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* Prepared by Lisa Lester, the Legal Summaries Editor. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.
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UNITED STATES COURT OF APPEALS, FIRST CIRCUIT

Muñoz-Monsalve v. Mukasey, 551 F.3d 1 (1st Cir. 2008).

LAW: According to § 208(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A), “[a]liens seeking asylum are entitled to basic procedural protections and to a fair hearing, but not to a letter-perfect one.” In deciding what constitutes “fundamental fairness” in an immigration hearing, the immigration judge (IJ) has wide boundaries in which to decide the case.

FACTS: Petitioner Eduardo Muñoz-Monsalve tried to enter the United States illegally in 2001 by using his brother’s passport. He was apprehended at a Miami airport and stated that his motivation to enter the U.S. was because he was unemployed in his native Colombia and wanted to work. He also said that he had been having trouble with a “paramilitary guerilla group” called the National Liberation Army (ELN). He told two different immigration officials that his interactions with the ELN revolved around the fact that the ELN was trying to extort money out of him. The matter was referred to an IJ, and subsequently, the Petitioner changed his story regarding his involvement with the ELN. He now stated that he was a Liberal Party activist in Columbia and ELN members had ordered him to stop his political involvement and give them money. Petitioner paid the money, but did not halt his political affiliations. The IJ found the inconsistencies in petitioner’s testimony to be incredible and ordered for his removal from the U.S. The Board of Immigration Appeals (BIA) denied the petitioner’s appeal, and his petition for judicial review to this court was granted.

ANALYSIS: The Court divided its analysis into three parts. The first argument advanced by petitioner is that the IJ should have demanded a competency evaluation; thus, due to the lack of the evaluation, the IJ deprived petitioner of his due process rights. The Court rejected this argument and stated that while every illegal alien is entitled to a trial with basic procedural requirements, the trial conducted does not have to be absolutely perfect. The only requirement is that the trial must be conducted under the guise of “fundamental fairness.” This means “the alien must have a meaningful opportunity to resent evidence and be heard by an
impartial judge.” If an alien is incompetent, then additional safeguards are provided for them. In this case, however, the issue of competency was never raised; therefore, a claim of incompetency is weak at best. In addition, when a claim for the violation of due process is brought, the petitioner must show that his claim was prejudiced by the failure of a competency determination. The Court did not find prejudice in petitioner’s claim, and thus rejected this first argument.

Petitioner next advanced an argument of credibility. When an alien is seeking asylum, his or her own credible testimony may be enough to prove that he or she is a refugee seeking asylum for fear of future persecution on account of certain characteristics. The IJ, however, still has the right to analyze this testimony and its credibility, as well as to require corroboration of the testimony. The court stated that when the petitioner’s testimony is inconsistent the testimony will likely be “sharply discounted” by the IJ. Thus, the Court agreed with the IJ’s reasoning and rejected the petitioner’s credibility argument.

Petitioner last argument revolved around his inability to immediately appeal the IJ’s decision to the BIA because the transcript of the master calendar conference was missing. In order to uphold this claim, the missing materials must relate to a material matter in the petitioner’s case and the absence of the materials must be prejudicial to the overall case. The court determined that the record of the trial was substantially complete and the absence of the master calendar conference did not prejudice the petitioner.

**HOLDING:** The Court of Appeals upheld the BIA’s decision to remove petitioner from the country and deny him asylum status. The Court reasoned that the petitioner’s due process rights were not violated nor was he prejudiced during the initial trial before the IJ.

**IMPACT:** The case simply emphasized the importance of aliens telling the truth when they are first questioned upon entering the country. This decision represents the unique situation when an alien tells conflicting stories of his reasons for entering the country illegally to various government officials. This decision has the potential to impact the granting of asylum stays for illegal aliens who have inconsistent stories.
UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Linares Huarcaya v. Mukasey. 550 F.3d 224 (2nd Cir. 2008).

LAW: 8 U.S.C. § 1255(i) was amended in 1994 by Congress in order to allow aliens who entered the United States without a proper inspection, but met certain standards to pay a penalty fee and change their alien status. To be eligible for this adjustment, aliens had to prove they either had “a visa petition or labor certificate filed on their behalf,” which was “approvable when filed” on or before April 30, 2001. “Approvable when filed” means that the filed petition was “(1) properly filed, (2) meritorious in fact and (3) non-frivolous.”

