Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its twelfth annual Survey of Recent Developments in Indiana Law. This survey covers the period from May 1, 1983, through May 1, 1984. 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. Exhaustion of Administrative Remedies

1. Section 1983 Actions in State Court.—Among the numerous exhaustion cases decided during the past survey period was *State ex rel. Basham v. Medical Licensing Board.*[1] In this case, Basham had unsuccessfully sought from the Board a license to practice the healing art of naprapathy. Basham had failed to file a written request for a hearing before the Board within fifteen days after the denial of his license application.[2]

On appeal, the court found legally irrelevant Basham's claim that his failure to timely request a hearing before the Board stemmed from the Board's failure to inform him of his statutory right to a hearing or of the statutory time limits within which such a hearing must be requested.[3] The court of appeals held that "the AAA [Administrative Adjudication Act] does not require the Board to give Basham notice of his right to a hearing and the time limits for perfecting that right."[4] Although the court is probably correct that the failure routinely to provide a rejected applicant with a brief indication that slumbering on his rights for a period in excess of fifteen days may result in the barring of any judicial remedy may not rise to an effective denial of the right to a hearing, this failure is dubious public policy and smacks of administrative adversariness. While providing a brief statement of hearing

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[1] 451 N.E.2d 691 (Ind. Ct. App. 1983).

[2] *Id.* at 693 (citing Ind. Code § 4-22-1-24 (1982)).

[3] 451 N.E.2d at 695.

[4] *Id.*

rights and requirements with every rejection notice may increase the number of hearings sought, this inexpensive procedure would encourage meritorious as well as meritless requests.

The court of appeals in *Basham* then addressed the issue of whether Basham's filing of an action against the Board in state court under 42 U.S.C. § 1983 excused Basham from his failure to exhaust his state administrative remedies. This issue had been settled in Indiana in *Thompson v. Medical Licensing Board*,[5] but the effect of the subsequent United States Supreme Court case of *Patsy v. Board of Regents*[6] had not been addressed by an Indiana state court prior to *Basham*.

In *Patsy*, Justice Marshall, writing for the Court, had stated the issue as "whether exhaustion of state administrative remedies is a prerequisite to an action under 42 U.S.C. § 1983 . . . ."[7] While neither this formulation nor the rest of the opinion in *Patsy* explicitly differentiated between section 1983 actions brought in federal court and those brought in state court, *Patsy* had been brought in federal court. The possible applicability of *Patsy* to state courts was thus left unclear.

Although the court in *Basham* did not explicitly analyze the opinion in *Patsy*, its reading of *Patsy* as simply reiterating the established rule that exhaustion is not a prerequisite to bringing a section 1983 action in federal as opposed to state court is defensible.[8]

In *Patsy*, Justice Marshall took pains to emphasize the established precedential basis for the Court's result.[9] The Court quoted a prior case that recognized "'the paramount role Congress has assigned to the federal courts to protect constitutional rights.'"[10] In the course of its discussion of congressional intent regarding state administrative exhaustion in section 1983 cases, the Court in *Patsy* had stated that the enacting Congress had "believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of the state courts."[11] This would at least suggest that Congress perceived the

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[5]180 Ind. App. 333, 398 N.E.2d 679 (1979) (on petition for rehearing), *cert. denied*, 449 U.S. 937 (1980). During the survey period, *Thompson* was also cited for the proposition that "the provisions of the AAA supersede the provisions of section 1983 in actions brought in state court." May v. Blinzinger, 460 N.E.2d 546, 550 (Ind. Ct. App. 1984) (citation omitted) (failure to follow provision for state court review of agency final determinations; state court § 1983 action filed instead). *But see infra* note 18 and accompanying text.

[6]457 U.S. 496 (1982).

[7]*Id.* at 498.

[8]451 N.E.2d at 694.

[9]457 U.S. at 500-01. Among the authorities cited by Justice Marshall was the Indiana-based federal court case of Carter v. Stanton, 405 U.S. 669, 671 (1972).

[10]457 U.S. at 500 (quoting Steffel v. Thompson, 415 U.S. 452, 473 (1974)).

[11]457 U.S. at 506 (citations omitted).

federal courts, and not the state courts, as havens from state administrative prejudice. Finally, to the extent that *Patsy* was concerned with the burden that never requiring exhaustion in section 1983 actions might impose on federal courts in particular,[12] the policy discussion in *Patsy* was irrelevant to the question of exhaustion in state court section 1983 actions.

Taken together, these considerations suggest that the court in *Basham* was on solid ground in minimizing the import of *Patsy* for state court cases. This conclusion is at least modestly supported by dicta in the Seventh Circuit case of *Scudder v. Town of Greendale, Indiana*.[13] In *Scudder*, the Seventh Circuit discussed the Indiana statutory exhaustion requirements with respect to adverse zoning determinations before holding that the plaintiff had failed to state a claim for relief under 42 U.S.C. § 1983.[14] The Seventh Circuit in *Scudder* indicated that the Supreme Court in *Patsy* had made "it clear that exhaustion of state remedies is not a condition precedent to bringing suit in federal court under 42 U.S.C. section 1983."[15] The court in *Scudder* thus referred specifically to federal courts, but did not explicitly intimate an opinion as to the applicability of *Patsy* to state court proceedings.

Other courts, however, have given the *Patsy* opinion a broader interpretation than that adopted in *Basham*. Several state courts have relied on *Patsy* in refusing to impose an exhaustion requirement in state court section 1983 actions, although also without discussing the relevant differences, if any, between state and federal court actions. For example, a New York state court has held on the basis of *Patsy* that "it is now clear that the exhaustion of state administrative or judicial remedies is not a condition precedent to the maintenance of an action pursuant to 42 U.S.C. § 1983."[16] Similarly, the California Court of Appeals has invoked *Patsy* in holding in the case of a state court section 1983 action that "a plaintiff need not exhaust state mandated judicial or administrative remedies before bringing a U.S.C. sec. 1983 claim."[17]

In light of the ambiguity of *Patsy*, a party in the position of applicant Basham who seeks to avoid dismissal for failure to exhaust administrative

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[12]*Id.* at 512-13.

[13]704 F.2d 999 (7th Cir. 1983).

[14]*Id.* at 1001-02. The court describes, without objection, the statutory exhaustion requirements in Indiana, *id.* at 1001 n.2.

[15]*Id.* at 1002.

