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THE POLITICS OF NONACQUIESCENCE: THE LEGACY OF *STIEBERGER v. SULLIVAN**

INTRODUCTION

In 1978, Theresa Stieberger missed an appointment with a Social Security Administration ("SSA") consulting examiner because her son was ill.¹ In response, the SSA immediately terminated the Supplemental Security Income ("SSI") benefits she had been receiving for four years.² After her 1983 reapplication for SSI and Social Security disability insurance ("SSDI") benefits³ was denied and her administrative remedies ex-

* *Stieberger v. Sullivan*, 792 F. Supp. 1376 (S.D.N.Y. 1992) (settlement order) [hereinafter *Stieberger Settlement*], modified by 801 F. Supp. 1079 (S.D.N.Y. 1992); *Stieberger v. Sullivan*, 738 F. Supp. 716 (S.D.N.Y. 1990) (motion for summary judgment) [hereinafter *Stieberger III*]; *Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986) [hereinafter *Stieberger II*]; *Stieberger v. Heckler*, 615 F. Supp. 1315 (S.D.N.Y. 1985) (motion for injunctive relief) [hereinafter *Stieberger I*].

¹ *Stieberger I*, 615 F. Supp. at 1323.

² *Id.* The Social Security Administration ("SSA") terminated Stieberger's Supplemental Security Income ("SSI") benefits without a pretermination evidentiary hearing pursuant to *Mathews v. Eldridge*, 424 U.S. 319 (1976), which held that such hearings are not required by the Due Process Clause of the Fifth Amendment. Eight years later, Congress passed the Social Security Disability Benefits Reform Act of 1984, which mandated a new standard of review—medical improvement—for termination of disability benefits. Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified at 42 U.S.C. § 423(f) (1988)).

³ *Stieberger I*, 615 F. Supp. at 1323. The Social Security Act encompasses two programs, Title XVI (SSI), 86 Stat. 1465 (codified at 42 U.S.C. § 1381-1383d (1988)) and Title II (SSDI), 49 Stat. 622 (codified at 42 U.S.C. § 401-433 (1988)). Each provides benefits for the disabled but serves different constituencies. SSI, established in 1972 and made effective January 1, 1974, federalized existing state public assistance disability programs and was designed essentially as an income maintenance program. Strict income and savings restrictions limit SSI benefits to only those who are indigent as well as completely disabled. In contrast, Social Security Disability Insurance ("SSDI") is an insurance program that inures to the benefit of only those who pay into the system through FICA contributions and, with the exception of a child's or widow's benefits, who have worked for five of the last ten years. SSDI benefits are calculated according to a claimant's salary history. SSI benefits, while often substantially lower, are available to those claimants who do not meet the SSDI earnings requirement or who have never been

hausted,⁴ she commenced an action in federal district court individually and on behalf of all similarly situated persons whose disability benefit claims were terminated or denied.⁵ Ms. Stieberger's claim alleged that denial or termination of benefits to the class was based on the SSA's unlawful policy of nonacquiescence in decisions of the United States Court of Appeals for the Second Circuit.⁶ The resulting litigation culminated in the largest Social Security class action in New York history.⁷

Stieberger v. Sullivan was settled in 1992.⁸ The relief the

employed.

⁴ Section 205(g) of the Social Security Act specifies four administrative levels through which each claimant must seek redress before commencing an action in federal district court. After filing an initial application, a claimant who is denied benefits may request reconsideration (a paper review of the merits of the initial decision). 20 C.F.R. § 404.907 (1993). Upon denial, the claimant may request a hearing before an administrative law judge ("ALJ"), who makes findings of fact, weighs the evidence, applies relevant regulations, and issues a decision. 20 C.F.R. § 404.950 (1993). Finally, unfavorable decisions may be appealed to the Appeals Council, a 20-member body based in Virginia. 20 C.F.R. § 404.967 (1993). The Appeals Council may deny or grant the request for review. If the request is granted, the Appeals Council may either remand the case to an ALJ or issue a decision. A determination to not overrule the ALJ's decision constitutes the final decision of the SSA. 20 C.F.R. § 404.981. The claimant then may seek judicial review in federal district court. 42 U.S.C. § 405(g) (1988).

Stieberger's initial application and request for reconsideration were denied. She appeared at her hearing pro se, where the ALJ denied her claims for SSI and SSDI benefits. *Stieberger I*, 615 F. Supp. at 1323. Her request for review by the Appeals Council was also denied. *Id.*

⁵ *Stieberger I*, 615 F. Supp. at 1400. The class was certified pursuant to Rule 23(b)(2) of the *Federal Rules of Civil Procedure* and consisted of "[a]ll New York State residents whose claims for benefits or continuation of benefits have been or will be denied or terminated pursuant to hearings before administrative law judges since October 1, 1981, based on a determination that they do not have a disability that prevents them from engaging in substantial gainful activity; and whose benefits have not been granted or restored through subsequent appeals." *Id.* at 1328.

⁶ *Id.* at 1321, 1328; *Stieberger III*, 738 F. Supp. at 728. For a discussion of the SSA's policy of nonacquiescence, see *infra* notes 27-73 and accompanying text.

Ms. Stieberger's claim also alleged that the SSA's "Bellmon Review" policy was unlawful because it subjected pro-claimant ("allowance") decisions of ALJs to agency review. See *infra* note 75, for a discussion of the Bellmon Review aspect of the case.

⁷ Letter from David S. Udell, Senior Attorney, Legal Services for the Elderly, Matthew Diller, The Legal Aid Society, and Jill Boskey, MFY Legal Services, to Social Security Disability Claimants' Representatives (Mar. 3, 1993) [hereinafter Udell Letter]. A virtually identical memorandum was issued by Brigitte Laforest of The Legal Aid Society's Stieberger Implementation Project (Jan. 10, 1994) [hereinafter Laforest Letter].

⁸ *Stieberger Settlement*, 792 F. Supp. 1376 (S.D.N.Y.), modified by 801 F.

settlement established is potentially enormous, measured both in simple human terms and as precedent for future actions against the SSA. Under the settlement, individual claims dating as far back as 1981 may be reopened and readjudicated.⁹ Moreover, as an example of private-party intervention in agency policymaking, the case may well be unparalleled. It partially unearthed the process by which agency personnel had formulated a systematic policy to terminate recipients' disability benefits unlawfully and to deny disability benefits to otherwise eligible claimants.¹⁰ As was revealed through discovery for the first time, the SSA refused to adhere to the doctrine of *stare decisis* by nonacquiescing in decisions of the Court of Appeals for the Second Circuit.¹¹

Pursuant to the *Stieberger* settlement agreement, the SSA agreed to mail notices to approximately 300,000 class members offering to reopen their claims, to re-adjudicate those claims, to pay up to four years of retroactive benefits, and to pay continuing benefits to those claimants who receive a favorable decision.¹² In addition, the settlement mandated that the SSA instruct each agency adjudicator to apply the law developed by the Second Circuit when deciding all future disability claims.¹³

Although the *Stieberger* settlement crafted far-reaching retroactive and prescriptive relief, its ultimate results may be more circumscribed. In a subsequent class action, *Schisler v. Sullivan*,¹⁴ the Second Circuit upheld the validity of SSA regulations promulgated in 1991 that fundamentally differed from the judicially created rules *Stieberger* was designed to en-

Supp. 1079 (S.D.N.Y.).

⁹ *Stieberger Settlement*, 792 F. Supp. at 1381-82.

¹⁰ *Stieberger III*, 738 F. Supp. 716.

¹¹ *Stieberger I*, 615 F. Supp. at 1321; *Stieberger III*, 738 F. Supp. at 732. For a discussion of the policy of nonacquiescence, see *infra* notes 27-73 and accompanying text.

¹² *Stieberger I*, 615 F. Supp. at 1397; *Stieberger Settlement*, 792 F. Supp. at 1382, 1385-86; Udell Letter, *supra* note 7, at 1.

¹³ ¹³ *Stieberger Settlement*, 792 F. Supp. at 1379. Summarized versions of selected Second Circuit decisions are contained in a *Manual of Second Circuit Disability Decisions* and are discussed *infra* at notes 231-39 and accompanying text.

¹⁴ *Schisler v. Sullivan*, 3 F.3d 563 (2d Cir. 1993) [hereinafter *Schisler III*]. For a discussion of this case, see *infra* notes 185-204 and accompanying text. See also Deborah Pines, *2d Circuit Revises Standard for Testimony*, N.Y.L.J., Aug. 25, 1993, at 1.

force.¹⁵ The result left the SSA procedures for reopening claims largely intact but undermined the substantive changes in the law *Stieberger* was thought to have created.¹⁶

Part I of this Comment discusses the SSA policies of non-acquiescence and the class actions that have challenged those policies. Part II examines *Stieberger*, and places it in the context of other recent Social Security class actions.

Part III analyzes the *Stieberger* settlement and argues that it contained substantive limitations and implementation problems that may significantly diminish the opportunity of some class members to obtain relief. The first substantive limitation in *Stieberger* was the district court's highly restrictive definition of agency non-acquiescence. Rather than allowing claimants to prove nonacquiescence in their individual cases, the court required the claimants to prove a "system-wide pattern of mistaken adjudication," thereby ignoring the effect of nonacquiescence on individual claimants.¹⁷ Second, the Second Circuit was excessively deferential to SSA representations regarding its own acquiescence policy,¹⁸ as well as the SSA's presumed authority to promulgate regulations in direct conflict with the rulings of the Second Circuit.¹⁹ A little more than a

¹⁵ *Stieberger* challenged SSA nonacquiescence in, inter alia, the treating physician rule, articulated by the Second Circuit in *Schisler v. Bowen*, 851 F.2d 43 (2d Cir. 1988) [hereinafter *Schisler II*]. The treating physician rule required that the opinion of a treating physician concerning the medical disability of a claimant be binding on the SSA, unless contradicted by substantial evidence, and even if contradicted the opinion was entitled to some extra weight. *Schisler v. Heckler*, 787 F.2d 76 (2d Cir. 1986) [hereinafter *Schisler I*].

¹⁶ See, e.g., Jeffrey Freedman, *New Rulings Move SSA Away from Policy of "Non-acquiescence,"* 63 N.Y. St. B.J. 22 (1991) (commenting on *Stieberger III*, 738 F. Supp. 716); Udell Letter, *supra* note 7.

¹⁷ *Stieberger III*, 738 F. Supp. at 728.

¹⁸ *Stieberger II*, 801 F.2d 29 (2d Cir. 1986) (vacating the district court's preliminary injunction on the grounds of the injunctive relief upheld in *Schisler I*; *Schisler I*, 787 F.2d 76 (2d Cir. 1986). The SSA's representation that it was now pursuing a policy of acquiescence was, in fact, false. See *infra* note 170 and accompanying text. The Second Circuit's deference to the SSA's counsel was, as the court subsequently recognized, unjustified. *Stieberger III*, 738 F. Supp. at 736 (calling the SSA's representation that it was in compliance with the treating physician rule "simply wrong"); *Schisler II*, 851 F.2d 43 (2d Cir. 1988).

¹⁹ For example, one year before the *Stieberger* settlement became effective, the SSA promulgated such a conflicting regulation. Standards for Consultative Examinations and Existing Medical Evidence 56 Fed. Reg. 36,932 (1991) (codified at 20 C.F.R. §§ 404.1527, 416.927 (1993)) [hereinafter Standards]; *Schisler III*, 3 F.3d 563 (upholding the validity of this regulation) [hereinafter *Schisler III*]. For a

year after the *Stieberger* settlement, the Second Circuit in *Schisler v. Sullivan*, upheld such a regulation.²⁰

In addition, the *Stieberger* settlement contained four implementation problems that may limit its effectiveness. First, the settlement did not require the SSA to reopen any claims or to establish a timetable for completing the adjudication of those claims that it did reopen.²¹ Second, the settlement allowed the SSA to make a de novo review of the medical evidence in any reopened claims.²² One effect of de novo review of a claimant's medical evidence is that the SSA may deny the claim based on insufficiency of evidence without first determining whether the agency had based its original decision on unlawful nonacquiescence.²³ Third, the value of a district court remand pursuant to *Stieberger* may be very limited not only because under the de novo standard a claim may be susceptible to denial on both factual and legal grounds, but because the settlement limits retroactive benefits to a maximum of four years.²⁴ Finally, prospective changes in agency decisionmaking will be restricted because the settlement failed to require

discussion of how this regulation conflicts with Second Circuit disability holdings, see *infra* notes 44-57 and accompanying text.

