Mercer Law Review

Volume 49
Number 4 *Annual Eleventh Circuit Survey*

Article 2

7-1998

# Administrative Law

Terri L. Carver

# Administrative Law

by Terri L. Carver*

## I. INTRODUCTION

The Eleventh Circuit ruled on numerous administrative law issues in 1997, including exhaustion of administrative remedies, deference to agency legal interpretations, and the time period for appealing federal agency actions. The Eleventh Circuit also took a close look at the scope of an inspector general's subpoena powers and clarified the role of agency investigations versus inspectors general investigations.

The Eleventh Circuit decided several cases of first impression in 1997. In a case of first impression nationwide,[1] the Eleventh Circuit ruled that determining the amount of attorney fees in an administrative case was a collateral issue.[2] Therefore, the issue of attorney fees did not toll the time period for seeking judicial review of an administrative decision on the merits.[3]

The Eleventh Circuit also reviewed two cases of first impression within the circuit.[4] First, the court held that a claimant who filed suit against an insolvent financial institution (later taken over by the Resolution Trust Corporation ("RTC")) was not required to exhaust administrative remedies when the defendant RTC initially elected to proceed with the suit.[5] The claims procedures against insolvent

---

* Terri L. Carver is an environmental attorney with the United States Air Force. This Article does not represent the views of the United States Air Force. University of Nebraska (B.A., 1980); Marquette University Law School (J.D., 1984); George Washington University Law School (LL.M., Environmental Law, 1996).

1. Fluor Constructors, Inc. v. Reich, 111 F.3d 94 (11th Cir. 1997). *See* discussion *infra* Part II.B.

2. 111 F.3d at 95.

3. *Id.*

4. Damiano v. FDIC, 104 F.3d 328 (11th Cir. 1997); Bradberry v. Director, Office of Workers' Compensation Programs, 117 F.3d 1361 (11th Cir. 1997). *See* discussion *infra* Parts II.A and III.B.

5. 104 F.3d at 335.

financial institutions, as set forth in the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"),[6] governed the court's decision.[7] In the second case, the court ruled the legal standard for survivor's benefits under the Black Lung Benefits program was whether black lung disease "hastened" the miner's death.[8] The court deferred to the agency's interpretation of its regulations on the Black Lung Benefits program.[9]

The court decided several cases involving exhaustion of administrative remedies. First, the Eleventh Circuit ruled plaintiffs need not exhaust state administrative remedies if the agency action is being challenged as a violation of federal law.[10] Second, the court found the three-part test for a waiver of the exhaustion requirement was not met because plaintiff failed to prove exhaustion of administrative remedies would cause irreparable harm or be futile.[11] Finally, the court clarified that a third party cannot later challenge in court an agency decision that the original party did not appeal through the agency's administrative process.[12]

In two cases, the Eleventh Circuit refused to defer to agency statutory interpretations the court deemed inconsistent with the underlying statutes.[13] However, the court did defer to agency regulatory interpretations as to commercial pilot qualifications,[14] eligibility requirements in the Black Lung Benefits program,[15] and Medicare reimbursement of bad debt claims.[16]

The Eleventh Circuit ruled the statutory time period for challenging an agency regulation did not apply if the plaintiff challenged the agency regulation as violative of the statute.[17] The court also clarified that an agency did not engage in improper retroactive rule-making if it

---

6. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 12 U.S.C.).

7. 104 F.3d at 333-35.

8. 117 F.3d at 1367.

9. *Id.*

10. Tallahassee Mem'l Reg'l Med. Ctr. v. Cook, 109 F.3d 693, 702 (11th Cir. 1997). *See* discussion *infra* Part II.A.

11. Crayton v. Callahan, 120 F.3d 1217, 1220, 1222 (11th Cir. 1997). *See* discussion *infra* Part II.A.

12. Bama Tomato Co. v. United States Dep't of Agric., 112 F.3d 1542, 1548 (11th Cir. 1997). *See* discussion *infra* Part II.A.

13. Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1477 (11th Cir. 1997); *Tallahassee Mem'l*, 109 F.3d at 703. *See* discussion *infra* Part III.A.

14. Zukas v. Hinson, 124 F.3d 1407, 1411 (11th Cir. 1997). *See* discussion *infra* Part III.B.

15. *Bradberry*, 117 F.3d at 1366-67. *See* discussion *infra* Part III.B.

16. University Health Servs., Inc. v. Health & Human Servs., 120 F.3d 1145, 1150 (11th Cir. 1997). *See* discussion *infra* Part III.B.

