SURVEYS

ADMINISTRATIVE LAW AND PROCEDURE

The Fifth Circuit rendered a number of decisions in the realm of administrative law during the survey period. Out of this group of decisions one case in particular is worthy of discussion. In *Gulf South Insulation v. United States Consumer Product Safety Commission*,[1] the court discussed two areas of particular significance: the standard of judicial review under the Consumer Product Safety Act[2] and the choice of statutory vehicles available to promulgate safety standards.

I. THE JUDICIAL REVIEW STANDARD PROMULGATED UNDER THE CONSUMER PRODUCT SAFETY ACT

Pursuant to the Consumer Product Safety Act (CPSA),[3] the Consumer Product Safety Commission (Commission) may promulgate safety standards if they are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with [a consumer] product."[4] The CPSA further specifies certain findings the Commission must make prior to setting any standard.[5] Judicial review of

1. 701 F.2d 1137 (5th Cir. Apr. 1983).
2. 15 U.S.C. §§ 2051-2083 (1982).
3. *Id.*
4. *Id.* § 2056(a).
5. *Id.* § 2058(f)(1). This section provides:

(f)(1) Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings for inclusion in such rule with respect to—

(A) the degree and nature of the risk of the injury the rule is designed to eliminate or reduce;

(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;

(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and

(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing

the Commission's standards lies in the court of appeals,[6] where the CPSA requires "substantial evidence" to support administrative findings.[7] In particular, a Consumer Product Safety Standard shall not be affirmed "unless the [required] findings . . . are supported by substantial evidence on the record taken as a whole."[8]

The substantial evidence test is normally reserved for review of administrative decisions reached through formal adjudication.[9] However, the CPSA's procedures represent a blending of the usual adjudicative, legislative, and administrative procedures.[10] By rejecting a formal hearing and providing for the informal procedures under 5 U.S.C. § 533,[11] Congress attempted to streamline the Commission's hearing process.[12] As a result, Congress adopted an adjudicative review standard[13] and established a definition of record which encompasses both the "written submissions of interested parties" and "any information which the Commission considers

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and other commercial practices consistent with the public health and safety.

Id. Section 2058(f)(3) provides:

(f)(3) The Commission shall not promulgate a consumer product safety rule unless it finds (and includes such finding in the rule)—

(A) that the rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

(B) that the promulgation of the rule is in the public interest;

(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product;

. . .

(E) that the benefits expected from the rule bear a reasonable relationship to its costs; and

(F) that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated.

Id. § 2058(f)(3).

6. *Id.* § 2060(a).

7. *Id.* § 2060(c).

8. *Id.*

9. Forester v. Consumer Product Safety Comm'n, 559 F.2d 774, 789 n.22 (D.C. Cir. 1977). *See* Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831, 837 (5th Cir. 1978).

10. 559 F.2d at 789 n.22. *See* H.R. REP. No. 1153, 92d Cong., 2d Sess. 36-37 (1972).

11. 5 U.S.C. § 533 (1982).

12. Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Comm'n, 569 F.2d 831, 837 (5th Cir. 1978).

13. *See id.* The standard of review adopted by Congress was the substantial evidence test. *Id.*

relevant."[14]

The result, however, created some difficulty. While Congress has mandated that the courts take a harder look at the Commission's findings, it nonetheless provided for a record whose volume, technical complexity, and remote relationship to the actual decision making process of the agency impedes clear vision.[15] Furthermore, judicial review of standards promulgated under the CPSA is difficult because the standards are based on policy as well as findings of fact.[16]

The leading decision in the Fifth Circuit on the meaning of substantial evidence in the context of the CPSA is *Aqua Slide 'N' Dive Corp. v. Consumer Products Safety Commission*.[17] This case involved the Commission's first exercise of its power to promulgate standards which insure that manufactured products are safe for consumer use.[18] According to *Aqua Slide*, Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize the Commission's actions more closely than an "arbitrary and capricious standard" would allow.[19]

In an attempt to discern the meaning of substantial evidence on the record as a whole, the Fifth Circuit framed its ultimate question as "whether the record contained such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20] The court noted that the inability of a court to weigh diverse technical data demands an inquiry into whether the Commission carried

14. *Id.*

15. *Id. See* Seaboard Coastline R.R. v. Coleman, 562 F.2d 1008, 1010-11 (5th Cir. 1977).

