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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Administrative Conference of the United States adopted two recommendations at its Sixty-fifth Plenary Session. The appended recommendations address: Consumer Complaint Databases and Aggregation of Similar Claims in Agency Adjudication.

FOR FURTHER INFORMATION CONTACT: For Recommendation 2016-1, Gisselle Bourns; for Recommendation 2016-2, Amber Williams. For both of these actions the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov. At its Sixty-fifth Plenary Session, held June 10, 2016, the Assembly of the Conference adopted two recommendations.

Recommendation 2016-1, *Consumer Complaint Databases.* This recommendation encourages agencies that make consumer complaints publicly available through online databases or downloadable data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and

limitations of the information and permit entities publicly identified to respond or request corrections or retractions.

Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication.* This recommendation provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.

The Appendix below sets forth the full texts of these two recommendations. The Conference will transmit them to affected agencies, Congress, and the Judicial Conference of the United States. The recommendations are not binding, so the entities to which they are addressed will make decisions on their implementation.

The Conference based these recommendations on research reports that are posted at: https://www.acus.gov/65th. A video of the Plenary Session is available at: new.livestream.com/ACUS/65thPlenary, and a transcript of the Plenary Session will be posted when it is available.

Dated: June 16, 2016

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2016-1

Consumer Complaint Databases

Adopted June 10, 2016

Some federal agencies maintain records of consumer complaints and feedback on products and services offered by private entities. Taking advantage of recent technological developments, several agencies have recently begun to make such information available to the public through online searchable databases and downloadable data sets that contain complaint narratives or provide aggregate data about complaints. Examples of such online searchable databases include: the Consumer Product Safety Commission's database of consumer product incident reports ("Saferproducts.gov"); the National Highway Traffic Safety Administration's database of recalls, investigations, and complaints ("Safercar.gov"); and the Consumer Financial Protection Bureau's database of financial products and services complaints ("Consumer Complaint Database").[1]

As documented by the Executive Office of the President's National Science and Technology Council, agencies are constantly improving databases that publish consumer

[1] Other examples located by the Administrative Conference include: the Department of Transportation's monthly data sets on the number and types of complaints against airlines ("Air Travel Consumer Report") (only aggregated data about complaints is made public, with the exception of animal incident reports, for which a narrative description is provided); the Federal Trade Commission's consumer complaints database ("Consumer Sentinel") (only aggregated data about complaints is made public); and the Federal Communications Commission's database of unwanted calls and consumer complaints ("Consumer Complaints at the FCC") (complaint narratives are not provided). Some databases and data sets include reports from both consumers and manufacturers, such as the Food and Drug Administration's database of reports of suspected device-associated deaths, serious injuries, and malfunctions ("MAUDE"), as well as its downloadable data sets of adverse events and medication errors ("FAERS").

complaints and information, and are gradually developing best practices for such disclosures.[2] Two policy considerations are significant in this process. Agencies must have the flexibility to provide information to the public to facilitate informed decisionmaking. At the same time, agencies should inform the public of the limitations of the information they disseminate.[3] The following recommendations aim to promote the widespread availability of such information and to identify best practices to ensure the integrity of complaints databases and data sets.

Recommendation

To the extent permitted by law, agencies that make consumer complaints publicly available (whether in narrative or aggregated form) through online databases or downloadable data sets should adopt and publish online written policies governing the public dissemination of consumer complaints through databases or downloadable data sets. These policies should:

1. inform the public of the source(s) and limitations of the information, including whether the information is verified or authenticated by the agency, and any procedures used to do so;

2. permit entities publicly identified in consumer complaints databases or downloadable data sets to respond, as practicable, or request corrections or retractions, as appropriate; and

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[2] *See* EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL SCIENCE AND TECHNOLOGY COUNCIL, SMART DISCLOSURE AND CONSUMER DECISION MAKING: REPORT OF THE TASK FORCE ON SMART DISCLOSURE 15 (May 30, 2013).

[3] *See generally id; see also* Nathan Cortez, Agency Publicity in the Internet Era 44-45 (Sept. 25, 2015) (report to the Administrative Conference of the United States), https://www.acus.gov/report/agency-publicity-internet-era-report (discussing disclaimers provided by Food and Drug Administration on the accuracy and reliability of data in MAUDE and FAERS databases).

3. give appropriate consideration to privacy interests.