²⁰ 3 F.3d 563. *Stieberger* was brought in part to challenge the SSA's nonacquiescence in the treating physician rule. *Schisler II*, 851 F.2d 43, was the most often-cited case for this rule. In *Schisler II*, the Second Circuit upheld the authority of the district court to rewrite a proposed Social Security Ruling ("SSR") that incompletely embodied the treating physician rule. See *infra* notes 176-80. The SSA issued the rewritten *Schisler* ruling in 1989, and the SSA subsequently promulgated a regulation, not an SSR, concerning the weight to be given the opinion of a treating physician that was substantially different from the treating physician rule. See *Standards*, *supra* note 19. The court in *Schisler III* upheld the validity of this regulation. 3 F.3d at 569. A crucial result of the *Schisler III* decision is that the SSA, pursuant to paragraph 4(f) of the *Stieberger Settlement*, 792 F. Supp. at 1379 (§ 4(f)), may remove the instruction concerning *Schisler* from the Manual of Second Circuit Decisions. For a discussion of the *Manual*, see *infra* notes 231-39 and accompanying text. In November 1993, the SSA rescinded the *Schisler II* ruling in favor of its new regulation. 58 Fed. Reg. 60,042 (1993).

²¹ See Udell Letter, *supra* note 7; *Stieberger Settlement*, 792 F. Supp. at 1382-84 (§§ 9, 10). The *Stieberger* settlement required only that the SSA send a notice to class members offering to reopen claims, and acknowledge the receipt of reopening requests, conduct an initial screening process, transmit to the proper adjudicators any claims they decide merit reopening, and notify individual class members of the outcome.

²² *Stieberger Settlement*, 792 F. Supp. at 1385 (§ 10(a)).

²³ See *infra* notes 211-21 and accompanying text.

²⁴ See Udell Letter, *supra* note 7; *Stieberger Settlement*, 792 F. Supp. at 1385-86 (§§ 10(b), (e)(4)).

Administrative Law Judges ("ALJs") or Appeals Council judges to cite and apply Social Security and circuit court case law.²⁵

This Comment concludes with a proposal to eliminate the Appeals Council and replace it with an Article III Court of Social Security Appeals.²⁶ This proposal differs substantially from earlier congressional proposals and responds to criticism concerning the potential politicization, lack of expertise, and geographical inconvenience of such a court.²⁷ By adjudicating all disability appeals, this court would have the jurisdiction to affirm or reverse decisions rendered at the hearing level and, most importantly, could develop independent case law to be applied by all SSA adjudicators.

I. BACKGROUND

A. *Intracircuit Nonacquiescence by the Social Security Administration*

1. Historical Nonacquiescence

Nonacquiescence²⁸ is the policy of refusing to follow the

²⁵ Currently, ALJs and Appeals Council judges must consult a manual containing abstracted holdings of some Second Circuit cases, but they continue to apply these holdings only as interpreted by SSA personnel pursuant to SSRs. In addition, neither adjudicators nor counsel (nor members of the public) have access to all final decisions of the Secretary, which may include unappealed decisions at any level of the claims process. The SSA has not joined the practice of such agencies as the Securities and Exchange Commission, the Federal Aviation Administration, and the National Transportation Safety Board in developing, publishing and citing to its own decisions.

²⁶ For other recommendations of specialized Social Security courts by the Administrative Conference of the United States, see 1 C.F.R. § 305.91-9 (1993), and most recently, *The Federal Administrative Judiciary*, 1 C.F.R. § 305.92-7 (1993). See also Robert E. Rains, *A Specialized Court for Social Security?*, 15 FLA. ST. U. L. REV. 1 (1987).

²⁷ See H.R. 4419, 99th Cong., 2d Sess. (1986); H.R. 4647, 99th Cong., 2d Sess. (1986); Rains, *supra* note 26, at 25-30.

²⁸ Three types of nonacquiescence have been identified by commentators: intercircuit nonacquiescence, nonacquiescence because of venue choice, and intracircuit nonacquiescence. Intercircuit nonacquiescence occurs when an administrative agency declines to follow the holding of one circuit court when processing a claim reviewable by another circuit court. Nonacquiescence because of venue choice occurs when a single administrative claim is subject to review by more than one circuit court. Intracircuit nonacquiescence—the focus of this Comment—occurs when an administrative agency in a particular claim declines to follow the precedent of

decision of a United States court of appeals except for the specific case decided by that court.²⁹ Typically, the SSA cites three reasons for declining to give precedential effect to any case except those cases decided by the United States Supreme Court: the need for national uniformity, separation of powers, and the statutory requirement devolving on the SSA to interpret and establish rules pursuant to the Social Security Act. The SSA argues that these policies justify agency resistance to judicial holdings that contradict its established policies and interpretations.³⁰

the only circuit with jurisdiction to review the claim. See Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 U. PA. L. REV. 1339 (1991); see also Samuel Figler, *Executive Agency Nonacquiescence to Judicial Opinions*, 61 GEO. WASH. L. REV. 1664 (1993); Peter J. Rooney, Note, *Nonacquiescence by the Securities and Exchange Commission: Its Relevance to the Nonacquiescence Debate*, 140 U. PA. L. REV. 1111 (1992).

²⁹ Intracircuit nonacquiescence as a general policy has been subjected to extensive scrutiny by commentators. This Comment does not discuss in detail the legality of nonacquiescence nor the constitutional bases for challenging its practice (separation of powers and due process), which have been studied extensively by commentators. See generally Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher & Revesz*, 99 YALE L.J. 801 (1990); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); Miriam R. Rubin and Karen A. Naughton, *Government Nonacquiescence Case in Point: Social Security Litigation*, 2 TOURO L. REV. 197 (1986); Jody L. Davis, Casenote, *Nonacquiescence by the Social Security Administration as a Matter of Law: Using Stieberger v. Sullivan as a Model*, 44 MERCER L. REV. 1453 (1993); Angela M. Johnson, Note, *The Social Security Administration's Policy of Nonacquiescence*, 62 IND. L. J. 1101 (1986-87); Ann Ruben, Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOK. L. REV. 89 (1986). The *Stieberger I* court's analysis of the legality of nonacquiescence is discussed *infra* at note 30.

³⁰ *Stieberger I*, 615 F. Supp. at 1357-67. The *Stieberger I* court's description of the SSA's defense of its nonacquiescence policy and its analysis of the policy's ultimate illegality is comprehensive. First, the SSA argued that the principle of separation of powers as expressed in *Marbury v. Madison*, 5 U.S. 137 (1803) does not directly undermine its nonacquiescence policy since "ordinary rules regarding the binding effect of judicial pronouncements do not apply with equal force to the federal government." *Stieberger I*, 615 F. Supp. at 1368. The court in *Stieberger I* was dubious of "the limiting construction on *Marbury* which defendants propose." *Id.* at 1357. The well-known language of *Marbury* specifically directed that "[i]t is, emphatically, the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177; see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."); *Lopez v. Heckler*, 725 F.2d 1489, 1497 n.5 (9th Cir.) ("What the Court said [in *Marbury* and *Cooper*] with regard to the Constitution applied with full force

with regard to federal statutory law."), *vacated and remanded on other grounds*, 463 U.S. 1328 (1983).

Second, the SSA asserted that its duty to administer the Social Security Act uniformly throughout the nation made nonacquiescence necessary. *Stieberger I*, 615 F. Supp. at 1361; *see also* 42 U.S.C. § 421(k)(1) (1988) (requiring the SSA to "establish by regulation uniform standards which shall be applied at all levels of determination, review, and adjudication in determining whether individuals are under disabilities"). The *Stieberger I* court held that the SSA's uniformity argument "not only fails to dispel the serious doubts concerning the legal validity of its policy, but in fact highlights some of the most troubling consequences of that policy." *Stieberger I*, 615 F. Supp. at 1361. In particular, the court pointed to "the inherent unfairness of the Secretary's policy to the very persons whom the Social Security Act was designed to protect." *Id.* at 1362.

Nothing tests more acutely the sincerity of our nation's commitment to the concept of "Equal Justice Under the Law" than the manner in which our government agencies respect the legal rights of its poorest and least influential citizens. This is especially so in dealing with the rights of those who are often unable to obtain legal representation and are unaware of their rights. It is unfortunate that in its desire to promote uniform legal standards for the disabled, the government has lost sight of the similarly compelling evil of disuniformity which its non-acquiescence policy entails. The consequence of the SSA's non-acquiescence policy is simply this: one set of rules applies to those claimants fortunate enough to procure legal representation, persistent enough to appeal an adverse determination of the various non-acquiescing levels of the agency to a federal court bound to follow the Court of Appeals ruling, and healthy enough to endure this belabored process; a different and adverse rule will govern the rights of those claimants who are unrepresented, insufficiently persistent in their efforts to invoke the benefits of favorable judicial rulings, or incapable of doing so.

Id. at 1362-63.

Moreover, in 1984, the House of Representatives passed a Social Security bill severely critical of nonacquiescence. *See* H.R. Rep. No. 618, 98th Cong., 2d Sess. 25 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3038. Conversely, the Senate's bill permitted nonacquiescence. It merely required the Secretary to send notice to the Senate Finance Committee and publish notice in the *Federal Register* regarding whether it would acquiesce in the decisions of the United States courts of appeals. S. 476, 98th Cong., 1st Sess. (1984). The Conference Committee failed to reach agreement on the issue, and Congress enacted the Social Security Disability Benefits Reform Act of 1984 without any mention of nonacquiescence. Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified in scattered sections of 42 U.S.C.).

Nonetheless, the Conference Committee pointedly challenged the SSA's policy on nonacquiescence:

The conferees do not intend that the agreement to drop both provisions [in the House and Senate] be interpreted as approval of "non-acquiescence" by a federal agency to an interpretation of a U.S. Circuit Court of Appeals as a general practice. On the contrary, the conferees note that questions have been raised about the constitutional basis of non-acquiescence and many of the conferees have strong concerns about some of the ways in which this policy has been applied, even if constitutional. Thus, the conferees urge that a policy of non-acquiescence be followed only in

The SSA had followed a limited nonacquiescence policy since about 1966,³¹ and ten years later began a comprehensive nonacquiescence policy.³² This more comprehensive policy was characterized by formal expressions of nonacquiescence in agency instruction materials and through Social Security Rulings ("SSRs") that specifically directed adjudicators not to apply appellate holdings.³³ By 1985, the SSA had abandoned formal nonacquiescence but continued to practice "silent nonacquiescence." Rather than formally announcing its refusal to apply appellate decisions, the SSA simply ignored these decisions and maintained its conflicting rules and regulations.³⁴

situations where the Administration has initiated or has the reasonable expectation and intention of initiating the steps necessary to receive a review of the issue in the Supreme Court.

H.R. Conf. Rep. No. 797, 98th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3095. See Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989); Johnson, *supra* note 29, at 1109-11; Coenen, *supra* note 28, at 1343-44, 1376-77 (noting that the "the clash between executive and judicial decisionmakers has spawned one of the most important modern issues in constitutional law—and an issue that the Supreme Court has yet to visit").

³¹ See SSR 66-23c, *declining to follow* *Cyrus v. Celebrezze*, 341 F.2d 192 (4th Cir. 1965) and *Massey v. Celebrezze*, 345 F.2d 146 (6th Cir. 1965).

³² See *Stieberger III*, 738 F. Supp. at 728; Kubitschek, *supra* note 30.

³³ *Stieberger III*, 738 F. Supp. at 747 ("[W]here a district or circuit court [']s decision contains interpretations of the law, regulations, or ruling[s] that are inconsistent with the Secretary's interpretations, the ALJs should not consider such decisions binding on future cases simply because the case is not appealed.") (quoting the Office of Hearings and Appeals "OHA" Handbook, § 1-161).

As OHA Associate Commissioner Louis B. Hays noted, "[T]he federal courts do not run SSA's programs . . . ALJs are responsible for applying the Secretary's policies and guidelines regardless of court decisions below the level of the Supreme Court." *Stieberger I*, 615 F. Supp. at 1351 (quoting Memorandum to Agency ALJs (Jan. 7, 1982)).

During this 14-year period, between 1975 and 1989, the SSA neither acquiesced in nor formally nonacquiesced in a Second Circuit disability opinion. Rather, the SSA instructed its adjudicators to not apply court decisions conflicting with agency rules, in effect ignoring the Second Circuit altogether. *Stieberger III*, 738 F. Supp. at 747.

