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ALERT

Supreme Court Decides That Parties May Facially Challenge Regulations – No Matter How Old – Within Six Years of Injury

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Last week, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the U.S. Supreme Court held that the six-year statute of limitations that applies to facial challenges of agency action under the Administrative Procedure Act (APA) does not begin to run against a party until that party is first injured by the agency action, whenever that might be. In doing so, the Court overruled the law in "[a]t least six Circuits," under which such challenges had to be brought within six years of the date the agency action became final, no matter when the party was first injured by it. The Court's analysis largely echoed an *amicus* brief Wiley submitted on behalf of the Cato Institute.

Decision

Generally, unless a specific statutory scheme delineates the parameters of judicial review under that scheme, final agency action is reviewable under the APA. Because the APA does not contain its own statute of limitations, the default statute of limitations in 28 U.S.C. § 2401(a) for bringing suits against the federal government usually applies, which requires claims to be brought "within six years after the right of action first accrues." The question presented in *Corner Post* concerned when a facial challenge to an agency action under the APA "first accrues." "At least six Circuits" had held that accrual occurred on the date the agency action became final, "regardless of when the plaintiff was injured" by it.

The Court disagreed, holding that a facial challenge under the APA does not accrue until the party seeking to bring it has first been injured by the final agency action, whenever that might be. The

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Court's decision turned on the "well-settled meaning" of the word "accrue," from before the general statute of limitations in § 2401(a) was adopted to the present. "Accrue," the Court reasoned, has long meant the moment "the plaintiff has a complete and present cause of action." And a "complete and present cause of action" requires "loss or damage" to the plaintiff. Thus, a facial challenge to final agency action does not become "complete and present" – it does not "accrue" – until the party seeking to bring that challenge is first injured by it.

In so holding, the Court rejected several arguments raised by the Government in support of the rule that accrual occurred on the date the agency action became final. For one, the Court disagreed that the "standard administrative-law practice" of having limitations periods run from the date of final agency action – embodied in many agency-specific review schemes – dictated how the Court should interpret "accrue" in § 2401(a). The Court also found that "policy concerns" about the need for ultimate repose from litigation challenging agency action could not "justify departing from the statute's clear text." And it found these concerns "overstated" in any event, pointing out that parties "may always assail a regulation as exceeding the agency's statutory authority" on an as-applied basis or by "petition[ing] an agency to reconsider a longstanding rule and then appeal[ing] the denial of that petition." The Court reserved for another day the question of whether a procedural injury (such as a failure to comply with notice and comment) could accrue more than six years after a rule is promulgated.

Justice Kavanaugh wrote a concurring opinion explaining that vacatur of agency action is an available remedy under the APA – a point the majority "assume[d] without deciding" but that several Justices recently have called into question.

Legal and Strategic Implications

Corner Post marks a significant change in the regulatory landscape under the APA. By holding that accrual occurs when the party seeking to challenge final agency action is first injured by it, the Court has opened the courthouse doors to parties who have been newly injured by old regulations and the like. This means that regulations that are reviewable under the APA may always be subject to direct, facial challenge, so long as someone has newly experienced an injury from the regulation. Although, as the Court observed, parties always had the ability to challenge old rules when those rules were specifically applied to them (such as in enforcement actions) or through the circuitous method of petitioning the agency to amend or rescind an old rule and then challenging the denial of that petition, the holding in *Corner Post* allows for direct, pre-enforcement, facial challenges to old rules without any absolute cutoff period.

For parties affected by agency actions subject to review under the APA, *Corner Post* has important effects moving forward. Since the Supreme Court's seminal decision in *Abbott Laboratories v. Gardner*, pre-enforcement review has been widely regarded as an essential check on the administrative state, in part because many companies have reasonably concluded that advancing even a meritorious defense in an enforcement action carries too much risk. But if old rules are automatically shielded from judicial review, then new market entrants are deprived of this important opportunity.

In returning the lower courts to a correct interpretation of Section 2401, the Supreme Court in *Corner Post* followed the normal rule that a statute of limitations begins to run when the plaintiff has been injured. The upshot – and the practical importance of this case – is that the statute of limitations applicable in APA actions will operate like any other statute of limitations, meaning that newly injured parties can challenge government action.

Finally, parties should stay attuned to the issue Justice Kavanaugh raised in his concurrence. Courts have long treated vacatur of regulations as an available remedy under the APA. But some Justices have recently called that proposition into question, arguing remedies must be limited to the parties before a reviewing court. Justice Kavanaugh's forceful defense of the vacatur remedy, marshaling arguments based in text, history, and tradition, is an important contribution.

For more information on this article or Wiley's Issues and Appeals Practice, please contact one of the authors.

Wiley Rein LLP represented the Cato Institute as amicus curiae *supporting the petitioner in* Corner Post.