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An Agricultural Law Research Article

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The exhaustion of administrative remedies doctrine requires those who claim that an agency's action is unlawful to exhaust any administrative remedies as a precondition to judicial relief.¹ The doctrine is a venerable one, having originated in the federal common law as a prudential rule of judicial administration.² It seeks to ensure that agencies retain the primary responsibility for administering the programs that Congress has placed within their purview and to promote judicial efficiency.³ In other words, "[t]he exhaustion doctrine . . . acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court."⁴

This traditional, court-created exhaustion doctrine has exceptions. For example, exhaustion is not required when the administrative remedy is inadequate or pursuing it would be futile.⁵ In general, these and the other exceptions reflect the judiciary's balancing of the affected individual's need for immediate judicial relief against the institutional needs for agency autonomy and judicial efficiency.⁶

Congress also has required the exhaustion of administrative remedies in certain instances. Congressional enactment of a statutory exhaustion requirement can give rise to the issue of whether Congress intended only to codify the court-created exhaustion doctrine or intended to impose an independent, jurisdictional duty to exhaust. This article discusses that issue with respect to statutory exhaustion requirement found in 7 U.S.C. § 6912(e). This statute requires exhaustion prior to the commencement of judicial actions

¹ See *generally* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 8.33 (3d ed. 1991) [hereinafter SCHWARTZ].

² See William F. Funk, *Exhaustion of Administrative Remedies: New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 1 (2000) [hereinafter Funk].

³ See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 12.10 (2d ed. 2001).

⁴ *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992).

⁵ See SCHWARTZ, *supra* note 1, at § 8.34.

⁶ See *McCarthy*, 507 U.S. at 146-49. Noting that the Court "has recognized that the balancing of interests is extremely case-specific," a leading administrative law scholar has concluded that "[t]he effect of such case-specific balancing has been a general indeterminacy of outcome in traditional exhaustion cases." Funk, *supra* note 2, at 3.

against the Secretary of Agriculture, the United States Department of Agriculture (USDA), and the Department's constituent agencies, officers, and employees.

Section 6912(e) and *Darby v. Cisneros*

Section 6912(e) is of relatively recent vintage. In 1994 Congress authorized the Secretary of Agriculture to reorganize the USDA to “achieve greater efficiency, effectiveness, and economies in the organization and management of the programs and activities carried out by the Department.”⁷ The reorganization legislation also required the exhaustion of administrative remedies as a prerequisite to judicial review of USDA action.⁸ This requirement, codified at 7 U.S.C. § 6912(e), states:

Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against—

- (1) the Secretary;
- (2) the Department; or
- (3) an agency, office, officer, or employee of the Department.⁹

Congress added § 6912(e) at the USDA's request in response to the United States Supreme Court's 1993 decision in *Darby v. Cisneros*.¹⁰ *Darby* had the immediate effect of making it unnecessary for parties contesting many USDA actions to exhaust their administrative appeal remedies before seeking judicial review under the Administrative Procedure Act (APA).¹¹ At the time, no broadly applicable statute required exhaustion of USDA administrative remedies. Agency administrative appeal procedures were optional, with the initial agency decision taking effect when it was rendered. Since *Darby* precluded the federal courts from imposing an exhaustion requirement in these circumstances, the decision left the USDA facing the prospect of parties aggrieved by USDA actions bypassing the agency's administrative appeal processes.

The issue in *Darby* was whether APA § 704,¹² “by providing the conditions under which agency action becomes ‘final for the purposes of’ judicial review, limits the authority of courts to impose additional exhaustion requirements as a prerequisite to

⁷ Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, tit. II, § 202, 108 Stat. 3178, 3209 (codified at 7 U.S.C. § 6901).

⁸ See *id.* § 212(e), 108 Stat. 3178, 3211 (codified at 7 U.S.C. § 6912(e)).

⁹ 7 U.S.C. § 6912(e).

¹⁰ 509 U.S. 137 (1993). For an extensive discussion of the *Darby* decision, see Funk, *supra* note 2.

¹¹ The judicial review provisions of the APA are codified at 5 U.S.C. §§ 701-706.