FACTS: Petitioner Alejandro Linares Huarcaya, while residing in his native Peru, dated a girl named Ruth for some eight years, yet fathered children with two other women. Ruth left Peru to live in the United States in 1998 and Huarcaya joined her in 2000, and entered the country without inspection. They were married on March 31, 2000, and Ruth filed an I-130 visa petition for Huarcaya one month after their marriage. They later divorced on March 4, 2000. Ruth’s visa petition was denied on March 8, 2004. Shortly after, Huarcaya married an American named Lucy and she also filed an I-130 on his behalf. Lucy’s petition was approved and Huarcaya filed an I-485 in order to seek adjustment of his status. The United States Citizenship and Immigration Service (USCIS), however, denied his I-485 application stating that Huarcaya had failed to file evidence showing that his first marriage was bona fide, and that he failed to show that Ruth’s first I-130 petition was “approvable when filed.” Huarcaya sought review of his denial at an immigration hearing. The IJ upheld the denial of the petition, because Huarcaya had failed to show that his first marriage was bona fide. Huarcaya then appealed to the BIA. While the appeal was being filed, the BIA ruled on a similar case in In re Riero. In that case, the BIA held that “in order for a visa petition to be ‘approvable when filed’ in this context, there must be a showing that the marriage on which it is based was bona fide.” The BIA upheld the IJ’s decision regarding Huarcaya, citing Riero, and stating that Ruth lacked certain pertinent information, which any wife in a would know about her husband. Huarcaya appealed.
ANALYSIS: The Court first dealt with Huarcaya’s argument that the construction of 8 U.S.C. § 1255(i) in Riero is not entitled to deference under Chevron, U.S.A., Inc. v. Natural Resources Defence Council, Inc. Instead of the petition’s bona fide requirement for the marriage, Huarcaya argued that the only thing that the petition must show is the establishment of a prima facie case, because this showing is the only way to give “content to both the terms ‘non-frivolous’ and ‘meritorious in fact.’” Chevron deference requires the Court to determine “whether Congress has directly spoken to the precise question at issue” and “unambiguously expressed its intent.” The Court first recognized that 8 U.S.C. § 1255(i) referenced in Riero, is silent on the question at issue and then turned to the second requirement. The Court said that the BIA’s interpretation of the statute was reasonable in light of the circumstances. The requirement that the marriage be bona fide is consistent with the statute’s requirement that the visa petition be “approvable when filed.” After proceeding through this analysis, the Court then determined that Chevron deference is not applicable here because the BIA is not interpreting a congressional statute, but, instead, is interpreting its own statute. Thus under Auer v. Robbins, Auer deference is applicable. Under Auer, “an agency’s interpretations [of its own regulations] are entitled to deference and are ‘controlling unless plainly erroneous or inconsistent with the regulation.’” The Court recognized that “approvable when filed” is ambiguous in nature and its qualifying terms of “non-frivolous” and “meritorious in fact” did nothing to cure the ambiguities.

In addition, Huarcaya argued that both the statute and the interpretation violated due process because they are “void for vagueness.” The Court held that Huarcaya failed to establish that the statute’s provision was vague as it applied to him. In order to establish a claim of vagueness, a court must first decide whether or not a reasonable person would be able to determine what is prohibited by the statute at issue and then “whether the law provides explicit standards for those who apply it.” In this case, Huarcaya was provided with what the BIA needed in order to prove that the marriage was bona fide and that the petition for a visa based on marriage always carried with it the requirement that the marriage not be fake.
HOLDING: The Court upheld the BIA’s denial of Huarcaya’s I-485 petition to change his immigration status.

IMPACT: This decision has the impact of discouraging an alien enter into marriage in order to obtain a visa, a specific citizenship status, or change of immigration status. Now, the alien must prove that the marriage was bona fide and was not entered into for the sole purpose of obtaining a visa.

UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Khrystotodorov v. Mukasey, 551 F.3d 775 (8th Cir. 2008).

LAW: 8 U.S.C. § 1158(b)(1)(A) vests the power in the Attorney General (AG) to grant asylum to a refugee, which is defined as a person who either chooses not to return or is unwilling to return to his native country because of fear of persecution. 8 U.S.C. § 1231(b)(3)(A) provides that a withholding of removal can be granted by the AG if they determine that the “applicant’s life or freedom would be threatened in his home country because of his race, religion, nationality, membership in a particular social group, or political opinion.” The Convention Against Torture (CAT) provides that an asylum applicant can obtain relief if they can demonstrate “that it is more likely than not that he or she would be tortured if returned” to their home country.

