INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

Eighth Circuit denies retroactive effect to "90-day rule"

The Eighth Circuit has ruled that the so-called "90-day rule" does not apply retroactively. *Harrod v. Glickman*, No. 98-3757, 2000 WL 283863 (8th Cir. Mar. 17, 2000). Enacted in 1990, the original 90-day rule provided that decisions made by state and county ASC committees in good faith and in the absence of misrepresentation, false statement, fraud, or wilful misconduct were final unless modified within 90 days or appealed. The rule further provided that "no action shall be taken to recover amounts found to have been disbursed thereon in error unless the producer had reason to believe that the decision was erroneous." 7 U.S.C. § 1433e(g) (1994) (repealed). Though the original 90-day rule was repealed in 1994, it was replaced with a substantially similar rule. *See* 7 U.S.C. § 7001(a)(2), (3).

In *Harrod*, the plaintiffs were Arkansas tomato producers. In 1989 they received federal disaster assistance for weather related losses. At the time they applied for and received these benefits, the plaintiffs were not aware that some of their losses had resulted from their application of a fungicide that had been contaminated by a defoliating herbicide.

When the plaintiffs became aware that some of their crop losses were caused by the contaminated fungicide, the plaintiffs sued the fungicide's manufacturer. They also notified the ASCS that some of their crop losses had been caused by the defective fungicide.

Because of their concerns regarding possible double recovery for their losses, the plaintiffs sought guidance from the ASCS before the trial of their action against the fungicide's manufacturer. The ASCS failed to provide the requested guidance. Subsequently, four days before the trial began, an attorney in the USDA's regional general counsel office told the plaintiffs that the government would not seek reimbursement of their 1989 disaster assistance benefits. The attorney represented that this decision was based on a new regulation, an apparent reference to the regulation implementing the statutory 90-day rule enacted in 1990.

At the trial against the fungicide's manufacturer, the plaintiffs represented to the jury that 30 percent of their crop damage was caused by weather conditions alone. They maintained that the rest of the damage was caused by a combination of the

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Federal district court upholds 'farmed wetland pasture" determination

Robert Prokop is a physician, farm owner, and pro se litigant. In his latter capacity, he challenged a "farmed wetland pasture" determination affecting two sites on his farm and lost. The resulting decision, *Prokop v. United States*, No. 4:97CV3395, 2000 WL 332704 (D. Neb. Mar. 29, 2000), is instructive both as to the burden carried by challengers to wetland determinations under the wetland conservation requirements ("Swampbuster") and the development of an administrative record before the USDA National Appeals Division (NAD).

The prelude to Dr. Prokop's experience as a pro se litigant began when he wrote the FSA a letter stating that he intended to clean out a canal to improve the drainage on certain areas of his farm. A series of on-site inspections of the area by the NRCS followed. These inspections led to a determination that two sites on the farm were "farmed wetland pasture" for purposes of the wetland conservation requirements commonly known as "Swampbuster," 16 U.S.C. §§ 3821-3824. Following the upholding of this determination by the NRCS State Conservationist and the county FSA committee, Dr. Prokop appealed to the NAD.

At his NAD hearing, Dr. Prokop conceded the sites were wetlands, but he

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defective fungicide and the weather. The jury, which was told that the plaintiffs had received disaster assistance payments, awarded the plaintiffs over $7 million in damages from the fungicide's manufacturer.

In 1994, the ASCS determined that the plaintiffs were not eligible for the 1989 disaster assistance payments because only 30 percent of their crop losses were caused by the weather, not the required 50 percent. When the agency sought reimbursement, the plaintiffs appealed to the USDA National Appeals Division (NAD), which found in favor of the agency. They then sought review in federal district court. The district court, however, granted summary judgment in the agency's favor, and the plaintiffs appealed to the Eighth Circuit.

