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PRE-ENFORCEMENT REVIEW OF ADMINISTRATIVE AGENCY ACTION: DEVELOPMENTS IN THE RIPENESS DOCTRINE

I. Introduction

Individuals and corporations in the United States are increasingly the target of various actions instituted by federal administrative agencies. These administrative actions range from the announcement of formal regulations to mere statements of general opinion. Frequently, an agency's action conflicts with the private interests of those subject to its authority. Accordingly, these conflicts necessitate a review procedure in which an affected party may challenge the agency's action. The statutes creating the various agencies often provide a means of reviewing administrative action within the agency itself. If such review is not available or if the result of the administrative review procedure seems unfavorable to the affected party, resort may be had to the judiciary.

Should appeal be made to the judiciary, the affected party must choose between two alternatives. The party may choose not to comply with the agency's action and thereby obtain review of the action's validity when the agency files suit to compel enforcement. Alternatively, the party may, in a limited number of situations, bring the matter before the courts immediately. This limited area of immediate review is known as pre-enforcement review. This note will examine the current availability of federal pre-enforcement review and identify which types of agency actions are and are not appropriate for such review. Additionally, a new approach to the decision to grant or to deny pre-enforcement review will be suggested.

II. Ripeness As the Prerequisite for Pre-enforcement Review

Pre-enforcement review is closely linked to the doctrine of "ripeness for review." Ripeness is a broad concept in administrative law which has been often discussed by the authorities in the field. In essence, the ripeness of an issue for judicial review concerns the appropriate time for judicial review of agency action. As such, ripeness concerns itself not with the issue of whether an affected party has a justiciable case and controversy and sufficient standing for a reviewing court to acquire jurisdiction. Although the doctrine of standing is beyond the scope of this note, courts sometimes rely on this doctrine to preclude review. See, e.g., Sierra Club v. Morton, 405 U.S. 727 (1972).
party will obtain review but rather, when such review will be granted.

To be distinguished from the ripeness issue is the doctrine of "exhaustion of administrative remedies." Exhaustion too, concerns itself with the timing of judicial review of administrative action. Exhaustion of remedies, however, is a more limited, procedurally oriented concept than is the doctrine of ripeness. The exhaustion issue involves the question of whether an issue of conflict should be channeled through the administrative process, toward an administrative remedy, before being considered by the courts. Thus, the availability of judicial review is affected only by the time required to channel an issue through the remaining administrative review processes.

The concept of ripeness, however, is broader in focus. Ripeness concerns itself with the more abstract aspect of the judicial process. It is an attempt to determine at what stage the courts should attempt to resolve developing conflicts among parties. A reviewing court must ask whether sufficient events have taken place to solidify the adverse positions of the parties and remove the conflict from the realm of the hypothetical, abstract, or remote. Review will be undertaken only if the conflict has "ripened" in finality and formality to become present, imminent and injurious. Whenever an agency action results in a conflict with the requisite finality, formality and injury prior to an enforcement proceeding, the agency action is said to be ripe for pre-enforcement review. The problem is determining the presence of these "requisites."

A. Development of Ripeness and Pre-enforcement Review

Before 1966 there was no definitive test to determine when and under what circumstances pre-enforcement review should be granted. Generally, the courts were reluctant to review agency action prior to enforcement. The rationale for this view, as expressed by Justice Harlan, speaking for the Supreme Court in Abbott Laboratories v. Gardner, was to prevent the courts, "...from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

The standards for pre-enforcement review prior to Abbott were ad hoc and applied in limited areas. Through the Abbott and companion decisions, the Supreme Court specifically addressed the issue of ripeness and pre-enforcement review. The Abbott Court announced a bifurcated test to determine which agency regulations could be challenged prior to an enforcement proceeding. In holding that a labeling regulation promulgated by the Commissioner of the

7 Davis at 21.01.
8 If the action is not sufficiently "ripe" for pre-enforcement review it would become "ripe" during the enforcement proceeding initiated by the agency. Accordingly, the affected party could then obtain "enforcement review" of the "ripened" issues.
9 387 U.S. at 148.
10 The courts had developed a variety of tests for pre-enforcement review. See, e.g., Frozen Foods Express v. United States, 351 U.S. 40 (1956) (immediate and practical impact); Columbia System v. U.S., 316 U.S. 407 (1942) (to avoid irreparable injury); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (to avoid present and real injury).
FDA was ripe for pre-enforcement review, the Court stated: "[T]he problem [of ripeness for pre-enforcement review] is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."

