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ADMINISTRATIVE LAW — SECOND CIRCUIT SUGGESTS THAT STATUTORY INTERPRETATIONS IN AGENCY MANUALS ARE INELIGIBLE FOR *CHEVRON* DEFERENCE. — *Estate of Landers v. Leavitt*, 545 F.3d 98 (2d Cir. 2008).

More than twenty years ago, in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>1</sup> the Supreme Court announced a two-step test for deciding when to accept an agency's interpretation of a statute. First, the court asks if the statute is ambiguous; second, if it is ambiguous, the court determines whether the agency's interpretation is reasonable; if it is, the court simply defers to that interpretation. While the *Chevron* test relieved lower courts of some of the burden of statutory interpretation, it also created a new challenge for them: deciding which agency interpretations qualify for *Chevron* deference and which do not, a question commonly referred to as *Chevron* Step Zero.<sup>2</sup> The Court has held that *Chevron* can only be used for "rules carrying the force of law."<sup>3</sup> Otherwise, the less deferential standard of *Skidmore v. Swift & Co.*<sup>4</sup> applies. Unfortunately, the Supreme Court has provided little guidance as to what it means for an interpretation to "carry the force of law," and lower courts have been flummoxed as to how to make sense of the phrase.<sup>5</sup> Recently, in *Estate of Landers v. Leavitt*,<sup>6</sup> a class action Medicare suit, the Second Circuit sought to evade the Step Zero challenge by finding that agency manuals are per se ineligible for *Chevron* deference. The Second Circuit's holding, however, is not consistent with Supreme Court precedent and may have led the court to deny *Chevron* deference to exactly the sort of interpretive rule that deserves it. While the Second Circuit's desire to formulate a clear rule in the murky waters of *Chevron* Step Zero is understandable, a more effective approach would have been to confront the ambiguity head-on by generating a definition of what it means for an interpretation to have "the force of law."

The dispute in *Landers* involved the Centers for Medicare and Medicaid Services' (CMS) definition of the term "inpatient" in the Medicare statute, as interpreted in an agency policy manual. The relevant statute states that Medicare will cover "post-hospital extended

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<sup>1</sup> 467 U.S. 837 (1984).

<sup>2</sup> See, e.g., Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

<sup>3</sup> *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

<sup>4</sup> 323 U.S. 134 (1944).

<sup>5</sup> See, e.g., *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 850–51 (8th Cir. 2008) (expressing uncertainty about whether an unpublished agency decision met the "force of law" test); *Pittsburg & Midway Coal Mining Co. v. Dir., Office of Workers' Comp. Programs*, 508 F.3d 975, 983 n.6 (11th Cir. 2007) (finding the appropriate degree of deference to an agency interpretation an "interesting and open question").

<sup>6</sup> 545 F.3d 98 (2d Cir. 2008).

care services for up to 100 days during any spell of illness”<sup>7</sup> but only if those services are provided “after transfer from a hospital in which [the Medicare beneficiary] was an inpatient for not less than 3 consecutive days before his discharge.”<sup>8</sup> Marion Landers, Marion Dixon, and Muriel Grigley were each hospitalized for three days prior to receiving extended care services.<sup>9</sup> Nevertheless, CMS denied the women coverage for the services because each woman spent one of those days in the hospital before being officially admitted, either in the emergency room or under observation.<sup>10</sup> The CMS Medicare Benefit Policy Manual states that a person is only an “inpatient” *after* being officially admitted to the hospital.<sup>11</sup>

The women challenged CMS’s interpretation in a class action suit in the U.S. District Court for Connecticut.<sup>12</sup> On cross-motions for summary judgment, the district court found for CMS, upholding the policy manual’s interpretation of “inpatient.”<sup>13</sup> The court refused to decide whether the agency’s interpretation deserved *Chevron* deference, finding it unnecessary to reach any conclusion on that question because even under the less deferential *Skidmore* standard, the agency’s interpretation passed muster.<sup>14</sup> The court decided the issue purely on the basis of the administrative record because it deemed additional discovery inappropriate.<sup>15</sup>

The plaintiffs appealed to the Second Circuit; Judge Livingston, writing for the court, affirmed.<sup>16</sup> Unlike the lower court, though, the Second Circuit resolved the question of what level of deference the CMS interpretation deserved, holding that *Chevron* deference was not appropriate for the policy manual.<sup>17</sup> In reaching this conclusion,

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<sup>7</sup> 42 U.S.C. § 1395d(a)(2) (2000).

