ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

October 5, 2020

MEMORANDUM

To: Office of the Legislative Counsel, United States House of Representatives
Office of the Legislative Counsel, United States Senate

From: Gavin Young, Attorney Advisor, Administrative Conference of the United States

Subject: The Administrative Conference's *Statutory Review Program*

The Office of the Chairman of the Administrative Conference of the United States is transmitting the attached judicial opinions under its *Statutory Review Program* that identify technical and related issues in several statutory provisions pertaining to federal administrative procedure. The opinions from the Courts of Appeals for the First and Eleventh Circuits and from the District Courts for the Western District of Texas and District of Columbia identify scrivener's errors that did not affect the court's decisions. The opinion from the Third Circuit discusses a potential drafting error in the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1415(b)(6)(B)) that may have a more substantive effect. The opinions are as follows:

- In *In re Financial Oversight & Management Board*, 919 F.3d 121 (1st Cir. 2019), the court affirmed the dismissal of the insurer's amended complaint on the grounds that neither 11 U.S.C. § 922(d) nor § 928(a) entitled the insurer to the relief sought. Section 922(d) provides an exception to automatic stays of applications of pledged special revenues "in a manner consistent with section 927 of this title to payment of indebtedness secured by such revenues." The court interpreted "section 927" as referring instead to § 928, noting that the court below and the parties agreed that the reference appeared to be a scrivener's error. Section 928 does refer to special revenues whereas § 927 does not.

- In *Meridor v. U.S. Attorney General*, 891 F.3d 1302 (11th Cir. 2018), the court remanded a case, in part because the Board of Immigration Appeals erred in determining an immigration judge lacked authority under 8 U.S.C. § 1182(d)(3)(A) to issue a waiver of noncitizen inadmissibility. In reviewing 8 U.S.C. § 1182(d) relating to the temporary admission of nonimmigrants, the court noted that (d)(14) should state "[t]he Secretary of Homeland Security, in the Secretary's discretion" rather than "[t]he Secretary of Homeland Security, in the Attorney General's discretion." In 2006, Congress had amended the statute by replacing "Attorney General" with "Secretary of Homeland Security" in each place it appears (Violence Against Women and Department of Justice Reauthorization Act of 2005, 109 P.L. 162 § 802(b)). While the amendment is properly reflected in the code in the technical sense (as "Attorney General" but not "Attorney General's" is the term to be stricken and replaced according to the amendment), the court

concluded that the remaining "Attorney General's" in (d)(14) was a likely scrivener's error, noting that a footnote to this section in the official code, drafted by the Office of the Law Revision Counsel, also states that the discretion "[p]robably should be" the Secretary's.

- In *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015), the court discussed at length a clause which specifies the time limitation for filing a complaint under the Individuals with Disabilities Education Act (IDEA), found at 20 U.S.C. § 1415(b)(6)(B). That clause specifies that a two-year limitations period runs *backward* from the reasonable discovery date, instead of *forward* (as traditional statutes of limitations run). Citing legislative history and the context of the Act as well as a corresponding clause in the same section which is similar in every other respect except for stating that the two-year limitations period runs forward from the discovery date (§ 1415(f)(3)(C)), the court concluded that § 1415(b)(6)(B) reflected a drafting error and was in fact intended to specify the same limitations period found in § 1415(f)(3)(C).

- In *Duberry v. District of Columbia*, 106 F. Supp. 3d 245 (D.D.C. 2015), *rev'd and remanded, Duberry v. District of Columbia*, 824 F.3d 1046 (D.C. Cir. 2016), the court dismissed plaintiff law enforcement officers' claims to require the District of Columbia Department of Corrections to classify plaintiffs as retired law enforcement officers within the meaning of the Law Enforcement Officers Safety Act. In reviewing the Act's statutory framework, the court noted that 18 U.S.C. § 926C(c)(1) appears to contain a scrivener's error because the phrase "from service" appeared twice instead of once. Although the decision was overturned by the D.C. Circuit, the D.C. Circuit did not address the technical error.

- In *Asarco LLC v. Cemex, Inc.*, 21 F. Supp. 3d 784 (W.D. Tex. 2014), the court found the plaintiff established that the defendant was liable pursuant to § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund) (42 U.S.C. § 9607(a)). The court determined that the placement of the phrase, "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—" with the text of subsection (a)(4) rather than on a new line after the text of (a)(4) was a scrivener's error. Citing similar findings by other courts, the court concluded the phrase above modifies paragraphs (a)(1) through (a)(4) rather than only paragraph (a)(4), as its current placement suggests.