In its decision affirming in part and reversing in part the district court's judgment, the Eighth Circuit first addressed the plaintiffs' argument that the agency's determination of their ineligibility for disaster assistance was not supported by the evidence. The court found that the agency's determination was not arbitrary or capricious, except as to one of the plaintiffs. This plaintiff, based on the court's review of the administrative record, had established that at least some of his production met the required loss threshold. Accordingly, it reversed and remanded the district court's decision as to that plaintiff.

The Eighth Circuit then addressed the plaintiffs' contention that the agency's demand for reimbursement was untimely. The court began its analysis with the proposition that "[t]he government's right to recover funds paid out erroneously 'is not barred unless Congress has clearly manifested its intention to raise a statutory barrier.'" *Harrod*, 2000 WL 283863 at *5 (quoting *United States v. Wurts*, 303 U.S. 414, 416 (1938)). In concluding that no statutory barrier existed here, the court first noted that neither the legislation authorizing 1989 disaster assistance nor the implementing regulations imposed a time restraint on the agency's ability to seek reimbursement. The court did not address whether the agency would be barred from suing the plaintiffs if they failed to satisfy the reimbursement demand. Thus, the court did not address whether the general statute of limitations for commencing actions brought by the United States, 7 U.S.C. § 2415, or the statute of limitations applicable to actions brought the Commodity Credit Corporation, 15 U.S.C. § 714b(b), could be invoked to bar recovery.

The court also found that 7 U.S.C. § 1385, which provides that the facts constituting the basis for payment decisions for certain programs was inapplicable here. In so doing, the court distinguished the present action from its earlier decision in *United States v. Kopf*, 379 F.2d 8 (8th Cir. 1967), where it had invoked section 1385 to invalidate the agency's recalculation of crop yields after the plaintiff farmers already had complied substantially with the program's requirements. Here, the court noted, the agency had not attempted to "redefine the playing field" after the farmers had made planting commitment as it had done in *Kopf*. Moreover, noted the court, the plaintiffs here had been provided with notice through the disaster assistance regulations that payments based on erroneous information were subject to reimbursement.

As to the plaintiffs' argument that the

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contended that they were "artificial wetlands" either because of the activities of beavers or his own field grading and irrigation of the farm. Nonetheless, the evidence offered by the agency established that the land was a wetland; that it had been manipulated and managed for pasture or hayland before December 23, 1985; and that it met the specified hydrologic criteria to be deemed "farmed wetland pasture." In support of his position, Dr. Prokop offered, in the words of the district court, "only his own observations and the observations of others which did not speak directly to the question of whether the agency's classification of the land as farmed wetland pasture was proper." *Prokop*, 2000 WL 332704 at *5. Moreover, according to the court, some of the evidence offered by Dr. Prokop supported the agency's position that the area was a "wetland" before the occurrence of the activities that Dr. Prokop contended rendered the sites "artificial wetlands." *See id*. at *6.

In reviewing the evidence presented at the hearing that ultimately led to a NAD determination in favor of the agency, the district court relied on *Downer v. United States*, 97 F.3d 999, 1005 (8th Cir. 1996), as placing the burden on Dr. Prokop to prove that the sites were "artificial wetlands." It concluded that he had not met this burden, noting that none of Dr. Prokop's evidence directly addressed whether the sites were wetlands before December 23, 1985. In addition, acknowledging that a dissenting judge in *Downer* would have placed the burden on the agency to prove that the sites were not "artificial wetlands," the district court concluded that there was sufficient evidence in the record for the agency to have carried this burden, thus distinguishing this record from the record in *Downer*, which did not contain technical data adequate to meet that burden. *Id*. at *7.