³⁴ *Stieberger III*, 738 F. Supp. at 728. Concomitantly, the Secretary declined to challenge adverse appellate decisions by petitioning for certiorari. As a result, the SSA prevented itself from facing an unfavorable, binding decision of the Supreme Court. Claimants thus were forced to adjudicate the same issues repeatedly in appellate courts. Most claimants, however, won at the appellate level and therefore were barred from seeking Supreme Court review of the SSA's underlying nonacquiescence policy. In 1984, Congress expressed its disappointment with the SSA's practice of nonacquiescence:

By refusing to apply circuit court interpretations and by not promptly

The SSA simultaneously promulgated a new rule establishing a complex procedure for partially applying appellate court decisions. This rule was a direct result of the *Stieberger* litigation.³⁵

The rule, embodied in Interim Circular 185 ("IC-185"), required the SSA to issue an Acquiescence Ruling ("AR"), which describes an appellate case and explains how the agency would apply it.³⁶ Under IC-185, after receiving an AR, an ALJ would make two decisions, one based solely on agency policy, the other on a court of appeals holding as interpreted by the AR. If the ALJ were prepared to deny a claim under *both* SSA policy and an AR, the ALJ issued a "decisional rationale" which addressed both sources. If the claimant then requested review, the Appeals Council would determine if a court might decide against the SSA. If so, the Appeals Council would award benefits to the claimant. An ALJ who was prepared to grant benefits under an AR but not under agency policy would write a "recommended favorable decision." If the Appeals Council agreed with the ALJ, but also believed the issue should be relitigated in the circuit court, it issued an unfavorable decision and forwarded it to a Special Policy Review Committee. Only if the Office of General Counsel of the Department of Health and Human Services and the Department of Justice agreed that relitigation was appropriate, would the unfavorable decision be adopted.³⁷

seeking review by the Supreme Court, the Secretary forces beneficiaries to re-litigate the same issue over and over again in the circuit, at substantial expense to both beneficiaries and the federal government. This is clearly an undesirable consequence.

H.R. Conf. Rep. No. 797, 98th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.A.N. 3096. See Kubitschek, *supra* note 30, at 402; Rains, *supra* note 26, at 15.

³⁵ *Stieberger III*, 738 F. Supp. at 759 ("The Court also cannot ignore the fact that the evolution of [the] SSA's acquiescence policy appears to have been driven in large part by this litigation. Each significant modification of agency policy came shortly before a major stage of this case.").

³⁶ *Id.* at 748. An acquiescence ruling ("AR") would be issued only when the court decision was squarely at odds with agency policy. It was to be applied only at the OHA level (at the ALJ and Appeals Council stages), that is, not in the initial application and reconsideration stages. Thus, as the *Stieberger III* court noted, where an AR was not issued, and in all adjudications below the ALJ stage, decisionmakers were instructed to continue to nonacquiesce in appellate holdings. *Id.*

³⁷ *Id.* at 748-49; *Stieberger I*, 615 F. Supp. at 1369-74. The SSA established the

In late 1985, the SSA issued Transmittal X-7, which modified the procedure for partially applying decisions of the courts of appeals.³⁸ This new rule provided that an AR reporting a court of appeals decision would apply to all administrative levels of review in situations where: prompt relitigation of the policy would not be sought; application of the AR was feasible and would not have an "unacceptably adverse effect on Social Security programs"; or where the agency planned to modify its regulations to conform to a circuit court holding.³⁹ The bifurcated procedures of IC-185 remained in effect where an AR did not apply at all administrative levels.⁴⁰

In addition, between 1986 and 1989, memoranda from the Associate Commissioner of the Office of Hearings and Appeals ("OHA") discussed aspects of SSA nonacquiescence but did not explicitly overrule this policy.⁴¹ SSA Continuing Legal Education programs taught adjudicators how to apply circuit court case law in a way that, as the *Stieberger* court characterized it, advantaged the SSA.⁴² Finally, in 1990 new regulations be-

Acquiescence Task Force in July 1985 to implement IC-185, by reviewing circuit court decisions and issuing ARs where there was a conflict between the circuit court and a policy of the SSA. *Stieberger III*, 738 F. Supp. at 751. The Task Force began with a staff of 12. Its staff was reduced to four in September 1985 and then to two. Finally, in 1987 the Task Force was terminated. *Id.* By June 1989, the SSA had issued 37 ARs, none of which reported Second Circuit disability decisions. *Id.* at 752.

³⁸ *Stieberger III*, 738 F. Supp. at 750.

³⁹ *Id.*

⁴⁰ *Id.* Applying IC-185 in this situation distinguishes the substantive law applicable at the initial application and reconsideration levels from that at the ALJ and Appeals Council levels. The SSA rejected a recommendation to notify claimants of this distinction on the grounds of increased administrative costs. *Id.*

⁴¹ See *id.* at 740, 755-57.

⁴² *Stieberger III*, 738 F. Supp. at 757. One afternoon of the training was devoted to applying circuit court decisions. The *Stieberger III* court recognized:

SSA clearly teaches adjudicators how to write decisions with the goal of passing judicial scrutiny. It also seems to instruct them how to apply decisions of courts of appeal to the facts in their cases, but it very carefully avoids explicitly directing them to use such decisions affirmatively in the decision-making process. An adjudicator, after reading SSA policy statements and undergoing Continuing Legal Education efforts, could well come away with the impression that the goal of writing decisions is just to avoid reversal, not to apply the full breadth of court of appeals holdings.

Id.

In addition, under SSA rules adjudicators must apply appellate decisions only as embodied in an AR. However, because the SSA never issued an AR reporting a

came effective that described the limited conditions under which SSA would issue ARs, and confirmed that adjudicators could not apply a circuit court holding unless it was first reported in an AR.⁴³

2. Nonacquiescence in Second Circuit Holdings

At the time of the *Stieberger* settlement, the Second Circuit had issued a number of substantive holdings that concerned the SSA's adjudication of disability claims, and the enforcement of the Second Circuit's decisions against contradictory SSA regulations. By far, the most influential Second Circuit decision dealt with the weight that the SSA was required to give to the uncontradicted opinion of a claimant's treating physician. The "treating physician rule" established that a physician's opinion was binding unless contradicted by substantial evidence.⁴⁴ Even if contradicted, the treating physician's opinion was still entitled to substantially greater weight than that of the Secretary's consulting examiner.⁴⁵

The SSA nonacquiesced in the "treating physician rule," thus forcing the Second Circuit to articulate the rule in dozens of cases.⁴⁶ In two well-known instances, the court issued scathing denunciations of the agency's silent nonacquies-

Second Circuit disability holding, see *supra* note 33, adjudicators could not apply these disability holdings, and the SSA could not properly be said to be acquiescing in them.

⁴³ *Id.* at 757.

When we determine that a United States Court of Appeals holding conflicts with our interpretation of a provision of the Social Security Act or regulations and the Government does not seek further review or is unsuccessful on further review, we will issue an [AR] that describes the administrative case and the court decision, identifies the issue involved, and explains how we will apply the holding, including, as necessary, how the holding relates to other decisions within the applicable circuit.

Id. at 757-58 (quoting 20 C.F.R. §§ 404.985(b), 416.1485(b) (1993)).

⁴⁴ *Schisler II*, 851 F.2d at 46-47; *Bluvband v. Heckler*, 730 F.2d 886, 892 (2d Cir. 1984); *Donato v. Secretary of HHS*, 721 F.2d 414, 419 (2d Cir. 1983); *Rivera v. Schweiker*, 717 F.2d 717, 723 (2d Cir. 1983); *Carroll v. Secretary of HHS*, 705 F.2d 638, 642 (2d Cir. 1983); *Hankerson v. Harris*, 636 F.2d 893, 896 (2d Cir. 1980); *Eiden v. Secretary of HEW*, 616 F.2d 63, 64 (2d Cir. 1980); *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978); *Gold v. Secretary of HEW*, 463 F.2d 38, 42 (2d Cir. 1972).

⁴⁵ *Schisler II*, 851 F.2d at 46-47.

⁴⁶ For a discussion of this phenomenon, see *supra* note 34.

cence.⁴⁷ Similarly, the *Stieberger I* court denounced the SSA's practice of nonacquiescence in the "treating physician rule":

The sheer volume of cases in this Circuit in which an administrative denial of benefits was overturned due to failure to properly apply the Second Circuit's treating physician rule is strong evidence that the Secretary's policy on the weight to be given to treating physician opinions is not in accord with Second Circuit caselaw.⁴⁸

Instead of acquiescing in the decisions of the Second Circuit, the SSA required its adjudicators to follow two SSRs that included other circuits' cases holding differently. Neither SSR established that a treating physician's opinion is binding in disability determinations in the absence of substantial evidence to the contrary. SSR 82-48c stated that "although the opinion of an examining physician is generally entitled to more weight than the opinion of a non-examining physician, the ALJ is free to reject the opinion of any physician when the evidence supports a contrary conclusion."⁴⁹ Similarly, SSR 83-6c warned that a treating physician "might have been leaning over backwards to support the application of disability benefits."⁵⁰ The *Stieberger* court concluded: "Read together, these various SSRs . . . strongly convey an approach to the treating physician's opinion which understates the significance of such an opinion and which is not in accord with the views of the Second Circuit. . . . The evidence of agency non-acquiescence in the Second Circuit's treating physician rule is overwhelming."⁵¹

The SSA also nonacquiesced in Second Circuit decisions

⁴⁷ *DeLeon v. Secretary of HHS*, 734 F.2d 930, 937 (2d Cir. 1984) (noting that the cases reversing the Secretary's denial of benefits because the ALJ failed to apply the treating physician rule are "almost legion"); see also *Hidalgo v. Bowen*, 822 F.2d 294, 296 (2d Cir. 1984) ("'Legion' should no longer be modified by 'almost.' We have relied upon the treating physician rule in 23 cases in which the administrative decision denying disability benefits has been either reversed or remanded. . . . We cite these cases to emphasize how often the rule has been expounded, and also to indicate some sense of frustration at how little, if any, impact our decisions have had on the Secretary and his administrative fact-finders.").

⁴⁸ *Stieberger I*, 615 F. Supp. at 1347.

⁴⁹ SSR 82-48c, reporting *Oldham v. Schweiker*, 660 F.2d 1078 (5th Cir. 1981).

⁵⁰ SSR 83-6c, reporting *Cummins v. Schweiker*, 670 F.2d 81 (7th Cir. 1982).

⁵¹ *Stieberger I*, 615 F. Supp. at 1346, 1349. In addition to the Second Circuit decisions, the court cited 26 district court decisions overturning the Secretary's denial of benefits based on failure to follow the treating physician rule. *Id.* at 1347.

that established the right to cross-examine authors of post-hearing reports,⁵² and decisions that accorded "limited weight" to personal observations of the claimant by the ALJ.⁵³ In addition, although the *Stieberger III* court eventually held that the SSA's conduct did not constitute nonacquiescence,⁵⁴ the SSA ignored Second Circuit holdings that established standards for evaluating a claimant's credibility,⁵⁵ and those holdings that established a duty to accord weight to the disability determinations of other agencies⁵⁶ and a duty to assist pro se claimants.⁵⁷

B. Class Actions Challenging SSA Policies

For claimants whose benefits were denied or terminated, the class action represents the most potent weapon against the SSA. In the context of a general challenge to SSA policy, the class action is effective in enforcing the legal rights of similarly situated claimants.⁵⁸ Class action litigation represents the

⁵² *Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984); *Gullo v. Califano*, 609 F.2d 649, 650 (2d Cir. 1979); cf. 20 C.F.R. §§ 404.950(d), 416.1450(d) (1993) (providing that a request to subpoena a witness must be filed five days before a hearing, but not indicating that a subpoena may be issued after a hearing to enable a claimant to cross-examine the author of a post-hearing report). See *Stieberger III*, 738 F. Supp. at 738.

⁵³ *Stieberger III*, 738 F. Supp. at 740; *DeLeon v. Secretary of HHS*, 734 F.2d 930 (2d Cir. 1984); *Carroll v. Secretary of HHS*, 705 F.2d 638 (2d Cir. 1983). The ALJ's reliance on his personal observations of the claimant at the hearing is commonly known as the "sit-and-squirm" test. The name derives from the common ALJ practice of making disability determinations in back-injury cases based on whether the claimant could sit comfortably in the witness chair throughout the hearing.

⁵⁴ For a discussion of the *Stieberger III* court's definition of nonacquiescence and criticism of this definition as too stringent, see *infra* notes 122-52 and accompanying text.

⁵⁵ *Rivera v. Schweiker*, 717 F.2d 719, 725 (2d Cir. 1983); *Singleton v. Secretary of HHS*, 623 F.2d 217, 219 (2d Cir. 1980); see also *Stieberger III*, 738 F. Supp. at 742. Determining a claimant's credibility figures prominently in two instances: (1) where a claimant alleges a disability but has a good work record; and (2) where a claimant alleges disabling pain. *Williams v. Bowen*, 859 F.2d 255, 260-61 (2d Cir. 1988) (holding that credibility findings must be set forth "with sufficient specificity to enable [the court] to decide whether the determination is supported by substantial evidence"); *Ferrares v. Heckler*, 728 F.2d 582, 587 (2d Cir. 1984) (same); see also SSR 88-13; 20 C.F.R. § 404.1529(c)(3)(i)-(vii) (1993).

⁵⁶ See *supra* note 142.

⁵⁷ See *supra* note 143.