17. *Legal Envtl. Assistance Found.*, 118 F.3d at 1473. *See* discussion *infra* Part II.B.

disallowed an old claim based on new information not available at the time the claim was paid.[18]

Finally, the Eleventh Circuit upheld Inspector General ("IG") subpoenas issued in a fraud investigation on disaster payments.[19] The court distinguished the IG's subpoena powers from agency compliance audits that were the agency's prerogative.[20]

## II. JURISDICTION TO REVIEW AGENCY ACTIONS

### A. *Exhaustion of Administrative Remedies*

In *Damiano v. FDIC*,[21] the Eleventh Circuit held that defendant RTC failed to give timely notice of administrative claims procedures to the plaintiff who sued an insolvent financial institution now in RTC receivership.[22] Under FIRREA,[23] the RTC was deemed to have elected to proceed with the lawsuit; therefore, the plaintiff was not required to exhaust administrative remedies.[24]

In 1990, plaintiff Irene Damiano filed an age discrimination suit against her former employer, Amerifirst Federal Savings & Loan Association ("Amerifirst"), prior to Amerifirst being declared insolvent.[25] The RTC was appointed the receiver of Amerifirst in March 1991.[26] Soon after its appointment as receiver, the RTC substituted itself as defendant in the age discrimination suit.[27] More than eight months passed before RTC raised the issue of plaintiff's failure to exhaust administrative remedies.[28] In 1994, the district court dismissed the

---

18. *University Health Servs.*, 120 F.3d at 1153. *See* discussion *infra* Part IV.

19. Inspector General of the United States Dep't of Agric. v. Glenn, 122 F.3d 1007, 1012 (11th Cir. 1997). *See* discussion *infra* Part IV.

20. *Glenn*, 122 F.3d at 1010-11.

21. 104 F.3d 328 (11th Cir. 1997).

22. *Id.* at 335.

23. *See supra* note 6.

24. 104 F.3d at 335.

25. *Id.* at 330-31.

26. *Id.* The court noted that on "December 31, 1985, the RTC dissolved and the Federal Deposit Insurance Corporation ("FDIC") succeeded to the RTC as receiver. 12 U.S.C. § 1441a(m). To avoid confusion, however, we will consistently refer to the receiver as the RTC in this opinion." *Id.* at 331 n.1. Therefore, my discussion of the case will also refer to the defendant as the RTC, not the FDIC.

27. 104 F.3d at 331.

28. *Id.* at 332. The court castigated the RTC for its failure to notify plaintiff by mail of the administrative claims process as required by FIRREA. *Id.* at 331 n.3, 333-34 n.6. Plaintiff did not argue that RTC's failure to notify her as required by FIRREA excused her from exhausting her administrative remedies. *Id.* at 331 n.3. Rather, plaintiff argued RTC elected to proceed with the suit when RTC failed to timely request a stay pending

case, holding that "FIRREA created a mandatory administrative exhaustion requirement for all claims, including those asserted in a pre-receivership lawsuit."[29] The district court ruled the plaintiff had "forfeited her claim by failing to exhaust her administrative remedies."[30]

The Eleventh Circuit, in a case of first impression in the circuit,[31] reversed the district court[32] and held FIRREA did not impose a mandatory administrative exhaustion process for claims asserted in pre-receivership lawsuits.[33] "[T]he [FIRREA] statute does not provide for an automatic stay of all pre-receivership actions, pending exhaustion of the administrative process . . . . It specifically gives the receiver the right, but not the duty, to stay a pending action within the first ninety days of being appointed as receiver."[34]

Here, the RTC clearly knew of plaintiff's pending age discrimination suit because it substituted itself as the successor party in the lawsuit within a month of its receivership appointment.[35] Yet, more than eight months passed before RTC protested plaintiff's failure to exhaust administrative remedies.[36] The Eleventh Circuit held:

> [The RTC] elected to proceed with this lawsuit judicially by failing to timely insist on the use of its administrative processes. To hold otherwise would be to allow the RTC to ignore a lawsuit of which it clearly was aware and in which it had intervened, thus luring the claimant to assume that the RTC [wa]s ready to deal with it as a litigant, while "[i]n reality, . . . the receiver l[ay] in ambush, awaiting expiration of the administrative deadline so that it [could] dispose of the claim without consideration of its merits."[37]

The court noted that subject matter jurisdiction of pending pre-receivership lawsuits, such as plaintiff's age discrimination lawsuit, "vested" at the time it was filed with the court.[38] The receivership did not disturb the district court's jurisdiction.[39] The FIRREA pre-receivership provisions were in sharp contrast to the FIRREA post-receivership

---

exhaustion of administrative remedies. *Id.* at 332.

29. *Id.* at 332.
30. *Id.*
31. *Id.* at 330.
32. *Id.* at 335.
33. *Id.* at 334.
34. *Id.* at 333-34.
35. *Id.* at 331.
36. *Id.* at 335.
37. *Id.* (footnote omitted) (quoting Whatley v. RTC, 32 F.3d 905, 908 (5th Cir. 1994)).
38. *Id.* at 333.
39. *Id.*

claims process,[40] which imposed a mandatory administrative process prior to suit as a jurisdictional prerequisite.[41]

In *Tallahassee Memorial Regional Medical Center v. Cook*,[42] the Eleventh Circuit held the plaintiffs' failure to exhaust state administrative remedies in challenging Medicaid hospital reimbursements could not bar a 42 U.S.C. § 1983 claim alleging a violation of federal law.[43] Plaintiffs[44] challenged Florida's failure to reimburse them for care of adolescent psychiatric patients after inpatient care was no longer required but prior to patients' placement in outpatient alternative treatment facilities.[45] Plaintiffs said reimbursement was required by the Boren Amendment,[46] under the federal Medicaid program.[47] The court agreed.[48]

The court rejected Florida's argument that plaintiffs had not exhausted the state's administrative appeals process on reimbursements.[49] "[A] claim under 42 U.S.C. § 1983 cannot be barred by a plaintiff's failure to exhaust state remedies with respect to unreviewed administrative actions . . . . The courts . . . have found this rule applies with equal force to cases under the [Boren] Amendment."[50]

The Eleventh Circuit clarified the criteria for a waiver of the jurisdictional prerequisite to exhaust administrative remedies, in *Crayton v. Callahan*.[51] In *Crayton*, plaintiffs alleged the Social Security Administration had a duty to determine if applicants to the Social

---

40. *Id.* at 333-34.