The Court established two criteria to determine the "fitness" of particular issues for pre-enforcement review: (1) whether the issue framed was "purely legal" i.e. was the statute properly construed by the commissioner; and, (2) whether the regulation was a "final agency action" that is, the definite and final agency position on a particular issue.

On the issue of "hardship," the Abbott Court stated that the agency action must place the party in a "dilemma." The "dilemma" requirement imposed by the Abbott Court was further clarified by the Third Circuit in A.O. Smith v. F.T.C. In A.O. Smith, the Third Circuit weighed the costs of compliance and the penalties for noncompliance with the FTC's implementation of a "Line of Business" (LB) annual reporting regulation. It was petitioner A. O. Smith's position that the reporting requirements of the LB program produced an immediate hardship and thus placed it in the requisite dilemma. In holding that there was sufficient hardship under the Abbott standard, the court stated:

Thus it appears from the Abbott Laboratories trilogy that one seeking discretionary relief may not obtain pre-enforcement review if there is no immediate threat of sanctions for non compliance, or if the potential sanction is de-minimis. Conversely, the court should find agency action ripe for judicial review if the action is final and clear cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action's validity, he must change his day to day course of conduct... Alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence.

From these decisions it is possible to extract the present law concerning ripeness for pre-enforcement review. In the words of the Supreme Court:

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12 387 U.S. at 149 (emphasis added).
13 Id.
14 Id. at 152.
15 530 F.2d 515 (3d Cir. 1976).
16 The LB program was designed to increase the availability and accuracy of data on industrial performance in specific areas of commercial activity. The program required certain large corporations to provide sales and cost data with respect to specific lines of product activity. The goal of the program was to provide more meaningful and understandable corporate financial statements.
17 530 F.2d at 524.
18 The companion cases of the "Abbott Trilogy" were similarly decided. In Gardner v. Toilet Goods Assn., 387 U.S. 167 (1966), the Court found the commissioner's regulations on color additives and on the applicability of a hair dye statutory exemption ripe for pre-enforcement review. Specific clearance by the commissioner was required of all "color additives" to be used in food, drugs and cosmetics. The regulation at issue included "diluents" and "any substance that results in coloring when applied to the human body" as "color additives" requiring specific clearance. Noting that the regulations were self-executing and that noncompliance could result in seizures, injunctions, criminal and/or civil sanction, the Court found sufficient degrees of "fitness" and "hardship" to grant review. In the third case of the trilogy, Toilet Goods Assn. v. Gardner, 387 U.S. 158 (1966), the Court held that although the "fitness" test was satisfied, there was no "direct and immediate impact" or "hardship" in the FDA regulation. The regulation in conflict allowed the commissioner to suspend the "certification service" of a business if it denied FDA inspectors free access to inspect the
Where the legal issue presented is fit for judicial resolution and where a regulation requires an immediate and significant change in the plaintiff's conduct of their affairs with serious penalties attached to non compliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgement Act must be permitted, absent a statutory bar or some other unusual circumstance...1

Obviously, under the Abbott holding, formal agency regulations which satisfy the two pronged test are to be adjudged “ripe for pre-enforcement review.”2 Left open in Abbott, however, is the extent to which less formal agency action may be considered ripe for pre-enforcement review. It is in this area of less formal, less final action, coupled with varying degrees of hardship, that the courts have had the most difficulty in applying the Abbott standards.21