¹² 5 U.S.C. § 704.

judicial review.”¹³ The Court held that it did, acknowledging that it was “surprising” that it had “taken over 45 years since the passage of the APA” for this question to be definitively answered.¹⁴

In relevant part, APA § 704 provides that judicial review is available for “final agency action for which there is no other adequate remedy in a court” and adds:

Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration . . . or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.¹⁵

The Court in *Darby* ruled “that § 704 means what it says.”¹⁶ The federal judiciary cannot require a party to exhaust optional administrative appeals before seeking judicial review under the APA of an otherwise final agency decision except in two instances. The first is when exhaustion is “expressly required by statute,” and the second is when exhaustion is required by agency rules that also make the initial agency decision “inoperative” pending further agency review.¹⁷

A statutory exhaustion requirement is more advantageous to an agency than an exhaustion requirement imposed by agency rule because Congress, unlike an agency, can require exhaustion without making the initial agency decision “inoperative” pending administrative review. It was thus fortuitous for the USDA that congressional action on the Clinton Administration’s request for authority to reorganize the USDA shortly followed the *Darby* decision. The reorganization legislation provided the USDA with a timely opportunity to request a statutory exhaustion requirement, and Congress responded by enacting § 6912(e).

Nearly a decade of litigation involving § 6912(e) has confirmed the observation that, “[i]n a post-*Darby* world, courts must grapple with many interpretive issues.”¹⁸ Although its terms are facially unambiguous, § 6912(e) has presented various interpretive issues, perhaps the most fundamental of which has been the question of whether it is jurisdictional.

¹³ *Darby*, 509 U.S. at 145.

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 704.

¹⁶ 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.3 (4th ed. 2002) [hereinafter PIERCE].

¹⁷ See *Darby*, 509 U.S. at 153-54.

¹⁸ PIERCE, *supra* note 16, at § 15.3.

Section 6912(e), however, has done more than provide fodder for interpretation. It has been a trap for the unwary or, more precisely, a litigation-ending pitfall for those plaintiffs who fail to discover or heed it. The reported decisions involving § 6912(e) reveal a state of asymmetrical knowledge about the existence of § 6912(e). Since its enactment, § 6912(e) has been asserted by the government in numerous cases, usually successfully. Two of the most recent of these cases, *In re 2000 Sugar Beet Crop Insurance Litigation*¹⁹ and *United States v. Childers*,²⁰ offer the opportunity to examine how some courts have grappled with § 6912(e).

The 2000 Sugar Beet Crop Insurance Litigation

Though the district court's decision in *In re 2000 Sugar Beet Crop Insurance Litigation* was reversed by the Eighth Circuit, the reversal was based on the Eighth Circuit's disagreement with the district court on the issue of whether an administrative remedy was available to the plaintiffs. The Eighth Circuit ruled that none was, thus avoiding the need to address the issue of whether § 6912(e) imposes a jurisdictional requirement.²¹ Putting aside this error on the part of the district court and assuming for the sake of this discussion that an administrative remedy was available, the district court's opinion is an appropriate place to begin this discussion for its consideration of § 6912(e) confronted the split of authority that has developed over whether § 6912(e) is jurisdictional.

In addition, the district court's decision in *In re 2000 Sugar Beet Crop Insurance Litigation* illustrates the consequences of not heeding the command of § 6912(e) in an unusual context. There, unlike in the typical judicial review case where the only parties before the court are the plaintiff and the government,²² § 6912(e) was applied to a third-party action against USDA agencies brought by private insurance companies who had been sued by some of their policyholders for failing to pay indemnities under crop insurance policies subsidized by the Federal Crop Insurance Corporation (FCIC).

The *2000 Sugar Beet Crop Insurance Litigation* was initiated in state court by Minnesota farmers who suffered losses to their 2000 sugar beet crop. Contending they

¹⁹ 228 F. Supp. 2d 999 (D. Minn. 2002), *rev'd sub nom*, National Crop Ins. Serv., Inc. v. Federal Crop Ins. Corp., 351 F.3d 346 (8th Cir. 2003).

²⁰ 789 N.E.2d 691 (Ohio Ct. App. 2003).

²¹ National Crop Ins. Serv., Inc. v. Federal Crop Ins. Corp., 351 F.3d 346, 349 (8th Cir. 2003).

