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Administrative Law--The Right to Judicial Review of Administrative Action

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CASE COMMENTS

Administrative Law—The Right to Judicial Review of Administrative Action

P, a corporate investment broker, deposited with insured banks, at the request of a borrower, an amount equal to the compensating balance required for that borrower. The bank then issued *P* a one year certificate of deposit, which, on the basis that the obligation represented by the certificate was an insured deposit, *P* sold to investors at its discounted value. *D* arbitrarily issued a press release stating that such certificates would no longer qualify for insurance. *P* appealed from a decision dismissing its complaint for failure to state a cause of action. *Held*, reversed. *P*'s amended complaint charging that a corporate agency of the government caused *P* substantial injury by issuance of a press release, deliberately misrepresenting federal law, for the specific purpose of destroying *P*'s business was sufficient to state a cause of action against the government agency for declaratory and injunctive relief. *Morton Int'l Corp. v. FDIC*, 305 F.2d 692 (1st Cir. 1962).

The case poses several questions. When does a party have the right to judicial review of a government agency's allegedly wrongful action? What must be contained in the complaint to satisfy the constitutional requirement of an actual "controversy?" Will this decision inhibit the use of publicity type enforcement techniques by an administrative agency?

The Administrative Procedure Act §12, 60 Stat. 244 (1946), 5 U.S.C. § 1009(a) (1958), grants the right of judicial review to any person who has suffered a legal wrong because of any agency's action or who has been adversely affected or aggrieved by such action within the meaning of any relevant statute. In *Ashwander v. TVA*, 297 U.S. 288 (1935), the Court stated that the pronouncements, policies and programs of a federal agency and its directors could not give rise to a justiciable controversy except as they culminate in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining.

Some courts have reasoned that the right to judicial review arises only when the administrative order imposes an obligation, that is, when it commands or prohibits. *Decamp Bus Lines v.*

United States, 185 F.Supp. 366 (D.N.J. 1960). This, however, seems to be somewhat of a minority view. Other authorities, reading the constitutional guaranties against arbitrary and discriminatory action into the laws creating agency powers, have held that the agency determination may be ripe for review even though it neither commands, prohibits, nor makes any direct demands on the complaining party. *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942); *Buchanan v. Warley*, 245 U.S. 60 (1917); 3 *Davis, Administrative Law* § 21.07 (1958). These authorities appear to be in accord with the better view that the true test in determining the right of a party to relief is the substantiality of the present or imminent harm which the agency determination inflicts on the complaining party. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Zacharias v. McGrath*, 105 F.Supp. 421 (D.D.C. 1952). West Virginia appears to follow this rule. In *State v. Huber*, 129 W. Va. 198, 40 S.E.2d 11 (1946), the court held that a judicial question arises, upon which the court may pass judgment, if an administrative body abuses the power given it, or exercises it in an arbitrary or fraudulent manner.

It would seem, therefore, that the better view assures judicial review when an agency has acted arbitrarily, abused its discretionary power, or, when it appears that the complaining party is likely to suffer substantial harm because of the agency ruling.

U.S. Const. art. III, § 2 limits the exercise of federal judicial power to cases and controversies. A "controversy" must be real and substantial, admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Lizza & Sons Inc. v Hartford Acc. & Indem. Co.*, 247 F.2d 262 (1st Cir. 1957).

Basically, the question in each declaratory judgment case will be whether the facts alleged, under all the circumstances, show a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941). The touchstone to justiciability is injury to a legally protected right. *Joint Anti-Fascist Refugee Comm. v. McGrath*, *supra*. Although the court in the principal case declined to rule whether an agency press release would, in itself, give rise to a "controversy," it seems, that because the plaintiff was given the

relief sought it is possible for a press release to cause injury to a protected right sufficient to give rise to a justiciable "controversy." Therefore, since a complaint will not be dismissed for failure to state a cause of action, except where it appears that the plaintiff is not entitled to relief under any state of facts which could be proven in support of his claim, *Bowdin v. Malone*, 284 F.2d 95 (5th Cir. 1960); *Brown v. Bullock*, 194 F.Supp. 207 (S.D.N.Y. 1961), it follows that the complaint, if it alleges the presence of past or imminent harm to a legally protected right, will be sufficient to satisfy the requirement of an actual "controversy" and entitle the plaintiff to be heard.

The question of whether the decision in the principal case will affect the publicity type enforcement techniques of administrative agencies can be resolved by a consideration of the right of an agency to perform its duties and the public's interest in the administration of the law as against an individual's right to conduct his business free from government interference.

It has been held that the Administrative Procedure Act has not changed the principle that one must have suffered a legal wrong in order to have standing to challenge programs administered by the government. *Duba v. Schuetzle*, 303 F.2d 570 (8th Cir. 1962). It is also maintained that administrative agencies should be free to fashion their own rules of procedure and pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. *Cella v. United States*, 208 F.2d 783 (7th Cir. 1953). The interference of the courts with the performance of the ordinary duties of the executive department of the government would be productive of "mischief" and such a power was never intended to be given them. *Duba v. Schuetzle*, *supra*. To invoke the power of the court one must be able to show that he has sustained or is in immediate danger of sustaining some direct injury to a particular right of his own as the result of the promulgation of an agency rule, and not merely that he suffers in some indefinite way with people generally. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Massachusetts v. Mellon*, 262 U.S. 447 (1922).

However, on the other hand, it appears to be elementary law that an order of an agency which adjudicates rights or directs must be based on a hearing. *Kukatush Mining Co. v. SEC*, 198 F.Supp. 508 (D.D.C. 1961); *Hoxsey Cancer Clinic v. Folsom*, 155 F.Supp. 376 (D.D.C. 1957). Also, an administrative order cannot be upheld

unless the grounds upon which the agency acted, in exercising its power, were those upon which its action could be sustained. *Baudin v. Dulles* 235, F.2d 532 (D.C. Cir. 1956). It has been decided that if the agency's action is arbitrary the injured party will have the right to judicial review. *Joint Anti-Fascist Refugee Comm. v. McGrath*, *supra*; *Friend v. Lee*, 221 F.2d 96 (D.C. Cir. 1955).

It seems, therefore, that the decision of the principal case does not vary from the rules already established concerning agency action. This case will inhibit the use of publicity type enforcement techniques if such techniques are used in an arbitrary or capricious manner. On the other hand, if the press release is issued in a valid exercise of the agency's authority and is in compliance with the law the decision of the case will not affect it, for the courts will not interfere in the valid exercise of an agency's power.

The courts in these situations are placed in a delicate position, for they must not only promote the public's interest in the administration of the law but also safeguard the constitutional right of each individual. But, as the cases indicate, the rights of the individual rise higher than the preservation of enforcement techniques employed by administrative agencies.

Thomas Franklin McCoy

**Conflict of Laws—Wrongful Death Measure of Damages—
Substantive or Procedural?**

The intestate, a passenger of *D's* common carrier aircraft, was killed in a crash in Massachusetts, the state of *D's* incorporation. *P*, as administratrix of her husband's estate, brought suit in federal district court, in New York, on diversity of citizenship. On appeal, only the cause of action based on the Massachusetts wrongful death act was considered. The district court applied the Massachusetts statute, but refused to apply the 15,000 dollar limitation, as being contrary to the public policy of New York. The circuit court reversed. Upon rehearing, the court, sitting en banc, *held*, reversed and affirmed the district court. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, neither the Full Faith and Credit Clause nor the Due Process Clause requires that the law be applied. *Pearson v. North-*