16. K. DAVIS, ADMINISTRATIVE LAW TEXT 527 (3d ed. 1972).

17. 569 F.2d 831 (5th Cir. 1978). The substantial evidence test was considered in several Fifth Circuit decisions during the survey period. According to Steere Tank Lines, Inc. v. ICC, 703 F.2d 927, 929 (5th Cir. Apr. 1983), the fact that two different conclusions could be drawn from the same evidence does not prevent an agency's finding from being supported by substantial evidence. In Green v. Schweiker, 694 F.2d 108, 110 (5th Cir. Dec. 1982), *cert. denied*, 103 S. Ct. 1790 (1983), the court stated that to meet the substantial evidence test, the record must contain such relevant evidence as reasonable minds might accept as adequate to support the conclusion. Finally, in Dellolio v. Heckler, 705 F.2d 123, 125 (5th Cir. May 1983), the Fifth Circuit reasoned that substantial evidence is more than a scintilla, less than a preponderance, and must do more than create a suspicion of the existence of facts to be established.

18. 569 F.2d at 835.

19. *Id.* at 837. *See also* H.R. REP. No. 1153, 92d Cong., 2d Sess. 38 (1972); 118 CONG. REC. 31,378 (1972) (remarks of Rep. Moss).

20. 569 F.2d at 838 (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

out its essential legislative task in a manner reasonable under the record.[21]

The United States Supreme Court offered yet another definition of substantial evidence in *NLRB v. Columbian Enameling & Stamping, Co.*[22] According to *Columbian Enameling*, substantial evidence means

> evidence . . . affording a substantial basis of fact from which the fact in issue can be reasonably inferred . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.[23]

Finally, in *Consolo v. Federal Maritime Commission*,[24] the Supreme Court stated that the aforementioned definition was considered authoritative in defining the standard of substantial evidence as used in the Administrative Procedure Act.[25]

In *Gulf South Insulation v. United States Consumer Product Safety Commission*,[26] the Commission concluded six years of investigation with the issuance of a final rule banning Urea Formaldehyde Foam Insulation (UFFI)[27] in residences and schools.[28] According to the Commission, UFFI presents an unreasonable risk of injury from irritation and cancer, and no feasible product standard exists which would adequately protect the product from these

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21. 569 F.2d at 838 (citing Florida Peach Growers Ass'n v. United States Dep't of Labor, 489 F.2d 120, 129 (5th Cir. 1974)).

22. 306 U.S. 292 (1939).

23. *Id.* at 300.

24. 383 U.S. 607 (1966).

25. *Id.* at 620. *See also* 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1982).

26. 701 F.2d 1137 (5th Cir. Apr. 1983).

27. The court in *Gulf South Insulation* explained:

> UFFI is a thermal insulation used in residences and other buildings. It is manufactured at the job site by mixing a liquid resin containing formaldehyde, a foaming agent, and compressed gas. The resulting liquid foam, which resembles shaving cream, is pumped into the walls of the building being insulated. After a time the mixture solidifies.

Id. at 1140.

28. *Id.* at 1139. Canada has already banned UFFI. Two states (Massachusetts and Connecticut) have also enacted statewide bans of UFFI. 47 Fed. Reg. 14,368 (1982). *See also* Bordon, Inc. v. Commissioner of Pub. Health, 388 Mass. 707, 448 N.E.2d 367 (1983) (the court upheld the ban of UFFI even though the Commissioner of Public Health failed to establish the amount of formaldehyde that UFFI contributed to the indoor environment and the number of people in the Commonwealth who had been affected by UFFI).

hazards.[29] The industry, as well as the American Counsel on Science and Health and the Washington Legal Foundation, took issue with numerous aspects of the Commission's findings.[30] The Fifth Circuit reviewed the records (including some studies completed after the Commission's rulings)[31] and concluded that the Commission's findings were not supported by substantial evidence on the record as a whole.[32] Accordingly, the court granted the industry's petition for review and vacated the Commission's ruling.[33]

The result in *Gulf South Insulation* is very hard to justify. Essentially, the Fifth Circuit exceeded its authority by substituting its interpretation of the available scientific results for that of the Commission's. In reviewing administrative findings, the Fifth Circuit's power is limited to setting aside the findings of an agency if they are not supported by substantial evidence.[34] Congress never intended to give a power of review similar to that of an appeal in equity.[35] If it had, it knew perfectly well how to do so (as is shown by provisions for reviewing tax court decisions).[36] Equitable review would destroy the unified administration obtained by the creation of a single agency, transforming the courts of appeal into super agencies.[37] The question becomes what deference should be paid to the findings of expert tribunals by nonexpert judges.[38] Of course no administrative agency or commission should be followed blindly, but the technical studies in *Gulf South Insulation* survived the scrutiny of an expert commission. Surely some deference should be given to the Com-

29. 701 F.2d at 1139. The findings of unreasonable risk and lack of a feasible product standard are essential to support a product ban under the Consumer Product Safety Act. 15 U.S.C. § 2057 (1982).