²² In many of these "typical" cases, the plaintiff had not bypassed the administrative appeal process altogether but had failed to raise a claim before the agency that it then sought to raise on judicial review. Section 6912(e) has been a bar to judicial review of such claims. See, e.g., *Gilmer-Glenville Ltd. Partnership v. Farmers Home Admin.*, 102 F. Supp. 2d 791, 795 (N.D. Ohio 2000); *Bentley v. Glickman*, 234 B.R. 12, 17-18 (N.D.N.Y. 1999); *Tucson Rod and Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1029 (D. Ariz. 1998); *Gregson v. United States Forestry Serv.*, 19 F. Supp. 2d 925, 929-30 (E.D. Ark. 1998). When presented with the question of whether the written comments of an interested third party can fulfill a plaintiff's duty under § 6912(e) when the applicable appeal regulations require the appellant to file a written appeal and permit interested parties to submit written comments, the only court to address the issue has answered "no." See *Chattooga River Watershed Coalition v. United States Forest Service*, 93 F. Supp. 2d 1246, 1250-51 (N.D. Ga. 2000).

were improperly denied indemnities under their federally subsidized crop insurance policies, the farmers sued the private insurance companies that had issued the policies. In response, the insurance companies, which were reinsured by the FCIC, removed the actions to the United States District Court for the District of Minnesota and filed a third-party complaint against the FCIC.²³

The insurance companies' third-party complaint alleged that a bulletin issued by the Manager of the Risk Management Agency (RMA), the USDA agency that oversees the FCIC, had relieved them of liability for the farmers' losses. This contention, however, had not been previously presented to the USDA Board of Contract Appeals, an administrative appeal process the FCIC regulations required insurers to exhaust.²⁴

The government moved to dismiss the third-party complaint, asserting lack of jurisdiction and failure to state a claim. The lack of jurisdiction motion was based on the alleged failure of the insurance companies to exhaust their administrative remedies.²⁵

The court agreed with the government and dismissed the third-party complaint for lack of subject matter jurisdiction without addressing the failure to state a claim defense.²⁶ After acknowledging that subject matter jurisdiction cannot be waived,²⁷ the court turned to the question of whether § 6912(e) was jurisdictional. Lacking guidance from the Eighth Circuit, which has not yet considered the question, the court looked to two circuits that have and found a split. The Second Circuit in *Bastek v. Federal Crop Insurance Corp.*²⁸ concluded that § 6912(e) was jurisdictional, while the Ninth Circuit in *McBride Cotton and Cattle Corp. v. Veneman*²⁹ reached the opposite conclusion.

The Second Circuit's decision in *Bastek* was the first appellate decision to consider § 6912(e). In *Bastek*, several New York onion farmers had sought to challenge the manner in which the FCIC calculated the indemnities due to them under their crop insurance policies. The district court dismissed their complaint because they had not exhausted their administrative appeal remedies before the USDA National Appeals Division (NAD). Before commencing their action, the farmers, through their attorney, had

²³ See *2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 1001.

²⁴ See *id.* at 1004-06. See also *Farmers Alliance Mut. Ins. Co. v. Federal Crop Ins. Corp.*, No. 00-2347-JWL, 2001 WL 30443, at *3-*4 (D. Kan. Jan. 3, 2001) (unreported decision) (ruling that § 6912(e) applies to crop insurance disputes reviewable by the USDA Board of Contract Appeals); *American Growers Ins. Co. v. Federal Crop Ins. Corp.*, No. Civ. 1:01-CV-10059, 2003 WL 1233073, at *4 (S.D. Iowa Mar. 3, 2003) (unreported decision) (discussing the jurisdiction of the USDA Board of Contract Appeals).

²⁵ See *2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 1001.

²⁶ See *id.* at 1007.

²⁷ See *id.* at 1002.

²⁸ 145 F.3d 90, 95 (2d Cir. 1998).