B. Application of the Abbott Standards

Since the decision in Abbott, there have been no pronouncements by the Supreme Court on the issue of ripeness for pre-enforcement review. For the past eleven years, the federal district and circuit courts have applied the Abbott standards to all forms of administrative agency actions to determine which are appropriate for pre-enforcement review. Indeed, the current state of the doctrine has been labeled “a stable and satisfactory ripeness law . . . largely the opposite of what it was under the Supreme Court’s decisions of the 1940’s and 1950’s when the Court was rendering extreme decisions closing the judicial doors, even when plaintiffs were seriously hurt by onerous legal uncertainties.”22 While it is true that the availability of pre-enforcement review has been expanded since the 1950’s, a review of the post Abbott cases reveals that “legal uncertainties” in the doctrine of pre-enforcement review continue to plague persons seeking relief from federal administrative agency action.23

To understand these legal uncertainties it is helpful to analyze the variety of agency actions in terms of a spectrum of “pre-enforcement reviewability.”3 On the “consistently reviewable” end of the spectrum are the formal agency regulations or orders which have a direct and immediate impact on the parties, as in Abbott.24 At the other end of the spectrum are agency subpoenas, which have been repeatedly declared inappropriate for pre-enforcement review.

1. Administrative Subpoenas and Agency Inaction

The pre-Abbott case of Reisman v. Caplin25 established that pre-enforce-
ment review of agency subpoenas is not available to a target individual or corporation. In Reisman, the Supreme Court examined the impact of an IRS subpoena which directed an accounting firm to produce for the commissioner all audit reports, work papers, and correspondence relating to a taxpayer. The Court could find no immediate hardship to the taxpayer because he was able to question the subpoena’s validity before the IRS hearing officer, who had “no power of enforcement or right to levy any sanctions” for non-compliance. The Court dismissed the possibility that contempt penalties could supply the requisite hardship by noting that, although failure to appear or to produce may lead to prosecution and sanction, this would not occur when the witness interposed good faith challenges to the summons.

The Reisman analysis was re-affirmed by the post-Abbott decision of Atlantic Richfield Co. v. F.T.C. In Atlantic Richfield, the Fifth Circuit refused to grant pre-enforcement review of an FTC investigatory subpoena duces tecum. The court noted that the subpoena “was not self-enforcing,” could “only be enforced by a district court where a plaintiff could raise all due process and procedural objections,” and that “Atlantic had an adequate remedy at law through the FTC enforcement actions and suffered no undue hardship by being remitted to that remedy by the district court’s denial of relief.”

The parties in Reisman and Atlantic Richfield were not faced with the financial hardship and/or criminal-civil sanction dilemma present in Abbott. Thus, just as “regulation” cases are typically granted pre-enforcement review, the “subpoena” cases are just as regularly denied early disposition by the courts.

The courts’ reluctance to grant pre-enforcement review in “subpoena” cases is also found, to a somewhat lesser degree, in cases involving agency delay and inaction. Such inaction has been found to be of sufficient finality and hardship in only a few cases. For example, in Environmental Defense Fund, Incorporated v. Hardin, the Secretary of Agriculture refused to take action on a request for an interim suspension of a regulation pertaining to the registration of DDT. Noting the “imminent hazard” of DDT, the D.C. Circuit held that even a temporary refusal to suspend would result in irreparable injury on a massive scale and that no subsequent action by the secretary could sharpen the issues. Thus, pre-enforcement review was appropriate on the issue of an interim suspension of the DDT registration. In short, to warrant review of such inaction, the affected party must establish that the administrative inaction must have the same impact as a denial of relief and that the inaction itself will inflict irreparable injury.