[16]Broadway & 67th St. Corp. v. City of New York, 116 Misc. 2d 217, 225, 455 N.Y.S.2d 347, 353 (N.Y. Sup. Ct. 1982). *See also* the opinion of Justice Asch, dissenting in part, in Montalvo v. Consolidated Edison Co., 92 A.D.2d 389, 403, 460 N.Y.S.2d 784, 793 (N.Y. App. Div. 1983).

[17]Logan v. Southern Cal. Rapid Transit Dist., 136 Cal. App. 3d 116, 124, 185 Cal. Rptr. 878, 883 (1982) (citation omitted).

remedies may wish to argue that the guiding principle must be that the states are generally barred from impairing or conditioning the exercise or redress of federally created rights, such as those protected by section 1983, through the imposition of an exhaustion requirement.[18]

2. Exhaustion and Constitutional Issues.—The court in *Basham* also addressed the issue of whether Basham's constitutional claim that the statutory licensing procedure discriminated against naprapaths constituted an exception to the exhaustion requirement. The court of appeals observed that "Basham argues that the constitutionality of a statute is a purely legal question beyond the expertise of an administrative board. We agree, but we believe Basham could have raised his constitutional issue in a trial court through the judicial review procedure of IC 4-22-1-14."[19]

It is not clear that the court in *Basham* meant to assert that the exhaustion doctrine is indifferent as to whether a constitutional challenge raises a "purely legal," or facial constitutional challenge or an intensely factual, or an "as applied," constitutional challenge. While other jurisdictions are occasionally more liberal in excepting constitutional challenges from an exhaustion requirement,[20] it seems clear that the Indiana courts are disposed to find an exception to the administrative exhaustion requirement where the constitutional claim at issue can be variously characterized as "purely legal," or facial, or as "procedural."[21]

A similar issue was addressed in *Drake v. Indiana Department of Natural Resources.*[22] In *Drake*, the appellant landowner argued that the failure of the Indiana Natural Resources Commission to provide him with notice of its proceedings on or decision with respect to lessees' application for an oil drilling permit violated his due process rights in such a way as to exempt him from compliance with the otherwise applicable judicial review requirements.[23]

The court of appeals in *Drake* declared:

> This case is distinguishable from *Wilson v. Board of Indiana*

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[18]*See id.* (citing Adler v. Los Angeles Unified School Dist., 98 Cal. App. 3d 280, 288, 159 Cal. Rptr. 528, 532 (1979); Graham v. City of Biggs, 96 Cal. App. 3d 250, 255-56, 157 Cal. Rptr. 761, 764 (1979); Rossiter v. Benoit, 88 Cal. App. 3d 706, 713, 152 Cal. Rptr. 65, 71 (1979)). For some possible emerging limitations on the *Patsy* doctrine, see Warfield v. Adams, 582 F. Supp. 111, 116-17, 117 n.6 (S.D. Ind. 1984) (Sharp, C.J., sitting by designation).

[19]451 N.E.2d at 696.

[20]*See, e.g.*, Montalvo v. Consolidated Edison Co., 92 A.D.2d 389, 403, 460 N.Y.S.2d 784, 793 (1983) (Asch, J., dissenting in part) ("Constitutional questions are for resolution by the courts" (citing Weinberger v. Salfi, 422 U.S. 749, 765 (1975)).

[21]*See, e.g.*, Drake v. Indiana Dep't of Natural Resources, 453 N.E.2d 293, 296 (Ind. Ct. App. 1983); Field v. Area Plan Comm'n, 421 N.E.2d 1132, 1138-39 n.5 (Ind. Ct. App. 1981); Bowen v. Sonnenburg, 411 N.E.2d 390 (Ind. Ct. App. 1980). The most authoritative case in Indiana on this point is Wilson v. Board of the Ind. Employment Sec. Div., 270 Ind. 302, 385 N.E.2d 438, *cert. denied*, 444 U.S. 874 (1979).

[22]453 N.E.2d 293 (Ind. Ct. App. 1983).

[23]*Id.* at 297 (citing IND. CODE § 4-22-1-14 (1982)).

> *Employment Security Division*, (1979) 270 Ind. 302, 385 N.E.2d 438, where the appellant was allowed to bypass available administrative channels and bring suit in circuit court based on a denial of constitutional due process. In that case, the procedures for suspending and terminating unemployment compensation benefits were challenged as being unconstitutional. The appellant did not raise her individual denial of benefits as the error; rather, the issue presented was a purely legal one. Drake claims, on the other hand, that the Agency violated its own regulations and the AAA in determining this particular case. Thus, a factual issue is presented and the AAA requirements for judicial review must be followed.[24]

The principles guiding appellate decisionmaking in this area should not be controversial. If agency expertise or authority is relevant, or if a thorough factual record is required in order to resolve the constitutional issue, exhaustion is, assuming no exceptional circumstances, a reasonable requirement.[25] If, on the other hand, agency procedures have invited or facilitated the failure to pursue administrative remedies in a timely and appropriate fashion, imposing an exhaustion requirement misses the point of the due process challenge.

3. Waiver of Exhaustion.—In *United States Auto Club, Inc. v. Woodward*,[26] the court of appeals considered a number of interesting isues, including an alleged waiver of exhaustion by a private association.

In this case, a race car owner brought a damages action against the United States Auto Club, Inc. (USAC) stemming from USAC's disallowance of the plaintiff's race qualifying attempt. The owner had timely filed his protest of the disallowance, but upon the denial by USAC's Chief Steward of his protest, the owner filed an action in Marion County Superior Court instead of forwarding his appeal to USAC's Director of Competition as provided for by the applicable USAC rules.[27]

At a prompt hearing on the owner's request for a preliminary injunction, the court extended the already-expired USAC appeal time limitation an extra day to permit the filing of the owner's appeal with the proper USAC authority. The court further ordered USAC to rule on the owner's appeal by the following day. Both parties complied with the court order, with the owner's appeal being duly denied by USAC.[28]

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[24]453 N.E.2d at 299.

[25]*See, e.g.*, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26:6, at 436 (2d ed. 1983) (citing W.E.B. DuBois Clubs of America v. Clark, 389 U.S. 309 (1967)). These and related considerations were also addressed during the survey period in Northside Sanitary Landfill, Inc. v. Indiana Envtl. Management Bd., 458 N.E.2d 277, 281-82 (Ind. Ct. App. 1984).

[26]460 N.E.2d 1255 (Ind. Ct. App. 1984).