²⁹ 290 F.3d 973, 980 (9th Cir. 2002).

only written letters to USDA officials in an unsuccessful attempt to change the indemnity formula.³⁰

Before the Second Circuit, the farmers argued that the district court had erred by failing to use any of the “so-called common law (or ‘judicial’) exhaustion cases” to excuse them from the exhaustion requirement of § 6912(e).³¹ The Second Circuit disagreed, noting that the distinction between the two kinds of exhaustion—statutory and common law—is “pivotal.”³² The court explained:

Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them. Common law (or “judicial”) doctrine, in contrast, recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process.³³

Referring to § 6912(e), the court stated, “[f]aced with unambiguous statutory language requiring exhaustion of administrative remedies, [w]e are not free to rewrite the statutory text.”³⁴ The court also quoted approvingly from the first reported district court decision to have considered § 6912(e): “[i]t is hard to imagine more direct and explicit language requiring that a plaintiff suing the Department of Agriculture, its agencies, or employees, must first turn to any administrative avenues before beginning a lawsuit.”³⁵ Having also concluded that the NAD administrative appeal process was available to the farmers,³⁶ the Second Circuit held that “7 U.S.C. § 6912(e) unambiguously required plaintiffs to exhaust their administrative remedies before bringing suit, and their failure to do so deprived them of the opportunity to obtain relief in the district court.”³⁷

³⁰ See *Bastek*, 145 F.3d at 92-93.

³¹ *Id.* at 91.

³² *Id.* at 94.

³³ *Id.* The court identified common law exhaustion exceptions as including undue prejudice, an inadequate agency remedy, lack of institutional competency to resolve the issue, a challenge to the agency procedure, lack of authority to grant the requested relief, and futility. *Id.* at n.4.

³⁴ *Id.* at 94 (quoting *McNeil v. United States*, 508 U.S. 106, 111 (1993)).

³⁵ *Id.* at 94-95 (quoting *Gleichman v. United States Dep’t of Agric.*, 896 F. Supp. 42, 44 (D. Me. 1995)).

³⁶ See *id.* at 93.

³⁷ *Id.* at 95. The court ruled that the farmers’ claim, as a challenge to a general policy as opposed to their individual benefit determinations, was subject to the NAD appeal process because, under 7 U.S.C. § 6992(d), the NAD Director has the authority to determine the jurisdiction of the NAD. Hence, the farmers should have presented their claim that NAD did not have jurisdiction to the NAD Director before bringing suit. *Id.* In *Kuster v. Veneman*, 226 F. Supp. 2d 1190 (D.N.D. 2002), where the only issue was “a legal challenge to a generally applicable agency action,” presentation of the claim to the NAD Director was excused as “fruitless.” *Id.* at 1192.

In *McBride Cotton and Cattle Corp.*, the other circuit court decision considered in *2000 Sugar Beet Crop Insurance Litigation*, the Ninth Circuit rejected the analysis and conclusion of the Second Circuit in *Bastek*. The plaintiffs in *McBride* challenged a USDA policy of not giving notice to entities of its pro-rata administrative offset of program payments due to the entities members or beneficiaries who were indebted to a USDA agency. The plaintiffs claimed that this no-notice policy violated their constitutional rights to due process. The district court, however, dismissed the action on the grounds that the plaintiffs had not exhausted their administrative remedies as required by § 6912(e).³⁸

The Ninth Circuit reversed the district court, ruling that § 6912(e) was not jurisdictional but merely a codification of the exhaustion requirement.³⁹ It also excused the plaintiffs from their noncompliance with § 6912(e) on the grounds that their “complaint alleges collateral, colorable constitutional claims and attempting to exhaust those claims would be futile.”⁴⁰

The Ninth Circuit concluded that § 6912(e) was not jurisdictional after failing to find in it “‘sweeping and direct’ language that goes beyond a requirement that only exhausted claims be brought.”⁴¹ This test was drawn from the United States Supreme Court’s decision in *Weinberger v. Salfi*.⁴² There, the Court stated that a statute creates a jurisdictional exhaustion requirement only when it contains “sweeping and direct” statutory language going beyond what is required to merely codify the exhaustion of administrative remedies doctrine.⁴³

Such “sweeping and direct” language, the Ninth Circuit noted, has been found “where the exhaustion statute explicitly limits the grant of subject matter jurisdiction and is an integral part of the statute granting jurisdiction.”⁴⁴ In contrast to this category of statutes, the court reasoned, § 6912(e) neither “limit[s] the district court’s subject matter jurisdiction over the plaintiffs’ claims,” nor “mentions, defines, or limits federal jurisdiction.”⁴⁵ In the court’s view, the language of § 6912(e) was more like the language found in the statutes it had previously held were codifications of the exhaustion requirement than the language in the statutes that it had previously held were jurisdictional.⁴⁶

³⁸ See *McBride Cotton and Cattle Corp.*, 290 F.3d at 976.