FACTS: Mykola Mykolayevich Khrystotodorov, his wife Oksana, and his daughter Viktoryiya entered the United States in 1999 as nonimmigrant visitors. They overstayed their visit and subsequent removal proceedings were instituted in June 2001. During the proceedings, they conceded their removability and filed an application for asylum and relief under CAT. They asserted that they had suffered religious persecution in their native Ukraine and they had a “well-founded fear” of continuing persecution if they were to return. Mykola described various incidents at a hearing before an immigration judge (IJ) which supported his claim that his family had suffered persecution at the hands of the Ukrainian National Assembly-Ukranian National Self Defence (UNA-UNSO) because of their religion.
At the conclusion of the hearing, the IJ provided extra time for Khrystotodorov to obtain needed documents proving that the UNA-UNSO was actually tied to the Ukranian government and medical documentation describing his injuries. After 18 months, Khrystotodorov offered some medical evidence, but no evidence which would have proven any governmental involvement with the UNA-UNSO. The IJ said that there was a lack of corroboration, noting that the provided records did not clearly indicate that the injuries Khrystotodorov suffered. Moreover, there was a “significant variance” between Khrystotodorov’s testimony and the country background reports. The BIA agreed with the IJ and the petitioners appealed.

ANALYSIS: The Court began the opinion with a brief discussion of the law and recognizes that in order for a refugee to be granted CAT relief, the torture that is more likely than not to be suffered has to come at the hands of a public official. Moreover, the likelihood of “torture” contains abuse that is more severe than that of a simple fear of persecution.

Petitioner’s first argument challenged the IJ’s ruling that the provided documents required credibility. In order to establish eligibility for asylum or withholding of removal, the refugee’s fear of persecution must be “both subjectively genuine and objectively reasonable” and must be established with “credible, direct, and specific” evidence. The IJ stated that the corroboration was needed in three specific areas of Khrystotodorov’s testimony: (1) evidence concerning UNA-UNSO’s ties to the government and evidence of their actual abuse of Baptists; (2) corroboration of the anti-UNA-UNSO’s rally; and (3) more specific evidence requiring the physical harm of Khrystotodorov. With respect to the first two reservations, the Court re-examined the country reports and found no substantial evidence that the UNA-UNSO specifically targeted Baptists for violence or that they had any ties to the Ukranian government. Moreover, there were no widespread reports of violent activities by the UNA-UNSO. There was concern over the validity of the signatures on the medical records from the hospital regarding his apparent nine-day hospital stay. Thus, the IJ did not ignore this evidence, but simply required additional corroboration to assess its validity.
In addition, the Court recognized that Khrystotodorov’s testimony was not enough to sustain his burden of proof, because the inconsistencies reasonably shed doubt on the validity of his testimony. Khrystotodorov’s argued that the introduction of new evidence was improperly denied by the IJ. The Court said that it was not unsympathetic to petitioner’s hardships in researching information. Moreover, the petitioner was given eighteen months by the IJ in order to uncover the additional corroborating evidence.

**HOLDING:** The Court agreed with the IJ and BIA and denied the petition of judicial review to reopen the case and vacated the ordered temporary stay.

**IMPACT:** This decision does not adversely affect a refugee’s chances of being granted asylum in the United States. It simply emphasizes that actual evidence of feared persecution or torture must be shown. A refugee should be prepared to show corroborating evidence of one’s testimony and must be prepared to meet the higher burden of proof required in the withholding of removal.

**UNITED STATES COURT OF APPEALS, NINTH CIRCUIT**

**Fones4All Corp. v. FCC,** 550 F.3d 811 (9th Cir. 2008).

**LAW:** The Telecommunications Act of 1996 gave the Federal Communication Commission (FCC) the authority to require that incumbent local exchange carriers (ILECs) provide competitive local exchange carriers (CLECs) “access to network elements on an unbundled basis.” Regulation § 51.319(d) allows ILECs “to disavow any contractual obligations for unbundled access to mass market switching.”

**FACTS:** Fones4All Corporation (Fones4All) filed a petition for forbearance seeking relief from regulation §51.319(d) within the applicable time period. The FCC’s chief of the Wireline Competition Bureau (WCB) granted an extension of 90 days in which to hear Fones4All’s petition, as provided under the applicable statutes. Fones4All filed an application for extension, contending that the WCB did not have the power to grant such an extension. The FCC took no action on the application for extension and denied
Fones4All’s petition for forbearance. The FCC issued its “Memorandum Opinion and Order” one day after the maximum allowable one year plus 90 days deadline. The petition was denied on the grounds that it was “procedurally defective.” Fones4All appealed the decision.

**ANALYSIS:** The first issue was the backdating of the FCC’s order. It was recognized that Fones4All did not raise the issue directly to the FCC; instead, they first raised the issue in this judicial action. Fones4All claimed that any attempt to raise the issue to the FCC would have been futile. However, because the requirement of “exhaustion of claims” is statutory in nature, and in order to accept Fones4All’s argument, an exception would have to be created. The Court refused to do this, stating that the FCC must have the chance to pass on the creation of such an exception before the court can do so. Even though Fones4All claims that it presented this issue to the FCC in its application of extension, their presentation did not the requirement because the issue cannot be implied from the circumstances and it must be “meaningfully rais[ed].”