[27]*Id.* at 1259.

[28]*Id.*

The USAC, apparently, did not appeal any aspect of the Marion Superior Court ruling on the preliminary injunction order.

The owner then proceeded to win a jury verdict in his damages action against USAC. USAC's appeal raised, among other issues, the question of the failure to exhaust USAC internal appeal procedures. On appeal, the court determined that the trial court was without authority to extend the contractually binding USAC appeal time limits by its order, and that USAC's right to insist upon exhaustion of its internal appeal process was not waived by its late hearing of the owner's appeal under the compulsion of a court order.[29]

It is clearly true that the owner in this instance did not exhaust his private administrative remedies within the precise timetable specified by USAC rules. Yet, the court of appeals decision in this case exalts form over substance. Most, if not all, of the purposes[30] of exhaustion were served by the compelled exhaustion that occurred on the trial court's order in this case. Clearly the internal USAC administrative remedy may not have been futile prior to its completion,[31] but it was obviously futile after it had in fact been exhausted without success. Demonstrated futility normally excuses exhaustion,[32] and the futility of requiring exhaustion was clearly, if unconventionally, demonstrated in this case.

It is also clear that an exhaustion requirement may be waived by an agency and, presumably, by a private defendant.[33] While waiver is typically thought of as intentional,[34] an exhaustion issue may be impliedly waived,[35] as by a party's failure to raise the issue in a timely fashion.[36] In this case, USAC apparently declined to appeal the trial court's preliminary injunction order, despite its right to do so under Rule 4(B) of the Indiana Rules of Appellate Procedure,[37] deciding instead to proceed

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[29]*Id.*

[30]A summary of the most commonly recognized purposes of an exhaustion requirement is provided in EEOC v. Roadway Express, Inc., 569 F. Supp. 1526, 1528-29 (N.D. Ind. 1983) (citing McKart v. United States, 395 U.S. 185 (1979)) and in Northside Sanitary Landfill, Inc. v. Indiana Envtl. Management Bd., 458 N.E.2d 277, 281 (Ind. Ct. App. 1984).

[31]460 N.E.2d at 1259.

[32]*See, e.g.*, EEOC v. Roadway Express, Inc., 569 F. Supp. 1526, 1529 (N.D. Ind. 1983). However, identity or overlap between the original and the rehearing or appellate administrative bodies does not by itself demonstrate futility. *See* Northside Sanitary Landfill, Inc. v. Indiana Envtl. Management Bd., 458 N.E.2d 277, 282-83 (Ind. Ct. App. 1984).

[33]*See* Holloway v. Gunnell, 685 F.2d 150, 152 n.2 (5th Cir. 1982); Silver v. Woolf, 538 F. Supp. 881, 884 (D. Conn. 1982), *aff'd*, 694 F.2d 8 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1525 (1983).

[34]*See, e.g.*, Lafayette Car Wash v. Boes, 258 Ind. 498, 501, 282 N.E.2d 837, 839 (1972).

[35]*See, e.g.*, Greenberg v. Bolger Inc., 497 F. Supp. 756, 772 (E.D.N.Y. 1980).

[36]*See* Mitchell v. United States, 664 F.2d 265, 276 (Ct. Cl. 1981), *aff'd*, 103 S. Ct. 2961 (1983).

[37]*See* City of Fort Wayne v. State ex rel. Hoagland, 168 Ind. App. 262, 342 N.E.2d

with the trial court-ordered exhaustion. There were, therefore, grounds for finding a waiver of exhaustion as well as futility, in addition to substantial compliance with any exhaustion requirement.

4. Exhaustion by Enforcement Defendants.—Metropolitan Development Commission v. I. Ching, Inc.[38] resulted in an interesting and thoughtful opinion dealing with several aspects of the exhaustion doctrine.

In this case, the Marion County Metropolitan Development Commission sought to enjoin I. Ching, Inc. from using its property in violation of local dwelling ordinances. At trial, the defendant I. Ching raised the issue of the zoning ordinance's unconstitutionality as applied to its property. The trial court entered judgment in favor of the defendant, but on appeal the Fourth District Court of Appeals reversed, holding that the defendant should have raised its argument that the ordinance was unconstitutional as applied with a separate body, the Board of Zoning Appeals, in a request for a zoning variance.[39]

A crucial turning point in the decision came when the court, disagreeing with and distinguishing prior Indiana authority,[40] held that requiring a defendant to exhaust administrative remedies in an enforcement action was not necessarily improper.[41] The court took the view that in light of the power of the Board of Zoning Appeals to hear constitutional challenges to zoning ordinances as applied,[42] and of that body's failure to indicate that a petition for a variance would be futile,[43] the balance of factors weighed toward requiring exhaustion.[44]

The court of appeals recognized authority to the effect that exhaustion should not be required of enforcement defendants,[45] but stated that "considerations of administrative autonomy" supported the "better rule" to the contrary.[46]

Requiring exhaustion by enforcement defendants in Indiana may indeed be more defensible than elsewhere, if it is assumed that the filing of an action by the Metropolitan Development Commission does not indicate that the Board of Zoning Appeals would view the ordinance as valid as applied, and that the Commission's opinion on the consti-

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865 (1976); Jacob Weinberg News Agency, Inc. v. City of Marion, 163 Ind. App. 181, 322 N.E.2d 730 (1975).

[38]460 N.E.2d 1236 (Ind. Ct. App. 1984).

[39]*Id.* at 1239-40.

[40]*Id.* at 1240 (citing Metropolitan Dev. Comm'n v. Waffle House, Inc., 424 N.E.2d 184 (Ind. Ct. App. 1981)).

[41]460 N.E.2d at 1238.

[42]*Id.* at 1239 (citing Metropolitan Bd. of Zoning Appeals v. Gateway Corp., 256 Ind. 326, 268 N.E.2d 736 (1971)).

[43]460 N.E.2d at 1239.

[44]*Id.* at 1239-40.

[45]*Id.* at 1238.

[46]*Id.*

tutionality as applied issue is irrelevant.[47] Elsewhere, in the case of enforcement actions brought by the agency to whom a variance petition would be brought, exhaustion is often not required. The breadth of the holdings of such cases varies.