Having upheld the NAD determination, the district court then turned to Dr. Prokop's complaints about the NAD process. Though he objected to various aspects of the NAD process, Dr. Prokop's chief complaint was that he was not permitted to call the witnesses he wanted to present at the NAD hearing. He had been denied that opportunity because he had repeatedly disregarded instructions from the NAD hearing officer to submit a summary of the expected testimony of his proposed witnesses. Citing a NAD regulation appearing at 7 C.F.R. section 11.8(c)(5)(ii), the district court observed that the hearing officer "had an obligation to exclude irrelevant, immaterial, or unduly repetitious evidence, and to require agency employees to made available to Plaintiff as witnesses at the hearing only if appropriate." *Id*. at *9. Without the requested summary of expected

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Immigration and Naturalization Service enforcement issues

By Jeffrey A. Feirick and Anthony D. Kanagy

The Immigration Reform and Control Act (IRCA) of 1986[1] prohibits the employment of unauthorized aliens. The IRCA makes it a crime for employers to (1) knowingly hire unauthorized aliens; (2) hire a person without complying with the IRCA verification requirements; or, (3) continue to employ an alien in the United States after learning the alien is no longer authorized to work in the United States.[2] Each employer has an obligation to verify the identity and eligibility of each individual who seeks employment. This paper will discuss: enforcement of the IRCA; illegal aliens and fraudulent documents; verification of employment eligibility; and enforcement procedures.

Enforcement of the IRCA

Because of the difficulty of enforcing immigration laws coupled with the high number of illegal aliens present in the United States, Congress has granted the Immigration and Naturalization Service (INS) special powers to enforce immigration laws.

Powers without a warrant

Any INS officer has the power to question any person without a warrant about that person's right to be in the United States. The INS officer, however, has to believe that the person might be an alien.[3] Within 100 miles of any U.S. border, an INS officer may board and search any vessel, railway car, aircraft, conveyance, or vehicle without a warrant.[4] Within 25 miles of any U.S. border, an INS officer may have access to private lands without a warrant to prevent the illegal entry of aliens into the U.S. Access to private lands does not include searching dwellings or houses.[5]

Agricultural provisions

Normally, law enforcement officers are permitted to enter open fields to conduct searches.[6] INS officers, however, are not permitted to freely enter a farm or outdoor agricultural operation to question people about their right to be in the U.S. (An exception exists if the farmland is within 25 miles of any U.S. border.)[7] In order to enter fields to question workers, INS officers must either have a warrant, consent, or exigent circumstances.[8]

Consent is permission to search the premises. The owner or an agent of the owner must give consent.[9] Exigent circumstances are circumstances that are extreme enough to permit an officer to act without obtaining a warrant. Exigent circumstances include chasing a fleeing felon and protecting people from danger.[10] If INS officers come onto a farm or outdoor agricultural operation without a warrant for the purpose of questioning workers about their right to be in the U.S., the owner or agent may deny the officers permission to enter the farm property.[11]

Questioning workers

If INS officers have a warrant or receive consent to enter the farm, they are permitted to generally question any worker about the worker's status as an alien.[12] INS officers can only detain a person who is listed on the warrant or who the INS officers have a reasonable suspicion to believe is an alien.[13] Reasonable suspicion is more than just a mere hunch. Reasonable suspicion has been defined as facts that would lead an officer to believe that a person is an alien.[14]

Questioning an individual without anything more is not detaining the individual. Detention occurs when the individual is not permitted to leave an area or when the individual's liberty is restrained.[15] An officer can arrest a person because of the person's alienage when the officer has a warrant for the person's arrest or when the officer has reason to believe that the alien is in the U.S. in violation of the law and is likely to escape before a warrant can be obtained.[16]

Illegal aliens and fraudulent documents

The IRCA employment verification process can be thwarted by fraud. Large-scale counterfeiting has made employment eligibility documents widely available.[17] Current employment law recognizes this fact and attempts to protect employers by adding a knowledge requirement to the employment verification process. Employers may hire an illegal alien so long as they did not know that the required documentation was fraudulent.[18]

Penalties for document fraud

The IRCA makes it unlawful for any person or entity knowingly:

(1) to forge, counterfeit, alter or falsely make any document to satisfy the IRCA,[19]