Fones4All contended that the WCB did not have the authority to extend the applicable time period. The statute, however, also gives the FCC the ability to delegate its functions to its subordinates, as was the case here.

Fones4All’s last argument is that the WCB-granted extension lacked necessity. The Court also denied this argument, stating that because of the unique nature of Fones4All’s application, it was necessary to extend the time period.

**HOLDING:** The court refused to hold that Fones4All’s petition was “deemed granted,” because it failed to exhaust the administrative remedies available to it.

**IMPACT:** This case simply emphasized the necessity of parties exhausting their administrative remedies before bringing administrative claims before the judicial branch. The courts will not entertain any arguments, no matter how prevailing, if the party has failed to exhaust all of its available administrative remedies.
**Sarei v. Rio Tinto, PLC.** 550 F.3d 822 (9th Cir. 2008).

**LAW:** The Alien Tort Statute (ATS) provides United States courts with jurisdiction "for any civil action by an alien for a tort only, committed in violation of the law or nations or a treaty of the United States."

**FACTS:** Rio Tinto, PLC, is part of an international mining group who acquired the operation of a mine on the Papua New Guinea island of Bougainville. According to the complaint, Rio Tinto engaged in actions of mass violence and pollution after working with the Papua New Guinea government to obtain the mining permit. Some residents on the island sabotaged the mine and forced its closure. Rio Tinto demanded the continued assistance of the government, and the government acquiesced and sent troops. Soon after, the country descended into a civil war. Rio Tinto couldn’t resume its mining activities, so they threatened to pull out, and the government instituted mass blockades so that the island’s citizens couldn’t receive medicine, food and other necessary items. The war ended twelve years later, and the plaintiffs brought this action alleging numerous violations of the ATS. The district court denied the plaintiffs’ claims saying that their complaint had only shown “nonjusticiable political questions” and that the ATS did not require “exhaustion of local remedies.” On appeal, the court held that the lower court’s subject matter jurisdiction over the claim ended as soon as the lower court held that the plaintiffs presented nonjusticiable political questions, and that the ATS does not require exhaustion of local remedies. The plaintiffs appealed.

**ANALYSIS:** Under *Sosa v. Alvarez-Machain*, the Supreme Court held that exhaustion of local remedies should be considered with cases brought under the ATS. The court here recognizes that “[j]udicially-imposed or prudential exhaustion” is not a prerequisite to jurisdiction, but is one of many factors that can help determine judicial timing. Under ordinary international law, one state is normally not required to consider a claim by another state unless all local remedies have been exhausted. Sovereign countries, however, may exercise jurisdiction over another through consent. Even though consent may grant jurisdiction, the principles of comity still explicitly state that the exhaustion of remedies is a requirement.
The case at issue involved a foreign corporation’s acts on foreign soil and is only before a United States court (which is not an international tribunal) because one of the plaintiffs is a permanent resident. Since the “nexus” is weak, the Court considered exhaustion principles. The Court cautioned that the burden of proof for exhaustion lies with the defendant. In addition, a claim has been exhausted when the appropriate highest entity issued a final warning or order, not when such action has been initiated.

**HOLDING:** The Court remanded the case to the district court in order to determine whether or not an exhaustion requirement should be imposed.

**IMPACT:** While some may see this as the United States judiciary expanding its jurisdiction, it is instead a cautious step toward ensuring that all claims, such as the ones brought under the ATS, are before courts only after all other possibilities have been tried. In this case, the Court decided that exhaustion of local remedies should be an additional factor considered in claims involving the ATS. With this additional factor, it may become more difficult for plaintiffs to win a case in a United States court under the ATS as it is now implied that local claims should be exhausted.

**UNITED STATES COURT OF APPEALS, TENTH CIRCUIT**

**Stewart v. Kempthorne,** 554 F.3d 1245 (10th Cir. 2009).

**LAW:** The Taylor Grazing Act (TGA), 43 U.S.C. §§ 315-315r, provides an all-encompassing plan in order to “administer, improve, and develop the grazing lands of the United States.” The TGA also invests the power in the Secretary of the Interior to grant grazing permits. Grazing permits will be given to those applicants who “(1) own or control land or water base property, and (2) either meet United States citizenship requirements, or be an entity authorized to conduct business in the state in which grazing is intended.” The grazing permits specify the “grazing preference, the terms and conditions, and the duration of the permits.”