³⁹ See *id.* at 976, 980.

⁴⁰ *Id.* at 976.

⁴¹ *Id.* at 978 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975), and *Anderson v. Babbitt*, 230 F.3d 1158, 1162 (9th Cir. 2000)).

⁴² 422 U.S. 749 (1975).

⁴³ *Id.* at 757.

⁴⁴ *Id.* at 979.

⁴⁵ *Id.*

⁴⁶ See *id.* at 979-80 (relying on the regulation at issue in *Anderson v. Babbitt*, 230 F.3d 1158, 1162 (9th Cir. 2000) (interpreting 43 C.F.R. § 4.21(c)), and the statute at issue *Rumbles v. Hill*,

Because the court made this comparison, it is relevant to note that one of decisions it relied upon for an example of non-jurisdictional language, *Rumbles v. Hill*,⁴⁷ was undermined by the United States Supreme Court in *Porter v. Nussle*.⁴⁸ There, the Court ruled that Congress made exhaustion jurisdictional by enacting 42 U.S.C. § 1997e(a) as a part of the Prison Litigation Reform Act of 1995.⁴⁹ This result is contrary to *Rumbles v. Hill* that concluded that § 1997e(a) was not jurisdictional.⁵⁰ Commenting on the broad sweep of the *Porter* decision, Professor Pierce stated: “The Court . . . noted that Congress can make exhaustion mandatory in all cases and can eliminate all judicial discretion to excuse a petitioner’s failure to exhaust, as the Court concluded that Congress did when it enacted § 1997e(a).”⁵¹

The Ninth Circuit in *McBride* acknowledged its split with the Second Circuit. Implicitly criticizing the Second Circuit’s decision in *Bastek* for opining that all explicit statutory exhaustion requirements are mandatory, the Ninth Circuit stated “that not all statutory exhaustion requirements are created equal. Only statutory exhaustion requirements containing ‘sweeping and direct’ language deprive a federal court of jurisdiction Section 6912(e) contains no such language.”⁵²

After concluding that § 6912(e) was not jurisdictional, the Ninth Circuit then addressed the issue of whether the plaintiffs’ failure to comply with it should be excused. It held that their noncompliance should be excused because their constitutional due process claim was “(1) collateral to a substantive claim of entitlement, (2) colorable, and (3) one whose resolution would not serve the purposes of exhaustion.”⁵³ The court

182 F.3d 1158, 1067 (9th Cir. 1999) (interpreting 42 U.S.C. § 1997e(a)), as examples of mere codifications of the exhaustion requirement and on the statutes at issue in *Henderson v. Bank of New England*, 986 F.2d 319, 320 (9th Cir. 1993) (interpreting 12 U.S.C. § 1821(d)(13(D))), and *Gallo Cattle Co. v. United States Dep’t of Agric.*, 159 F.3d 1194, 1197-98 (9th Cir. 1998) (interpreting 7 U.S.C. § 4509), as examples of exhaustion requirements that were jurisdictional.

⁴⁷ 182 F.3d 1064 (9th Cir. 1999).

⁴⁸ 534 U.S. 516 (2002); see also *Booth v. Churner*, 532 U.S. 731, 740-741 (2001) (ruling that Congress in 42 U.S.C. § 1997e(a) mandated exhaustion “regardless of the relief offered through administrative procedures”); *Sweet v. Cooper*, No. C99-5189SI(PR), 2001 WL 679495, at *1 (N.D. Cal. June 7, 2001) (unreported decision) (noting that “*Rumbles* is no longer good law” after *Booth v. Churner*).

⁴⁹ See *Nussle*, 534 U.S. at 528-29.

⁵⁰ See *Rumbles*, 182 F.3d at 1067.