⁵⁸ FED. R. CIV. P. 23(c)(3); *Kubitschek*, *supra* note 30, at 642.

forum other than the Supreme Court would ordinarily have no precedential effect on a subsequent individual action.⁵⁹

Recent class action litigation directed against SSA nonacquiescence originated with *Lopez v. Heckler*,⁶⁰ which challenged the SSA's refusal to follow the Ninth Circuit's standard for continued SSDI and SSI benefits.⁶¹ A second case, *Schisler v. Heckler*,⁶² originally was brought to challenge SSA procedures to terminate benefits to mentally disabled persons, but over time evolved into a direct challenge to the Secretary's refusal to acquiesce in the Second Circuit's "treating physician rule."⁶³

A similar class action, *Hyatt v. Heckler*,⁶⁴ was brought in the Fourth Circuit to challenge the SSA's procedures for denying and terminating claims involving diabetes mellitus, hypertension, and pain. Although the Fourth Circuit initially vacated the district court's injunction, on remand from the Supreme Court,⁶⁵ the Fourth Circuit held that claims involving diabetes and hypertension must be evaluated in accordance with the law of the circuit.⁶⁶ The court concluded: "The evidence did

⁵⁹ For a discussion of nonacquiescence, see *supra* notes 28-53 and accompanying text.

⁶⁰ 572 F. Supp. 26 (C.D. Cal.), *aff'd in part and rev'd in part*, 725 F.2d 1489 (9th Cir. 1983), *vacated on other grounds*, 469 U.S. 1082 (1984). The Supreme Court did not reach the issue of nonacquiescence in *Lopez*, nor has it done so in any case to date.

⁶¹ The Ninth Circuit held that the medical improvement standard was proper, and rejected the SSA's clandestine adoption of treating continuing benefits cases as new applications. 725 F.2d at 1510. The medical improvement standard was eventually enacted statutorily. Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(f) (1988). See also Kubitschek, *supra* note 30, at 643.

⁶² *Schisler v. Heckler*, 574 F. Supp. 1538 (W.D.N.Y. 1983); *Schisler v. Heckler*, 107 F.R.D. 609 (W.D.N.Y. 1984), *aff'd in part and rev'd and remanded in part*, *Schisler I*, 787 F.2d 76, *aff'd in part and rev'd in part, sub nom., Schisler II*, 851 F.2d 43, *aff'd in part and rev'd in part, sub nom., Schisler III*, 3 F.3d 563.

⁶³ See *supra* notes 45-52 and accompanying text.

⁶⁴ *Hyatt v. Heckler*, 579 F. Supp. 985 (W.D.N.C. 1984), *vacated and remanded*, 757 F.2d 1455 (4th Cir. 1985), *vacated and remanded sub nom., Hyatt v. Bowen*, 476 U.S. 1167 (1986); *Hyatt v. Heckler*, 807 F.2d 376 (4th Cir. 1986) (on remand).

⁶⁵ *Hyatt*, 807 F.2d at 381. The Supreme Court vacated the judgment of the Fourth Circuit and remanded for further consideration in light of *Bowen v. City of New York*, 476 U.S. 467 (1986).

⁶⁶ In comparison, claims involving pain were to be evaluated in accordance with the Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(d)(5)(A) (1988), which superseded the Fourth Circuit's rulings concerning evaluation of claims of disabling pain. *Hyatt*, 807 F.2d at 381.

not reveal mere irregularities or errors in individual cases. Instead, it depicted a systematic, unpublished policy that denied benefits in disregard of the law."⁶⁷ Specifically, the court noted that "[i]t is unrealistic to believe that publication of both the agency's regulations and the court of appeals' decisions would alert persons to the Secretary's nonacquiescence in circuit law."⁶⁸ The court rejected the district court's grant of injunctive relief to class plaintiffs, however, finding that the SSA's elimination of a conflicting SSR made such relief unnecessary.⁶⁹

Class actions have successfully challenged SSA procedures, policies, and rules that did not directly involve nonacquiescence. For example, SSA's procedures for evaluating mental disorders were struck through a class action brought in the Second Circuit.⁷⁰ In a recent class action challenging the SSA's procedures for evaluating child disability claims originally brought in the Third Circuit, the Supreme Court held that the SSA's regulations violated the Social Security Act.⁷¹ Similarly, a Second Circuit class action successfully challenged the SSA's procedures for evaluating cardiovascular disabilities, and resulted in the potential reopening of thousands of claims.⁷²

with the Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(d)(5)(A) (1988), which superseded the Fourth Circuit's rulings concerning evaluation of claims of disabling pain. *Hyatt*, 807 F.2d at 381.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* The SSA eliminated SSR 82-55, which nonacquiesced in the Fourth Circuit's holdings concerning diabetes and hypertension.

⁷⁰ *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y.), *aff'd*, 720 F.2d 729 (2d Cir. 1984), *aff'd sub nom.* *Bowen v. City of New York*, 476 U.S. 467 (1986). The Supreme Court did not rule on the substantive violation, only the procedural issue of exhaustion of administrative remedies.

⁷¹ *Sullivan v. Zebley*, 493 U.S. 521 (1990). The Court held that the SSA's policy of denying SSI benefits to children whose impairments were not included in the Listing of Impairments, 20 C.F.R. pt. 404. subpt. P, App. 1 (1993), was inconsistent with the statutory standard of "comparable severity," 42 U.S.C. § 1382a(c)(3)(A) (1988), because it deprived children of the ability to show that they were nonetheless functionally disabled. *Zebley*, 493 U.S. at 535-41.

⁷² *New York v. Sullivan*, 906 F.2d 910 (2d Cir. 1990). For an interesting technologically oriented discussion of this case, see Bonnie E. Muir, Comment, *Technology Overtakes Entitlements: State of New York v. Sullivan*, 19 RUTGERS COMPUTER & TECH. L.J. 517 (1993). Other class actions adjudicated within the last two years have involved individual ALJ bias, *Grant v. Shalala*, 989 F.2d 1332 (3d Cir. 1993); *Kendrick v. Sullivan*, 784 F. Supp. 94 (S.D.N.Y. 1992); state agency practices, *Day v. Sullivan*, 794 F. Supp. 801 (S.D. Ohio 1991), *aff'd in part and rev'd in part*,

Although these numerous challenges to SSA policy and practice were important, two lawsuits, *Schisler* and *Stieberger*, represent the high water mark of class action litigation against fundamental SSA procedures. The Second Circuit's early articulation of the "treating physician rule," and its consistent opposition to the SSA's attempts to circumvent this rule in favor of its own interpretive stance, made a showdown between the Second Circuit and the SSA inevitable.⁷³ By 1993, after nearly a decade of SSA intransigence, the Second Circuit faced one of only two possible choices: continue to demand that the SSA follow Second Circuit procedures for determining disability, or allow the SSA to promulgate its own rules that would effectively return the agency's procedures to the status quo ante. That the Second Circuit ultimately chose the latter course poignantly demonstrates the powerful potential—and concomitant weakness—of the class action to redirect SSA disability procedures.⁷⁴

II. *STIEBERGER V. SULLIVAN*

A. *Procedural History*

Stieberger's amended complaint specifically challenged both the SSA's policies of nonacquiescence in Second Circuit disability decisions and the SSA's Bellmon Review program.⁷⁵

sub nom., *Day v. Shalala*, 23 F.3d 1052 (6th Cir. 1994); rules for the evaluation of AIDS claims, *Rosetti v. Sullivan*, 788 F. Supp. 1380 (E.D. Pa. 1992); chronic alcoholism and drug dependency, *Schoolcraft v. Sullivan*, 971 F.2d 81 (8th Cir. 1992); initial calculation of SSI benefits, *Farley v. Sullivan*, 983 F.2d 405 (2d Cir. 1993); and the policy of counting veterans' benefits paid to support a veteran's dependent as dependent's unearned income for the purpose of calculating his SSI benefits. *White v. Shalala*, 7 F.3d 296 (2d Cir. 1993).

⁷³ See *supra* notes 44-57 and accompanying text.

⁷⁴ See *infra* note 204 and accompanying text.

⁷⁵ *Stieberger I*, 615 F. Supp. at 1321. The Social Security Disability Amendments of 1980 (sponsored by Senator Henry Bellmon) originated "Bellmon Review," the bureaucratic practice of reviewing ALJ's disability decisions. Social Security Disability Amendments of 1980, 42 U.S.C. § 421 (1982). Congress was particularly concerned with the frequent reversals by ALJs of unfavorable determinations made by state agencies at the reconsideration level, ALJ's rate of allowance decisions, *Stieberger I*, 615 F. Supp. at 1376; *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132, 1134 (D.D.C. 1984), and the apparent disparities among ALJ decisions. In response to these concerns, the SSA promulgated SSR 82-13. Through this ruling, the SSA announced the implementation of an own-mo-

After additional claimants either intervened or joined through consolidation, plaintiffs' experiences fully represented how the SSA's disability application and termination policies worked in practice.⁷⁶ *Stieberger* sought injunctive relief, a writ of mandamus and class certification.⁷⁷

Stieberger's individual claim was based on unlawful termination of disability benefits. Her claim alleged that an ALJ's finding disregarded contradictory Second Circuit law. The ALJ had simply rejected the opinion of plaintiff's treating physician that the plaintiff was totally disabled.⁷⁸ Similarly, one intervenor's claim asserted that he had encountered almost

tion review by the Appeals Council for "a prescribed percentage" of decisions rendered by certain ALJs, "particularly those [who had] allow[ed] previously denied claims for disability benefits." SSR 82-13.

The Secretary's decision to establish own-motion review of ALJs with the highest allowance rates prompted a lawsuit in 1984 by the Association of Administrative Law Judges. See *Association of Admin. Law Judges*, 594 F. Supp. at 1132. The action challenged the program, alleging that it violated an ALJ's right to "decisional independence" under the Administrative Procedure Act, 5 U.S.C. §§ 551-560 (1988). See *Association of Admin. Law Judges*, 594 F. Supp. at 1133. Although the court ultimately denied injunctive relief, the litigation itself pressured the SSA to modify its policy that same year. *Id.* at 1141. Specifically, ALJs with high allowance rates were no longer individually targeted for review. *Stieberger I*, 615 F. Supp. at 1397.

The *Stieberger* court voiced its serious concern with the allowance-based portion of Bellmon Review, noting "[t]he danger of an unduly coercive or pressure-inducing review procedure" that "threatens the integrity and impartiality of the factfinding which is so crucial to the proper functioning of the disability determination process." *Id.* at 1395. The court also argued that "this case involves the implementation of a result-based review procedure in which individual ALJs were singled out for decisional review, a process which members of Congress, the judiciary and the ALJ corps itself have recognized as being quite likely to create prejudicial pressures to deny benefits to disability claimants." *Id.* at 1396.

Despite its concerns with Bellmon Review, however, the court ultimately refused to enjoin the SSA from continuing Bellmon Review since the SSA had in fact modified its policy to eliminate allowance-based review. *Id.* at 1397. Therefore, the court ruled, *Stieberger* class plaintiffs had failed to show that they were likely to succeed in demonstrating the invalidity of the policy then in practice. *Id.* Rather, the current practice represented "a reasonable reconciliation of the Secretary's desire to preserve some means for reviewing otherwise unreviewable ALJ allowance decisions and the claimants' desire to minimize the unfavorable impact of the Bellmon Review on ALJ decisionmaking." *Id.*

This portion of the decision was not appealed, and subsequent litigation focused solely on nonacquiescence. See generally *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).

⁷⁶ *Stieberger I*, 615 F. Supp. at 1326-27.

⁷⁷ *Id.* at 1315.

⁷⁸ *Id.* at 1323.

identical administrative experiences in the denial of his application for disability benefits; another intervenor, an eleven-year-old retarded boy, alleged that he had been granted SSI benefits by the Appeals Council, yet had never received payment.⁷⁹ The ALJs who had denied the applications of the two claimants added through consolidation either accorded impermissible weight to consulting examiners in impeaching the opinions of the claimants' treating physicians, or had simply ignored these opinions altogether.⁸⁰

After an extensive series of pretrial motions, the district court granted Stieberger's motion for class certification.⁸¹ The court also enjoined the implementation of the SSA's original nonacquiescence policy, finding that the disability claimant class was likely to succeed on the merits.⁸²

The SSA appealed and in 1986 the Second Circuit vacated the preliminary injunction on the grounds that the injunctive relief granted in another class action, *Schisler v. Heckler*,⁸³ removed the justification for such relief. *Schisler* had required the SSA to accord binding weight to the uncontradicted and clinically supported opinions of a claimant's treating physician.⁸⁴ Although the *Stieberger* court recognized that the class in *Schisler* was less extensive than that in *Stieberger*, nonetheless it held that *Schisler* had "substantially reduced the need" for further injunctive relief.⁸⁵ Moreover, the court found that vacating the *Stieberger* injunction and proceeding with the injunction in *Schisler* would "minimize intrusion into the administrative process and at the same time accord the Secretary the opportunity to demonstrate his good faith compliance with the law of this Circuit."⁸⁶ The court, however, kept open the possibility of injunctive relief, hinting that a preliminary injunction would be appropriate if the Secretary did not proceed "expeditiously" to instruct all adjudicators to apply the treating

⁷⁹ *Id.* at 1324.