**FACTS:** The United States Department of the Interior established three different allotments for livestock grazing within the
Grand Staircase-Escalante National Monument. Regarding the first allotment entitled the “Clark Bench Allotment,” Grand Canyon Trust and Canyonlands Grazing Company (Canyonlands) entered into an agreement with Brent Robinson for either the transfer or relinquishment of his grazing permit over the allotment. The Bureau of Land Management (BLM) granted them the grazing permits. Plaintiffs Trevor Stewart, Worth Brown, James Brown, and William Alleman all sought individual grazing permits on the same allotment of land after Canyonlands had filed their application. The BLM denied all of the applications, citing Canyonlands’ preference.

Plaintiffs appealed the BLM’s denial of their applications, and the Administrative Law Judge (ALJ) affirmed the BLM’s denial on the fact that the BLM had reached its decision on a logical and factual basis. The district court affirmed the decision of the ALJ and the plaintiffs appealed.

**ANALYSIS:** The Court of Appeals first examined the necessary qualifications in order to obtain a grazing permit under the TGA. The Court found that the qualifications were met. The Court agreed with the ALJ and the district court, in that Canyonlands owned livestock prior to filing their applications for grazing permits. In its transaction with O’Driscoll to obtain the “Last Chance Allotment” preference, they agreed to pay his trespass fees in exchange for O’Driscoll’s remaining four cattle. Plaintiffs argue that this transfer does not actually constitute ownership of the cattle, in that the cattle were strays and Utah law claims the strays after attempts to locate the true owner fail. The Court rejected these claims, holding that the Plaintiffs could not raise these issues, as they failed to do so in the lower courts.

The Plaintiffs argued that under the TGA, a permit holder must have the intent to graze, and Canyonlands did not possess this requisite intent. The Court disagreed, holding that the only time the BLM ensures that the land is actually being used for grazing is after the permit is granted. Moreover, it would be a waste of time for the government to have to determine the subjective intent of every grazing permit applicant.

Plaintiffs’ argued a lacked standing. The Court recognized that interveners in an action do not have to establish their own individual standing as long as they are associated with another party who does have constitutional standing. In the lower court, however, the
counties were named as plaintiffs and not as interveners. In order to have standing, a plaintiff must demonstrate “an injury in fact,” “a causal connection between the injury and the conduct,” and that “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” The counties argue that the issuance of the permits to Canyonlands negatively impacted them financially, eliminated grazing in the area, and that a decrease in grazing subsequently decreased the tax revenues. The Court, however, could not find a direct injury to the counties due to the issuance of the grazing permits; at best, a “conjectural” injury may exist.

**HOLDING:** The Court of Appeals upheld the BLM’s issuance of grazing permits for the three land allotments to Canyonlands.

**IMPACT:** The Court’s decision may discourage individuals from seeking grazing permits, as they may feel that they will be defeated by organizations. Moreover, the Court may have opened the floodgates by permitting applicants for grazing permits to not demonstrate an intent to use the land for grazing. Other organizations may attempt to obtain grazing land without the intent to actually use the land for grazing purposes. This would decrease the amount of grazing land available, and could subsequently decrease the amount of wild or stray cattle in those areas.

**UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT**

*Gregory v. First Title of Am., Inc.*, 555 F.3d 1300 (11th Cir. 2009).

**LAW:** The Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1), provides that no employee employed by an employer engaged in interstate commerce can work more than forty hours a week unless they are compensated for this work at a rate that is no less than one and a half times the normal pay rate. The FLSA also contains several exceptions to this provision, including any employees who are employed in the capacity of an outside salesperson. 29 C.F.R. § 541.700 provides the definition of an outside salesperson, as one whose primary duties are obtaining orders or service contracts for which customers will pay directly for these
services and as one who must be engaged in business outside the employer’s normal place of business.

**FACTS:** Bruce Napolitano owns First Title of America, Inc. (Appellees) and Nelda Gregory (Gregory) was his employee for approximately six months. Gregory was initially hired as a marketing executive, and in the employment agreement, her job description was “to provide the services for referring and closing title insurance companies.” She was initially paid $1,000 per week, but was later paid on a commission basis. Gregory also claimed that she often worked over forty hours per week, but never received any overtime compensation. Gregory appeals the district court decision, which said that she fit within the outside salesperson exception to the FLSA; thus, she was not entitled to compensation.