(2) to use or attempt to use any document lawfully issued to or with respect to a person other than the possessor,[20]

(3) to prepare, file, or assist another in preparing or filing any application with knowledge or in reckless disregard of the fact that such application or document was falsely made or, does not relate to the person on whose behalf it was or is being submitted.[21]

Verification of employment eligibility

The Form I-9 is the Employment Eligibility Verification Form.[22] The form is used to verify an applicant's job status. Form I-9 is available from INS District Offices, Superintendent of Documents, Washington, D.C. or www.ins.usdoj.gov/graphics/formsfee/forms/I-9.htm. Employers may electronically generate blank forms provided the form is not substantially altered. When copying or printing the Form I-9, the text of the two-sided form may be reproduced by making either double-sided or single-sided copies.[23]

Employees fill out the first section of the form by providing basic information and attesting that they are authorized to work in the U.S. The employer must ensure that the form is properly filled out at the time a person is hired or within three business days of the hire.[24] The employer must physically examine the documents presented and complete section 2—"Employer Review and Verification." The employer fills out the rest of the form after verifying the documents presented. The employer is forbidden to require more or less documentation from different groups of employees, or face discrimination charges.

Unfair immigration-related employment practices

The IRCA makes it illegal to discriminate against any individual (other than an alien not authorized to work in the U.S.) in hiring, discharging, recruiting or referring for a fee because of that individual's national origin or citizenship status.[25] This provision does not apply to employers with three or fewer employees.[26] Employers cannot specify which document(s) they will accept from an employee in order to verify employment.[27]

Storage of Forms I-9

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An employer must retain Form I-9[28]:

(1) three years after the date the employee is hired, or

(2) one year after an employee is terminated, whichever is later.

Employment verification requirements of previously employed persons

When an employer rehires an employee, the employer may inspect the previously completed Form I-9 in lieu of completing a new form and:[29]

(1) update the Form I-9 to reflect the date of rehire provided the form is less than three years old and the person is still eligible to work; or

(2) finding the person's employment authorization has expired, the employer must reverify on the Form I-9 employment authorization, or no longer employ the person.

Enforcement procedures

The INS, the Special Counsel for Immigration-Related Unfair Employment Practices, or the Department of Labor are all given authority to inspect an employer's Form I-9.[30] The inspection may take place after three days notice. On the day of inspection, the forms must be made available in their original form or on microfilm or microfiche at the location where the request for production was made.[31] Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the IRCA.[32] A subpoena or warrant is not required, but the use of such enforcement tools is not precluded.[33]

The INS has special powers to enforce immigration laws. One way the INS exercises this power is through a review of employer compliance with IRCA verification requirements. The initiation of a compliance check can occur upon the receipt of a complaint or by INS's own initiative.[34]

A compliance check can start with a complaint or an INS inspection. When a complaint is received, the INS reserves the right to investigate only those complaints that have a reasonable probability of validity. After the investigation, if a violation is detected, the INS may issue a Notice of Intent to Fine (NOITF) or a Warning Notice.[35] A Warning Notice will contain a statement of the basis for the violations and the statutory provision violated.

INS officers issue a NOTIF after the consultation and concurrence of an INS attorney. The notice contains the following information:[36]

1. the basis for the charge(s),
2. the statute violated,
3. the penalty imposed,
4. advice to the recipient of

a. the right to representation by counsel at no expense to the government

b. any statement given may be used against the person

c. the right to request a hearing before an Administrative Law Judge within 30 days of the Notice of Intent to Fine

d. the fact that the INS will issue a final order in 45 days if a written request for a hearing is not timely received. There is no appeal of the final order.