41. *Id.*

42. 109 F.3d 693 (11th Cir. 1997) (per curiam). The Eleventh Circuit adopted the district court opinion, which is set forth in Appendix A of the Eleventh Circuit decision. *Id.* at 694-95. Therefore, citation to case facts and legal analysis are to the district court opinion in Appendix A. The Eleventh Circuit affirmed all the district court holdings except for the district court's directives to the Florida State Legislature, which the Eleventh Circuit vacated. *Id.*

43. *Id.* at 702.

44. Plaintiffs were two Florida hospitals, Tallahassee Memorial Regional Medical Center, Inc. and Florida Hospital Medical Center, which were "fully qualified to provide in-patient psychiatric care for adults and adolescents under Florida's Medicaid program." *Id.* at 695.

45. *Id.* at 700. The court noted the "extreme shortage of spaces at alternative care facilities for the adolescent psychiatric patients." *Id.* Plaintiffs found themselves forced to keep adolescent patients within their facilities until slots opened up in these alternative care facilities, because the patients could not be released in an unsupervised setting. *Id.*

46. 42 U.S.C. § 1396a(a)(13)(A) (1994).

47. 109 F.3d at 696.

48. *Id.* at 703.

49. *Id.* at 702.

50. *Id.* (citations omitted).

51. 120 F.3d 1217 (11th Cir. 1997).

Security Disability Insurance ("SSDI") program were mentally retarded, even if mental retardation was not the basis of the initial disability application.[52]

The Eleventh Circuit noted the federal SSDI statute set forth two jurisdictional prerequisites for judicial review of agency decisions.[53] "*First*, the individual must have presented a claim for benefits to the Secretary. *Second*, the claimant must have exhausted the administrative remedies. This means claimant must have completed each of the steps of the administrative review process unless exhaustion has been waived."[54] In this case, plaintiffs had not completed the administrative process prior to filing suit alleging an SSDI violation.[55]

The Eleventh Circuit applied a three-part test to determine if the exhaustion requirement had been or should be waived: "(1) are the issues entirely collateral to the claim for benefits; (2) would failure to waive cause irreparable injury; and (3) would exhaustion be futile."[56] The Eleventh Circuit affirmed the district court's findings[57] that plaintiffs failed to prove exhaustion of administrative remedies would cause irreparable harm or be futile.[58]

After reviewing three United States Supreme Court cases on waiver of the administrative exhaustion requirement,[59] the Eleventh Circuit summarized the "rules" regarding exhaustion of administrative remedies as follows:

> The agency may always waive the exhaustion requirement. It may be held to have done so by failing to challenge the sufficiency of the allegations in plaintiffs' complaint . . . . Exhaustion may be excused when the only contested issue is constitutional, collateral to the consideration of claimant's claim, and its resolution therefore falls outside the agency's authority . . . . Exhaustion may be impractical and inconsistent with the exhaustion principles when a judicial determination has been made that the agency's procedure is illegal.[60]

The Eleventh Circuit modified the district court's dismissal with prejudice to dismissal without prejudice to allow plaintiffs to seek judicial review once they had exhausted administrative remedies.[61]

---

52. *Id.* at 1220.
53. *Id.*
54. *Id.* (citation omitted).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1222.
59. *Id.* at 1221.
60. *Id.* at 1222.
61. *Id.*

In *Bama Tomato Co. v. United States Department of Agriculture*,[62] the Eleventh Circuit ruled that failure to appeal a U.S. Department of Agriculture's ("USDA") employment bar under the Perishable Agricultural Commodities Act ("PACA") program[63] barred a subsequent judicial challenge to the employment bar.[64] The USDA had revoked the license of Mims Produce for PACA violations.[65] The USDA had found Jerry Mims was connected to Mims Produce and imposed a one-year employment bar.[66] Thus, no PACA participant could employ Mr. Mims during the one-year barment.[67] The USDA had notified Mr. Mims of his administrative appeal rights.[68] Mr. Mims did not appeal the USDA employment bar.[69]

Plaintiff, Bama Tomato Company, hired Mr. Mims during the barment period in violation of USDA regulations.[70] The USDA sanctioned the Bama Tomato Company ("Bama") and Bama appealed the sanction.[71]

Bama asked the court to review the USDA's initial decision to bar Mr. Mims from the PACA program.[72] The Eleventh Circuit refused to hear this issue because Mr. Mims had failed to exhaust his administrative remedies:

> Mims . . . waived his right to contest the issue of whether he was responsibly connected to Mims Produce by failing to challenge directly the determination . . . . Thus, Bama [Tomato Company] cannot step into Mims' shoes and challenge the final determination that Mims [wa]s subject to the employment bar provisions of the PACA.[73]