**ANALYSIS:** The Court held that a job title alone does not determine an employee’s classification within the FLSA. Instead, an employee’s status is determined based on their salaries and duties, which will then define their employee status under the FLSA. Gregory argued that she does not fall within this exception because she never actually sold title insurance to anyone; her only job was to promote and market the insurance. In order to support this argument, she relied on a Department of Labor (DOL) opinion letter, which she received from the DOL handbook, and *Amendola v. Bristol-Myers Squibb Co.*

Appellees argued that due to Gregory’s own testimony, she falls within the outside salesperson exception. Gregory testified that her primary job purpose was to obtain orders for title insurance and that she was solely paid on a commission basis. Appellees also point to *Ackerman v. Coca-Cola Enterprises, Inc.*, in which the court held that promotional and marketing work that is performed in conjunction with obtaining orders is exempted work under the FLSA. The Court applied the “primary duty test,” which considers multiple factors, including: “the relative importance of the exempt duties; the amount of time spent performing the exempt work; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.” The Court concluded that Gregory’s primary duty was to obtain insurance orders from her employer and that most of her time
on the clock was spent outside of the office. In addition, Gregory obtained direct credit for all of her sales, and did not pass off the sales to another salesperson in order for it to be completed. Moreover, there were no “intervening sales efforts” once Gregory had obtained the sale.

**HOLDING:** The Court upheld the district court’s decision that Gregory fits within the outside salesperson exception in the FLSA; therefore, Gregory was not entitled to overtime compensation.

**IMPACT:** This decision expands the definition of an outside salesperson under the FLSA. Now an outside salesperson can be defined as someone who seeks sales on behalf of their employer and who closes the deals themselves without any intervention by a third party or the employer. The case also emphasizes that how an employee is defined is based solely on the actual duties performed and not by what is included in the job description.

**Pugliese v. Pukka Dev., Inc.,** 550 F.3d 1299 (11th Cir. 2009).

**LAW:** According to 15 U.S.C. § 1703(d) of the Interstate Land Sales Act (ILSA), a contract or lease for any lot of land that is not exempt under § 1702 of the ILSA can be revoked at the “option of the purchaser or lessee for two years from the date of the signing of such contract or agreement.” § 1702 of the ILSA has three subsections which provide for: (a) the exemption of “the sale or lease of certain properties or ‘lots’ from the ILSA;” (b) contains the exemption from the registration and disclosure requirements for certain lots under ILSA, including those subdivision lots which contain less than 100 lots; and (c) allows for the creation of other rules or exemptions for other lots.

**FACTS:** Plaintiffs filed suit to revoke their contracts with Pukka Development, Inc. (Pukka) to purchase units in Pukka’s 78-unit complex nearly two years after entering into the agreement under § 1703(d) of ILSA. Pukka believed that the contracts were exempt from §1703(d) of ILSA and both sides filed motions for summary judgment. The district court granted Plaintiff’s summary motion and Pukka appealed.
ANALYSIS: The Court recognized that both parties agreed that Pukka’s subdivision contains less than 100 lots; thus, they are exempt from the requirements in § 1702(b) of ILSA. The parties, however, disagreed on the language of § 1703. Pukka’s main argument came from a letter from Ivy Jackson, Director of the RESPA and Interstate Land Sales office of the United States Department of Housing and Urban Development (HUD), supporting Pukka’s position that a lot that is exempt under § 1702 is also exempt from the revocation right contained in § 1703. The district court disregarded this letter, reasoning that the court was free to make its own interpretation of the letter, and did not have to give total deference to agency interpretation.

The Court of Appeals began its look at the interpretation question by first looking at the statute’s plain language. It is determined that the statute in § 1702(a) exempts certain lots from all provisions of ILSA, and thus “serves as a reminder” that some lots are exempt from all of ILSA’s provisions. Congress, however, has also explicitly recognized that when a statute has particular language in one part of a statute, and later excludes it from another part, then the court must presume that Congress acted intentionally in its omission. Thus, the Court here disagrees with Plaintiff’s argument to add language to § 1703, stating that they cannot revise a statutory provision and their only role is to interpret them.

The Court next addressed the ambiguous nature of the statute. Typically, courts defer to the controlling government agency’s interpretation of the statute so long as the interpretation is “permissible.” HUD is the agency responsible for administering and promulgating relative rules under ILSA. Applying Chevron deference, the Court first recognized that HUD had not directly addressed the conflict between the two sections, but had addressed it in past statutes. The previous version of the statute provided that if a lot of land was exempt under § 1702(b), then it was also exempt from the revocation provision in § 1703. Thus, HUD’s interpretation was found to be acceptable by the Court.