In a recent case, for example, the Ohio Supreme Court was confronted with a question of enforcement defendant exhaustion.[48] That court determined that "there is a difference between those instances in which the landowner in the initial action was the party claiming the relief from the law, and instances in which the landowner was in a defensive position, as here."[49] The court then broadly held that "'[t]he requirement of exhaustion of administrative remedies is not applicable where the constitutionality of a statute is raised as a defense in a proceeding brought to enforce the statute.'"[50] Of particular interest was the court's rationale, which would apply even under the facts in *I. Ching*. Quoting the Illinois Supreme Court, the court noted:

> "Although there is authority that the rule of exhaustion of administrative remedies has application whether the validity of a zoning ordinance is raised by a defendant or a moving party, . . . there is at the same time the sound principle, based upon the assumption that one may not be held civilly or criminally liable for violating an invalid ordinance, that a proceeding for the violation of a municipal regulation is subject to any defense which will exonerate the defendant from liability, including a defense of the invalidity of the ordinance. . . . Indeed, as one author has observed, 'the tradition is deeply imbedded that * * * statutes may be challenged by resisting enforcement.'"[51]

It is clear that in at least some enforcement defendant exhaustion cases, the failure to exhaust administrative remedies is less than a deliberate bypassing or flouting of agency authority. Also to be weighed in the balance are considerations of administrative, as well as judicial, economy. Whatever the virtues of the opinion in *I. Ching*, its rule does not maximize the convenience and dispatch with which defenses to an enforcement action may be raised.[52]

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[47] *Id.* at 1238-39.

[48] Johnson's Island, Inc. v. Board of Township Trustees, 69 Ohio St. 2d 241, 431 N.E.2d 672 (1982).

[49] *Id.* at 248, 431 N.E.2d at 677.

[50] *Id.* (quoting the lower court's decision).

[51] *Id.* at 248-49, 431 N.E.2d at 677 (quoting County of Lake v. MacNeal, 24 Ill. 2d 253, 259-60, 181 N.E.2d 85, 89-90 (1962) (citations omitted) (Ill. 1982).

[52] A second case within the general area of exhaustion of administrative remedies by defendants decided within the past survey period was EEOC v. Roadway Express, Inc., 569 F. Supp. 1526 (N.D. Ind. 1983). In this instance, the court, relying on EEOC v. Cuzzens of Georgia, Inc., 608 F.2d 1062, 1064 (5th Cir. 1979), held that Roadway's failure to exhaust internal EEOC procedures barred Roadway from raising nonconstitutional defenses to judicial enforcement of an EEOC subpoena, in the absence of a showing of

5. The Futility Exception to Exhaustion.—The past survey period was not without its victories for those seeking to excuse their failure to exhaust administrative remedies. In *Ahles v. Orr*,[53] the plaintiffs, without commencing or completing administrative proceedings, filed a complaint for declaratory judgment to the effect that an executive order issued by Governor Orr suspending all state merit pay increases was contrary to law and that the plaintiffs were entitled to merit pay increases.[54]

On appeal, the court found that the executive order in this instance was subject to challenge under neither the State Personnel Act[55] nor the Administrative Adjudication Act.[56] Exhaustion under these statutes was therefore not required.[57] The court went on to declare that even if the plaintiffs' complaint were assumed to be subject to statutory exhaustion, their complaint would fall within the recognized exception for futility or inadequacy of remedy. Referring first to the persons named under the State Personnel Act procedures, the court of appeals concluded:

> None of these officials or agencies has the power to overrule the Governor or to declare his executive order invalid. Plainly, no adequate remedy is provided and resort to such procedures would be futile. Further, judicial review under the Administrative Adjudication Act likewise would be unavailing. Judicial review could accomplish only a remand to the administrative agency for corrective action. . . . Remand to an agency which is powerless to effect a remedy is both inadequate and an exercise in futility.[58]

It should be noted that exhaustion was not required in this case even though the administrative agencies would presumably have had special expertise in resolving factual issues involved in the plaintiffs' claims of entitlement to merit pay increases.

B. Administrative Res Judicata

The relatively recently[59] developed doctrine of administrative res judicata was considered in *Pequinot v. Allen County Board of Zoning Appeals*.[60] In this case, the parent company of the plaintiff had, in 1973, been denied permission by the Allen County Board of Zoning

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futility. 569 F. Supp. at 1528-29. To have held otherwise would have clearly diminished the usefulness of the internal EEOC review procedures.

[53]456 N.E.2d 425 (Ind. Ct. App. 1983).

[54]*Id.* at 426 n.1.

[55]IND. CODE § 4-15-2-35 (1982).

[56]IND. CODE §§ 4-22-1-1,-30 (1982 & Supp. 1984).

[57]456 N.E.2d at 426.

[58]*Id.* at 427 (citations omitted). *See also* Bolerjack v. Forsythe, 461 N.E.2d 1126, 1131-33 (Ind. Ct. App. 1984).

[59]Actually, there are clear elements of the application of this doctrine in Board of Comm'rs of Huntington County v. Heaston, 144 Ind. 583, 41 N.E. 457 (1895).

[60]446 N.E.2d 1021 (Ind. Ct. App. 1983).

Appeals to construct an asphalt plant at a quarry site because of fear of pollution.[61] The plaintiff, in 1979, filed a similar application for a special exception to construct an asphalt plant at the site, on this occasion proving, in the judgment of the board, that it would meet the stringent state and federal pollution regulations enacted since 1973.[62]

The remonstrators in *Pequinot* asserted on appeal that the special exception was precluded because of the operation of administrative res judicata. It was apparently assumed on appeal that the relationship between the plaintiff and its parent company was sufficient to constitute privity for res judicata purposes.

The court of appeals referred to what it called its first acknowledgment of the doctrine,[63] and to the policy grounds of "'economy, predictability and repose.'"[64] The court declined to apply administrative res judicata, however, on the grounds that facts and circumstances had changed so substantially from 1973 to 1979 as to undercut the rationale and applicability of the 1973 determination, while no vested rights had intervened in reliance on the earlier decision.[65]

It is predictable that the administrative res judicata doctrine will often prove difficult to apply. An inquiry into whether the original agency determination was "quasi-judicial" rather than ministerial, or was discretionary, legislative, or investigatory, is merely the beginning. Assuming that the matter or issues decided or potentially raised for res judicata or collateral estoppel purposes can be identified, problems of fairness remain, particularly where the prior determination was informal, or was conducted without benefit of counsel.[66]

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[61] *Id.* at 1026.

[62] *Id.* at 1026-27.

[63] *Id.* at 1026 (citing Braughton v. Metropolitan Bd. of Zoning Appeals, 146 Ind. App. 652, 257 N.E.2d 839 (1970)).