⁵¹ PIERCE, *supra* note 16, at § 15.3 (Supp. 2003). For a discussion of exhaustion under the Prison Litigation Reform Act in the context of class action suits, see Elizabeth S. Hess, Comment, *Administrative Exhaustion and Class Actions: Rules, Rights, Requirements, Remedies, and the Prison Litigation Reform Act Issue Resolved*, 2003 U. CHI. LEGAL F. 773.

⁵² *McBride Cotton and Cattle Corp.*, 290 F.3d at 980.

⁵³ *Id.* (quoting *Anderson v. Babbitt*, 230 F.3d 1158, 1163 (9th Cir. 2000) (internal quotation marks omitted)). Years earlier, in *Gleichman v. United States Dep’t of Agric.*, 896 F. Supp. 42 (D. Maine 1995), the USDA “conceded that [under § 6912(e)] exhaustion is not required for challenges to the constitutionality of the agency’s statutes or regulations.” *Id.* at 46. See also *Wiley v. Glickman*,

reasoned the constitutional claim was collateral because it was a facial challenge to an agency policy that the agency did not have the process to resolve and for which the necessary factual predicate was uncontested.⁵⁴ The court also found that the claim was sufficiently substantial to be “colorable” and that its judicial resolution would not serve the purposes of exhaustion because the USDA NAD lacked the authority to decide the constitutionality of the policy.⁵⁵ Thus, concluded the court, “[r]equiring exhaustion would be an idle act.”⁵⁶

Having considered *Bastek* and *McBride*, the court in *2000 Sugar Beet Crop Insurance Litigation* chose to follow the former. It stated:

In enacting 7 U.S.C. § 6912(e), . . . Congress made exhaustion an affirmative requirement, providing that “a person shall exhaust” administrative remedies before initiating litigation against the FCIC A waiver of exhaustion would divest the USDA of its prerogative to review determinations and pronouncements prior to judicial action. It would remove the FCIC’s ability to create a factual record, and render the agency’s crop insurance expertise moot. Under these conditions, this Court finds the requirement jurisdictional.⁵⁷

The court also determined that the USDA’s administrative appeal procedures themselves required exhaustion of the crop insurance companies’ claims.⁵⁸ Then it considered but found inapplicable the exceptions recognized by the Eighth Circuit to statutory exhaustion. These exceptions, which are similar to the exception applied in *McBride*, “occur where the litigant ‘(1) raises a colorable constitutional claim collateral to his substantive claim of entitlement; (2) shows that irreparable harm would result from the exhaustion; and (3) shows that the purpose of exhaustion would not be served by requiring further administrative remedies.’”⁵⁹

No. Civ. A3-99-32, 1999 WL 33283314, at *2 (D.N.D. Apr. 7, 1999) (unreported decision) (ruling “that Section 6912(e) does not require exhaustion of a colorable constitutional challenge to generally applicable agency action.”); *Kuster*, 226 F. Supp. 2d at 1192 (relying on *Wiley v. Glickman* to excuse exhaustion).

⁵⁴ See *id.* at 980-81.

⁵⁵ See *id.* at 981-82.

⁵⁶ *Id.* at 982 (citation omitted).

⁵⁷ *2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 1004.

⁵⁸ See *id.* at 1005-06. See also *Rain & Hail Ins. Serv., Inc. v. Federal Crop Ins. Corp.*, 229 F. Supp. 2d 710, 715-16 (S.D. Texas 2002) (noting that both § 6912(e) and 7 C.F.R. § 400.169 require exhaustion); *American Growers Ins. Co. v. Federal Crop Ins. Corp.*, 210 F. Supp. 2d 1088, 1092 (S.D. Iowa 2002) (ruling that § 6912(e) and 7 U.S.C. § 1506, when read together, require exhaustion of administrative remedies as a condition precedent to filing suit).

⁵⁹ *2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 1006 (quoting *Anderson v. Sullivan*, 959 F.2d 690, 693 (8th Cir. 1992)).