The Court then addressed whether the deletion of this specific exemption has the effect of depriving HUD to interpret the statute. The Court stated that even if Chevron deference was inapplicable in the interpretation of the prior statute, HUD could gain additional deference under Skidmore v. Swift. Deference to an agency’s interpretation under Skidmore is merited “depending upon the
'thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' The court recognized that Jackson's letter was rationally analyzed, was consistent with past interpretations of the statute and was "thoroughly reasoned." Thus, it was entitled to *Skidmore* deference.

**HOLDING:** The Court deferred to HUD's interpretation of §§ 1702, 1703 of ILSA, holding that § 1703 means that if any lot or piece of land is exempt from any provision found in § 1702, then it is also exempt from the revocation provision found in § 1703.

**IMPACT:** This case will likely allow any party to a contract, or a lease for a particular piece of land or a particular lot, to be unable to revoke the agreement if the piece of land is exempt under any other provision of ILSA. This may make people more cautious when entering into contracts or leases for land, as they may want to revoke the contract if market conditions decline or if other adverse conditions become apparent.

**UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT**


**LAW:** Congress enacted The Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3, in order to encourage the development of alternative energy and it required utility companies to purchase their energy from "qualifying facilities." The Federal Energy Regulatory Commission (FERC) was charged with enacting rules under PURPA. PURPA was amended in 2005 in order to create exemptions for three types of facilities that did not have to abide by the statute.

**FACTS:** In FERC's formal rulemaking process of PURPA, they interpreted the word "markets" as contained in the Act to contain both competitive and noncompetitive markets. The American Forest
and Paper Association (AFPA) believed the interpretation was wrong and petitioned for review.

**ANALYSIS:** The Court begins with saying that *Chevron* deference must be applied to the FERC's interpretation. First, the Court must determine whether the language in the statute is ambiguous and then determine whether the interpretation by the agency was reasonable. It was recognized that the FERC interpreted "markets" to include both competitive and non-competitive markets, and two of the three exemption provisions explicitly provide for the inclusion of "competitive." The existence of "competitive" in two exemptions and the absence of it in the last provision, caused the Court to hold the statute to be ambiguous.

The Court next turned to whether the FERC's interpretation was reasonable. The FERC's interpretation is consistent with the maxim that when Congress deliberately excludes a word from a statute in one section but includes it in another, then Congress acted with purposeful intent. The interpretation appears to also be consistent with the widely used definitions, but AFPA argues that the definition of "market" should solely be limited to being competitive in nature. The Court disagrees with the AFPA, because the cases they cited to prove their position only use "competitive" as a modifying word for market and do not say that all markets must be competitive in nature. Lastly, the AFPA argues that there must be a factual basis for utilities to qualify for any of the exemptions. The FERC's determinations in its final rule are rebuttable presumptions, and the Court finds this to be acceptable and does not require the FERC to hold case-by-case adjudications.

**HOLDING:** The FERC's interpretation of "markets" in PURPA to include both competitive and noncompetitive markets was upheld as being reasonable.

**IMPACT:** This holding by the Court will likely make the exemptions from abiding by PURPA available to more utilities. The fact that the exemption will be more widely available may have the adverse effect of actually decreasing the use of alternative energy, because fewer utilities will be required to seek it.
Malladi Drugs & Pharm., Ltd. v. Tandy, 552 F.3d 885 (D.C. Cir. 2009).

**LAW:** 21 U.S.C. § 881(a)(9) provides that the Drug Enforcement Administration (DEA) may seize any List I chemical (which include ephedrine and pseudoephedrine) that have been "imported, possessed, or acquired in violation" of regulations. The Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 981, provides for an administrative forfeiture, which has the same effects of a judicial forfeiture. In order to obtain such forfeiture, the DEA must give adequate notice to the forfeiting party. Once this notice is provided, other parties may either choose to go ahead with the administrative proceedings, or they can file a claim to have the government institute a judicial forfeiture process.

**FACTS:** A United States subsidiary of Malladi Drugs and Pharmaceuticals, Ltd. (Malladi) imported List I chemicals from India and sold them to Novus Fine Chemicals, LLC and other companies. Malladi’s record-keeping procedures for these List I chemicals were inspected by DEA agents, and as a result of their reservations, 233 drums of ephedrine and pseudoephedrine were seized. DEA agents returned five days later and demanded Malladi’s surrender of its DEA import registration and seized 400 drums of ephedrine hydrochloride, 240 drums of pseudoephedrine hydrochloride, and 400 drums of ephedrine. The value of all four of these seizures was $1,420,000. Malladi was supplied with a letter of notification from the DEA about its intent to administratively forfeit the seized chemicals. The letter also provided all of the relevant deadlines and procedures. Malladi didn’t respond and subsequently, the DEA administratively forfeited the chemicals. Malladi then filed a petition with the DEA to return the chemicals and their petition was denied. Malladi then sued the DEA in district court seeking either the return of the chemicals or the institution of judicial forfeiture proceedings for the chemicals. The district court granted the DEA’s motion to dismiss, and Malladi appealed.