[64] 446 N.E.2d at 1026 (quoting Carpenter v. Whitley County Plan Comm'n, 174 Ind. App. 412, 414, 367 N.E.2d 1156, 1158 (1977)).

[65] 446 N.E.2d at 1026-27.

[66] An "adequate opportunity to litigate" the issues was required in United States v. Utah Constr. & Mining Co., 384 U.S. 394, 421-22 (1966). For further limitations on the operation of administrative res judicata, see RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982).

Most recently, in McDonald v. City of West Branch, Michigan, 104 S. Ct. 1799 (1984), the United States Supreme Court imposed a flat rule denying res judicata or collateral estoppel effect to the results of arbitrations brought pursuant to a collective bargaining agreement where the claimant subsequently brings a federal court section 1983 action. *See id.* at 1804. The Court was particularly concerned with the frequent lack of legal expertise of the arbitrator, limits on the scope of the arbitrator's authority, and the problem of control of the grievant's presentation by a union that may have conflicts of interest. *See id.* at 1803. One final consideration, with implications beyond arbitrations, was that "'[t]he record of the arbitration proceedings is not as complete [as that in judicial proceedings]; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony

C. *Probable Cause Determinations and Civil Rights Claims*

The case of *Kimble Division of Owens-Illinois, Inc. v. Busz*[67] raised the issue whether a determination by the Indiana Civil Rights Commission (ICRC) that no probable cause existed to support a claim of employment discrimination was an "administrative adjudication" that must be made in accordance with the Administrative Adjudication Act (AAA),[68] or whether it was an essentially unreviewable exercise of the Civil Rights Commission's statutory[69] discretion.

The court of appeals held that "a probable cause determination by the ICRC is an administrative adjudication, . . . and because individual rights are being determined, the determination must be made in accordance with the AAA."[70] In addition to its statutory analysis, the court noted that while a prosecutor exercises prosecutorial discretion in pursuit exclusively of the public interest, the Indiana Civil Rights Commission is charged not only with upholding the public interest, but with redressing individual grievances as well.[71]

The rule in *Busz* has subsequently been codified by means of the past legislative session's enactment of Public Law 19-1984, which took effect February 29, 1984. As amended, the statutory provision defining "administrative adjudication" now includes "determinations of probable cause and no probable cause and factfinding conferences by the state civil rights commission."[72]

The effect of *Busz* and its codification is to reduce agency discretion, and predictably to increase the Commission's workload.

D. *Administrative Search Warrants*

In two instances[73] during the past survey period, the court of appeals was called upon to review a trial court's quashing of an administrative

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under oath, are often severely limited or unavailable.'" *Id.* at 1804 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-58 (1974)).

In addition, many administrative adjudiciations, as in the case of disability claims, are not adversarial. In sum, it seems clear that a party seeking to avoid the imposition of administrative res judicata will typically have several arguments to deploy. *See generally* Annot., 52 A.L.R. 3D 494 (1973 & Supp. 1983); Note, *Indiana Variance Proceedings and the Application of Res Judicata*, 46 IND. L.J. 286 (1971).

[67]449 N.E.2d 618 (Ind. Ct. App. 1983).

[68]*Id.* at 621 (citing IND. CODE § 4-22-1-2 (1982)).

[69]*See* IND. CODE § 22-9-1-11 (1982).

[70]449 N.E.2d at 622 (citations omitted).

[71]*Id.* By way of contrast, the court of appeals in Indiana Envtl. Management Bd. v. Town of Bremen, 458 N.E.2d 672 (Ind. Ct. App. 1984), declared that the Environmental Mangement Board "is not required to investigate a reported violation." *Id.* at 677.

[72]IND. CODE § 4-22-1-2 (1982 & Supp. 1984).

[73]*In re* A Search Warrant for the Comm'r of Labor to Inspect the Premises of Frank Foundries Corp., 448 N.E.2d 1089 (Ind. Ct. App. 1983) [hereinafter cited as *Frank Foundries*]; *In re* Search Warrant for the Comm'r of Labor to Inspect the Premises of

search warrant issued to the Commissioner of Labor to search an industrial employer's premises for possible Indiana Occupational Safety and Health Act (IOSHA) violations.

In both cases, the original issuance of the search warrant was supported principally by probable cause affidavits indicating that the warrants were brought in connection with a general program of scheduled inspections concentrating on industries classified as "high hazard" because of relatively high recent lost workday ratios.[74] In *In re Search Warrant for the Commissioner of Labor to Inspect the Premises of J & P Custom Plating*, the targeted individual business establishment asserted lack of probable cause to support the search warrant, contending that

> the classification of "highly hazardous" industries should be founded on more than injury statistics, the 1979 statistics are stale and should be based on state rather than federal injury statistics, and the manuals containing a detailed description of the classification system should be presented as evidence along with evidence of how many Indiana industries and employees fall within the manual's coverage.[75]

J & P also objected on the basis of its small size, type of equipment, and established record of industrial safety, to the contention that it fell within the category of "highly hazardous" industries.[76]

In rejecting these arguments, the court of appeals made the crucial determination that "[t]he State cannot possibly determine which individual companies are 'highly hazardous' by virtue of their particularized injury statistics or the type of equipment employed."[77] The intention of the court of appeals was to not unduly expand the evidentiary burden borne by the state in routine administrative warrant request cases.

The court of appeals was therefore content to decide the case on the basis of prior authorities upholding OSHA search warrants issued pursuant to neutral, general administrative plans.[78] For the appropri-

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J & P Custom Plating, Inc., 458 N.E.2d 1164 (Ind. Ct. App. 1984) [hereinafter cited as *J & P Custom Plating*].

[74]*See Frank Foundries*, 448 N.E.2d at 1089, 1091 n.l. (Ind. Ct. App. 1983), and *J & P Custom Plating*, 458 N.E.2d 1164, 1165 (Ind. Ct. App. 1984).

[75]458 N.E.2d at 1166.

[76]*Id.*

[77]*Id.* at 1167.