<sup>8</sup> *Id.* § 1395x(i).

<sup>9</sup> *Landers*, 545 F.3d at 103.

<sup>10</sup> *Id.* at 104.

<sup>11</sup> CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE BENEFIT POLICY MANUAL, PUB. NO. 100-02, ch. 1 § 10 (45th rev. ed. 2006), <http://www.cms.hhs.gov/Manuals/IOM/list.asp>.

<sup>12</sup> *Landers v. Leavitt*, No. 3:04-cv-1988, 2006 WL 2560297 (D. Conn. Sept. 1, 2006).

<sup>13</sup> *Id.* The court also dismissed the plaintiffs’ equal protection challenge because CMS had provided a rational explanation for its denial of coverage for the class of patients who had not spent three days in the hospital post-admission. *Id.* at \*14.

<sup>14</sup> *Id.* at \*8.

<sup>15</sup> *Id.* at \*2–4.

<sup>16</sup> Judge Hall joined the opinion. Judge Oberdorfer, the District of Columbia district judge who had originally been on the panel, recused himself after oral argument. *Landers*, 545 F.3d at 102 n.\*. In addition to the *Chevron* question, the court disposed of two other issues on appeal. The CMS rule did not violate equal protection rights because the interpretation did not concern a suspect class and was “rationally related to a legitimate government interest.” *Id.* at 112 (quoting *Kraham v. Lippman*, 478 F.3d 502, 506 (2d Cir. 2007)) (internal quotation marks omitted). Nor did the district judge err in declining to consider evidence outside the administrative record. *Id.* at 113–14.

<sup>17</sup> *Id.* at 107.

Judge Livingston first established that the statutory term “inpatient” was ambiguous.<sup>18</sup> She then asked whether the CMS reading of the statute deserved *Chevron* deference and thus needed only to be reasonable or whether the court was required to examine the interpretation under the less deferential *Skidmore* standard.<sup>19</sup> Judge Livingston followed the Supreme Court’s *Chevron* Step Zero test from *United States v. Mead Corp.*,<sup>20</sup> holding that an interpretation is eligible for *Chevron* deference if “Congress delegated authority to the agency generally to make rules carrying the force of law, and . . . the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>21</sup> Judge Livingston found ample evidence that the interpretation in question met the first half of this test: Congress clearly delegated Medicare rulemaking authority to CMS.<sup>22</sup>

Judge Livingston then evaluated whether the agency interpretation “was promulgated in the exercise of that authority.” She first noted that while most agency interpretations given *Chevron* deference were “legislative” regulations issued through notice-and-comment rulemaking, the absence of such formal promulgation procedures was not “reason alone” to deny the CMS interpretation *Chevron* deference.<sup>23</sup> Still, she could find “few, if any, instances in which an agency manual” had been given such deference.<sup>24</sup> The Supreme Court’s opinions in *Barnhart* and *Mead*<sup>25</sup> “recognized that some subset of informal interpretations can receive *Chevron* deference,” but both cited the same lone case concerning an agency opinion letter to illustrate this point.<sup>26</sup> An opinion letter, the court reasoned, “is qualitatively different from an agency manual.”<sup>27</sup> Judge Livingston therefore determined that no subsequent decision had fundamentally altered the Supreme Court’s pre-*Mead* declaration in *Christensen v. Harris County*<sup>28</sup> that “agency manuals . . . do not warrant *Chevron*-style deference.”<sup>29</sup>

Judge Livingston went on to ask whether the interpretation was highly persuasive and thus should be upheld under the less deferential *Skidmore* standard. The court found that the CMS interpretation was

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<sup>18</sup> *Id.* at 105.