Administrative Conference Recommendation 2016-2

Aggregation of Similar Claims in Agency Adjudication

Adopted June 10, 2016

Federal agencies in the United States adjudicate hundreds of thousands of cases each year—more than the federal courts. Unlike federal and state courts, federal agencies have generally avoided aggregation tools that could resolve large groups of claims more efficiently. Consequently, in a wide variety of cases, agencies risk wasting resources in repetitive adjudication, reaching inconsistent outcomes for the same kinds of claims, and denying individuals access to the affordable representation that aggregate procedures promise. Now more than ever, adjudication programs, especially high volume adjudications, could benefit from innovative solutions, like aggregation.[1]

The Administrative Procedure Act (APA)[2] does not provide specifically for aggregation in the context of adjudication, though it also does not foreclose the use of aggregation procedures. Federal agencies often enjoy broad discretion, pursuant to their organic statutes, to

[1] Other related techniques that can help resolve recurring legal issues in agencies include the use of precedential decisions, declaratory orders as provided in 5 U.S.C. 554(e), and rulemaking. With respect to declaratory orders, see Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 16, 2015), *available at* https://www.acus.gov/recommendation/declaratory-orders. The Supreme Court has recognized agency authority to use rulemaking to resolve issues that otherwise might recur and require hearings in adjudications. *See Heckler v. Campbell*, 461 U.S. 458 (1983).

[2] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701-706 and scattered sections in Title 5).

craft procedures they deem "necessary and appropriate" to adjudicate the cases and claims that come before them.[3] This broad discretion includes the ability to aggregate common cases, both formally and informally. Formal aggregation involves permitting one party to represent many others in a single proceeding.[4] In informal aggregation, different claimants with very similar claims pursue a separate case with separate counsel, but the agency assigns them to the same adjudicator or to the same docket, in an effort to expedite the cases, conserve resources, and ensure consistent outcomes.[5]

Yet, even as some agencies face large backlogs, few have employed such innovative tools. There are several possible explanations for this phenomenon. The sheer number of claims in aggregate agency adjudications may raise concerns of feasibility, legitimacy, and accuracy because aggregation could (1) create diseconomies of scale by inviting even more claims that further stretch the agency's capacity to adjudicate; (2) negatively affect the perceived legitimacy of the process; and (3) increase the consequence of error.

Notwithstanding these risks, several agencies have identified contexts in which the benefits of aggregation, including producing a pool of information about recurring problems,

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[3] Broad discretion exists both in "formal adjudication," where the agency's statute requires a "hearing on the record," triggering the APA's trial-type procedures, and in "informal adjudication," where the procedures set forth in APA §§ 554, 556 & 557 are not required, thus allowing less formal procedures (although some "informal adjudications" are nevertheless quite formal).

[4] This recommendation does not address formal aggregation of respondents or defendants in proceedings before agencies.

[5] The American Law Institute's *Principles of the Law of Aggregation* defines proceedings that coordinate separate lawsuits in this way as "administrative aggregations," which are distinct from joinder actions (in which multiple parties are joined in the same proceeding) or representative actions (in which a party represents a class in the same proceeding). *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2010) (describing different types of aggregate proceedings).

achieving greater equality in outcomes, and securing the kind of expert assistance high volume adjudication attracts, outweigh the costs.[6] Agencies have also responded to the challenges of aggregation by (1) carefully piloting aggregation procedures to improve output while avoiding creation of new inefficiencies; (2) reducing potential allegations of bias or illegitimacy by relying on panels, rather than single adjudicators, and providing additional opportunities for parties to voluntarily participate in the process; and (3) allowing cases raising scientific or novel factual questions to "mature"[7]—that is, putting off aggregation until the agency has the benefit of several opinions and conclusions from different adjudicators about how a case may be handled expeditiously.

The Administrative Conference recognizes aggregation as a useful tool to be employed in appropriate circumstances. This recommendation provides guidance and best practices to agencies as they consider whether or how to use or improve their use of aggregation.[8]

Recommendation

1. Aggregate adjudication where used should be governed by formal or informal aggregation rules of procedure consistent with the APA and due process.

Using Alternative Decisionmaking Techniques

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[6] *See* Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication 27–65 (June 9, 2016), *available at* https://www.acus.gov/report/aggregate-agency-adjudication-final-report (describing three examples of aggregation in adjudication).

[7] *Cf.* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995) (defining "maturity" in which both sides' litigation strategies are clear, expected outcomes reach an "equilibrium," and global resolutions or settlements may be sought).