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26 Id. at 446.
27 Id. at 447.
28 546 F.2d 646 (5th Cir. 1977).
29 Id. at 649.
30 In Abbott, the petitioning drug manufacturers would have been forced to destroy large quantities of advertising material and then reprint others, at considerable expense, if they chose to comply with the regulation. Alternatively, if the petitioners in Abbott chose not to comply with the regulation, they ran the risk of fines, loss of public esteem and even criminal sanction.
32 Id. at 1098-99.
33 Consistent with Environmental Defense is Medical Com. for Human Rts. v. Securities & Exch. Com’n., 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972). In Medical Committee, the D.C. Circuit held ripe for review the commissioner’s decision not to
The area of agency inaction would seem to present the most difficult problems for a party seeking pre-enforcement review. There must be some special circumstance such as "imminent danger" to establish finality and hardship. Absent some special circumstance, it would seem wise to heed Chief Judge Bazelon, speaking for the D.C. Circuit in *Environmental Defense Fund*, "clearly relief delayed is not always equivalent to relief denied. There are many factors that result in delay and a court is generally ill suited to review the order in which an agency conducts its business." Obviously, pre-enforcement review of such agency inaction will be quite limited.

Such "subpoena" and "inaction" cases create no great difficulty for the courts. The more difficult cases, in which the courts have applied different interpretations to the requirements of "fitness" and "hardship," involve agency actions from the middle of the "ripeness spectrum."  

2. Policy Statements

Although an agency's policy statements on a particular issue or procedure are clearly less formal and less final than agency regulations, courts have often found such statements ripe for pre-enforcement review. The explanation for such findings lies in a continuing tendency of courts to make "pragmatic" evaluations and categorizations of the "finality" and "formality" of agency action. A "pragmatic" evaluation requires a court to look beyond the particular label attached to the action by the agency to the action's substance. More specifically, a court must recognize that the agency's label is not determinative of the action's finality. Additionally, courts using "pragmatic" characterizations have often tended to lessen or liberalize the burdens required to satisfy the "hardship" prong of the *Abbott* test. With such "pragmatic" evaluations of "finality" and liberal tests for "hardship," the opportunity for pre-enforcement review is enhanced.

In *Citizens Communication Center v. F.C.C.*, a policy statement established a preference for existing radio and television stations at license application hearings. The effect of this policy statement was that established stations which had operated with "substantial past performance" and "without serious deficiencies" were preferred over mutually exclusive new applicants.

The D.C. Circuit held the statement ripe for pre-enforcement review. The court decided the fitness prong of the *Abbott* test by holding that administrative consideration and reconsideration of the statement constituted finality and that the hearing issue involved statutory interpretation and was thus "purely legal." On the issue of hardship, the court held that "depriving competing applicants of their right to a full comparative hearing on the merits of their own application,

grant the Committee a hearing on a company's refusal to include in its proxy statement a resolution on the manufacture of napalm. The court stated that no significance whatsoever inheres in the fact that the administrative determination is couched in terms of a "no action" decision rather than in the form of a decree binding a party to perform or refrain from some particular act. 432 F.2d at 668.

34 428 F.2d at 1099.
35 See generally *Davis* at 21.06-08 (1976 supp.).
37 447 F.2d 1201 (D.C. Cir. 1971).
38 Id. at 1205.
and by severely limiting the importance of other criteria, the commission has made the cost of processing a competing application prohibitive when measured by the challengers' very minimal chance of success."

The court's holding on the issue of hardship is a liberalization of the "dilemma" requirement announced in Abbott. The court in Citizens deemed that prospective inability to compete could properly be analogized to the financial hardship and the risk of civil and criminal sanctions present in Abbott.

Another "pragmatic" evaluation of agency action occurred in Continental Airlines v. C.A.B. In Continental, a "board policy" concerning commercial airline seat configuration had been implemented by the Civil Aeronautics Board. Judge McGowan, speaking for the D.C. Circuit, held the "board policy" ripe for pre-enforcement review by stating, "the label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has not yet put into effect." Having "pierced" the agency's label, the Continental court then applied the Abbott standards to the substance of the agency's action and found sufficient "fitness" in the CAB's policy statement. The court then evaluated the hardship which accompanied the board's statement and found the financial expense of removing airline seats well within the bounds of "hardship" required by Abbott and Citizens.