<sup>19</sup> *Id.*

<sup>20</sup> 533 U.S. 218 (2001).

<sup>21</sup> *Landers*, 545 F.3d at 105 (quoting *Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007) (per curiam) (quoting *Mead*, 533 U.S. at 226–27)) (internal quotation mark omitted).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 106.

<sup>24</sup> *Id.*

<sup>25</sup> 535 U.S. 212 (2002).

<sup>26</sup> *Landers*, 545 F.3d at 106 (citing *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)).

<sup>27</sup> *Id.*

<sup>28</sup> 529 U.S. 576 (2000).

<sup>29</sup> *Landers*, 545 F.3d at 106–07 (quoting *Christensen*, 529 U.S. at 587).

“entitled to a great deal of persuasive weight,”<sup>30</sup> because it was long-standing,<sup>31</sup> consistent,<sup>32</sup> considered,<sup>33</sup> and “relatively formal within the universe of informal interpretations.”<sup>34</sup> The court therefore upheld the CMS determination that a Medicare beneficiary becomes an inpatient only after admission to the hospital, finding that the agency’s interpretation was highly persuasive and in “accord[] with the statutory text and our governing precedents.”<sup>35</sup>

*Landers* was not, however, an unqualified success for the government. It lost on the issue of *Chevron* deference for the agency manual interpretation in question, and such a loss was not inevitable. It is not clear that, as the Second Circuit claimed, Supreme Court precedent dictates that interpretations in agency policy manuals are per se ineligible for *Chevron* deference. Indeed, recent Supreme Court precedent may suggest that interpretations like the one at stake in *Landers* should receive deference under *Chevron*. While it is understandable that the Second Circuit should wish to create a categorical rule, a better approach would have been to attempt to define what it means for an interpretation to be promulgated with the “force of law,” thereby adding specificity to the Supreme Court’s ambiguous test for whether an interpretation passes *Chevron* Step Zero.

The Second Circuit presented its holding that agency manuals are ineligible for *Chevron* deference as a simple reiteration of a Supreme Court stance held since *Christensen* in 2000. But Judge Livingston was on shaky ground when she asserted that nothing in either *Mead* or *Barnhart v. Walton* (the Supreme Court’s two most important subsequent *Chevron* Step Zero cases) disturbed the *Christensen* Court’s assertion that agency manuals are beyond the *Chevron* pale. It is true that Justice Souter, writing for the *Mead* majority, quoted the *Christensen* contention regarding policy manuals.<sup>36</sup> Yet even as Justice Souter recapitulated this claim, he undercut its foundations. A key rationale for the *Christensen* Court’s denial of *Chevron* deference to policy manual interpretations and other interpretive rules was that such rules had not passed through notice-and-comment or other formal rulemaking procedures.<sup>37</sup> The *Mead* Court, however, explicitly stated

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 107–08. The CMS policy dated back to a 1965 regulation.

<sup>32</sup> *Id.* at 108. The agency maintained the same definition elsewhere in the manual.

<sup>33</sup> *Id.* at 109–10. CMS had recently requested and reflected on public comments concerning whether the policy should be changed.

<sup>34</sup> *Id.* at 110.

<sup>35</sup> *Id.* at 111.

<sup>36</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001).

<sup>37</sup> *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (“Here . . . we confront an interpretation . . . not . . . arrived at after, for example, a formal adjudication or notice-and-comment rule-

that such formal procedures were not necessary for *Chevron* eligibility,<sup>38</sup> thus rendering the reason for policy manuals' ineligibility less clear.