[8] This recommendation covers both adjudications conducted by administrative law judges and adjudications conducted by non-administrative law judges.

2. Agencies should consider using a variety of techniques to resolve claims with common issues of fact or law, especially in high volume adjudication programs. In addition to the aggregate adjudication procedures discussed in paragraphs 3–10, these techniques might include the designation of individual decisions as "precedential," the use of rulemaking to resolve issues that are appropriate for generalized resolution and would otherwise recur in multiple adjudications, and the use of declaratory orders in individual cases.

Determining Whether to Use Aggregation Procedures

3. Agencies should take steps to identify whether their cases have common claims and issues that might justify adopting rules governing aggregation. Such steps could include:

a. Developing the information infrastructure, such as public centralized docketing, needed for agencies and parties to identify and track cases with common issues of fact or law;

b. Encouraging adjudicators and parties to identify specific cases or types of cases that are likely to involve common issues of fact or law and therefore prove to be attractive candidates for aggregation; and

c. Piloting programs to test the reliability of an approach to aggregation before implementing the program broadly.

4. Agencies should develop procedures and protocols to assign similar cases to the same adjudicator or panel of adjudicators using a number of factors, including:

a. Whether coordination would avoid duplication in discovery;

b. Whether it would prevent inconsistent evidentiary or other pre-hearing rulings;

c. Whether it would conserve the resources of the parties, their representatives, and the agencies; and

d. Where appropriate, whether the agencies can accomplish similar goals by using other tools as set forth in paragraph 2.

5. Agencies should develop procedures and protocols for adjudicators to determine whether to formally aggregate similar claims in a single proceeding with consideration of the principles and procedures in Rule 23 of the Federal Rules of Civil Procedure, including:

a. Whether the number of cases or claims are sufficiently numerous and similar to justify aggregation;

b. Whether an aggregate proceeding would be manageable and materially advance the resolution of the cases;

c. Whether the benefits of collective control outweigh the benefits of individual control, including whether adequate counsel is available to represent the parties in an aggregate proceeding;

d. Whether (or the extent to which) any existing individual adjudication has (or related adjudications have) progressed; and

e. Whether the novelty or complexity of the issues being adjudicated would benefit from the input of different adjudicators.

Structuring the Aggregate Proceeding

6. Agencies that use aggregation should ensure that the parties' and other stakeholders' interests are adequately protected and that the process is understood to be transparent and legitimate by considering the use of mechanisms such as:

a. Permitting interested stakeholders to file amicus briefs or their equivalent;

b. Conducting "fairness hearings," in which all interested stakeholders may express their concerns with the proposed relief to adjudicators in person or in writing;

c. Ensuring that separate interests are adequately represented in order to avoid conflicts of interest;

d. Permitting parties to opt out in appropriate circumstances;

e. Permitting parties to challenge the decision to aggregate in the appeals process, including an interlocutory appeal to the agency; and

f. Allowing oral arguments for amici or amicus briefs in agency appeals.

7. Agencies that use aggregation should develop written and publicly available policies explaining how they initiate, conduct, and terminate aggregation proceedings. The policies should also set forth the factors used to determine whether aggregation is appropriate.

8. Where feasible, agencies should consider assigning a specialized corps of experienced adjudicators who would be trained to handle aggregate proceedings, consistent with APA requirements where administrative law judges are assigned. Agencies should also consider using a panel of adjudicators from the specialized corps to address concerns with having a single adjudicator decide cases that could have a significant impact. Agencies that have few

adjudicators may need to "borrow" adjudicators from other agencies for this purpose.

Using Aggregation to Enhance Control of Policymaking

9. Agencies should make all decisions in aggregate proceedings publicly available. In order to obtain the maximum benefit from aggregate proceedings, agencies should also consider designating final agency decisions as precedential if doing so will:

a. Help other adjudicators handle subsequent cases involving similar issues more expeditiously;

b. Provide guidance to future parties;

c. Avoid inconsistent outcomes; or

d. Increase transparency and openness.

10. Agencies should ensure the outcomes of aggregate adjudication are communicated to policymakers or personnel involved in rulemaking so that they can determine whether a notice-and-comment rulemaking proceeding codifying the outcome might be worthwhile. If agencies are uncertain they want to proceed with a rule, they might issue a notice of inquiry to invite interested parties to comment on whether the agencies should codify the adjudicatory decision (in whole or in part) in a new regulation.

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