The limits of the "pragmatic" evaluation of board policy statements, however, were made clear by the D.C. Circuit's refusal to grant pre-enforcement review in Pacific Gas & Electric Co. v. Federal Power Com'n. In Pacific, the FPC issued a "statement of general policy" aimed at correcting uncertainties in the gas supply and curtailment area. The policy statement said that in the national interest a decision to limit or cut off a customer during a natural gas shortage should be based on the particular customer's end use of the gas (e.g. residential heating), rather than on the utility's prior sales contracts. This plan was to be implemented unless a company demonstrated that a different curtailment plan would better advance the public interest. Fearing that withholding gas in violation of existing contracts would subject it to liability for breach of contract, Pacific sought pre-enforcement review.

The D.C. Circuit recognized that the agency's characterization of the action as a "statement of policy" may not be conclusive. Nevertheless, when "the agency states that in subsequent proceedings it will thoroughly consider the policy's applicability to the facts of a given case and also the underlying validity of the policy itself, then the agency intends to treat the order as a general statement of policy." Such tentative statements of policy did not establish a curtailment plan for any particular utility; it was simply the "preferred plan" which would serve as "a guide in other proceedings." Accordingly, the test of fitness was not satisfied in that the FPC had not decided to adopt the plan as final. Similarly, there was

39 Id. at 1206.
40 522 F.2d 107 (D.C. Cir. 1974).
41 Id. at 124.
42 506 F.2d 33 (D.C. Cir. 1974).
43 Id. at 39.
44 Id. at 40.
not the same degree of hardship that was present in *Citizens* or *Continental*, because the court asserted that there was no final, inflexible impact upon the parties.\(^{45}\)

The holding in *Pacific* can easily be reconciled with the *Continental* and *Citizens* decisions. In the latter cases the policy statements carried the weight of a formal ruling in that there was no element of "tentativeness" in the boards' positions. In contrast, the petitioners in *Pacific* were accorded ample opportunity to attack the board's policy at subsequent review proceedings. Similarly, the hardship brought about by the mere possibility that the company might have to breach existing contracts lacked the injurious effects of the hardships faced by *Citizens* and *Continental*.

The availability of pre-enforcement review of policy statements depends on the similarity of the facts and effects of a particular case to those in *Continental* and *Citizens*. Thus, if a party can establish that a conflict possesses the same degrees of "fitness" and "hardship" found in *Continental* and *Citizens*, the potential for pre-enforcement review is enhanced.

3. Agency Suggestions

The District of Columbia Circuit further restricted the requirement of formality as a determinative criterion for fitness for review in *Independent Broker-Dealer T. Ass'n v. Securities & E. Com'n*.\(^{46}\) Disregarding allegations of informality in the SEC suggestion that it might forbid an established brokerage commission exchange system, Judge Leventhal declared, "the fact that an agency has not issued a command does not mean that the step by which it initiated a procedure or informal action, leading up to the exercise of its powers may be relegated to an area of mere unreviewable suggestions."\(^{47}\)

The court easily resolved the hardship issue by stating that the position taken by the commission, "cut off a source of income to appellant broker-dealers."\(^{48}\) Thus, loss of potential income without any risk of criminal or civil sanctions was held sufficient hardship to satisfy the *Abbott* hardship criterion.

The liberality of the District of Columbia Circuit is not a uniform trend in the federal courts, as shown by the Tenth Circuit's decision in *Anaconda Company v. Ruckelshaus*.\(^{49}\) After rejecting Montana's standards for sulfur emissions under the Clean Air Act of 1970, the EPA promulgated its own proposed standards as replacements. The court denied review, holding that the standard under review was merely a proposed one and was not final.\(^{50}\)

Furthermore, the court asserted that *Anaconda* had not suffered any immediate hardship. The court declared that the emission standard had not been applied to the company and that mere promulgation of the standard did not

\(^{45}\) *Id.* at 41.