**ANALYSIS:** The Court began its analysis by recognizing that the DEA regulations involving List I chemicals only give two options to any party who has had its chemicals seized: a petition for remission and a claim to initiate the process of judicial forfeiture. If
the party fails to select any of these options by the applicable
deadline, then the DEA can file a default judgment and can
administratively forfeit the chemicals. The Court stated that Malladi
failed to pursue both of these options, even though it was provided
with notices and instead chose to file a discretionary petition.
Because the DEA denied this petition, Malladi now seeks their prior
option of initiating the process of judicial forfeiture for the first time.
The Court, however, states that the failure by Malladi to seek judicial
forfeiture in the initial proceedings subsequently prohibits them from
bringing the judicial forfeiture now. This fact demonstrated that
Malladi did not exhaust its administrative remedies, which is a
prerequisite for obtaining judicial review.

Malladi counters this argument by stating that the normal
exhaustion rules don’t apply because this is not a direct appeal from
the administrative decision; instead, it is a collateral attack on the
administrative remedy of forfeiture. The Court, however, also
rejected this idea, holding that it is not the title of the complaint that
matters, it is the fact that Malladi previously had this option of
choosing the process of judicial forfeiture and they chose not to
pursue it.

**HOLDING:** The Court upheld the district court’s dismissal of
Malladi’s claim because Malladi had chosen not to exhaust their
available administrative remedies.

**IMPACT:** The Court held that in cases involving DEA
regulations, a party appealing the seizure of chemicals, once
receiving notice, must choose an administrative option. If they
choose not to pursue these avenues, then they cannot later try to
obtain these remedies in a judicial proceeding. This seemingly
restricts a party’s access to judicial proceedings, and also emphasizes
that the Court will not be a stand-in for the agency, nor will they
contravene their rules and regulations in order to give the party what
they want administratively in a judicial proceeding.

_Tesoro Ref. & Mktg Co. v. Fed. Energy Regulatory Comm’n_,
552 F.3d 868 (D.C. Cir. 2009).

**LAW:** 18 C.F.R. § 343.2 allows challenges to be brought for
pipeline rates adjusted for inflation under 18 C.F.R. § 343.3.
FACTS: The Federal Energy Regulatory Commission (FERC) issued an order approving Calnev Pipe Line’s increase in the rates they charged, adjusted for inflation. Tesoro Refining and Marketing Company (Tesoro) sought review of the FERC’s order, focusing on the difference in “revenues over cost of service.” The FERC denied Tesoro’s petition, following its clarification of an earlier order. The FERC now required a complainant challenging the increase of rates due to inflation to prove two things: “(1) that the pipeline is substantially over-recovering its cost of service and (2) that the indexed based increase so exceeds the actual increase in the pipeline’s cost that the resulting rate increase would substantially exacerbate that over-recovery.” Based on the re-clarification, the FERC denied Tesoro’s complaint. Subsequently, Tesoro petitioned for review.

ANALYSIS: The Court first recognized that in order to seek judicial review for a matter, the party seeking review must first raise this issue with the appropriate agency. In this case, Tesoro may have been able to get the result it wanted by re-raising the issue with the FERC. Typically a party can avoid the requirement of exhaustion of administrative remedies for judicial review by showing several situations, including: the suffering of irreparable harm; bias by the agency; or the inability of the agency to grant equitable relief. Tesoro’s complaint was based on an order by the FERC, which at the time was not final and also had not been repudiated.

Tesoro’s last argument was that any further attempts to bring its complaint before the FERC would be futile, as they knew that the complaint would be denied. The court recognized that the most futile arguments are brought by parties who can prove that the same argument had been rejected by the specific agency in the past. Tesoro brought its futility argument because the agency would most likely reject that argument in the future. The Court does not want to expand the realm of the futility argument here; instead, the Court stated that the only time this argument can be successfully advanced is when the applicable administrative remedies would be useless.

HOLDING: The Court upheld the FERC’s denial of Tesoro’s complaint because Tesoro failed to exhaust all of its administrative remedies. Tesoro must first make its complaint regarding the
clarification order to the FERC, before the court can grant judicial review.

**IMPACT:** This case shows that courts will not take a complaint by a party against an administrative agency before the party has exhausted all of its options with that particular agency. The court makes it clear that even though situations may exist where there is little hope that the complaint may be granted by the agency, the court will not allow the complaining party to cut any corners. The complaining party must still exhaust all of its avenues provided to it by the applicable agency.