⁸⁰ *Id.* at 1324.

⁸¹ *Stieberger I*, 615 F. Supp. at 1400; see *supra* note 5.

⁸² *Id.* at 1399.

⁸³ *Schisler I*, 787 F.2d 76 (2d Cir. 1986).

⁸⁴ *Id.* at 76.

⁸⁵ *Stieberger II*, 801 F.2d at 37.

⁸⁶ *Id.* at 38.

physician rule.⁸⁷

After extensive discovery revealed the contents of numerous agency documents relating to the newly created (and subsequently disbanded) Acquiescence Task Force,⁸⁸ Stieberger moved for summary judgment. In 1990, the district court granted her motion with respect to four areas of agency nonacquiescence, and denied her motion with respect to nine others.⁸⁹ Additionally, the court granted defendant's motion for summary judgment for those class members "represented by counsel at the last stage of the administrative process who knew or should have known of the facts giving rise to this action."⁹⁰ Finally, the court reinstated the injunction against the implementation of SSA's acquiescence policy, and ordered the parties to submit revised remedial orders.⁹¹

In 1992, 14 years after Theresa Stieberger's disability benefits were terminated, and eight years after she had filed her claim, the district court approved the *Stieberger* settlement agreement.⁹²

B. *The Settlement Agreement*

The *Stieberger* settlement crafted wide-ranging relief for approximately 300,000 Social Security claimants and will remain in effect until the year 2000.⁹³ Named members of the plaintiff class—including Theresa Stieberger—were awarded substantial retroactive benefits.⁹⁴ The settlement provided

⁸⁷ *Id.*

⁸⁸ The Acquiescence Task Force was formed in July 1985 to implement the SSA's nonacquiescence policy described in IC-185. See *Stieberger III*, 738 F. Supp. at 735; *supra* note 37.

⁸⁹ *Stieberger III*, 738 F. Supp. at 758-59; see *infra* notes 137-49 and accompanying text.

⁹⁰ *Stieberger III*, 738 F. Supp. at 758.

⁹¹ *Id.* at 759-60.

⁹² *Stieberger Settlement*, 792 F. Supp. at 1376.

⁹³ *Id.* at 1391 (¶ 20). Although the agreement expires eight years after the date of the settlement, obligations to take action or benefits awarded pursuant to reopenings of claims are unaffected by its expiration.

⁹⁴ *Id.* (¶ 21). Pursuant to the settlement, Stieberger was paid retroactive and current SSDI benefits from December 1981 (she had already been paid retroactive SSI benefits), and would also be allowed to present evidence regarding why her 1974 claim should be reopened. The two intervenors were also paid retroactive SSDI benefits.

Although these awards represented a substantial victory, they are nevertheless

that the SSA would identify class members who met enumerated criteria and would send each of them notice, after which they would have 180 days to request a reopening.⁹⁵ Detailed procedures were established to govern the SSA's initial determination of whether a requestor satisfied the criteria for reopening.⁹⁶

Pursuant to the settlement, after a claimant requests a reopening of her claim, the SSA considers the following: whether the claimant had been a New York State resident at the time of the administrative adjudication; whether the claim had been denied or terminated on disability grounds; and whether this decision had been rendered at any level of administrative review between October 1, 1981 and October 17, 1985, or at the OHA level after October 17, 1985, up until when the SSA issued instructions to its adjudicators to follow Second Circuit decisions.⁹⁷ Claimants whose denials or terminations fall outside these three threshold circumstances are not entitled to a reopening.⁹⁸ The settlement merely requires the SSA to make

troubling. The relief awarded to the three named members of the plaintiff class—actual payment of retroactive benefits—is far more generous than the relief crafted for the 300,000-member plaintiff class. The only relief they received was the possibility of the SSA reopening their applications, readjudicating their claims, and awarding benefits within a limited four-year period. *See infra* notes 96-102 and accompanying text.

⁹⁵ *Id.* at 1382 (¶¶ 7(b), 8). The settlement applied only to New York residents at the time of the prior determination whose claim had been terminated or denied on medical or vocational grounds. Other issues, such as the amount of insurance coverage (quarters) and substantial gainful activity, were specifically excluded. *Id.* at 1382 (¶ 7(b)(1), (3)). Claimants whose application for SSDI or SSI benefits were terminated or denied between October 1, 1981, and the date the SSA sent instructions to each adjudicator requiring them to apply decisions of the Second Circuit (pursuant to Attachment 1), met the criteria for class membership if the denial or termination had occurred either at any administrative level between October 1, 1981, and October 17, 1985, or at the ALJ or Appeals Council levels between October 18, 1985, and the effective date of Attachment 1. *Id.* at 1382 (¶ 8(a), (c)(i)-(ii)).

The SSA was further required to identify potential class members and send individual notice to each member within 120 days of identification. Recipients had 180 days to respond. The SSA then would send an acknowledgment to each requester within 30 days. *Id.* at 1382-84 (¶ 9).

⁹⁶ *Id.* at 1383 (¶ 9(h)). The SSA was required to send a notice to each requester who was denied a reopening, and judicial review to challenge the SSA's decision was available.

⁹⁷ *Stieberger Settlement*, 792 F. Supp. at 1382 (¶¶ 7, 8).

⁹⁸ *Id.* In addition, the SSA will not reopen claims that were appealed and overturned, and those already fully reevaluated under another class action. *Id.* at 1385

these initial determinations "within a reasonable time."⁹⁹

A claimant whose request for reopening falls within these threshold standards is contacted by her local SSA office, instructed to complete an application, and informed of her right to submit medical evidence.¹⁰⁰ If the claimant has no additional pending claim, the reopened claim is adjudicated at the reconsideration level, rather than at the initial application level.¹⁰¹ Pending claims are consolidated with reopened claims and adjudicated at the level of the pending claim or at reconsideration level, whichever is higher.¹⁰² The record is developed for a maximum four-year period prior to the reopening request, as well as subsequent to the request.¹⁰³ A class member whose earlier claim was pending in a district court or in the Second Circuit can elect either to receive a reopening pursuant to the settlement or to proceed with a separate court case. If the class member chooses a reopening from the SSA, the agency will agree to remand the claim for reopening.¹⁰⁴

The settlement also requires that the SSA instruct all adjudicators to comply with holdings in Second Circuit disability decisions, rescind all previous nonacquiescence policies and rulings, and issue detailed instructions concerning individual holdings.¹⁰⁵ Each adjudicator is provided with a *Manual of Second Circuit Disability Decisions*, which contains an abstract of individual disability holdings issued before the settlement date. Each office receives copies of subsequent Second Circuit decisions.¹⁰⁶ If either party petitioned for a rehearing or cer-

(¶ 10(a), (c)(2)).

⁹⁹ *Id.* at 1383 (¶ 10(h)).

¹⁰⁰ *Id.* at 1386 (¶ 10(e)(1)).

¹⁰¹ For a discussion of these administrative levels, see *supra* note 4.

¹⁰² *Stieberger Settlement*, 792 F. Supp. at 1386 (¶ 10(e)(2)).

¹⁰³ *Id.* at 1386 (¶ 10(e)(4)).

¹⁰⁴ *Id.* at 1386 (¶ 10(b), (e)(3)).

¹⁰⁵ *Id.* at 1378-79 (¶¶ 2, 3), 1381 (¶ 6); see also Attachment 1, "Application of Second Circuit Decisions to Social Security Act Disability Benefit Claims of New York Residents." The Settlement requires the SSA to rescind, as applicable to New York State residents seeking disability benefits, all policies, procedures and SSRs: that state a general policy of nonacquiescence, or hold that the Secretary is bound only by decisions of the United States Supreme Court; that the SSA's statutory interpretation or implementation supersede those of the Second Circuit; that Second Circuit holdings are binding only when adopted in a SSR or acquiescence ruling; or that Second Circuit holdings have no stare decisis effect. See *supra* notes 28-43 and accompanying text. The ramifications of this clause are discussed *infra* at notes 231-42 and accompanying text.

¹⁰⁶ *Stieberger Settlement*, 792 F. Supp. at 1379 (¶¶ 4(b), 5(a)). The *Manual* is

tiorari of the Second Circuit decision (thus drawing a disability decision into question), however, the SSA need not acquiesce and can instead instruct its adjudicators not to apply the holding.¹⁰⁷ If a disability decision has changed since the SSA originally adjudicated a claim, it must follow the law in effect at the time the claim is reopened.¹⁰⁸

The settlement also resolves all claims by class members who challenged the "Bellmon Review" program.¹⁰⁹ It explicitly does not resolve any claims challenging the regulations ultimately found valid by *Schisler III*.¹¹⁰

Finally, the settlement requires the SSA to furnish plaintiffs' counsel with detailed information concerning the SSA's implementation of the settlement, including a statistical implementation report every 120 days and a sample of reopened cases.¹¹¹ In addition, plaintiffs' counsel must receive prior notice of all SSA instructions concerning reopening procedures and is given 30 days to object or comment. If plaintiffs' counsel does object, the SSA is prohibited from issuing the instructions.¹¹²

the *Manual* upon the occurrence of certain conditions. *Stieberger Settlement*, 792 F. Supp. at 1379 (¶ 4(f)). These conditions have occurred. See *supra* note 19.

¹⁰⁷ *Stieberger Settlement*, 792 F. Supp. at 1380 (¶ 5(e)(1)). This rule, however, is subject to detailed procedures and rescission within 10 days if the Second Circuit decision is no longer subject to review. *Id.* at 1388-81 (¶ 5(e)(2), (3), (4)).

¹⁰⁸ The *Stieberger* settlement provides:

In adjudicating reopened claims, SSA shall require its decisionmakers and reviewers of decisions to apply the holdings in Second Circuit disability decisions in accordance with the provisions set forth in this settlement agreement, including the instruction set forth as Attachment 1. SSA shall require the decisionmakers and reviewers to apply the law in effect on the date on which the new determination on the reopened claim is rendered.

Stieberger Settlement, 792 F. Supp. at 1384 (¶ 10) (emphasis added). For a discussion of this problem, see *infra* notes 215-21 and accompanying text.

¹⁰⁹ *Id.* at 1389 (¶ 14). For a discussion of Bellmon Review, see *supra* note 75.

¹¹⁰ See 56 Fed. Reg. 36,932 (1991); *Schisler III*, 3 F.3d at 567-69; *Stieberger Settlement*, 792 F. Supp. at 1389 (¶ 14). For a discussion of this case, see *infra* notes 185-204 and accompanying text.

¹¹¹ *Stieberger Settlement*, 792 F. Supp. at 1388 (¶ 11(a), (b)). Allowing plaintiffs' counsel access to a sample of reopened cases is designed "solely for the purpose of monitoring compliance with the settlement." *Id.* (¶ 10(b)).

¹¹² *Id.* (¶ 10(d)(i)-(iii)).

III. ANALYSIS

A. *Substantive Limitations of the Stieberger Settlement*

The settlement agreement approved by the court in 1992 crafted exceptionally wide relief.¹¹³ First, it resolved the claims of the entire plaintiff class, requiring the SSA to identify potential class members and notify them of their rights under the settlement.¹¹⁴ Second, the policy changes required of the SSA are applicable to all claimants, not only to those identified as class members.¹¹⁵ Certain provisions of the settlement represent substantial concessions by the SSA. These provisions provide for the publication and mandatory availability of the *Manual of Second Circuit Disability Decisions*,¹¹⁶ and of a volume containing all disability decisions of the Second Circuit rendered after the settlement,¹¹⁷ as well as detailed rescission instructions.¹¹⁸

The opportunity of class and non-class members¹¹⁹ to obtain relief under the settlement, however, is limited in two crucial ways. First, because it relied on the *Stieberger* court's overly restrictive definition of SSA nonacquiescence, the settlement may not end all of the SSA's nonacquiescence policies in several important Second Circuit precedents.¹²⁰ Second, the settlement did not effectively stop the SSA's nonacquiescence in the "treating physician rule" because the Second Circuit was excessively deferential to the SSA's claimed authority to promulgate conflicting regulations. In the end, the SSA was able to regulate this rule out of existence.¹²¹

¹¹³ *Stieberger Settlement*, 792 F. Supp. at 1377.

¹¹⁴ *Id.* at 1378; see *supra* note 95 and accompanying text.

¹¹⁵ See *supra* note 105 and accompanying text.

¹¹⁶ *Stieberger Settlement*, 792 F. Supp. at 1379 (¶ 4(c)); The *Manual* is discussed *infra* at notes 231-39 and accompanying text.

¹¹⁷ *Id.* at 1379 (¶ 5(a)).