\(^{47}\) 442 F.2d at 139.

\(^{48}\) *Id.* at 141.

\(^{49}\) 482 F.2d 1301 (10th Cir. 1973).

\(^{50}\) 482 F.2d at 1305; *cf.* Bethlehem Steel v. U.S. Environmental Protection, 536 F.2d 156 (7th Cir. 1976).
injure Anaconda, since there was no certainty that it would be enforced against the company.51

The holding in Anaconda must be viewed as a reminder that not all courts are willing to relax the requirements of "hardship" and "fitness" to ameliorate burdens arising from administrative agency action.52 Thus, in the area of agency suggestions and proposals, the availability of pre-enforcement review will often depend upon the attitude taken by the particular court. Some courts, notably the D.C. Circuit, frequently employ a "pragmatic" approach to establish the "finality" required to satisfy the Abbott "fitness" standard. This "pragmatic" approach refers to a court's willingness to look beyond the label attached to an action to its substance. Thus an agency's label is not determinative of the action's finality. In addition, these "pragmatic" courts often employ a liberal approach to the quantum of injury required to satisfy the Abbott "hardship" standard. As such, had Anaconda been before the D.C. Circuit, it is reasonable to suggest that the court might have reached a different result.

4. Opinions, Notices and Interpretations

One of the most important cases on the subject of ripeness since Abbott is the D.C. Circuit's decision in National Automatic Laundry and Cleaning Council v. Shultz.53 In National Laundry, an opinion letter signed by the Administrator of the Wage and Hour Division of the Department of Labor was found to be ripe for pre-enforcement review. The court concluded its discussion of finality by stating that, "the letter in this case was signed by the Administrator (only 1.25% of similar letters received such personal attention of the administrator): it was rendered on a broad legal question affecting an entire industry group; we take it as satisfying the aspect of finality which requires an authoritative agency ruling . . . ."54

The hardship facing the petitioners for non-compliance was indeed substantial: criminal penalties and civil liability for double the deficiency in wage payments could be imposed. Accordingly, the court asserted that the hardship prong of the Abbott test was satisfied.55

The National Laundry decision was premised upon a unique set of facts: the agency's administrator took the unusual step of personally responding to the inquiry letter, and his response affected an entire industry. Absent such special circumstances, however, it would seem wise to heed Judge Leventhal's dicta concerning opinion letters: "In view of the hundreds of thousands of inquiries the Wage and Hour Division answers each year, a lack of formality is understandable, and, of course, the overwhelming majority of these will not be appropriate for

51 482 F.2d at 1301.
52 Anaconda's financial burden to install equipment to comply with the EPA standards would seem to be as substantial as the hardship of being unable to compete in Citizens. 447 F.2d 1201 (D.C. Cir. 1971).
53 443 F.2d 689 (D.C. Cir. 1971). At issue was the commissioner's opinion that employees of coin operated laundries were subject to the minimum wage as specified in the Fair Labor Standards Act.
54 443 F.2d at 702.
55 Id. at 696.
review by way of declaratory judgment."\(^{56}\) Obviously then, pre-enforcement review of agency opinions will be granted only in rare instances.

A recent decision by the Court of Appeals for the Third Circuit indicates a retreat from what has been termed "pragmatic" decisionmaking.\(^{57}\) In \textit{West Penn Power Company v. Train}\(^{58}\) the court held that a "notice of violation" was not ripe, notwithstanding the dilemma of installing expensive antipollution equipment or facing fines of up to $25,000 for each day of non compliance. The \textit{West Penn} court relied on the notice's asserted lack of finality to deny review.\(^{59}\) It would seem that the decision in \textit{West Penn} does not comport with the liberal trend of cases since the \textit{Abbott} decision, in that the court refused to use the "pragmatic" method to establish formality and finality. It could well be argued that the EPA's position was, practically speaking, final. Indeed, it was highly unlikely that the agency would change its position on the finding of a "violation" in subsequent administrative proceedings. Accordingly, the court's refusal to "pragmatically" establish "finality" and thus "fitness," permitted it to ignore completely the hardship caused by the EPA's "notice."