### *B. Statute of Limitations*

In *Fluor Constructors, Inc. v. Reich*,[74] a case of first impression nationwide, the Eleventh Circuit held the *Budinich* rule[75] that reimbursement of attorney fees is a collateral issue also applied to adminis-

---

62. 112 F.3d 1542 (11th Cir. 1997).
63. 7 U.S.C. §§ 499a-499s (1994 & Supp. I 1995).
64. 112 F.3d at 1548.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 1544.
70. *Id.*
71. *Id.* at 1544-45.
72. *Id.* at 1546.
73. *Id.* at 1548.
74. 111 F.3d 94 (11th Cir. 1997).
75. The United States Supreme Court established this rule in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

trative cases.[76] Thus, issues regarding attorney fees do not toll the time period for seeking judicial review of an administrative decision on the merits.[77] Fluor Constructors ("Fluor"), the plaintiff-employer, challenged an adverse Labor Secretary's decision awarding back pay to one of Fluor's employees, Tritt, under a federal whistle-blower protection statute.[78] The Labor Secretary found Fluor violated the nuclear industry whistle-blower statute when Fluor fired Tritt in reprisal for Tritt's questioning safety practices at the Crystal River Power Plant.[79]

During the administrative review process, this case went back and forth between the administrative law judge ("ALJ") and the Labor Secretary:

> The [Labor Secretary's] order [reversing the ALJ's initial decision] remanded the case to the ALJ for a determination of back pay, benefits, and, if necessary, compensatory damages [to be paid to Tritt]. Fluor subsequently sought review of the Secretary's order in this court, but we determined jurisdiction was lacking because Fluor was not appealing a final order.
>
> On March 16, 1995, the [Labor] Secretary issued an order upholding the ALJ's decision on damages and remanding for the sole purpose of determining the amount of attorney's fees Fluor owed pursuant to 42 U.S.C. § 5851(b)(2)(B).[80]

Thus, the Secretary issued a decision on the merits on March 16, 1995. The Labor Secretary subsequently adopted the ALJ's determination on the attorney fees issue.[81]

Plaintiff did not file his appeal of the Secretary's order on the merits until June 29, 1995, more than sixty days after the Secretary's March 16, 1995 decision.[82] Apparently, plaintiff, having been burned once on the timeliness of his appeal, waited until the ALJ resolved the attorney fees issue before appealing the Secretary's decision.[83]

---

76. 111 F.3d at 95.
77. *Id.* at 96.
78. *Id.* at 95.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 96.
83. Senior Circuit Judge Hill, in his concurring opinion, traced the chronology of plaintiff's actions, including plaintiff's initial appeal that was denied for being filed prematurely. *Id.* at 97 (Hill, J., concurring). Judge Hill noted that when the Secretary approved the ALJ's order on Tritt's back pay and other damages, the Secretary remanded the issue of attorney fees to the ALJ. *Id.*

> The employer [Fluor], guarding against the error of prematurity, withheld an appeal until the ALJ had acted on the remand. When this was done, and the Secretary had, finally, ended the proceedings by upholding the ALJ's decision in

The Eleventh Circuit started its analysis by noting Federal Rule of Appellate Procedure 15(a)[84] requires a party to file a petition for review of a final decision of a Secretary "within the time prescribed by law."[85] Under the Energy Reorganization Act of 1974,[86] "petitions for review in the United States courts of appeals 'must be filed within sixty days from the issuance of the Secretary's order.'"[87]

The court then analyzed whether the rule established in *Budinich* should be applied in this case. In *Budinich*, the United States Supreme Court held "the imposition and the amount of attorney's fees are always collateral to the merits of the action."[88] The Eleventh Circuit ruled:

> Where an order disposes of a party's substantive claims, but does not dispose of claims relating to attorney's fees, the time for appeal of the substantive claims starts to run from the date of the first order unless the district court grants a delay . . . . Though *Budinich* considered the timeliness of an appeal from a district court judgment rather than a review of a final administrative decision, the Supreme Court's analysis does not allow for the establishment of a different rule for administrative cases. We hold that for the purposes of an appeal from an administrative agency, both the imposition and the amount of attorney's fees are collateral to the merits of an action.[89]

The court also held Fluor's case did not meet the "unique circumstances" doctrine for granting the appeal despite its untimeliness.[90] Thus, the Eleventh Circuit dismissed the appeal for lack of subject matter jurisdiction.[91] As an aside, the court said Fluor would not have won on appeal anyway.[92]

---

its entirety, the employer appealed to us.

"Too late!" said the Secretary in the motion to dismiss this appeal. The employer should have appealed regardless of the remand to fix attorney[] fees.

We agree, the employer's appeal is to be "dismissed if you do and dismissed if you don't!"

Counsel, will, I anticipate, file appeals whenever one might conceivably be available and let the court sort it all out.

*Id.*

84. FED. R. APP. P. 15(a).
85. 111 F.3d at 96.
86. 42 U.S.C. §§ 5801-5891 (1994 & Supp. 1997).
87. 111 F.3d at 96 (quoting 42 U.S.C. § 5851(c)(1)).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 97.
92. *Id.* at 97 n.2.

