimbursable under Medicare

During the past survey period, the Seventh Circuit, with congressional assistance, resolved the division of district court authority[173] as to the permissibility of reimbursement to hospitals under Medicare for performance of their free care obligations under the Hill-Burton Act.[174]

Specifically, in *Johnson County Memorial Hospital v. Schweiker*,[175] the Seventh Circuit reversed the decision of the District Court for the Southern District of Indiana[176] on the authority of its decision the same day in the consolidated case of *Saint Mary of Nazareth Hospital Center v. Department of Health & Human Services*.[177]

The court of appeals in Johnson County held that

> Congress never intended to reimburse hospitals with Medicare funds for the free care the hospitals are obligated to perform under the terms of the Hill-Burton Act. Moreover, it would be improper to allow the hospitals to receive a double payment from the

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[172]For the most recent sustained attempt to clarify the murky concept of "affirmative misconduct" on the part of the government, see Community Health Servs. v. Califano, 698 F.2d 615, 621-24 (3d Cir. 1983) (inquiring whether the unauthorized incorrect advice was "closely connected to the basic fairness of the administrative decision making process"). *Cf.* Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (per curiam) (looking not only into causality, but also to whether the error in question induced uncorrectable action or inaction by claimant and whether it involved the breach of a regulation). It may be noted that each of these two decisions, as well as a decision in the Second Circuit Court, Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980), provoked dissenting opinions.

In *McDonald*, the government appealed the adverse summary judgment order to the Seventh Circuit, but did not file a brief, and eventually voluntarily dismissed with prejudice. This factor was among those taken into account when the district court awarded attorney's fees under the Equal Access to Justice Act, based on a finding that the government's position "was not substantially justified." McDonald v. Schweiker, 551 F. Supp. 327, 333 (N.D. Ind. 1982) (discussing as well issues of timeliness of application and exclusivity of attorney's fees under the Social Security Act). *See* 2 H. McCormick, Social Security Claims and Procedures § 777 (3d ed. 1983).

[173]Each of the relevant district court opinions is discussed in Wright, *Social Security and Public Welfare: 1982 Survey of Recent Developments in Indiana Law*, 16 Ind. L. Rev. 339, 344-45 (1983).

[174]*See* 42 U.S.C. § 291c(e) (1976).

[175]698 F.2d 1347 (7th Cir. 1983).

[176]Johnson County Memorial Hosp. v. Schweiker, 527 F. Supp. 1134 (S.D. Ind. 1981).

[177]698 F.2d 1337 (7th Cir. 1983) (consolidating the appeal of St. James Hosp. v. Harris, 535 F. Supp 751 (N.D. Ill. 1981)).

> government, and Congress did not intend to compensate hospitals a second time for medical care for which the government has already paid through contractual agreements for indigent care under the Hill-Burton Act.[178]

The court noted that a section of the 1982 Tax Equity and Fiscal Responsibility Act[179] had amended the applicable Medicare statute[180] to resolve retroactively the reimbursability issue and that the expressed post-congressional view was that non-reimbursability had always been the intent of Congress.[181] A related due process taking argument, in which the providers asserted a vested contractual right to reimbursement of the Medicare costs in question, was rejected on similar grounds.[182]

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[178]698 F.2d at 1350.

[179]96 Stat. 324 (1982).

[180]42 U.S.C. § 1395x(v)(1) (1976).

[181]698 F.2d at 1350 (quoting H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 431 (1982) reprinted in 1982 U.S. Code Cong. & Ad. News 1190, 1211).

[182]698 F.2d at 1350. *See also* Metropolitan Medical Center v. Harris, 693 F.2d 775 (8th Cir. 1982); Harper-Grace Hosps. v. Schweiker, 691 F.2d 808, 810 (6th Cir. 1982); Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982).

Among the miscellany of recent cases dealing with either substantive or jurisdictional administrative law are Synesael v. Ling, 691 F.2d 1213 (7th Cir. 1982) (upholding the validity of Indiana's five year "reachback" rule limiting Medicaid benefit eligibility in cases of asset transfers for inadequate consideration); American Healthcare Corp. v. Schweiker, 688 F.2d 1072 (7th Cir. 1982) (no constitutional entitlement shown under the circumstances to a pre-decertification hearing with respect to Medicare or Medicaid provider facilities, hence no waiver of exhaustion requirement, hence no subject matter jurisdiction); Indiana Hosp. Ass'n. Inc. v. Schweiker, 544 F. Supp. 1167 (S.D. Ind. 1982) (numerous Indiana hospitals not entitled to reimbursement of portion of return on equity capital, bad debt, and charity costs attributable to participation in Medicare program as "reasonable cost" thereof) (similar result obtained in Saline Community Hosp. Ass'n v. Schweiker, 554 F. Supp. 1133 (E.D. Mich. 1983)). *See generally* Neeley-Kvarme, *Administrative and Judicial Review of Medicare Issues: A Guide Through the Maze*, 57 Notre Dame Law. 1 (1981).