30. 701 F.2d at 1143. The disposition of this case was aided by *amicus curiae* briefs filed by the American Counsel on Science and Health and the Washington Legal Foundation urging the Fifth Circuit to vacate the ban. The National Consumer League also filed a brief seeking the ban's affirmance. *Id.* at 1143 n.9.

31. *Id.* at 1145.

32. *Id.* at 1140.

33. *Id.*

34. 15 U.S.C. § 2060(c) (1982).

35. NLRB v. Southland Mfg. Co., 201 F.2d 244, 246 (4th Cir. 1952).

36. *Id.*

37. *Id.* According to the Fourth Circuit, adequate judicial review was granted when the courts were given power to determine whether the findings of the agency have substantial support in the record considered as a whole. The court continues, "it should be noted that such determination is analogous to the other powers of review vested in the courts of appeal with respect to agency action, all of which is designed to grant redress against action which is illegal or arbitrary." *Id.*

38. K. DAVIS, *supra* note 16, at 529.

mission's interpretation. As a general rule, expert opinions deserve to be heeded, and courts traditionally defer to the expertise of government regulatory agencies.[39] According to *Aqua Slide*, the courts will defer to the Commission's fact finding expertise when the record shows the Commission made an *actual judgment* concerning the significance of the evidence.[40]

Gulf South Insulation put the Commission in an uncomfortable position. Their expert interpretations and conclusions are now subject to second guessing. The lesson of *Gulf South Insulation* is that the Fifth Circuit requires *very* strict adherence to the requirements of the CPSA, particularly sections 2058(f)(1) and 2058(f)(3).[41] Such adherence should be accompanied with more than adequate documentation which shows that the Commission made an *actual judgment* concerning the significance of the evidence.

II. STATUTORY BASIS FOR SAFETY BANS

Two potential vehicles exist for the type of rulemaking found in *Gulf South Insulation v. United States Consumer Product Safety Commission*.[42] They are the Consumer Product Safety Act (CPSA)[43] and the Federal Hazardous Substance Act (FHSA).[44] The procedures mandated by these Acts differ substantially.[45] The CPSA provides for informal rulemaking[46] while the FHSA requires a formal hearing, complete with rules of evidence and the right to confront and cross-examine witnesses.[47]

Establishing which Act to proceed under for a particular product is determined by section 2079(d).[48] Section 2079(d) provides that where a risk of injury could be eliminated or reduced to a sufficient extent by action taken under the FHSA, the Commission may

39. 569 F.2d at 843. The court, however, did state that the expert opinion must be based on more than casual observation and speculation. *Id.*

40. *Id.* at 838 (citing Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 61 (1975)).

41. 15 U.S.C. § 2058(f) (1982). *See supra* note 5.

42. 701 F.2d 1137 (5th Cir. Apr. 1983).

43. 15 U.S.C. §§ 2051-2083 (1982).

44. *Id.* §§ 1261-1276.

45. For this reason, the industry brought a lack of due process complaint arguing that the rule should have been promulgated pursuant to the Federal Hazardous Substance Act, 15 U.S.C. §§ 1261-1276 (1982). 701 F.2d at 1148.

46. 701 F.2d at 1148. *See* 15 U.S.C. §§ 2015-2083 (1982).

47. 701 F.2d at 1148. *See* 15 U.S.C. § 2056(a) (1982).

48. 15 U.S.C. § 2079(d) (1982).

take regulatory action under the CPSA.[49] This action may be taken *only* if the Commission, by rulemaking, finds that it is in the public interest to proceed under the CPSA.[50] Restated, the Commission can proceed under the less stringent procedural provisions of the CPSA *only* if one of two tests is satisfied. It must be shown either that the risk could not be regulated sufficiently under the FHSA or that it is in the public interest to proceed under the CPSA rather than the FHSA.[51]

In *Gulf South Insulation* the Commission contended that it had met both tests.[52] Because under the FHSA the Commission lacked the authority to regulate products installed in nonresidential buildings[53] such as schools, the Commission concluded that the risk of injury addressed by this ban could not be eliminated or reduced to a sufficient extent by action taken under the FHSA.[54] For this reason and in order to avoid the need to conduct duplicative proceedings under the CPSA and the FHSA, the Commission concluded that it was in the public interest to regulate this product under the CPSA.[55] In addition, because of the complex and lengthy nature of the rulemaking proceedings that would be required under the FHSA, the Commission concluded that it would be in the public interest to regulate this product under the CPSA.[56]

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49. *Id.*

50. *Id.* Section 2079(d) also states that such a rule shall identify the risk of injury proposed to be regulated under this chapter and shall be promulgated in accordance with § 553 of title 5. The submission of data, views, and arguments respecting the rule shall not exceed 30 days from date of publication. *Id.*

51. 701 F.2d at 1149.