In *Legal Environmental Assistance Foundation, Inc. v. EPA*,[93] the Eleventh Circuit held the statutory time periods for challenging agency regulations do not apply if the plaintiff is challenging a regulation as violative of the underlying statute.[94] The Legal Environmental Assistance Foundation ("LEAF") challenged the Environmental Protection Agency's ("EPA") underground injection control ("UIC") regulations[95] as inconsistent with the Safe Drinking Water Act ("SDWA").[96] Specifically, LEAF argued the EPA's exclusion of hydraulic fracturing from the UIC regulatory regime violated the SDWA.[97]

The EPA argued the Eleventh Circuit did not have jurisdiction over LEAF's suit because LEAF's challenge to the UIC regulations "should have been brought within forty-five days of the promulgation of the regulations and [wa]s now time-barred pursuant to [section] 300j-7(a)(2)."[98] The court rejected EPA's argument by distinguishing procedural versus substantive challenges to agency regulations.[99]

Procedural challenges to a regulation, such as an agency's failure to provide notice and comment during the rule-making process, were bound by the statutory time period for challenging agency regulations.[100] However, an allegation that an agency regulation was contrary to the underlying statute was a substantive challenge and was not subject to the statutory time limit for appealing agency actions.[101] An agency regulation that "'create[d] a rule out of harmony with the statute, [wa]s a mere nullity.'"[102] Therefore, the Eleventh Circuit ruled it had subject matter jurisdiction over the suit.[103] The Eleventh Circuit

---

93. 118 F.3d 1467 (11th Cir. 1997).

94. *Id.* at 1473.

95. The EPA promulgated its UIC regulations at 40 C.F.R. pt. 144. Minimum requirements for UIC programs delegated to the states are contained in 40 C.F.R. pt. 145. The EPA promulgated these regulations in 1983. *See* 48 Fed. Reg. 14,189, 14,202 (1983).

96. 118 F.3d at 1472.

97. *Id.* at 1471.

98. *Id.* at 1472. The EPA cited *Natural Resources Defense Council v. Nuclear Regulatory Commission ("NRDC v. NRC")*, 666 F.2d 595 (D.C. Cir. 1981), in support of its argument that the court lacked jurisdiction because LEAF had failed to challenge the UIC regulations within the statutory period. 118 F.3d at 1472.

99. 118 F.3d at 1472. The court said the *NRDC v. NRC* case cited by EPA distinguished between procedural versus substantive challenges to agency regulations. Only untimely procedural challenges to agency regulations were barred by the applicable statutory period. *Id.*

100. *Id.*

101. *Id.* at 1473.

102. *Id.* (citation omitted).

103. *Id.*

ultimately found the EPA's UIC regulations void insofar as it excluded hydraulic fracturing from the UIC regulatory regime.[104]

## III. JUDICIAL REVIEW OF AGENCY ACTIONS

### A. *Deference to an Agency's Statutory Interpretation*

Deference to the EPA's interpretation of the SDWA was another issue before the court in *Legal Environmental Assistance Foundation*.[105] The EPA had interpreted the SDWA provision on underground injection as excluding hydraulic fracturing used in natural gas production. As previously discussed, the plaintiff LEAF alleged the EPA's hydraulic fracturing exclusion from the UIC regulations violated the SDWA.[106]

The EPA asserted the SDWA was ambiguous on this issue and EPA's statutory interpretation was "permissible."[107] The court noted the *Chevron* doctrine,[108] which required deference to an agency's "permissible" statutory interpretation if congressional intent was ambiguous.[109]

The Eleventh Circuit made clear that deference to the agency's interpretation only came into play if the statute was ambiguous.[110] The court examined the statutory definition of "underground injection."[111]

> "[U]nderground injection" means the subsurface emplacement of fluids by forcing them into cavities and passages in the ground through a well. The process of hydraulic fracturing obviously falls within this definition, as it involves the subsurface emplacement of fluids by forcing them into cracks in the ground through a well. Nothing in the statutory definition suggests that EPA has the authority to exclude from the reach of the regulations an activity (i.e., hydraulic fracturing) which unquestionably falls with the plain meaning of the definition . . . .[112]

Therefore, the SDWA required the EPA to regulate all underground injection activities, including hydraulic fracturing.[113]

---

104. *Id.* at 1478.
105. 118 F.3d 1467.
106. *Id.* at 1469, 1471.
107. *Id.* at 1473-74.
108. The *Chevron* doctrine is based on the United States Supreme Court decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
109. *Legal Envtl. Assistance Found.*, 118 F.3d at 1473.
110. *Id.* at 1474.
111. *Id.*
112. *Id.* at 1474-75 (footnotes omitted).
113. *Id.*

The EPA asserted two other bases for its SDWA statutory interpretation. The EPA argued its SDWA interpretation regarding underground injection was entitled to "special deference" because EPA's interpretation had been consistent over a long period of time.[114] The EPA also argued that Congress ratified the EPA's SDWA interpretation in the UIC regulations when Congress amended the SDWA in 1986.[115] The court rejected both arguments.[116] "[N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and long[-]standing agency interpretations must fall to the extent they conflict with statutory language."[117]

> As to the ratification argument, EPA has made no showing that Congress was aware that EPA's interpretation of "well injection" excluded hydraulic fracturing . . . when Congress reenacted the SDWA in 1986. Where "the record of congressional discussion preceding reenactment makes no reference to the . . . regulation [at issue], and there is no other evidence to suggest that Congress was even aware of the [agency's] interpretive position[,] . . . 'we consider the . . . reenactment to be without significance . . . .'"[118]

