

INTRODUCTORY REMARKS

JUSTICE DENIED: RULES DELAYED IN AUTO SAFETY AND MENTAL HEALTH

November 7, 2013

When elected officials talk about regulations, there is a lot to disagree on. The stakes in this area can be very high, and people disagree in good faith about the appropriate scope of regulation.

What we are discussing here today should not lead to disagreement.

First, let's start with the facts. Regulatory agencies generally have the authority to act through official rulemaking—the notice and comment process created in 1946 and developed throughout the years. This process is relatively open and transparent, and it tends to produce rules that—whatever we might think of them—are at least clear and unambiguous.

Agencies also have the authority to act in other ways. They can put out guidance documents interpreting their rules or a statute. They can put out temporary rules as stopgap measures. They can enforce the law through adjudication and use agency precedent instead of a rule. All of these measures are, to some degree, less transparent than the notice and comment process. Most produce less clarity.

When an agency has the duty to protect the public, it will tend to do so in a way that requires the least time, energy, and resources. That's just commonsense.

In the context of administrative law, this means that the massive delays in the rulemaking process are going to push agencies—in fact, force agencies—to use tools other than rulemaking.

Of course, there are cases where agencies should rely on alternatives to official rulemaking. Sometimes adjudication is a more flexible and appropriate tool than rulemaking. Sometimes a new program requires a series of temporary rules to get up and running quickly.

But when agencies rely on alternatives to official rulemaking, there is a cost. The case studies we are going to consider here today show how high that cost can be.

In the case of mental health parity, the cost has been clarity and certainty. Congress passed the landmark Mental Health Parity and Addiction Equity Act in 2008. And I want to applaud the Ranking Member, Senator Hatch, who was an original cosponsor of that legislation and is a champion in this fight.

However, the devil was in the details. To clarify those details, the Act required the implementing agencies to write a rule within one year. Two years later, the agencies released an interim final rule. But the rule left too many questions unanswered. Even worse, it left industry wondering whether to change its policies or to wait until a final rule brought certainty on the path forward. Regulators also

hesitated to change their rules, leaving industry free to delay compliance with the law. Five years after the Act was passed, its promise remains unfulfilled.

In mental health, uncertainty kills. If an individual poses a threat to himself or others, he cannot be told he will get the care he needs as soon as his insurance company decides what “parity” means. He cannot win access to needed care only after resorting to the courts or to a long administrative process. In a very concrete way, justice delayed is justice denied.

In the auto safety realm, the National Highway Traffic Safety Administration (NHTSA, pronounced nitz-ah) struggled early in its history to release rules in a timely fashion. The result was two-fold. On the one hand, important NHTSA rules have been delayed even when Congress has expressly demanded them. The rear visibility rule that was discussed at the last hearing of this subcommittee is a prime example.

On the other hand, NHTSA has had to do by recall what it should have been able to do by rule. Clarence Ditlow will tell the story of rules that were suggested to NHTSA by automobile safety advocates but went nowhere, only to come up again when defective automobiles have had to be removed from the road. These are tragic situations for those who are injured or killed in a car that never should have been sold in the first place. They are also bad for those car companies who want to

know exactly what is required of them by the law. When I talk to businessmen, they tell me that they can make money in a heavily regulated industry. They just need to know what the rules are and to have certainty about what the rules will be. When policy is made by adjudication because rulemaking is too difficult, these businessmen cannot get the certainty they need.

As I said at the beginning, the story we are telling here today should be common ground. Both industry and consumers should want clear rules. Both employers and workers should want rules that are developed with public input and public scrutiny. Representatives of both private interests and the public interest should want bad behavior to be prevented before it occurs, rather than simply punished after.

And if we can all agree on the problem we face, maybe we can start to work together to find solutions we can agree on.

I want to thank everybody who came out today—particularly Ranking Member Hatch and our witnesses.