¹¹⁸ *Id.* at 1381 (¶ 6); see *supra* note 105.

¹¹⁹ The provision of the *Stieberger* settlement requiring the SSA to apply Second Circuit disability decisions applies to all decisions rendered to claimants residing in New York State, whether or not a claimant is a member of the *Stieberger* class. See *Stieberger Settlement*, 792 F. Supp. at 1378 (¶ 2).

¹²⁰ See *infra* notes 122-52 and accompanying text.

¹²¹ See *infra* notes 153-204 and accompanying text.

1. The Restrictive Definition of SSA Nonacquiescence

The centerpiece of the *Stieberger* settlement is the provision that mandates that the SSA rescind all nonacquiescence instructions¹²² and that its decisionmakers be bound only by Supreme Court decisions.¹²³ Additionally, the settlement requires the SSA to rescind its earlier instructions that state that decisionmakers should ignore circuit court holdings that contradicted the Secretary's statutory interpretation of the Social Security Act unless an acquiescence ruling had adopted these decisions.¹²⁴ The now-rescinded instructions had formed the basis of the SSA's policy of formal nonacquiescence.¹²⁵ Further, the settlement states that all SSA decisionmakers must "comply with holdings in Second Circuit disability decisions in adjudicating or reviewing claims for disability benefits."¹²⁶

The settlement, however, fails to define "nonacquiescence." Instead, it relies on the restrictive definition of the *Stieberger* court, which limited SSA nonacquiescence to a "system-wide pattern of mistaken adjudication."¹²⁷ In the event of future litigation concerning agency nonacquiescence under the *Stieberger* settlement, this definition will limit the relief available to the plaintiff class to only the four specific areas of nonacquiescence already found by the court.¹²⁸

In reaching its restrictive definition of "nonacquiescence," the *Stieberger* court first distinguished formal and "silent" nonacquiescence and addressed whether the SSA had deliber-

¹²² The settlement excepts regulations from this prohibition.

¹²³ *Stieberger Settlement*, 792 F. Supp. at 1381 (¶ 6).

¹²⁴ *Id.* For a discussion of the SSA's acquiescence rulings, a formal acquiescence in a holding of a circuit court of appeals, see *supra* note 32 and accompanying text.

¹²⁵ See *supra* notes 33-34 and accompanying text.

¹²⁶ *Stieberger Settlement*, 792 F. Supp. at 1378 (¶ 2).

¹²⁷ *Stieberger III*, 738 F. Supp. at 728.

¹²⁸ *Id.* at 758-59; see *supra* notes 46-53 and accompanying text. The court found that the SSA had nonacquiesced in the Second Circuit's treating physician rule and in the following Second Circuit holdings: a claimant may cross-examine the authors of post-hearing reports; the ALJ may accord only limited weight to his personal observations of the claimant's physical and mental condition; and the testimony of a claimant with a good work history is deemed to be substantially credible. *Stieberger III*, 738 F. Supp. at 758-59.

ately refused to implement the Second Circuit rulings.¹²⁹ The court subjected the SSA's silent nonacquiescence policy to a two-prong test, one that required both "substantial differences" between the SSA policy and the decision of the Second Circuit, and "substantial impact" of silent nonacquiescence upon the SSA's adjudicatory process.¹³⁰ The substantial impact prong in turn required evidence of "a system-wide pattern of mistaken adjudication," defined as a "series" of earlier court cases which reversed the SSA's final determination for failure to apply a particular Second Circuit holding.¹³¹

The *Stieberger* court, however, left ambiguous exactly what constituted such a series of earlier cases. It asserted that "[a] small number of cases over a significant period of time where courts reversed for failure to apply a court of appeals holding . . . could not be called non-acquiescence."¹³² The court held, however, that "if a rather large number of courts have found that SSA adjudicators failed to apply a particular holding, the difference between agency policy and the particular holding can be said to have influenced agency adjudication."¹³³ The court attempted to justify this distinction by arguing that it provided an opportunity for SSA officials to determine the existence of differences between agency policy and a Second Circuit decision.¹³⁴ Only if (1) "a number of courts" had reversed cases because SSA adjudicators failed to apply a holding, or if (2) "some group within SSA" had informed agency officials of these differences and the SSA failed to reconcile its policy with the court's holding, could the agency's omission be considered deliberate.¹³⁵ The SSA's conduct would only then constitute nonacquiescence.¹³⁶

The court next applied the two-prong test to the claims of the *Stieberger* plaintiff class. The plaintiffs argued that the SSA had nonacquiesced in thirteen specific holdings of the Second Circuit. However, despite substantial evidence to the

¹²⁹ *Stieberger III*, 738 F. Supp. at 728.

¹³⁰ *Id.* (citing *Floyd v. Sullivan*, 833 F.2d 529 (5th Cir. 1987)).

¹³¹ *Id.*

¹³² *Id.* at 729.

¹³³ *Id.*

¹³⁴ *Stieberger III*, 738 F. Supp. at 729.

¹³⁵ *Id.*

¹³⁶ *Id.*

contrary, the court found that the SSA had nonacquiesced in only four holdings.¹³⁷ For example, the court found that the SSA required that its decisionmakers discuss and analyze both objective medical evidence and the claimant's subjective complaints when making credibility findings in cases alleging disabling pain.¹³⁸ In contrast, the holdings of the Second Circuit mandated such credibility analysis in *all* cases.¹³⁹ The *Stieberger I* court, however, refused to decide whether "substantial differences" between SSA policy and the Second Circuit existed because "only a couple of courts" had determined that the SSA had not applied the Second Circuit holding.¹⁴⁰ Instead, the court simply concluded that "the absence of a significant number of cases where [the] SSA failed to apply this holding coupled with the absence of any acknowledgment by [the] SSA of [its] failure to apply the holding leads us to conclude that plaintiffs have not established non-acquiescence to their detriment in this area of the law."¹⁴¹

The court also compared the differences between SSA policy and Second Circuit case law concerning the SSA's duties to accord weight to disability determinations of other agencies¹⁴² and to assist pro se claimants.¹⁴³ In both instances

¹³⁷ *Id.* at 758-59; see *supra* note 128.

¹³⁸ SSR 88-13 states that "[i]n evaluating a claimant's subjective complaints of pain, the adjudicator must give full consideration to all of the available evidence, medical and other, that reflects on the impairment and any attendant limitation of function." See also 20 C.F.R. § 404.1529(c)(3)(i)-(vii) (1993) (delineating seven factors the decisionmaker must consider).

¹³⁹ The *Stieberger* court conceded that "[w]hile arguably not inconsistent with the Second Circuit holdings, the SSA's policy does differ in certain respects from the Second Circuit holdings with respect to credibility findings." *Stieberger III*, 738 F. Supp. at 743; see also *Williams v. Bowen*, 859 F.2d 255, 260-61 (2d Cir. 1988) (instructing that "[a] finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"); *Ferraris v. Heckler*, 728 F.2d 582, 587 (2d Cir. 1984) (stating that "the crucial factors in any determination must be set forth with sufficient specificity to enable [the court] to decide whether the determination is supported by substantial evidence.").

¹⁴⁰ *Stieberger III*, 738 F. Supp. at 743-44. The *Stieberger III* court noted that there were five such decisions. *Baran v. Bowen*, 710 F. Supp. 53 (S.D.N.Y. 1989); *Holland v. Bowen* No. 88-2301, 1988 WL 25112 (S.D.N.Y. Mar. 7, 1988); *Weber v. Bowen*, No. 87-4617, 1988 WL 138160 (S.D.N.Y. Dec. 13, 1988); *Brandon v. Bowen*, 666 F. Supp. 604 (S.D.N.Y. 1987); *James v. Bowen*, No. 85-6379, 1987 WL 15123 (S.D.N.Y. July 28, 1987).

¹⁴¹ *Stieberger III*, 738 F. Supp. at 744.

¹⁴² Second Circuit decisions and the SSA's regulations are substantially differ-

the court found that the SSA had failed to apply Second Circuit holdings.¹⁴⁴ However, since it found only a "handful of cases" that reversed the SSA's decisions on the basis of its failure to follow these holdings, the court determined that neither practice satisfied the substantial impact prong of the test.¹⁴⁵ Thus, the court concluded that the SSA had

ent. *Compare* *Havas v. Bowen*, 804 F.2d 783, 786 n.1 (2d Cir. 1986) ("While the determination of another governmental agency that a social security benefits claimant is disabled is not binding on the Secretary, it is entitled to some weight and should be considered.") (quoting *Cuther v. Weinberger*, 516 F.2d 1282, 1286 (2d Cir. 1975)); *Hankerson v. Harris*, 636 F.2d 893, 896 (2d Cir. 1980) (holding that although not binding on the SSA, the determination of another agency that a claimant is disabled is entitled to some weight and should be considered); *Parker v. Harris*, 626 F.2d 225, 233 (2d Cir. 1980) (same) *with* 20 C.F.R. §§ 404.1504, 416.904 (1993) (mandating that "[a] decision by any other governmental agency about whether you are disabled or blind is based upon its rule and is not our decision about whether you are disabled or blind"); and 20 C.F.R. §§ 404.1513(e), 416.913(e) (1993) (advising that "information from other sources . . . may help us to understand how your impairment affects your ability to work" but failing to require that determinations by other agencies be accorded some weight); *see also* *Stieberger III*, 738 F. Supp. at 744.

¹⁴³ Second Circuit decisions holding that ALJ's have a heightened duty to assist pro se claimants conflict with the SSA's regulations. *Compare* *Echevarria v. Secretary of HHS*, 685 F.2d 751, 755-56 (2d Cir. 1982) (holding that when a claimant is pro se the ALJ is under a heightened duty "to scrupulously and conscientiously probe into . . . relevant facts," and must inform him of his proposed action and provide an opportunity for the claimant to obtain a more detailed statement from his treating physician) *and* *Gold v. Secretary of HEW*, 463 F.2d 38, 43 (2d Cir. 1972) (holding that when a claimant is pro se the ALJ must undertake a "searching investigation" of the record) *with* 20 C.F.R. §§ 404.944, 416.1444 (1993) (requiring the ALJ to look fully into the issues but failing to establish a heightened duty or require the ALJ to inform a pro se claimant of his proposed action and to provide him with an opportunity to obtain a more detailed statement from his treating physician); *see also* *Stieberger III*, 738 F. Supp. at 746.

¹⁴⁴ *Stieberger III*, 738 F. Supp. at 745-46.

¹⁴⁵ *See* *Wallace v. Bowen*, 678 F. Supp. 431 (S.D.N.Y. 1987) (finding that the SSA failed to apply the Second Circuit's requirement to accord some weight to the disability determinations of other agencies); *Fusco v. Bowen*, No. CV-85-371, 1987 WL 18771 (E.D.N.Y. Oct. 6, 1987) (same); *Visser v. Heckler*, No. 83-3479, 1986 WL 2205 (S.D.N.Y. Feb. 10, 1986) (same); *Dunbar v. Califano*, 454 F. Supp. 1261 (W.D.N.Y. 1978) (same); *see also* *Sobocinski v. Bowen*, 678 F. Supp. 55 (S.D.N.Y. 1987) (holding that the SSA failed to follow the Second Circuit's rule requiring the agency to inform a pro se claimant of his proposed action and give him an opportunity to submit a detailed statement from his treating physician); *Wallace v. Bowen*, 678 F. Supp. 431 (S.D.N.Y. 1987) (same); *Ramirez v. Secretary of HHS*, No. 85-7778, 1986 WL 11191 (S.D.N.Y. Sept. 26, 1986) (same); *Hernandez v. Heckler*, 585 F. Supp. 338 (S.D.N.Y. 1984) (same); *Rodriguez v. Schweiker*, 520 F. Supp. 666 (S.D.N.Y. 1981) (same). Four other allegations of agency nonacquiescence were denied on other grounds. *Stieberger III*, 738 F. Supp. at 759.

"acquiesced."

The fundamental flaw in the *Stieberger I* court's analysis of nonacquiescence is its adherence to the substantial impact prong of the test. This test is highly ambiguous because: (1) the court never defined how "substantial" the impact on the adjudicatory process must be in order for the SSA's policy to be classified as nonacquiescence; and (2) the court did not apply the test in a uniform manner. In one instance, the court held that five cases that reversed the SSA's decision on the grounds that the SSA's policy conflicted with applicable Second Circuit decisions were insufficient to constitute nonacquiescence,¹⁴⁶ while in another instance, the court held that nine cases—just four more—were enough to establish a pattern.¹⁴⁷ In yet another instance, the *Stieberger I* court held that the SSA had nonacquiesced in a Second Circuit's rule on the basis of only two district court cases.¹⁴⁸ The discrepant application of the substantial impact prong of the *Stieberger I* court's nonacquiescence test within the decision itself reveals the test's ambiguity.