Contesting a notice of intent to fine

A person contesting a NOITF must request a hearing before an Administrative Law Judge. The request must be in writing and given within thirty days of receipt of the NOITF. In computing the thirty-day request period, the day of the NOITF is not included in the period. If the request is received by mail, an additional five days are added to the thirty-day period. The response to the NOITF may, but is not required to, contain a response to each allegation.[37]

Failure to file a request for an Administrative Law Judge hearing causes the INS to issue a final order from which there is no appeal.[38]

Penalties

A. Criminal penalties. Criminal penalties apply to any person who engages in a pattern or practice of violations.[39] The term "pattern" or "practice" means regular, repeated, and intentional activities, but does not include isolated, sporadic, or accidental acts.[40] The fine shall not be more than $3,000 for each unauthorized alien, imprisonment for not more than six months for the entire pattern or practice, or both.[41]

B. Civil penalties. The civil penalty imposed by the act depends on the violation. In determining the level of the penalties imposed, numerous offenses found in a single proceeding will be counted as a single offense.[42] For example:

1. An employer who knowingly hires or knowingly allows the continuation of employment of an unauthorized alien can be subject to:[43]

a. an order to cease and desist from such behavior

b. the payment of a civil fine

i. First offense—not less than $250 and not more than $2,000 for each unauthorized alien if the offense occurred before September 29, 1999. Not less than $275 and not more than $2,200 if the offense occurred after September 29, 1999.

ii. Second offense—not less than $2,000 and not more than $5,000 for each unauthorized alien if the offense occurred before September 29, 1999. Not less than $2,200 and not more than $5,500 if the offense occurred after September 29, 1999.

iii. More than two offenses—not less than $3,000 and not more than $10,000 for each unauthorized alien if the offense occurred before September 29, 1999. Not less than $3,000 and not more than $11,000 if the offense occurred after September 29, 1999.

2. An employer who fails to comply with the employment verification requirements is subject to a civil penalty of: not less than $100 and not more than $1,000 for each individual if the offense occurred before September 29, 1999. Not less than $110 and not more than $1,100 if the offense occurred after September 29,1999.[44]

Several factors guide the amount of the fine. These factors include the size of the business of the employer being charged; the good faith of the employer; the seriousness of the violation; whether or not the individual was an unauthorized alien; and the history of previous violations of the employer.

Good faith defense

An employer who shows "good faith" compliance with the Form I-9 verification requirements has a rebuttable defense that he has not violated the IRCA.[45] If the INS or other enforcement agency detects a violation and notifies the employer of the violation, the employer has ten business days, beginning from the date of the notification, to correct the failure or be held in violation of the IRCA.[46] In a 1989 Ninth Circuit Court of Appeals Case, the INS notified an employer that three aliens were suspected of green card fraud. The employer disregarded the notice and failed to take appropriate corrective action. The court held that the employer's two-week delay in firing the illegal aliens violated the IRCA.[47]

The good faith defense, however, is

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also not available for employers who fail to complete a verification form for an unauthorized alien. The Ninth Circuit Court of Appeals held that the employer failed to comply with the verification requirement by failing to re-verify a prior employee who had worked elsewhere for the previous six months.[48]