*Barnhart* did little to clarify the situation. The Court reiterated that some interpretations that had not passed through notice-and-comment procedures could receive *Chevron* deference and confirmed that any statements in *Christensen* to the contrary were overruled,<sup>39</sup> but it notably did not reiterate that policy manuals, or indeed any general class of informal rules, were per se ineligible for *Chevron* deference. In fact, the *Barnhart* Court implied that some policy manual interpretations *do* deserve *Chevron* deference.<sup>40</sup>

The Second Circuit's holding might still be correct if the implication in *Barnhart* is faulty and interpretations within policy manuals are inevitably unable to meet the *Mead* test for *Chevron* eligibility: an agency only gets *Chevron* deference if Congress granted it the power to make rules with the "force of law" and if its interpretation has been made while exercising that power.<sup>41</sup> The problem, though, is that it is not obvious what it means for a rule to have the "force of law."<sup>42</sup> *Mead* and subsequent decisions have undermined the conventional notion that a rule has the "force of law" if it is a "legislative," as opposed

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making. Interpretations such as [these] . . . which lack the force of law — do not warrant *Chevron*-style deference.”)

<sup>38</sup> *Mead*, 533 U.S. at 226–27.

<sup>39</sup> *Barnhart*, 535 U.S. at 221–22.

<sup>40</sup> Justice Breyer, writing for the majority, gave *Chevron* deference to a very recent agency regulation, arguing that the interpretation in the regulation was nonetheless one of long standing because it had been promulgated in other less formal formats, among them an agency manual, for decades. *Id.* at 219–20 (citing the interpretation found in SOC. SEC. ADMIN., DISABILITY INSURANCE STATE MANUAL § 316 (1965)). Justice Breyer specifically noted that these less formal formats were not necessarily ineligible for *Chevron* deference. *Id.* at 221–22.

The *Landers* court's second attempt to anchor its holding in Supreme Court precedent was equally unconvincing. It claimed that its holding was based on its awareness of "few, if any, instances in which an agency manual, in particular, has been accorded *Chevron* deference" by the courts, and on the fact that such agency manuals are "qualitatively different" from opinion letters — the only nonlegislative format to which the *Mead* and *Barnhart* Courts specifically acknowledged having given deference in the past. *Landers*, 545 F.3d at 106. But in *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449 (1999), the Supreme Court *did* give *Chevron* deference to an interpretation contained in a Medicare policy manual. *Id.* at 452–53. The Second Circuit might be pardoned for its oversight: the Supreme Court itself ignored the case in *Mead* and *Barnhart*. This is likely because *Your Home* was written by Justice Scalia, a vocal opponent of excluding any authoritative agency interpretations from *Chevron* deference. See *Mead*, 533 U.S. at 239 (Scalia, J., dissenting). In *Your Home*, Justice Scalia offered no Step Zero reason for extending *Chevron* to the policy manual decision, stating simply that the interpretation was "well within the bounds of reasonable interpretation, and hence entitled to deference under [*Chevron*]." *Id.* at 453. The later decisions may have eschewed a citation to *Your Home* to avoid any implication that the Court was, like Justice Scalia, dispensing with *Chevron* Step Zero altogether.

<sup>41</sup> *Mead*, 533 U.S. at 229.

<sup>42</sup> See, e.g., Sunstein, *supra* note 2, at 222–29 (exploring several possible interpretations of the "force of law" test and arguing that its application presents a real challenge for lower courts).

to a “nonlegislative” or “interpretive” rule,<sup>43</sup> but the Supreme Court did not offer an alternate definition in either *Mead* or *Barnhart*. Indeed, it was likely an attempt to sidestep the ambiguity as to the phrase’s meaning that led the Second Circuit to declare all policy manuals ineligible for *Chevron* in the first place. But the Second Circuit may have overestimated the extent of the ambiguity. *Mead* and *Barnhart* do reveal some of the characteristics that the Court has found helpful in determining if a rule has the “force of law,” and the agency manual interpretation at stake in *Landers* appears to possess these characteristics, suggesting that it is not true that all policy manual interpretations will fail to meet the *Mead* “force of law” test.