[78]The decisive Indiana authorities were State v. Kokomo Tube Co., 426 N.E.2d 1338 (Ind. Ct. App. 1981) and *Frank Foundries*, 448 N.E.2d 1089 (Ind. Ct. App. 1983). *Kokomo Tube* had established the applicability of a civil, rather than criminal, probable cause standard, as well as the modest degree of specificity required of the supporting affidavits. 426 N.E.2d at 1346, 1348-49. *Frank Foundries* involved the use of affidavits which were less objectionable than those in *J & P Custom Plating* in several respects. The affidavits in *Frank Foundries* were explicit about the minimum lapse of one year between regularly scheduled inspections and provided greater detail about the role employer size and degree

ateness of not requiring any reference to safety conditions or safety history at the individual business to be inspected, the court cited a United States Supreme Court case[79] dealing with building code inspections.

While it is clearly unreasonable to undermine a neutral and reasonable inspection program by requiring the state to forecast the adverse safety inspection results that may or may not develop, a balancing concern for the fourth amendment rights of non-highly regulated industries suggests that the required evidentiary showing for a search warrant in such cases should be based on the most current and particularized showing as can reasonably be produced without undue cost and time expenditures on the part of the state.

The best balancing of the competing interests would require not only notice to the employer of its industrial classification and of whether the industry was classified as "highly hazardous" or not, but an advance opportunity for the employer to reduce the probability that it would be inspected by making a prior credible demonstration of an exceptional safety record. As matters stand, the safest employer within a broad classification of a given size is no less likely to be inspected under the program than the least safe.[80] This state of affairs is inconsistent with IOSHA's general policy goal of focusing its resources in such a way as to maximize the reduction of industrial accidents and illnesses.[81]

The supporting affidavits in *In re A Search Warrant for the Commissioner of Labor to Inspect the Premises of Frank Foundries Corp.* were more satisfactory, but even they highlighted the dubious procedure of essentially immunizing the most dangerous industries as a whole from further programmed inspections until 166 less dangerous, but still "highly hazardous," industries had been inspected in their turns.[82] It would not be surprising to discover a greater "safety gap" between the most and least safe of the "highly hazardous" industries than between the safest of the "highly hazardous" industries and the least safe of the non-highly hazardous industries.

Frank Foundries is particularly noteworthy for its disposal of the argument, which had been successful at trial, that the Target Industries Program discussed in the supporting affidavits was a rule subject to promulgation under the Administrative Adjudication Act,[83] and not merely

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of hazardousness played in the implementation of the regularly scheduled inspection program; the affidavits in *J & P Custom Plating* contained no satisfactory counterpart. *See* 448 N.E.2d 1089, 1091 n.l.

[79]Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

[80]*See J & P Custom Plating*, 458 N.E.2d at 1165; *Frank Foundries*, 448 N.E.2d 1089, 1091 n.l (Ind. Ct. App. 1983).

[81]*See J & P Custom Plating*, 458 N.E.2d at 1165; *Frank Foundries*, 448 N.E.2d 1089, 1091 n.l (Ind. Ct. App. 1983).

[82]448 N.E.2d at 1091 n.l.

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

an internal policy. The court of appeals held that the inspection program need not have been promulgated subject to notice and comment procedures because "[w]hile the very nature of the Target Industries Program is to 'classify' industries according to set 'standards', the program is not a 'rule' because it is an internal policy or procedure not having the force of law."[84]

Distinctions between and among legislative rules on the one hand and internal policy standards and interpretive rules on the other have often been problematic.[85] Whether notice and comment opportunity should have been required often depends upon a court's determination whether the rule or policy has a substantial impact on the affected party.[86] While the immediate legal force of the IOSHA inspection classification program and its practical impact is not as unequivocal as in other sorts of claimed internal policies,[87] and while the burden of notice and comment procedures might be substantial, there is a case to be made for requiring such procedures.

It is clear that the precise provisions of the inspection program affect most employers' likelihood of inspection and potential civil liability. There is no "full-blown hearing" prior to the issuance of the search warrant.[88] The decisive question should therefore be whether it is reasonable to suppose that requiring notice and comment procedures would be likely to result in significant refinement and improvement of the classification system and inspection criteria, but this is obviously a difficult question to answer on appeal in a given case.

Finally, the targeted business in *Frank Foundries* sought to quash the administrative search warrant on res judicata grounds. Apparently, a previous search warrant sought by the Commissioner of Labor on March 4, 1980 to search for IOSHA violations had been quashed without appeal.[89] This ingenious argument fell as the court recognized that the inspection program at issue plainly contemplates the possibility that

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[84]448 N.E.2d at 1092. The court of appeals cited *In re* Stoddard Lumber Co., 627 F.2d 984, 986-88 (9th Cir. 1980) in this context.

[85]*See, e.g.*, Note, *The Interpretive Rule Exemption: A Definitional Approach to Its Application*, 15 IND. L. REV. 875 (1982). *See also* Allied Van Lines, Inc. v. ICC, 708 F.2d 297, 300-01 (7th Cir. 1983); Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. CHI. L. REV. 430 (1976).

[86]*See, e.g.*, Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972); Herron v. Heckler, 576 F. Supp. 218, 232 (N.D. Cal. 1983).

[87]See Mugg v. Stanton, 454 N.E.2d 867 (Ind. Ct. App. 1983), also decided during the past survey period, in which an oral policy of not providing for transportation expense allowances for persons enrolled in four year college programs was found to be void and unenforceable as not having been duly promulgated in accordance with Indiana Code section 4-22-2-2 (1982). 454 N.E.2d at 870.

[88]*J & P Custom Plating*, 458 N.E.2d at 1167.

[89]*Frank Foundries*, 448 N.E.2d at 1094.

targeted businesses could face yearly inspections,[90] and that to hold otherwise would jeopardize the program's purposes.

E. Standing

In *Bethlehem Steel Corp. v. United States Environmental Protection Agency*,[91] the Seventh Circuit was confronted with an issue of standing as well as the substantive question, referred to by Judge Posner as one of first impression,[92] whether the Environmental Protection Agency (EPA) is authorized to modify the status of an air quality control region from "unclassifiable" to that of "nonattainment" at a time several years after its official designation by the EPA as unclassifiable.

Originally, the state of Indiana had designated Porter County as unclassifiable on the basis of available information, and the EPA had confirmed this designation in a listing promulgated in 1978. Four years later, the EPA reclassified a portion of Porter County including the Burns Harbor Works of Bethlehem Steel as a nonattainment area with regard to particulate matter air pollution standards. Indiana was given one year to submit plans for reaching attainment status within three-and-one-half years after approval of the new plans by the EPA.[93]

The Seventh Circuit first determined that the EPA's order in this instance bore the requisite degree of finality in that such a reclassification "triggers definite and grave consequences."[94] Bethlehem Steel had standing as an injured party since, as the major pollutant source within the area concerned, it would undoubtedly be required by the State of Indiana to reduce its particulate emissions in compliance with the EPA order.[95]

While standing is often thought of as requiring a showing that the threatened injury be not only substantial but direct,[96] the prudential element of standing here was properly emphasized.[97] The predictable impact on Bethlehem Steel was no less serious and no more diffusely shared for being indirect. In a comparable Indiana Supreme Court case[98]

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[90]*Id.* at 1094, 1091 n.l.