As a result of the court's adherence to the substantial impact test, claimants now must meet a threshold showing that the SSA's refusal to follow a Second Circuit holding already has been litigated in favor of other claimants. That is, litigants can prove that the SSA is nonacquiescing only if they demonstrate that a "substantial" number of district court cases reversing the SSA are based on the SSA's failure to apply an applicable Second Circuit holding.¹⁴⁹ For example, whether a

¹⁴⁶ See *supra* note 157.

¹⁴⁷ *Stieberger III*, 738 F. Supp. at 742 (nonacquiescence when the SSA failed to follow the Second Circuit's holding that the testimony of a claimant with a good work history is deemed to be substantially credible).

¹⁴⁸ *Id.* at 740 (SSA failed to acquiesce in a Second Circuit ruling that gave a claimant a right to cross-examine the authors of post-hearing reports); see *Tripodi v. Heckler*, 100 F.R.D. 736 (E.D.N.Y. 1984) (holding that a claimant had a right to cross-examine the authors of post-hearing reports); *Lora v. Bowen*, No. 85-7063, 1987 WL 16151 (S.D.N.Y. Aug. 14, 1987) (same). This is not to argue that the *Stieberger* court was wrong to hold that the SSA nonacquiesced in the Second Circuit rule, only that to so hold on the basis of only two cases appears to be arbitrary.

¹⁴⁹ The specificity requirement inferred from the *Stieberger* decision may be illustrated as follows: suppose an ALJ denied disability benefits based on her conceded failure to adhere to a Second Circuit holding and arguably on an unrelated factual finding. If it can be argued that the ALJ's decision was based on her find-

pro se class member¹⁵⁰ successfully challenges the SSA's policy concerning its duty to assist her in presenting her claim for reopening will depend upon an initial showing that many other claimants had litigated that same issue and won.¹⁵¹ This restrictive interpretation of nonacquiescence is likely to apply to all future challenges to SSA policies within the Second Circuit—not simply to *Stieberger* class members.¹⁵²

2. Excessive Deference to Agency Rulemaking

While the *Stieberger* settlement severely limited plaintiffs' prospective relief, the situation was exasperated by the Second Circuit's retreat from defending its own case law in *Schisler III*. Instead of upholding its own case law, the Second Circuit deferred to the SSA's rulemaking procedure. *Stieberger* was litigated to enjoin the SSA from refusing to apply Second Circuit disability holdings in administrative adjudications.¹⁵³ The most significant of these disability decisions was *Schisler II*, which articulated the treating physician rule.¹⁵⁴ The

ing of fact—despite her failure to follow the Second Circuit—the decision may not come up to the required specificity to be defined as an example of nonacquiescence.

¹⁵⁰ A *Stieberger* class member seeking a reopening of her claim may be pro se. All class members are, however, assisted in their claims by the *Stieberger* Implementation Project run by The Legal Aid Society's Civil Appeals and Law Reform Unit. See Laforest Letter, *supra* note 7.

¹⁵¹ The summary disposition of many Social Security appeals in district courts makes even more difficult the requirement that plaintiff show that a disputed issue was previously litigated. For example, many such cases are not reported and may be available only to those with access to an on-line legal service such as Westlaw or Lexis. It is precisely those pro se claimants, those subjected to a heightened duty by the SSA, who are the most disadvantaged by this requirement. Ironically, of course, when a particular case presents issues previously litigated the it is more likely not to be reported. In addition, even when a decision is reported or accessible, the court's disposition of the specific issue being challenged must represent its holding. The SSA is not, of course, required to acquiesce to dicta. The nature of most Social Security cases, however, hinge on several different issues. Even when the court recognizes that the SSA has failed to follow a precedent in one issue but finds sufficient justification on a second issue to hold for a plaintiff, a subsequent plaintiff attempting to use the SSA's nonacquiescence in the first issue may find her efforts thwarted.

¹⁵² The decision in *Stieberger I* is not, of course, binding authority in the Second Circuit. Since it remains the only decision to define nonacquiescence by the SSA, however, it will continue to have persuasive authority.

¹⁵³ See *supra* notes 78-80 and accompanying text.

¹⁵⁴ 851 F.2d at 46-47. For a discussion of the treating physician rule, see *supra*

Stieberger court held that the SSA had nonacquiesced in the treating physician rule, but had not in the nonexamining physician rule.¹⁵⁵ The nonexamining physician rule is a corollary of the treating physician rule. It prohibits the opinion of a physician (usually a disability examiner employed by the SSA to review medical evidence submitted by claimants and collected by claims representatives) who has never examined the claimant, to overrule the contrary opinion of a treating physician.¹⁵⁶

Under the *Stieberger* settlement, the SSA agreed to acquiesce in the treating physician rule.¹⁵⁷ One year before the settlement, however, the SSA issued, through informal rulemaking procedures, a set of standards that differed substantially from the Second Circuit's treating physician rule.¹⁵⁸ This rule was challenged by two class actions—including the ongoing *Schisler* class action.¹⁵⁹ The Second Circuit, in *Schisler III*, accorded great deference to the SSA and upheld the validity of the new rules.¹⁶⁰ As a result, the treating physician rule no longer exists and, therefore, the *Stieberger* settlement no longer mandates that the SSA accord binding effect to the opinions of treating physicians.

The *Stieberger* and *Schisler* litigation intersected at numerous points between 1985 to 1993. In 1983, the district court in *Schisler v. Heckler*,¹⁶¹ certified a subclass consisting of class members who were disabled by mental impairments and had experienced hardship as a result of the SSA's review of their disability benefits eligibility.¹⁶² The court granted in-

notes 44-51 and accompanying text.

¹⁵⁵ *Stieberger III*, 738 F. Supp. at 737-38.

¹⁵⁶ *Hidalgo v. Bowen*, 822 F.2d 294, 297 (2d Cir. 1987) (the opinion of a nonexamining source cannot constitute the substantial evidence necessary to override the opinion of a treating source); *Havas v. Bowen*, 804 F.2d 783, 786 (2d Cir. 1986) (same).

¹⁵⁷ See *supra* notes 105-08 and accompanying text.

¹⁵⁸ See Standards, *supra* note 19.

¹⁵⁹ *Aldrich v. Sullivan*, 800 F. Supp. 1197 (D. Vt. 1992); *Schisler v. Sullivan*, No. 80-CV-572E, 1992 WL 170736 (W.D.N.Y. July 8, 1992).

¹⁶⁰ 3 F.3d at 569.

¹⁶¹ 574 F. Supp. 1538 (W.D.N.Y. 1983).

¹⁶² *Id.* at 1543. This subclass consisted of those class members:

who have been or will be found eligible for Title II disability insurance benefits or SSI disability benefits due to a mental disability, in whole or in part, and with respect to whom review of continuing disability has

relief to members of the subclass, and ordered the SSA to conduct a home visit or face-to-face interview before terminating their disability benefits.¹⁶³ On a motion for summary judgment, the court remanded all class members' cases to the SSA. The court's ruling was made pursuant to the Social Security Disability Reform Act of 1984 ("Reform Act"), which had codified a new standard for the SSA's review of claimants' continued eligibility for benefits.¹⁶⁴

The SSA appealed, and the plaintiffs cross-appealed the

continuing disability investigation ("CDI") program. See Social Security Disability Amendments of 1980, 42 U.S.C. § 421(i) (1982). The CDI program terminated the disability benefits of hundreds of thousands of beneficiaries, including those who were disabled by mental impairments and were unable to participate effectively in the CDI process. See *Schisler* at 1543; *Schisler I*, 787 F.2d at 78 (noting that "the greatly increased number of CDIs led to a dramatic increase in the number of terminations. More than 470,000 people had their disability benefits terminated in the three years after March, 1981 . . . resulting in a flurry of class-actions, including the present one, challenging the termination process.") (citation omitted). Theresa Stieberger's disability benefits for her mental impairments were terminated as a result of the SSA's application in 1978 of what would become the CDI program's "current-disability" standard, when she missed an appointment with an SSA consulting physician. *Stieberger I*, 615 F. Supp. at 1323; see *supra* notes 2-3 and accompanying text. The CDI's "current disability" standard was repealed by the Social Security Disability Benefits Reform Act of 1984, 42 U.S.C. § 423(f) (1988) [hereinafter Reform Act], which required the SSA to return to the "medical improvement" standard that it had adhered to before June, 1976. Concomitantly, the Reform Act essentially superseded *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976), which held that an evidentiary pretermination hearing was not required in Social Security disability benefits cases, because administrative procedures in place adequately safeguard the due process rights of recipients of disability benefits.

¹⁶³ *Schisler v. Heckler*, 574 F. Supp. 1538, 1550 (W.D.N.Y. 1983). The district court distinguished *Mathews* by arguing that the existence of a mental impairment caused the risk of erroneous deprivation of benefits to outweigh the additional administrative burden of a home or face-to-face interview. *Schisler*, 574 F. Supp. at 1550.

¹⁶⁴ *Schisler v. Heckler*, 107 F.R.D. 609, 614 (W.D.N.Y. 1984); Reform Act § 2(a). This section of the Reform Act amended the Social Security Act, § 223(f), to require substantial evidence of medical improvement in the beneficiary's impairment rendering the beneficiary able to engage in substantial gainful activity to terminate his SSDI or SSI benefits. This provision ended the SSA's secretive policy, based on unpublished written instructions to adjudicators, to terminate disability benefits without notice when evidence indicated that a claimant was currently able to engage in substantial gainful activity. *Schisler*, 107 F.R.D. at 613-14.

Sections 2(d)(3)(A) and 2(d)(3)(B) of the Reform Act required that courts remand cases to the SSA, where the SSA determined that a beneficiary was not entitled to continuing benefits on the ground that the impairment ceased, and where the beneficiary was a member of a class action relating to medical improvement, certified before September 19, 1984. These section referred, of course, to the ongoing *Schisler* class action.

The SSA appealed, and the plaintiffs cross-appealed the denial of injunctive relief, which would have mandated that the SSA apply the "treating physician rule."¹⁶⁵ In 1986, the Second Circuit, in *Schisler I*,¹⁶⁶ held that the remand "should be followed expeditiously by an order that [the] SSA state in relevant publications . . . that adjudicators at all levels, state and federal, are to apply the treating physician rule of this circuit."¹⁶⁷ Judge Winter, writing for the panel, noted that although the SSA's nonacquiescence in the treating physician rule was never formally announced,¹⁶⁸ a sufficient number of reversals in district courts and in the Second Circuit existed "to justify plaintiff's concern that [the] SSA does not march to that particular drummer."¹⁶⁹ Nonetheless, and quite remarkably, the court concluded that, based on statements by the SSA's counsel during oral argument, the SSA had "in fact adopted the treating physician rule and has not deliberately misstated its position to us."¹⁷⁰

where the beneficiary was a member of a class action relating to medical improvement, certified before September 19, 1984. These section referred, of course, to the ongoing *Schisler* class action.

¹⁶⁵ *Schisler*, 787 F.2d at 79.

¹⁶⁶ *Id.* at 76.

¹⁶⁷ *Id.* at 84.

¹⁶⁸ That is, the SSA's nonacquiescence in the treating physician rule was not published as a Nonacquiescence Ruling. The SSA, however, already had begun practicing "silent nonacquiescence." See *supra* note 34 and accompanying text.

¹⁶⁹ *Schisler I*, 787 F.2d at 83-84.

¹⁷⁰ *Id.* The court noted:

At oral argument, much time was spent on the question of what [the] SSA's policy is with regard to the treating physician issue and what instructions [the] SSA gives its adjudicators as to that policy. After some colloquy, counsel for SSA [Frank A. Rosenfeld, Appellate Staff attorney in the Civil Division of the Department of Justice] specifically informed the court as to "the policy position of the Secretary [of the SSA] and stated, 'It is clear . . . that it is the same as the second circuit rule.'"

Id. at 83.

The court offered three reasons for concluding that "[w]e take the statements made to us by counsel for SSA at face value." *Id.* at 84. First, "[a]s an officer of the court, he was under an obligation of candor, and the preexisting controversy over the treating physician rule and the relief requested in the case surely cautioned against casual misstatements." *Id.* Second, in *Stieberger I*, "entirely different SSA lawyers informed the district court that 'the Secretary's standards for evaluating the opinion of a claimant's treating physician are consistent with Second Circuit opinions on this issue.'" *Id.* at 84. Third, "SSA is under a special obligation to be clear about its acquiescence or nonacquiescence in decisions of the various Courts of Appeals in light of the concerns of the Congress" that the SSA be dis-

The Second Circuit's order in *Schisler I* was the focus of prolonged litigation over the SSA's implementation of the treating physician rule. On remand to the district court, the SSA produced a draft SSR that merely included the treating physician rule among several factors for its adjudicators to consider.¹⁷¹ The district court concluded that the proposed

couraged from requiring disappointed claimants to re-litigate the same issue in court. *Id.*; See H. Conf. Rep. No. 797, 98th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3096.