The *Mead* Court revealed at least two characteristics that affect whether a rule has the “force of law.” In the course of denying *Chevron* deference to an agency decision letter, the Court placed weight on the fact that, while the letter was binding on the agency and the recipient, it was not binding as to third parties, and such parties were explicitly warned against any reliance on the letter.<sup>44</sup> If a rule can be thought to have the “force of law” because it is binding on all parties and can be relied upon, then the interpretations in the CMS manuals meet these criteria. The statute authorizing CMS to promulgate regulations and rules explicitly states that if a Medicare provider follows the guidance found in a manual, then that provider “shall not be subject to any penalty or interest” even if such guidance is in error.<sup>45</sup> The statute also states that CMS cannot change manual interpretations retroactively and must give thirty days notice of proposed changes, unless retroactive enforcement or immediate application of changes is necessitated by law or the “public interest.”<sup>46</sup> Moreover, all manual interpretations must be published in the *Federal Register*,<sup>47</sup> a further indication that Congress intended that the interpretations induce reliance.

The *Mead* Court also hinted that rules lack the force of law if they seem improperly considered or are crafted by bureaucrats at a low level of the agency.<sup>48</sup> The interpretation in *Landers* did not suffer from these failings. CMS had published in the *Federal Register* a request for comments on its interpretation of “inpatient.” After collect-

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<sup>43</sup> See, e.g., Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 476–77 (2002) (“Legislative rules are those that have the force and effect of law. . . . Nonlegislative rules do not.”). Yet the *Landers* court itself acknowledged that this assumption is invalid and that some nonlegislative rules carry the force of law, citing *Mead*, *Barnhart*, and the more recent *Gonzales v. Oregon*, 546 U.S. 243 (2006). See *Landers*, 545 F.3d at 106.

<sup>44</sup> *Mead*, 533 U.S. at 232–33.

<sup>45</sup> 42 U.S.C. § 1395hh(e)(1)(c) (2000 & Supp. V 2005).

<sup>46</sup> *Id.* § 1395hh(e)(1)(A).

<sup>47</sup> *Id.* § 1395hh(c)(1).

<sup>48</sup> *Mead*, 533 U.S. at 233–34.

ing the comments, the agency published its decision to maintain the current interpretation and its reasons for doing so.<sup>49</sup> The CMS interpretation was not merely the product of an underling's rapid pen.

The *Barnhart* Court amplified the factors open to consideration in the “force of law” test. That Court also looked to the “careful consideration the Agency has given the question” in determining whether *Chevron* applies,<sup>50</sup> but further stipulated that it was appropriate to examine “the interstitial nature of the legal question, the related expertise of the Agency, [and] the importance of the question to administration of the statute.”<sup>51</sup> The CMS interpretation meets these expanded criteria. The “inpatient” question is undoubtedly interstitial and the Second Circuit itself recognized the deference owed to the expertise of the agency. Nor can the importance of the legal question be denied: one can hardly imagine CMS successfully administering the Medicare statute without deciding the definition of “inpatient.”<sup>52</sup>

Furthermore, *Landers*'s holding may not only clash with the reasoning in *Mead* and *Barnhart*, but also with the best justification for the holdings in those cases. *Mead* and *Barnhart*'s Step Zero declarations may combat agency “ossification”<sup>53</sup> — the reluctance of agencies to act because of the onerous nature of the rulemaking and adjudication processes. The *Mead* standard allows some leeway for courts to reward agencies that promulgate interpretations through pared-down processes that avoid some of the ossifying burdens of more formal procedures while still preventing agencies from exercising the discretion that the formal procedures are designed to cabin. But if this justification is convincing, then CMS manual interpretations may be a paradigmatic example of interpretations that *should* receive deference because of the statutory constraints on their issuance and alteration.