[91]723 F.2d 1303 (7th Cir. 1983).

[92]*Id.* at 1305.

[93]*Id.* at 1305-06.

[94]*Id.* at 1306.

[95]*Id.*

[96]See Marsym Dev. Corp. v. Winchester Economic Dev. Comm'n, 457 N.E.2d 542, 544 (Ind. 1984) (Hunter, J., dissenting to denial of transfer), also decided within the past survey period.

[97]*See id.* at 543 (Hunter, J., dissenting to denial of transfer).

[98]Indiana Air Pollution Control Bd. v. City of Richmond, 457 N.E.2d 204 (Ind. 1983). In *Richmond*, the Indiana Supreme Court vacated the decision of the court of appeals and affirmed the trial court's entry of summary judgment in favor of the City of Richmond, holding that the Air Pollution Control Board was required to make determinations of air quality standards violations through adjudication under the AAA, and not through unauthorized rulemaking procedures.

also decided within the past survey period, the court concluded that "the . . . assertion that such a classification is harmful may not be such a remote and speculative proposition, particularly where . . . the geographical area is small and the city-owned electric company may be the only possible violator of the pollution standards."[99]

On the substantive issue, the Seventh Circuit interpreted 42 U.S.C. § 7407(d) and its legislative history to limit any modifications by the EPA of the state's classifications to a period expiring sixty days after the state's submission of its classifications to EPA. While the court of appeals recognized that the effect of this interpretation was to freeze classifications based upon incomplete 1977 information, it observed that the EPA was not without other instruments in mandating environmental quality improvements.[100]

While the court was apparently correct in asserting that the precise issue had not been previously decided, it had a certain measure of available guidance contrary to its own holding. The Fifth Circuit had, in a somewhat different context, stated that "[w]e . . . read § 7407(d)(4) as saying that after February 3, 1978, an unclassified area will be deemed a § 7407(d)(1)(D) [unclassified] area until an effective designation is made. Thus it is no bar to EPA redesignation on remand."[101]

F. Social Security Disability and Substantial Evidence

The federal district court in *Adams v. Heckler* adopted an unusually strong version of the familiar rule that in social security disability benefit cases the opinions of physicians who have treated the claimant on a continuing basis are ordinarily to be accorded greater weight than those of government consulting physicians with a more limited opportunity to examine the claimant.[102] In this case, the claimant sought to avoid the termination of his disability benefits by submitting the reports of his two treating physicians. One such physician had reported his opinion that the claimant was unable to perform manual labor for medical reasons, and was not educated or trained in sedentary work. He sub-

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[99]*Id.* at 207.

[100]723 F.2d at 1308-09 (citing 42 U.S.C. § 7410 (c)(1)(C) (1976 & Supp. V 1981)). The urgency, from an environmentalist's standpoint, of the EPA's availing itself of this remedy was heightened during the past survey period by the Seventh Circuit's decision giving effect to an Indiana state court's decision invalidating, on state procedural grounds, the Indiana air pollution control plan that had been approved by the EPA under 42 U.S.C. § 7410. *See* Sierra Club v. Indiana-Kentucky Elec. Corp., 716 F.2d 1145 (7th Cir. 1983) (giving effect to Indiana Envtl. Management Bd. v. Indiana-Kentucky Elec. Corp., 181 Ind. App. 570, 393 N.E.2d 213 (1979)).

[101]United States Steel Corp. v. United States EPA, 595 F.2d 207, 214 n.14 (5th Cir. 1979). *See also* McIlwain v. Hayes, 530 F. Supp. 973, 977 (D.D.C. 1981) (generally supporting the analysis in *U.S. Steel* in the context of an FDA color additive list).

[102]580 F. Supp. 315 (N.D. Ind. 1984).

sequently offered his legal conclusion that the claimant was permanently and totally disabled, and that the claimant "was unable to sit, stand or walk for any significant amount of time without pain."[103] The second physician, who had admittedly not examined the claimant from 1977 to a period about five months prior to the Administrative Law Judge's (ALJ) de novo determination of the case, presented his opinion that the claimant would be unable to do even sedentary work.[104] The only evidence contrary was "the portion of the government consultants' reports stating plaintiff could do sedentary work."[105] In concluding that substantial evidence was lacking to support the Secretary's termination of benefits, the court held that "in the present case, [the treating physicians'] conclusions that Mr. Adams is totally and permanently disabled due to his back injuries must, as a matter of law, be given the greatest weight."[106] Even more strongly, the court declared that "[t]he ALJ and the Appeals Council reached their decisions only by ignoring [a treating physician's] opinions and relying solely upon the one-time, government-paid medical consultant. Under the great weight of authority, this constitutes error as a matter of law."[107]

While it is certainly true that probative evidence may not be "ignored," the formulation adopted by the court in this instance is unusually strong and seems inconsistent with controlling Seventh Circuit precedent. In a prior Seventh Circuit case,[108] the court of appeals reported that the claimant

> Cummins particularly complains of the ALJ's refusal to defer to the judgment of Cummins' personal physician. It is true that this physician had examined Cummins more extensively than anyone else; but as Cummins' personal physician he might have been leaning over backwards to support the application for disability benefits; therefore the fact that he had greater knowledge of Cummins' medical condition was not entitled to controlling weight.[109]

The Seventh Circuit has subsequently discussed this quoted language in such a way as to place it in its regulatory context, but without supporting the extreme formulation in *Adams*.[110] Under the most recent, and not particularly helpful, Seventh Circuit language, "[i]f the ALJ concludes

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[103]*Id.* at 317.

[104]*Id.*

[105]*Id.* at 318.

[106]*Id.* at 320.

[107]*Id.*

[108]*See* Cummins v. Schweiker, 670 F.2d 81 (7th Cir. 1982).

[109]*Id.* at 84. *See also* Brownton v. Heckler, 571 F. Supp. 140, 143 (N.D. Cal. 1983).