This result flows from the rigidity of the \textit{Abbott} standards, in that both "fitness" and "hardship" must be established to obtain pre-enforcement review. Thus, under such standards, West Penn's dilemma of installing expensive antipollution equipment or facing $25,000 per diem fines could be completely ignored because of a restrictive interpretation of "finality." \textit{West Penn}, then, can be classified as an example of the present uncertainty in the ripeness for pre-enforcement review area. Again, it would seem possible that, given the degrees of "fitness" and "hardship" present in \textit{West Penn}, a different court could have reached a different result without abandoning the current standards for pre-enforcement review.\(^{60}\)

The decision in \textit{West Penn} has not, however, established a trend limiting the availability of pre-enforcement review. Two decisions of the D.C. Circuit have reaffirmed the "pragmatic" approach to the "finality" requirement of the "fitness" test. In \textit{Independent Bankers Ass'n of America v. Smith},\(^{61}\) a statement that a customer-bank communication terminal (CBCT) was not a "branch" within the meaning of the National Banking Act was held ripe for pre-enforcement review even though the Comptroller of the Currency had labeled the decision "interpretative."

\textit{West Penn}, then, can be classified as an example of the present uncertainty in the ripeness for pre-enforcement review area. Again, it would seem possible that, given the degrees of "fitness" and "hardship" present in \textit{West Penn}, a different court could have reached a different result without abandoning the current standards for pre-enforcement review.\(^{60}\)

The court noted:

\begin{quote}
[U]nder the statutory plan, the notice of violation is not final agency action since it may be followed by either (1) an (order) which may be issued 30 days after notice . . . , but shall not take effect until the person it is issued to has an opportunity to confer with the administrator concerning the alleged violations . . . or (2) a civil suit. . . . The statutory scheme contemplates that the violation notice itself has neither an independent coercive effect nor the force of law.
\end{quote}

\(^{56}\) Id. at 701.

\(^{57}\) See, \textit{Davies} at 21.08 (1977 supp.).


\(^{59}\) The court noted:

\begin{quote}
[U]nder the statutory plan, the notice of violation is not final agency action since it may be followed by either (1) an (order) which may be issued 30 days after notice . . . , but shall not take effect until the person it is issued to has an opportunity to confer with the administrator concerning the alleged violations . . . or (2) a civil suit. . . . The statutory scheme contemplates that the violation notice itself has neither an independent coercive effect nor the force of law.
\end{quote}

\(^{60}\) In his lengthy dissenting opinion in \textit{West Penn}, Judge Adams attacked the majority's conclusions on both the finality and hardship issues. 522 F.2d at 317-19.

\(^{61}\) 534 F.2d 921 (D.C. Cir. 1976).
notice-and-comment hearing. Nevertheless, the court concluded that "judging from the Comptroller's negative response to IBBA's request for such rulemaking procedures, his ruling is every bit as (definitive) as the Federal Drug Administration regulation encountered in Abbott Laboratories i.e. administrative reconsideration of the ruling seems unlikely." The court then looked to the "acute competitive disadvantage for state chartered banks located in states where off premises CBCTs are not permitted under state law" to satisfy the hardship test.

In Straus Communications, Inc. v. F.C.C. the D.C. Circuit held ripe an informal letter which notified a broadcasting station that it had violated the FCC's Personal Attack Rule. The Straus court established "fitness" by looking to the letter's substance. The court noted that the letter's not being labeled an "order" was not "an obstacle" as the letter clearly indicated the commissioner's belief that the station's action constituted a violation. Although the letter did not provide for any monetary penalties the court found sufficient hardship and injury. The letter became "a permanent part of the station's record," which in all likelihood meant that, "future violation by this station would stand to suffer harsher treatment than similar violations by other stations."