The court also said "'where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction.'"[119] The court held the EPA's UIC regulations excluding hydraulic fracturing were inconsistent with the SDWA and were void.[120]

In *Tallahassee Memorial Regional Medical Center v. Cook*,[121] the Eleventh Circuit ruled the Florida Agency for Health Care Administration's ("AHCA") interpretation of Medicaid laws was not entitled to deference.[122] The court found AHCA's refusal to reimburse hospitals for adolescent psychiatric care during "grace days" (when inpatient care was not medically necessary) violated federal Medicaid laws.[123] The AHCA was the state agency responsible for operating the Medicaid program in Florida.[124] Under federal law, if a state elected to include inpatient psychiatric treatment as part of their Medicaid program, then

---

114. *Id.* at 1477.
115. *Id.*
116. *Id.*
117. *Id.* (first bracket in original) (quoting Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171 (1989)).
118. *Id.* (brackets in original) (quoting Brown v. Gardner, 513 U.S. 115, 121 (1994)).
119. *Id.* at 1477-78 (brackets in original) (quoting *Brown*, 513 U.S. at 121).
120. *Id.*
121. 109 F.3d 693 (11th Cir. 1997).
122. *Id.* at 703.
123. *Id.* at 704.
124. *Id.* at 695.

hospitals had to provide that care "as long as the medical necessity exist[ed]."[125] The Boren Amendment[126] to the federal Medicaid program required participating states to reimburse hospitals for their "reasonable and adequate" costs and to ensure "reasonable access" of citizens to those hospital services.[127]

In its per curiam opinion, the Eleventh Circuit appended the district court's order which included numerous findings.[128] Florida had a severe shortage of outpatient alternative care facilities for adolescent psychiatric patients.[129] Plaintiff hospitals had been forced to keep adolescent psychiatric patients even though inpatient care was no longer required.[130] These patients could not find available alternative care facilities nor could they be discharged to an unsupervised setting.[131] The AHCA refused to reimburse the hospitals for these "grace days" because AHCA found inpatient care was no longer a "medical necessity."[132]

The court held the Boren Amendment required reimbursement for these "grace days."[133] Florida's interpretation of the Medicaid law was "directly contrary to the express mandate of the Boren Amendment and [wa]s accordingly not entitled to deference."[134]

### *B. Deference to an Agency's Interpretation of Its Regulations*

The Eleventh Circuit deferred to the Federal Aviation Administration's ("FAA") interpretation of its regulations regarding pilot qualifications in *Zukas v. Hinson*.[135] Zukas was convicted of transporting cocaine in his Piper Navajo aircraft.[136] More than six months after his drug conviction, the FAA revoked Zukas's commercial pilot certificate.[137]

Zukas challenged the certificate revocation as a violation of the "stale complaint rule,"[138] which states: "[w]here the [FAA's] complaint states allegations of offenses which occurred more than 6 months prior to the

---

125. *Id.* at 698 (footnote omitted).
126. 42 U.S.C. § 1396a(a)(13)(A) (1994).
127. 109 F.3d at 699.
128. *Id.* at 694-95.
129. *Id.* at 700.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 700, 704.
134. *Id.* at 703.
135. 124 F.3d 1407, 1411 (11th Cir. 1997).
136. *Id.* at 1408.
137. *Id.*
138. 49 C.F.R. § 821.33 (1989).

Administrator's advising [the pilot certificate holder] as to the reasons for proposed action[,] . . . [the pilot certificate holder] may move to dismiss such allegations . . . ."[139] However, this six-month "stale complaint" rule did not apply when there were allegations involving pilot qualifications.[140] The FAA asserted its revocation of Zukas's certificate was based on his lack of pilot qualifications.[141]

The court found Zukas's drug conviction "implicated his qualifications to retain his pilot certificate"[142] and deferred to the FAA's "reasonable interpretation of its own regulations."[143] Thus, the stale complaint rule did not apply and the FAA's certificate revocation was timely.[144]

In *Bradberry v. Director, Office of Workers' Compensation Programs*,[145] the Eleventh Circuit reversed an ALJ's denial of survivor's benefits under the Black Lung Benefits program as contrary to the program Director's interpretation of agency regulations.[146] Under the Black Lung Benefits program, a family member of a deceased coal miner was eligible for survivor's benefits if black lung disease (pneumoconiosis) was a "substantially contributing cause" to the coal miner's death.[147] The program Director's long-standing, consistent interpretation of the "substantially contributing cause" standard was whether pneumoconiosis "hastened death to any degree."[148] The ALJ did not utilize the Director's "hastening death" interpretation of the agency standard, when it denied survivor benefits to Mrs. Bradberry.[149]

The Eleventh Circuit ruled the program Director's interpretation was entitled to deference and the ALJ should have applied the "hastening death" interpretation of the standard.[150] The Director's interpretation

---

139. 124 F.3d at 1410 (brackets in original) (quoting 49 C.F.R. § 821.33).

140. *Id.* at 1410 (footnote omitted).

141. *Id.* at 1411.