Also bearing similarity to the exception applied in *McBride*, subsequent to its decision in *Bastek* the Second Circuit ruled in *Theodoropoulos v. INS*⁶⁰ that “[a] petitioner may avoid even statutorily established administrative exhaustion requirements when, inter alia, ‘a plaintiff has raised a substantial constitutional question.’”⁶¹ This assertion, however, was called into question in the court’s subsequent decision in *Beharry v. Ashcroft*.⁶² There, after quoting *Bastek* for the proposition that the exceptions to common law exhaustion “do not apply where . . . a clear statutory exhaustion requirement exists,”⁶³ the court commented that *Theodoropoulos* “may be to the contrary, but the mandate in that case has not issued and a petition for rehearing is *sub judice* at present.”⁶⁴ Assuming that the Second Circuit continues to recognize a constitutional exception to otherwise mandatory statutory exhaustion requirements, the split between the Ninth Circuit and Second Circuit on the question of whether § 6912(e) is jurisdictional may be of substantially less consequence relative to unexhausted constitutional claims.⁶⁵

While the court in *2000 Sugar Beet Crop Insurance Litigation* focused on the circuit court decisions in *Bastek* and *McBride*, other circuits have either required compliance with § 6912(e) or excused it. For example, a few months after *Bastek* was decided by the Second Circuit, the D.C. Circuit in *Deaf Smith County Grain Processors, Inc. v. Glickman*⁶⁶ refused to review a disputed agency determination on the grounds that the plaintiff had failed to exhaust administrative remedies by never administratively appealing the determination through the available appeal process.⁶⁷ The Third Circuit, in *Kleissler v. United States Forest Service*,⁶⁸ declined to take a “flexible and liberal view of the exhaustion of remedies requirement such that any reference during the administrative appeals process to issues related to claims set forth in the federal complaint satisfies the exhaustion requirement” on the grounds that § 6912(e) “does not permit us to do that.”⁶⁹ In another case involving issues of exhaustion of distinct, but related, claims in a challenge to timber sales in the Boise National Forest, the Ninth

⁶⁰ 313 F.3d 732 (2d Cir. 2002), *withdrawn by* 358 F.3d 162 (2d Cir. 2004).

⁶¹ *Id.* at 737 (quoting *Able v. United States*, 88 F.3d 1280, 1288 (2d Cir. 1996)).

⁶² 329 F.3d 51 (2d Cir. 2003).

⁶³ *Id.* at 58 (quoting *Bastek*, 145 F.3d at 95).

⁶⁴ *Id.* at 58 n.11.

⁶⁵ As to where the United States Supreme Court stands on a constitutional exception to exhaustion, Professor Pierce observes that there is “a line of cases” in which the Court has recognized an exception and “another long line of cases” in which “the Court has declined to resolve constitutional questions because of the petitioner’s failure to exhaust administrative remedies.” PIERCE, *supra* note 16, at § 15.5 (citations omitted).

⁶⁶ 162 F.3d 1206 (D.C. Cir. 1998).

⁶⁷ *See id.* at 1214.

⁶⁸ 183 F.3d 196 (3d Cir. 1999).

⁶⁹ *Id.* at 202.

Circuit in *Idaho Sporting Congress, Inc. v. Rittenhouse*,⁷⁰ ruled that one of two claims had been exhausted while the other had not been exhausted and therefore was not subject to judicial review.⁷¹

More noteworthy, in *Gold Dollar Warehouse, Inc. v. Glickman*⁷² the Fourth Circuit held that a facial challenge to certain USDA regulations need not be exhausted in the absence of agency appeal procedures for such a challenge.⁷³ The only administrative appeal process available to the plaintiff was the USDA NAD appeal process, and the NAD rules of procedure expressly stated that the NAD process could not be used to seek review of USDA regulations.⁷⁴ The court, however, also ruled that the plaintiff was required to exhaust its “as applied” challenge to the regulations, for this challenge involved a question of fact that was “unquestionably one for the agency in the first instance.”⁷⁵

United States v. Childers

The second recent decision involving § 6912(e), *United States v. Childers*,⁷⁶ was unusual in that it was decided by a state court, the Court of Appeals of Ohio. In *Childers*, the United States had commenced a mortgage foreclosure action against a borrower who had received a rural housing loan from the USDA Rural Housing Services (RHS). The borrower resisted the government’s motion for summary judgment with the claim that the RHS had failed to service her loan properly. The government countered by invoking § 6912(e) and relied on *Cottrell v. United States*⁷⁷ for the proposition that the borrower was precluded from asserting this claim because she had failed to exhaust her administrative remedies.⁷⁸

In *Cottrell*, an RHS borrower brought a complaint in her Chapter 13 bankruptcy proceeding seeking to have the RHS’s foreclosure on her house declared null and void

⁷⁰ 305 F.3d 957 (9th Cir. 2002).