Contrasting the Independent Bankers and Straus cases with the West Penn holding compels the conclusion that the law of ripeness for pre-enforcement review in the area of less formal agency opinions and statements is by no means settled. According to Independent Bankers and Straus, finality may be established when "administrative reconsideration seems unlikely" or when an action "clearly indicates the commissioner's belief." The West Penn court denied review, however, even though it seems correct to assume that the commissioner of the EPA was unlikely to change his position regarding the finding of an emissions violation. Similarly, on the issue of hardship, "an acute competitive disadvantage" or "a likelihood that future violations would result in harsher treatment" would seem to be of lesser consequence than the thousands of dollars required to install the EPA mandated equipment in West Penn. Clearly in this area of agency action the law of ripeness cannot be deemed "stable and satisfactory." There is a wide area of rather unbridled judicial discretion with which affected parties must deal.

III. Conclusion

The general standards for pre-enforcement review have been clearly defined since the Supreme Court's decision in Abbott Laboratories v. Gardner. These standards require a court to evaluate the "fitness of the issues for judicial determination" and the "hardship to the parties of withholding judicial review." Although the Abbott holding related to the reviewability of formal agency regu-

62 Id. at 929.
63 Id.
64 530 F.2d 1001 (D.C. Cir. 1976). The letter at issue refers to an incident wherein one of the station's broadcasters referred to a U.S. Congressman as a "coward" in response to a question during a call-in talk show.
65 530 F.2d at 1006.
66 Id.
67 See Davis, supra note 22.
lations, federal courts rely on Abbott to test the reviewability of less formal, less final, and less injurious agency actions. The courts, however, have not been uniform in their application of the Abbott tests. Most reviewing courts, especially the D.C. Circuit, have elected to employ a "pragmatic" evaluation of the issue of "fitness" and have demonstrated a liberal tendency in evaluating requisite "hardship." Accordingly, courts have granted pre-enforcement review in cases with a lesser degree of ripeness than was present in Abbott. There are occasional holdings from other circuits denying pre-enforcement review to parties who have established a quantum of fitness and hardship greater than some of the "ripe" cases from the D.C. Circuit, but which did not possess the degree of fitness and hardship present in Abbott. Based on the post-Abbott cases, it seems that the probability of obtaining pre-enforcement review of less formal, less final, and less burdensome agency action is increased if the case were heard in the D.C. Circuit. The higher probability of review from the D.C. Circuit results from a consistent pattern of "pragmatic" analysis to establish "fitness" in conjunction with a liberal evaluation of the quantum of injury required to establish "hardship."

There are, thus, many uncertainties with regard to the availability of pre-enforcement review. These uncertainties, have, at times, closed the doors of review to plaintiffs who were genuinely injured by an agency action. Currently it is possible for a court to find an action to lack "formality" or "finality" and thus deny its "fitness" even though there are substantial hardships inflicted by the action. The inherent problems of such a rigid "two pronged" test for pre-enforcement review can be seen in West Penn Power Company v. Train. By refusing to find sufficient "finality" in the EPA's "notice of violation," the court could ignore West Penn's hardship dilemma without violating the standards announced in Abbott. The intent of the Abbott decision was to prevent such foreclosures of the judicial process to plaintiffs who had been genuinely injured by an agency action. Although the West Penn decision did not violate the technical Abbott standards, it would seem to be violative of true intent of the Abbott decision. To ameliorate this problem, the courts should move away from restrictive requirements of "finality" when the hardship effected by the agency action is substantial. The decision to grant pre-enforcement review should be based on a flexible "facts of the particular case" approach. Such an approach would "pragmatically" establish "fitness," with lesser degrees of "finality" and "formality," if an action's resultant "hardship" was extremely burdensome. In view of the fact that agency actions are becoming more pervasive, burdensome and costly, as witnessed by West Penn, a more flexible approach to the granting of pre-enforcement review would be more in keeping with the intent of the Abbott decision, and with the interests of justice.

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