[1] 8 U.S.C.§ 1324(a) *et seq*. (1999).
[2] 8 U.S.C.§ 1324(a) (1999).
[3] 8 U.S.C.A. § 1357(a)(1) (1970).
[4] 8 U.S.C.A. § 1357(a)(3)(1998); 8 C.F.R. § 287.1(a)(2)(1998).
[5] 8 U.S.C.§ 1357(a)(3).
[6] *Oliver v. United States*, 466 U.S. 170, 177 (1984).
[7] 8 U.S.C.§ 1357(e).
[8] 8 U.S.C.A.§ 1357(e); *Int'l Molders' and Alllied Workers' Local Union No. 164 v. Nelson*, 643 F. Supp. 884, 896-897 (N.D. Cal. 1986)(citing: *United States v. Blake*, 632 F.2d 731, 733 (9th Cir. 1980).
[9] 8 U.S.C.A. § 1357(e).
[10] *Int'l Molders'*, 643 F. Supp. at 896-897.
[11] *See* 8 U.S.C.A. § 1357(e).
[12] *See Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 212-213 (1984).
[13] *See, e.g. Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Int'l Molders'*, 643 F. Supp. at 898.
[14] *See Terry*, 392 U.S. at 21.
[15] *Delgado*, 466 U.S. at 215 (citing: *Terry*, 392 U.S. at 19, n. 16).
[16] 8 U.S.C.A. § 1357(a)(4).
[17] *Illegal Aliens: Significant Obstacles to Reducing Unauthorized Alien Employment Exist*, Testimony Before the Committee on the Judiciary, Subcomm. on Immigration and Claims, House of Representatives, 106 Cong. (1999)(statement of Richard M. Stana, Associate Director, Administration of Justice Issues, Gen. Gov't. Div.
[18] 8 U.S.C.A. § 1324(a)(1999).
[19] 8 U.S.C.S. § 1324(c)(a)(1)(1999).
[20] 8 U.S.C.S. § 1324(c)(a)(3)(1999).
[21] 8 U.S.C.S. § 1324(c)(a)(5)(1999).
[22] Office of Inspector General, U.S. Department of Labor, Office of Audit, *Consolidation of Labor's Enforcement Responsibilities for the H-2A Program Could Better Protect U.S. Agricultural Workers*. Report Number: 04-98-004-03-321, March 31, 1998, Appendix B.
[23] 8 C.F.R..§ 274a.2(a)(1999).
[24] 8 C.F.R. § 274a.2(b)(1)(ii)(1999).
[25] 8 U.S.C.S. § 1324b(a)(1999).
[26] 8 U.S.C.S. § 1324b(a)(2)(1999).
[27] 8 U.S.C.S. § 1324b(a)(6)(1999).
[28] 8 C.F.R. § 274a.2(b)(2)(1999).
[29] 8 C.F.R. § 274a.2(c)(1)(1999).
[30] 8 C.F.R. § 274a,2(b)(ii)(1999).
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] 8 C.F.R. § 274a.9 (1999).
[35] 8 C.F.R. § 274a.9(d) (1999).
[36] *Id.*
[37] 8 C.F.R. § 274a.9(e) (1999).
[38] 8 C.F.R. § 274a.9(f) (1999).
[39] 8 C.F.R. § 274a.10(a) (1999).
[40] 8 C.F.R. § 274a.1(k)(1999).
[41] 8 C.F.R. § 274a.10(a) (1999).
[42] 8 C.F.R. § 274a.10(b) (1999).
[43] 8 C.F.R. § 274a.10(b)(1) (1999).
[44] 8 C.F.R. § 274a.10(b)(2) (1999).
[45] 8 C.F.R. § 274a.4 (1999).
[46] 8 U.S.C..A. § 1324a(b)(6)(B)(1999).
[47] *See Mester Manufacturing Company v. INS*, 879 F.2d 561,, 567 (9th Cir. 1989).
[48] *See Maka v. INS*, 932 F.2d 1352, 1362 (9th Cir. 1991).

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testimony, the hearing officer could not fulfill this obligation. This, plus the absence of any showing of prejudice and Dr. Prokop's remark to the hearing officer that he thought the hearing had been fair, was enough for the district court to conclude that Dr. Prokop had not been denied due process.

Dr. Prokop's assertions of various other deficiencies in the agency and NAD appeal processes ranging from the failure of agency personnel to carry agency manuals, rules, and regulations with them on the site inspections of the wetlands to his own failure to include in the record documents he contended were material were also rejected by the district court. Finally, the district court rejected Dr. Prokop's demand for consequential damages, noting among other infirmities to his demand that Dr. Prokop had not lost any farm program payments and that he had received permission to clean out the canal.