The above discussion seeks to demonstrate that the Second Circuit was not justified in holding agency policy manuals ineligible as a class for *Chevron* deference, but it also suggests why the Second Circuit *wanted* to declare all policy manuals ineligible. The *Chevron* Step Zero inquiry, as it now stands, is complicated and rather contradictory.<sup>54</sup> As such, it is extremely difficult for lower courts to follow with

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<sup>49</sup> *Landers*, 545 F.3d at 109.

<sup>50</sup> *Barnhart v. Walton*, 535 U.S. 212, 222 (2002).

<sup>51</sup> *Id.*

<sup>52</sup> Indeed, the question in *Landers* was similar to that in *Barnhart*, a case involving the Social Security Administration's interpretation of when a person with an “impairment” can receive benefits.

<sup>53</sup> See generally Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

<sup>54</sup> For example, if an interstitial agency decision deserves *Chevron* deference — as *Barnhart* suggests — then wouldn't the decision letter in *Mead* qualify? Or did that decision letter's other difficulties outweigh the interstitial factor? Professor Cass Sunstein notes that “[m]any lower

any consistency. Perhaps, then, the Second Circuit's decision can be justified on practical grounds of judicial feasibility.

But simply because some sort of rule is desirable does not mean that the Second Circuit's rule is. It would surely be preferable for the court to have established a rule that is both clear and logically consistent with the Supreme Court's decisions in *Mead* and *Barnhart*. True, the tangled nature of Supreme Court precedent makes it difficult for a circuit court to formulate a sweeping rule regarding *Chevron* eligibility. Such a rule would probably contradict some element of existing precedent, and its creation is best left to the Supreme Court itself.<sup>55</sup> But the Second Circuit could have focused narrowly on developing a rule for when agency interpretations in the particular context of the administration of a benefits program should be seen to "carry the force of law." For example, the court could have developed the following rule: the interpretation of an agency administering a benefits program has the "force of law" if that interpretation is binding on the agency and all outside parties. Such a rule would draw on the rationale in *Mead* and would be consistent with the Court's finding in *Barnhart*. It might also promote some deossification while fettering discretion by requiring agency consistency.<sup>56</sup>

Moving forward, circuit judges could formulate rules, such as this one, specifying exactly how "force of law" should be defined in the various contexts in which agencies make interpretations. Not only would such a tactic promote logical consistency and judicial administrability in lower courts, but it might also bring to light various potential interpretations of the phrase, thus inducing the Supreme Court itself to conclusively settle the meaning of these ambiguous words that are so crucial to the *Chevron* analysis.

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courts seem to choose between *Mead* and *Barnhart*, and the result is a kind of Step Zero chaos." Sunstein, *supra* note 2, at 221.

<sup>55</sup> Professor Thomas Merrill, for example, suggests the following rule: "Agencies have been given power to act with the force of law when Congress has prescribed some sanction or other legal consequence for violations of agency action." Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-rules and Meta-standards*, 54 ADMIN. L. REV. 807, 833 (2002). He admits, however, that one of its chief difficulties is that it would exclude from *Chevron* deference interpretations of agencies such as the NLRB and the FDA that have typically enjoyed *Chevron* deference but whose rules and orders can only be enforced in individual actions. *Id.* at 831-32.

<sup>56</sup> Of course, such a rule would not necessarily promote public participation in agency interpretations, which many commentators suggest is of paramount importance because the public should be involved in the creation of the rules by which they will be bound. *See, e.g., id.* Professor Nina Mendelson has also put forward a convincing argument that public participation in rulemaking is vital to ensure that interested (but not regulated) parties have a say in regulations. *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007). While these arguments are valid, they most clearly support a blanket ban on *Chevron* deference for interpretations that have not passed through the notice-and-comment or formal adjudication procedures specifically designed to enable public participation, but the Supreme Court foreclosed this possibility in *Mead* and *Barnhart*.