142. *Id.*

143. *Id.*

144. *Id.*

145. 117 F.3d 1361 (11th Cir. 1997).

146. *Id.* at 1367. Plaintiff, Hattie Bradberry, had pursued her claim through multiple administrative reviews within the U.S. Department of Labor. When the Labor Department initially denied her claim, plaintiff requested a hearing before the ALJ. *Id.* at 1363. The ALJ denied plaintiff's claim. *Id.* at 1364. The Benefits Review Board ("BRB") affirmed the ALJ's decision. Plaintiff appealed the BRB decision to the Eleventh Circuit. *Id.*

147. *Id.* at 1365. *See* 20 C.F.R. § 718.205(c) (1997).

148. 117 F.3d at 1365 (footnote omitted) (quoting Northern Coal Co. v. Director, Office of Workers Compensation Program, 100 F.3d 871, 874 (10th Cir. 1996)).

149. *Id.* at 1364.

150. *Id.* at 1366-67.

of the eligibility standard was "long held and . . . neither plainly erroneous nor inconsistent with the regulatory language."[151]

In *University Health Services, Inc. v. Health & Human Services*,[152] the court deferred to the U.S. Department of Health and Human Services' ("HHS") interpretation of its Medicare guidance manual regarding payment of bad debt claims.[153] The HHS Secretary denied payment of plaintiff's Medicare bad debt claims.[154] The HHS Secretary found the plaintiff exerted more effort to collect its non-Medicare debts than it did to collect its Medicare debts, in violation of Medicare regulations.[155]

Federal Medicare regulations required health care providers to make reasonable efforts to collect from Medicare patients prior to submitting a bad debt claim for reimbursement.[156] The HHS had published a "Provider Reimbursement Manual" ("PRM") to provide additional guidance to health care providers on bad debt claims and other Medicare reimbursements.[157] Section 310 of the PRM required health care providers to make "similar" efforts to collect both Medicare and non-Medicare claims.[158] However, section 310.2 of the PRM stated that a debt was presumed to be uncollectible "[i]f after reasonable and customary attempts to collect a bill, the debt remain[ed] unpaid more than 120 days from the date the first bill [wa]s mailed to the beneficiary."[159]

The HHS Secretary denied plaintiff's bad debt claims because plaintiff sent its non-Medicare debts to an in-house collection agency after 120 days, but did not make further collection efforts on the Medicare debts.[160] Plaintiff argued that once a Medicare debt reached 120 days, PRM section 310.2 indicated no further collection efforts were required.[161]

The Eleventh Circuit explained when it would defer to an agency's interpretation of its own regulations. "Although an agency's interpretive rules do not have the force of law, the Secretary's interpretation of her own regulations are 'controlling unless plainly erroneous or inconsistent

151. *Id.* at 1366 (footnote omitted).
152. 120 F.3d 1145 (11th Cir. 1997).
153. *Id.* at 1150.
154. *Id.* at 1148.
155. *Id.*
156. *Id.* at 1147.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 1148.
161. *Id.* at 1148-49.

with the regulation.'"[162] The HHS Secretary interpreted sections 310 and 310.2 of the PRM as follows:

> PRM § 310 requires similar treatment of all patient accounts of comparable size regardless of the point in time at which the collection effort is measured. PRM § 310.2 [the 120-day collection rule] does not come into effect unless the provider has complied with PRM § 310 in treating identically all Medicare and non-Medicare accounts and has ceased collection efforts with regard to all accounts after 120 days.[163]

The court found the HHS Secretary's interpretation of the two PRM provisions was "plausible and consistent with the [Medicare] regulation's directive that a provider expend reasonable collection efforts before claiming and receiving [Medicare] reimbursement . . . ."[164] The Eleventh Circuit ruled HHS's interpretation of the PRM guidelines was not "arbitrary, plainly erroneous, or inconsistent with Medicare policy."[165] Therefore, the court was "bound to give controlling weight to the Secretary's interpretation of the governing regulation and accompanying guidelines."[166]

## IV. AGENCY RULE-MAKING AND SUBPOENA POWERS

In *University Health Services, Inc.*,[167] plaintiff alleged the HHS Secretary's retroactive disallowance of plaintiff's 1986 bad debt claim constituted improper "retroactive rule-making."[168] Plaintiff said HHS's past policy had been to pay (through its Blue Cross intermediary) Medicare bad debt claims that remained outstanding after 120 days.[169]

In this case, Blue Cross conducted an audit of the 1986 bad debt claim.[170] Blue Cross found that plaintiff had submitted Medicare debts that were uncollected after 120 days to HHS for reimbursement, but sent its non-Medicare debts (over 120 days) to an in-house collection agency.[171] Prior to this audit, Blue Cross was not aware of plaintiff's differing collection procedures for Medicare versus non-Medicare debts.[172] Blue Cross, with HHS approval, disallowed the 1986 bad

---

162. *Id.* (quoting Auer v. Robbins, 117 S. Ct. 905, 911 (1997)).
163. *Id.* at 1149.
164. *Id.* at 1150.
165. *Id.*
166. *Id.*
167. 120 F.3d 1145 (11th Cir. 1997).
168. *Id.* at 1149.
169. *Id.* at 1148.
170. *Id.*
171. *Id.*
172. *Id.* at 1150.