⁷¹ See *id.* at 965-66.

⁷² 211 F.3d 93 (4th Cir. 2000).

⁷³ See *id.* at 99.

⁷⁴ See *id.* at 98 (citing 7 C.F.R. § 11.3(b)).

⁷⁵ *Id.* at 99-100. In an action asserting constitutional tort claims against USDA officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), apparently commenced while administrative proceedings were ongoing, a district court declined to dismiss the complaint on the grounds that the plaintiff had failed to comply with § 6912(e) but “urge[d] the parties to continue to pursue the administrative processes available to them . . . with the hope that settlement will occur.” *Nebraska Beef, Ltd. v. Greening*, No. 8:03CV175, 2004 WL 546900 (D. Neb. Mar. 18, 2004).

⁷⁶ 789 N.E.2d 691 (Ohio Ct. App. 2003).

⁷⁷ 213 B.R. 33 (M.D. Ala. 1997).

⁷⁸ See *id.* at 692-94.

because her loan was not serviced properly. The borrower had not exhausted her administrative remedies, and the RHS invoked § 6912(e).⁷⁹

The court refused to find, as the RHS had argued, that § 6912(e) was jurisdictional. Instead, it likened it to a statute of limitations or a condition precedent to suit.⁸⁰ In either case, the court stated, its application was subject to equitable defenses, although the existence of an equitable defense has, “at least, less impact where exhaustion is clearly mandated.”⁸¹ From this premise, the court considered and rejected on the grounds of insufficient proof the borrower’s claim that the RHS should be equitably estopped from relying on § 6912(e) because of its failure to service her loan properly.⁸²

Notwithstanding the similarities in the facts in *Cottrell* and the case before it, the *Childers* court ruled that neither *Cottrell* nor § 6912(e) applied. The court noted that in *Cottrell* the borrower had brought an action against the government. Section 6912(e) requires exhaustion only before an action is brought against the Secretary, the Department, or an agency or employee of the Department. “Here,” the court stated, the borrower “is not bringing an action against the government; rather, she is defending an action brought by the government.”⁸³ Concluding that the borrower had raised a genuine issue of material fact with respect to her claim that the RHS had improperly serviced her loan, the court denied the RHS’s motion for summary judgment.⁸⁴

Conclusion

As the *2000 Sugar Beet Crop Insurance Litigation* and *Childers* illustrate, questions of how § 6912(e) should be interpreted have arisen in various contexts. In addition, they or the cases they rely upon illustrate that answers to the same question, such as whether § 6912(e) is jurisdictional, are not uniform.

To the extent that lessons can be drawn from the cases on § 6912(e), the primary lesson is that § 6912(e) should be understood to mean what it says. The second lesson is that guessing wrong about whether a court will excuse exhaustion has serious consequences, with the usual result being the loss of the claim. While the clarity of the meaning of § 6912(e) remains imperfect, its command is clear enough to make disregarding it in some circumstances an invitation to a legal malpractice action. Thus, if there is an available administrative remedy, including an administrative process for

⁷⁹ See *Cottrell*, 213 B.R. at 36-37.

⁸⁰ See *id.* at 37. See also *Farmers Alliance Mut. Ins. Co. v. Federal Crop Ins. Corp.*, No. 00-2347-JWL, 2001 WL 30443, at *2 (D. Kan. 2001) (unreported decision) (ruling that § 6912(e) is not jurisdictional “but is an affirmative defense and subjects the complaint to a Rule 12(b)(6) motion to dismiss”).

⁸¹ *Id.*

⁸² See *Cottrell*, 213 B.R. at 36-41.

⁸³ *Childers*, 789 N.E.2d at 694.

⁸⁴ *Id.* at 696.

determining whether a remedy is available,⁸⁵ it should be exhausted before seeking judicial review or bringing any other action against the USDA.

⁸⁵ See *supra* note 37 (discussing the authority of the USDA NAD Director to determine the jurisdiction of the USDA NAD).