[110]*See* Whitney v. Schweiker, 695 F.2d 784, 788-89 (7th Cir. 1982). *See also* Prill v. Schweiker, 546 F. Supp. 1381, 1388-89 (N.D. Ill. 1982); Carter v. Schweiker, 535 F. Supp. 195, 203-04 (S.D. Ill. 1982).

that a treating physician's evidence is credible . . . he should give it controlling weight in the absence of evidence to the contrary. . . ."[111]

G. *Social Security Remand Standards*

During the past survey period, the case of *Czubala v. Heckler*[112] was the occasion for an unusually thorough discussion of the post-1980 standards for a social security disability claimant's obtaining a remand to the Secretary on grounds of new evidence.[113] In *Czubala*, the Secretary had determined that the claimant was disabled from 1975 to 1977, but not thereafter.[114] In arguing for remand to hear new and substantial evidence, the claimant pointed to an affidavit from his mother testifying to the claimant's posthearing hospitalization.[115]

In ordering a remand to consider a portion of the claimant's proferred new evidence, the court adopted relatively stringent standards for interpreting the remand statute. The court apparently required not only that the evidence be new, in the sense that it could not have been timely proferred, but that the evidence be new "on its face," or by its date.[116] The new evidence was also required to be new in the sense of being not repetitious or cumulative.[117] Further, the evidence must be relevant, probative, and material in the sense of bearing a "nexus" to the original claim and being such as to generate a reasonable possibility of a change in the Secretary's original determination.[118] New but nonmaterial evidence may of course be of value to a claimant in creating the basis for an independent new claim of disability.

Other decisions interpreting the post-1980 remand standard for new evidence reception have at least occasionally been more liberal in not requiring "facial" newness, and in being somewhat less fastidious in requiring a showing of good cause for the claimant's failure to originally introduce the evidence.[119] It has been said, in accordance with the broad reading owed the Act,[120] that "[t]he good cause requirement often is

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[111]Whitney v. Schweiker, 695 F.2d 784, 789 (7th Cir. 1982).

[112]574 F. Supp. 890 (N.D. Ind. 1983).

[113]*See* 42 U.S.C. § 405(g) (1982). The amendment at issue was Pub. L. No. 96-265, § 307, 94 Stat. 458 (1980). *See also* S. REP. No. 408, 96th Cong., 1st Sess. 58-59, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 1336-37.

[114]574 F. Supp. at 892.

[115]*Id.* at 899 n.4.

[116]*Id.* at 898-99. Whether parol evidence would ever be available to show the prior unavailability of "new" evidence may be further discussed in subsequent cases.

[117]*Id.* at 899.

[118]*Id.* at 899-901. A similar standard was subsequently imposed in Newhouse v. Heckler, 580 F. Supp. 1101, 1103 (E.D. Pa. 1984), and in McNeil v. Heckler, 577 F. Supp. 212, 213 (D. Mass. 1983).

[119]*See, e.g.*, Burton v. Heckler, 724 F.2d 1415, 1417-18 (9th Cir. 1984). *See also* Reynolds v. Heckler, 570 F. Supp. 1064, 1067 (D. Ariz. 1983).

[120]*See, e.g.*, Curtis v. Heckler, 579 F. Supp. 1026, 1028 (E.D. Tex. 1984).

liberally applied, where . . . there is no indication that a remand for consideration of new evidence will result in prejudice to the Secretary.''[121] The counterweight to this liberality, however, must be recognition of the congressional intent to limit the authority of courts to remand unsatisfying decisions, and to inhibit claimants from withholding available evidence in hopes of a second chance if their claim is administratively denied.[122]

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[121]Burton v. Heckler, 724 F.2d 1415, 1417-18 (9th Cir. 1984) (citation omitted).

[122]*See, e.g.*, Willis v. Secretary of HHS, 727 F.2d 551, 553-54 (6th Cir. 1984) (per curiam); Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir. 1983). A number of Indiana-based medicare reimbursement cases were also decided during the past survey period. Among these were Community Hosp. of Indianapolis, Inc. v. Schweiker, 717 F.2d 372, 375 (7th Cir. 1983) (medicare reimbursement level for hospital's rehabilitation center properly set at level of special, rather than routine, care units under plain meaning of regulations effective for 1977 and 1978); St. Francis Hosp. Center v. Heckler, 714 F.2d 872, 875 (7th Cir. 1983) (per curiam), *cert. denied*, 104 S. Ct. 1274 (1984) (congressional intent not to allow medicare reimbursement for nonproprietary hospitals' return on equity capital; no fifth amendment violation in voluntary scheme implementing such intention), *cited in* Sun Towers, Inc. v. Heckler, 725 F.2d 315, 335 (5th Cir. 1984); Johnson County Memorial Hosp. v. Heckler, 572 F. Supp. 1538, 1540-41 (S.D. Ind. 1983) (delegation of Secretary's authority to review decisions of Provider Reimbursement Review Board to administrator and then to deputy administrator of Health Care Financing Administration not improper); St. Joseph Hosp. v. Heckler, 570 F. Supp. 434, 440 (N.D. Ind. 1983) (''Under the *Vermont Yankee* doctrine, as applied to the APA scheme for an exempt 'benefit' regulation, the requirement of a sufficient contemporaneous statement of justification does not apply to a regulation not subject to 5 U.S.C. § 553, such as the patient telephone regulation.'') (upholding validity of 1966 regulation disallowing medicare reimbursement for bedside telephones), *cited with approval in* Bedford County Gen. Hosp. v. Heckler, 574 F. Supp. 943, 945-46 (E.D. Tenn. 1983).

Also decided during the survey period were McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983) which provided some interesting dicta on the unresolved issue of equitable estoppel against the government, a theme picked up in Heckler v. Community Health Services of Crawford, 104 S. Ct. 2218 (1984); Frey v. Review Bd. of the Ind. Employment Sec. Div., 446 N.E.2d 1341, 1344 (Ind. Ct. App. 1983) (finding adequate preservation for appellate review of the legal issue that mere fact of college attendance does not as a matter of law classify an unemployment compensation claimant as unavailable for work), and Fruehauf Corp. v. Review Bd. of the Ind. Employment Sec. Div., 448 N.E.2d 1193, 1196-97 (Ind. Ct. App. 1983) (finding an abuse of discretion in the Board's refusal to hear additional evidence where an intervening holiday had prevented the employer from receiving prior notice of the hearing).