debts claim because plaintiff's debt collection practices were "inconsistent with Medicare policy."[173]

The court noted the same agency guidelines on bad debt claims were in effect during the time plaintiff alleged a "rule change" occurred.[174] More importantly, Blue Cross discovered new information about plaintiff's non-Medicare versus Medicare claims.[175] Blue Cross denied the reimbursement of plaintiff's Medicare bad debts claim based upon the new information.[176] The court rejected plaintiff's argument that HHS had engaged in "retroactive rule-making."[177] "[The] University fail[ed] to demonstrate how this decision [denying reimbursement of the University's claim] constitutes a substantive change or a different application of the Secretary's policy prohibiting dissimilar treatment of Medicare and non-Medicare accounts as embodied in PRM § 310."[178]

In *Inspector General of the United States Department of Agriculture v. Glenn*,[179] defendants appealed the district court decision upholding the USDA IG's subpoenas to defendants.[180] The Eleventh Circuit affirmed the district court finding that the IG subpoenas were authorized by federal law and were not indefinite or unduly burdensome.[181]

The USDA IG received a hotline complaint of possible fraud in disaster payments to Mitchell County, Georgia participants.[182] In response to the hotline complaint, the USDA IG audited the Consolidated Farm Service Agency's ("CFSA") Mitchell County disaster program.[183] When defendants refused the IG's request for information, the IG issued subpoenas and sought judicial enforcement.[184]

The Eleventh Circuit reviewed the statutory basis of the IG's subpoena power. The Inspector General Act of 1978 ("IGA")[185] authorized inspectors general to issue subpoenas as part of their investigations into fraud and abuse.[186] The court set forth three criteria for judging the validity of the USDA's subpoenas to the defendants: "(1) the Inspector

173. *Id.* at 1148, 1150.
174. *Id.* at 1150.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* (footnote omitted).
179. 122 F.3d 1007 (11th Cir. 1997).
180. *Id.* at 1008-09.
181. *Id.*
182. *Id.* at 1009.
183. *Id.*
184. *Id.*
185. 5 U.S.C. app. §§ 1-12 (1994).
186. 122 F.3d at 1008-09.

General's investigation [wa]s within its authority; (2) the subpoena's demand [wa]s not too indefinite or overly burdensome; (3) and [sic] the information sought [wa]s reasonably relevant."[187]

As to the first criteria, the Eleventh Circuit examined the legislative history of the IGA to determine when IG audits were authorized. The IGA's legislative history suggested that such audits were to have three basic areas of inquiry:

> (1) examinations of financial transactions, accounts, and reports and reviews of compliance with applicable laws and regulations, (2) reviews of efficiency and economy to determine whether the audited entity is giving due consideration to economical and efficient management, utilization, and conservation of its resources and to minimum expenditure of effort, and (3) reviews of program results to determine whether programs or activities meet the objectives established by Congress or the establishment.[188]

The court found the IGA authorized broad subpoena power to effectively discharge their audit responsibilities under the statute.[189]

The Eleventh Circuit also noted a Fifth Circuit decision that IGs "do not have authority to conduct regulatory compliance audits 'which are most appropriately viewed as being within the authority of the agency itself.'"[190] Defendants challenged the USDA subpoenas as a regulatory compliance audit that only the CFSA had the authority to conduct.[191] The Eleventh Circuit distinguished the Fifth Circuit case, which did not involve an IG investigation in response to "a specific allegation of fraud and abuse" in an agency program.[192]

The defendants also argued the IG was only authorized to detect fraud and abuse within government agencies, not fraud and abuse by participants in those agency programs.[193] The court rejected this argument:

> While we agree that IGA's main function is to detect abuse within agencies themselves, the IGA's legislative history indicates that Inspectors General are permitted and expected to investigate public involvement with the programs in certain situations .... [W]e conclude that the Inspector General's public contact in this case was

187. *Id.* at 1009.
188. *Id.* at 1010 (quoting S. Rep. No. 95-1071, at 30 (1978)).
189. *Id.* at 1010-11.
190. *Id.* (quoting Burlington N. R.R. v. Office of Inspector General R.R. Retirement Bd., 983 F.2d 631, 642 (5th Cir. 1993)).
191. *Id.*
192. *Id.*
193. *Id.*

> appropriate because it occurred during the course of an investigation into alleged misuse of taxpayer dollars.[194]

After deciding the USDA IG's subpoenas were within the IGA's statutory authority, the court also disposed of defendants' allegations that the subpoenas were too indefinite and unduly burdensome.[195] Defendants argued the IG could not request records beyond the two-year statutory retention period.[196] The court said the IG's subpoena power could reach records "created prior to the retention period."[197]

The court also rejected defendants' argument that the subpoenas were unduly burdensome because one of the defendants, Mr. Griffin, lacked the mental capacity to explain his recordkeeping system.[198] The court noted the IG had not requested an explanation from Mr. Griffin regarding his recordkeeping system.[199] Therefore, Mr. Griffin's mental capacity had no bearing on the enforceability of the IG subpoenas.[200]

194. *Id.* (footnote omitted) (citation omitted).
195. *Id.* at 1011.
196. *Id.*
197. *Id.*
198. *Id.* at 1011-12.
199. *Id.*
200. *Id.*