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Fourth Circuit addresses USDA statutory exhaustion requirement

In a decision that may be at odds with the Second Circuit's decision in *Bastek v. Federal Crop Ins. Corp.*, 145 F.3d 90 (2d Cir. 1998), the Fourth Circuit has held 7 U.S.C. section 6912(e) does not require the exhaustion of the USDA National Appeal Division (NAD) administrative appeal process by plaintiffs who asserts a facial challenge to a USDA regulation, that is, a challenge premised on the allegation that there are no circumstances in which the challenged regulation could be lawfully applied to them. *Gold Dollar Warehouse, Inc. v. Glickman*, Nos. 98-2461, 98-2491, 2000 WL 376148 (4th Cir. Apr. 13, 2000). The court also held, on the other hand, that plaintiffs challenge to a regulation as applied is required under § 6912(e) to exhaust the NAD appeal process.

Seven U.S.C. section 6912(e) provides that "[n]otwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court of competent jurisdiction against–(1) the Secretary; (2) the Department [of Agriculture]; or (3) an agency, office, officer, or employee of the Department." The determinations of certain USDA agencies, including the Farm Service Agency, are administratively appealable to the NAD. The NAD regulations, however, provide that the NAD appeal process "may not be used to seek review of statutes or USDA regulations issued under Federal Law." 7 C.F.R. § 11.3(b).

In *Gold Dollar Warehouse* several tobacco warehouses challenged the USDA's authority to assess tobacco marketing quota (TMQ) penalties against them. TMQ penalties apply to tobacco subject to a marketing quota, and they are incurred when any tobacco in excess of quota limit is sold by a producer. When tobacco subject to a marketing quota is sold by producers to dealers it is known as "producer tobacco." Once sold to a dealer, the tobacco becomes "resale tobacco," and dealers must maintain "dealer cards" showing that they have not sold more tobacco than they purchased. "Resale tobacco" can be sold dealer to dealer or by auction on a warehouse floor.

Under the challenged USDA regulation, the penalty for the sale of excess tobacco, which is seventy-five percent of the tobacco's market price, could be assessed against any dealer or warehouse

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operator who permitted a person who owes TMQ penalties to use the dealer's or warehouse operator's identification card to market tobacco. *See* 7 C.F.R. § 723.311(d)(2). The plaintiff warehouses challenged the assessment of penalties against them under this regulation on three grounds. First, they contended that personal liability could not be imposed on them under the governing statute, 7 U.S.C. § 1314(a), under any circumstances. Second, they contended that under the same statute the regulation could only be applied to sales of "producer tobacco," not "resale tobacco." They also contended that the USDA was precluded from assessing penalties against them by virtue of the five-year statute of limitations codified at 28 U.S.C. § 2462.

The plaintiff warehouses did not exhaust the available NAD administrative appeal remedies before commencing their action. The Fourth Circuit held that the plaintiffs' first challenge was a facial challenge to the regulation that could not be administratively appealed because the NAD regulations, specifically, 7 C.F.R. section 11.3(b), precludes NAD review of agency regulations. Therefore, according to the court, administrative exhaustion was not required by 7 U.S.C. section 6912(e). Thus having jurisdiction, the court addressed the merits, and, concluding that the plaintiff warehouses' claim was "bordering on the frivolous," upheld the regulation on the grounds that the plain language of the statute authorized the payment of the penalty by a warehouse, subject to indemnification by the producer through a deduction in the amount of the penalty from the price paid by the warehouse for the tobacco.

Though it reached the merits of the plaintiff warehouses' first contention, the Fourth Circuit held that the plaintiffs' second and third contentions were subject to the statutory exhaustion requirement. As to plaintiffs' second contention, the Fourth Circuit characterized this challenge to the regulation as an "as applied" challenge since it required the plaintiff warehouses to establish the antecedent fact that they were selling "resale tobacco" instead of "producer tobacco." According to the court, "[t]he antecedent factual question of whether the warehouses were engaged in the sale of producer or resale tobacco is unquestionably one for the agency in the first instance." As to the contention that the statute of limitations precluded the assessment, the court held that this matter belonged in the first instance in the NAD appeal process, since the claim was neither a challenge to a statute nor to a regulation but rather "a straightforward argument for review of the USDA's adverse decision to assess penalties for years that would fall outside of a five-year statute of limitations."