52. *Id.*

53. *See* 15 U.S.C. § 1262(b) (1982). The Federal Hazardous Substance Act may regulate such hazardous substances intended or packaged in a form suitable for use in the household or by children. *Id.*

54. 47 Fed. Reg. 14,367 (1982). As proposed, the ban would have applied to UFFI that is installed in commercial buildings, recreational facilities, schools, and other public buildings. *Id.* at 14,368.

55. *Id.* at 14,368. Originally, the Commission took steps to publish a proposed rule which would have required the potential purchasers to be given notice concerning the potential adverse and acute health effects associated with the release of formaldehyde gas from UFFI. 45 Fed. Reg. 39,434 (1980). Also, the Commission took several steps that it wanted to avoid duplicating. For example, the Commission held public hearings on UFFI in Portland, Atlanta, Minneapolis, and Hartford, as well as a technical workshop on formaldehyde at the National Bureau of Standards. 47 Fed. Reg. 14,367-68 (1982). (Note that this is merely an example and is not an attempt to list the entire process taken by the Commission while attempting to publish a proposed rule requiring notice.)

56. 47 Fed. Reg. 14,369 (1982).

The Fifth Circuit, recognizing the aforementioned tests, asserted that the Commission had met neither test.[57] The court relied on the fact that the Commission focused its attention on homes.[58] The judges were convinced that the Commission never made any real attempt to address the risk associated with the use of UFFI in nonresidential buildings.[59] According to the Fifth Circuit, the Commission extended the ban to schools *only* to justify its decision to proceed under the CPSA.[60] Additionally, the court asserted that the Commission found it was in the public interest to regulate UFFI under the CPSA *solely* to avoid the complex and lengthy nature of the rulemaking proceedings required under the FHSA.[61]

The court concluded that the industry had been denied important procedural rights guaranteed by the FHSA and that the Commission's decision to establish rulemaking under the CPSA was therefore improper.[62] The court further stated that any future regulatory effort directed at UFFI must be made pursuant to the FHSA.[63]

Section 2079(d) was amended in 1976 to provide that consumer products may be regulated under the CPSA *only* if the Commission establishes one of the two tests. Despite the negative language, the amendment broadens the Commission's jurisdiction under the CPSA by permitting the Commission, in its *sound discretion*, to regulate products under the CPSA which formerly would have been subject to regulation exclusively under the FHSA. Even the Fifth Circuit concedes that it may be in the public interest to regulate extremely dangerous products under the CPSA for the sake of speed and efficiency.[64] However, the court obviously does not feel that

57. 701 F.2d at 1148-50.

58. *Id.* at 1149. The Fifth Circuit noted that all the evidence was deduced from in-home tests which predicated the risk to a person present in a UFFI home for sixteen hours a day, seven days a week. According to this court no academic institution was shown to have a curriculum requiring such constant attendance. *Id.*

59. *Id.*

60. *Id.* The Fifth Circuit reasoned that because the ban in schools was completely unsubstantiated, the ban was insufficient for this purpose. *Id.*

61. *Id. See also* 47 Fed. Reg. 14,369 (1982).

62. 701 F.2d at 1149-50. The Fifth Circuit reasoned that the selection of procedures is too important to be based on unexplored theories and desires for administrative convenience. *Id.*

63. *Id.* This remains the situation unless, of course, the Commission substantiates its decision to proceed under the CPSA with the findings required by § 2079(d) and a more than adequate record.

64. 701 F.2d at 1150.

UFFI is such a product.

Once again, it appears that the Fifth Circuit substituted its lay interpretation of scientific data to determine that UFFI is not extremely dangerous. Also, no deference was given to the Commission's technical and scientific decision.

III. CONCLUSION

For the Commission *Gulf South Insulation* is a message from the Fifth Circuit. Apparently the court is going to be very strict in its evaluation of the Commission's actions. The Commission's judgment is given little deference, unfortunately, but at this point the only solution is for the Commission to make necessary adjustments. Heavy responsibility now rests on the Commission to convince or possibly educate the Fifth Circuit Court of Appeals.

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