Whether the Fourth Circuit's decision holding that a facial challenge to an agency regulation is not subject to the statutory exhaustion requirement can be reconciled with the Second Circuit's decision in *Bastek* is an open question. *Bastek* involved, in part, a challenge to "the FCIC's general policy of calculating indemnities." *Bastek*, 145 F.3d at 95. The Second Circuit, however, held that the plaintiffs had not exhausted their administrative remedies because they had not sought a determination from the NAD Director under 7 U.S.C. section 6992(d) as to whether the challenge was properly appealable through the NAD administrative appeal process. In *Gold Dollar Warehouse*, the Fourth Circuit did not cite either *Bastek* or 7 U.S.C. § 6992(d). Therefore, not only did it not opine as to whether a facial challenge to an agency's "general policy" might be distinguished from a facial challenge to an agency regulation, it left unresolved the question of whether the *Bastek* decision is correct in its ruling that parties challenging a matter arguably not within the NAD's jurisdiction must seek a NAD Director appealability determination under section 6992(d) before the NAD appeal process is exhausted.

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90-day rule barred the agency's reimbursement demand, the court first noted the presumption that "courts should not apply 'statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment, absent an express statutory command to the contrary.'" *Harrod*, 2000 WL 283863 at *7 (quoting *Viacom Inc. v. Ingram Enters. Inc.,* 141 F.3d 886, 888 (8th Cir. 1998) (internal quotation marks omitted)). Applying this presumption to the 90-day rule, the court concluded that the rule did not evince any congressional intent on whether it should be applied retroactively, much less a clear command in favor of retroactive application. Therefore, the court reasoned, the presumption against retroactivity would govern if its application to a 1989 agency decision would have a retroactive effect. The court concluded that such an application would have a retroactive effect because "applying the statute here would impair the government's rights [to recover payments made in error at any time] and impose a new duty with which the agency could not have timely complied because the original decision to award benefits was made in 1989, well outside the new 90-day period." *Id*. For essentially the same reasons, the court also ruled that the 90-day rule was not merely procedural and therefore not subject to the presumption against retroactivity. As the court observed, if applied here the rule would not be "a mere procedural limit on the remedy but would substantively eliminate the government's common law right to recover funds erroneously paid out." *Id*. at *8.

The third and final issue addressed by the court was the plaintiffs' contention that the agency should be estopped from seeking reimbursement because one of its attorneys represented on the eve of the trial against the fungicide's manufacturer that no reimbursement would be sought. As a result, the manufacturer was allowed to introduce evidence that the plaintiffs had received disaster assistance payments. Based on this evidence, the plaintiffs contended, the jury reduced the damages it awarded to them. Alternatively, the plaintiffs argued that the agency should have granted them equitable relief. *See* 7 U.S.C. § 1339a; 7 C.F.R. §§ 718.7, 718.8.

The Eighth Circuit rejected both contentions. As to plaintiffs' estoppel contention, the court noted the "overwhelming weight of the cases holding that estoppel will not lie against the government," and found no "affirmative misconduct" to support an exception to the rule against estoppel. *Id*. at *9. Given this state of the law, the court also observed that "it was, in our view, unreasonable for the appellants to rely on the oral statement of the government's attorney, particularly when the retroactive effect of the new rule was questionable." *Id*.

As to the plaintiffs' contention that the agency should have granted equitable relief, the court first found that the agency had considered equitable relief but had concluded that such relief was not warranted without elaboration. The court then concluded that its own review of the record supported "the agency's assessment that equitable relief was not warranted in this situation." *Id*.

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