Judge Winter erroneously concluded that the statements by the SSA's counsel at oral argument correctly represented the SSA's policy. He might have assumed that written instructions of the SSA in fact reflected its policies, and that the lack of written instructions meant that the SSA was following the Second Circuit's decisions. The SSA, however, was practicing silent nonacquiescence in the court's decisions where its position disagreed with the Second Circuit. It remains unclear whether the SSA informed its counsel of this policy, either before oral argument in *Schisler I* and *Stieberger*, or after the court in *Schisler I* accepted their representations to the contrary. As the district court in *Stieberger* subsequently stated:

[The] SSA's erroneous claims to the *Schisler* Court that its proposed instruction codified the treating physician rule further confirms that SSA's policy prior to compliance with the *Stieberger* injunction was not in accord with the law of the Second Circuit, though counsel for SSA seems inexplicably to have believed otherwise. The Court has no choice but to conclude that SSA's counsel in *Schisler*, when he indicated to the Court of Appeals that SSA policy was 'the same as' the treating physician rule, was simply wrong.

Stieberger III, 738 F. Supp. at 736. In *Schisler III*, Judge Winter refers to this representation by the SSA's counsel, but does not acknowledge either that it misrepresented the SSA's true policy or that he was wrong in giving it credibility. *Schisler III*, 3 F.3d at 565; see *infra* notes 185-204 and accompanying text.

It appears that this was not the last time the SSA represented that there was no contradiction between its regulation and the treating physician rule. Up until December, 1991, at oral argument on the SSA's submission of its SSR, counsel for the SSA continued to claim that the agency did not refuse to acquiesce in the treating physician rule. Plaintiff Memorandum in Opposition to Defendant's Submission of Ruling for Approval at 3, *Schisler v. Sullivan*, No. CV-80-572E, 1992 WL 170736 (W.D.N.Y. July 8, 1992).

¹⁷¹ See *Schisler II*, 851 F.2d at 44 (discussing the proposed SSR). As the court noted:

The proposed draft's section on "Evaluating the Evidence and Resolving Conflicts" did not begin until page nine and the statement of the treating physician rule did not appear until page ten. Many aspects of the draft SSR contained what the Secretary describes as "elaborations" on that rule. These so-called elaborations included a formulation that made the rule merely one of many factors, including the consistency of the physician's opinion with other medical reports, to be considered by the adjudicator, and a requirement that the treating physician's opinion be supported by clinical or laboratory diagnostic evidence.

Id. at 44.

SSR "fails to reflect, in significant respects, the treating physician rule," that "[t]here lurks in its lengthy and discursive text bases for *not* applying the treating physician rule," and therefore, edited the SSR in accordance with *Schisler I*.¹⁷²

On appeal, the SSA argued that the district court had exceeded its authority in editing the proposed SSR, and asked the Second Circuit "to accord the draft SSR the traditional deference shown to administrative rulings and to restore it in its elaborate detail."¹⁷³ In *Schisler II*, the Second Circuit rejected this argument, and adopted the district court's revisions of the proposed SSR.¹⁷⁴ Judge Winter stated:

[T]he deference traditionally shown to administrative rulings is not appropriate in view of the limited goal of the remand. . . . So far as the content of the SSR is concerned, the Secretary has some leeway with regard to particular language but not with regard to substance. Having taken the position that he has adopted the treating physician rule of this circuit, the Secretary is thereby bound to offer a formulation of that rule based on our caselaw.¹⁷⁵

The edited version of the SSR approved by the Second Circuit faithfully reflected the substance of the treating physician rule.¹⁷⁶ However, as one district court judge cogently remarked, the SSA "never approved of the Treating Physician Rule."¹⁷⁷ Even before the court in *Schisler II* approved it, the SSA had published proposed rules in a Notice of Proposed Rulemaking that were substantially at odds with the treating physician rule.¹⁷⁸ In 1991, the SSA issued final rules¹⁷⁹ and

¹⁷² *Id.* at 44-45 (citing to the unreported district court opinion).

¹⁷³ *Schisler II*, 851 F.2d at 45.

¹⁷⁴ *Id.* The Second Circuit adopted the edited SSR but made two changes, giving emphasis to the "nature of the physician's relationship with the plaintiff, rather than its duration," and deleting the prohibition against overriding a treating physician's opinion with the opinion of a nonexamining physician. *Id.* at 46. The latter change was reinstated upon plaintiff's petition for rehearing. Plaintiffs successfully argued that the court misinterpreted its own precedents by relying on *Havas v. Bowen*, 804 F.2d 783 (2d Cir. 1986) (stating the nonexamining physician rule in dicta), and ignoring *Hidalgo v. Bowen*, 822 F.2d 294 (2d Cir. 1987) (stating the nonexamining physician rule as a holding). *Schisler II*, 851 F.2d at 47.

¹⁷⁵ *Schisler II*, 851 F.2d at 45.

¹⁷⁶ *Id.* at 46-47 (reproducing the approved SSR at Appendix A).

¹⁷⁷ *Schisler v. Sullivan*, No. 80-CV-572E, 1992 WL 170736, at *1 (W.D.N.Y. July 8, 1992).

¹⁷⁸ 52 Fed. Reg. 13,014 (1987). The differences between the SSA's rules and the treating physician rule are discussed *infra* at notes 199-201 and accompanying text.

¹⁷⁹ Standards, *supra* note 19. The portion of the final rule pertaining to opin-

filed a "Notice" with the *Schisler* district court that the approved SSR was rendered obsolete by the final rule and would be formally rescinded.¹⁸⁰

Following the *Schisler II* ruling, the *Schisler* plaintiffs moved to prohibit the SSA from rescinding the approved SSR on the grounds that such rescission would contradict the treating physician rule.¹⁸¹ The district court agreed and ordered the SSA to submit a new SSR which would provide its adjudicators with "clear guidance as to the Second Circuit's treating physician rule."¹⁸² The SSA's new SSR merely stated that all adjudicators should apply the final rule and consider the treating physician rule superseded.¹⁸³ The district court ordered the approval of the SSA's notice of rescission but limited its effect to the SSA's adjudicators, holding that the treating physician rule continued to apply in the courts of the Second Circuit.¹⁸⁴

Both parties appealed, and the Second Circuit, in *Schisler III*,¹⁸⁵ finally upheld the SSA's regulatory scheme in its entirety, effectively reversing *Schisler II*. Judge Winter, again writing for the panel, argued that although the new regulations differed from the treating physician rule, they were neither arbitrary nor capricious, and were therefore valid. Since they were valid, they were also binding on the courts.¹⁸⁶ The judge reasoned that since the SSA no longer asserted that it

ions of treating physicians is codified at 20 C.F.R. § 404.1527 (1993) (SSDI) and 20 C.F.R. § 416.927 (1993) (SSI).

¹⁸⁰ *Schisler v. Sullivan*, No. CV-80-572E, 1991 WL 224407, at *1 (W.D.N.Y. Oct. 25, 1991).

¹⁸¹ *Id.* The court denied plaintiff's motion to hold the SSA in contempt of the court's order, dated October 26, 1988, prohibiting the SSA from rendering the approved SSR obsolete by implementing its differing standards. *Id.* at *1.

¹⁸² *Id.*

¹⁸³ *Schisler v. Sullivan*, No. 80-CV-572E, 1992 WL 170736, at *3 (W.D.N.Y. July 8, 1992) (discussing the new SSR).

¹⁸⁴ *Id.* at *6. The court held that the treating physician rule shall "be given an overriding and paramount status and effect in the courts of the Second Circuit as appropriate and until and unless the United States Court of Appeals for the Second Circuit otherwise declares." *Id.*

The district court in *Schisler* differentiated administrative adjudication, pursuant to 42 U.S.C. § 405(a) (1988), and judicial review under 42 U.S.C. § 405(g) (1988). In an identical challenge to the SSA's final rule, the district court in *Aldrich v. Sullivan*, 800 F. Supp. 1197 (D. Vt. 1992) followed this approach.

¹⁸⁵ 3 F.3d at 569.

¹⁸⁶ *Id.* at 568.

was adopting the treating physician rule (because it had attempted to rescind the approved SSR), it could validly promulgate contrary regulations without further judicial interference.¹⁸⁷

To support its deferential view, the court erroneously construed plaintiffs' challenge to the validity of the SSA's regulations. The court mistakenly interpreted the plaintiff's protest of the SSA's elimination of the treating physician rule as a general challenge to the SSA's authority to promulgate regulations.¹⁸⁸ The court then cited *Heckler v. Campbell*¹⁸⁹ and *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*¹⁹⁰ for the proposition that agency regulations that are reasonable and not "arbitrary, capricious, or manifestly contrary to the statute" should be accorded deference.¹⁹¹

Although these cases have superficial appeal, the particular facts of the prolonged *Schisler* litigation distinguish *Schisler* from either *Campbell* or *Chevron*. The Court in *Campbell* held that based on rulemaking alone the SSA could determine whether in general a sufficient number of jobs existed in the national economy for which a claimant was qualified. The court thereby relieved the SSA of its obligation of presenting the testimony of a vocational expert at an individualized hearing.¹⁹² In resolving this question, the Court noted that this issue is not unique to each claimant, and allowed the SSA to "rely on its rulemaking authority to determine issues that do not require case-by-case consideration."¹⁹³ In contrast, the application of the treating physician rule always involves individualized, case-by-case analysis of the medical facts underpinning each plaintiff's disability claim.

The Second Circuit also held that since the regulation at issue was neither arbitrary nor capricious, it was barred from

¹⁸⁷ See *supra* note 179 and accompanying text.

¹⁸⁸ *Schisler III*, 3 F.3d at 563 (stating that "[t]he Secretary has the statutory authority to promulgate regulations concerning the weighing of evidence, including the weight to be given to opinions of treating physicians").

¹⁸⁹ 461 U.S. 458, 466 (1983) (stating that the Secretary's authority to promulgate regulations under the Social Security Act is "exceptionally broad").

¹⁹⁰ 467 U.S. 837 (1984) (stating that when a statute is ambiguous, a reviewing court's analysis is limited to whether an agency's interpretation is reasonable).

¹⁹¹ *Id.* at 844.

¹⁹² *Campbell*, 461 U.S. 467-68.

¹⁹³ *Id.* at 467.

challenging or even modifying it based on the Supreme Court's instructions in *Chevron*.¹⁹⁴ The Court in *Chevron* articulated a "two-step" analysis for judicial review of an agency's statutory interpretation. Step one involved ascertaining whether Congress "has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁹⁵ Only when the statute is "silent or ambiguous with respect to the specific issue" may the court review the agency's regulations under step two, and then its scope of review is limited to whether the agency's interpretation of the statute was reasonable.¹⁹⁶

Chevron, however, was predicated on the gap-filling role Congress had intended for an agency when it did not specifically legislate on an issue.¹⁹⁷ Given the particular statutory context at issue in *Chevron*,¹⁹⁸ the Court held that Congressional intent was ambiguous and that the agency's regulatory construction of the statute was reasonable.¹⁹⁹ In contrast, Congress was neither silent nor ambiguous with respect to medical

¹⁹⁴ *Chevron*, 467 U.S. at 842-44.

¹⁹⁵ *Id.*, 467 U.S. at 842-43.

¹⁹⁶ *Id.* at 843.

¹⁹⁷ *Id.* The Court quoted with approval the famous gap-filling passage from *Morton v. Ruiz*, 415 U.S. 199 (1974): "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gaps left, implicitly or explicitly, by Congress." *Ruiz*, 415 U.S. at 231. The Court in *Chevron* concluded

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843-44; see also Abner S. Greene, *Adjudicative Retroactivity in Administrative Law*, 1991 SUP. CT. REV. 261, 276 ("In short, at [*Chevron*] stage 1, a court determines the meaning of the law to the extent possible given the standard sources of law, and forbids the agency from acting outside the scope of such meaning. But at stage 2 law has stopped . . . and discretion takes over.").

¹⁹⁸ *Chevron* involved the EPA's regulatory definition of the term "stationary source" as used in the Clean Air Act. The EPA defined the term to include all pollution-emitting devices of a single plant ("a bubble") rather than considering each device separately. 467 U.S. at 840.

¹⁹⁹ *Id.*

evidence obtained from a treating physician. The Reform Act required that the SSA "make every reasonable effort to obtain from the individual's treating physician (or other treating health provider) all medical evidence, including diagnostic tests, necessary in order to properly make such [disability] determination, *prior* to evaluating medical evidence obtained from any other source on a consultative basis."²⁰⁰ Step one of the *Chevron* analysis for judicial review of administrative interpretation, therefore, was satisfied because Congress had unambiguously indicated its intent. The *Schisler III* court should have stopped its analysis at step one but, instead, it erroneously proceeded to apply the deferential scope of review under step two of the *Chevron* analysis. To apply *Chevron* properly, the *Schisler III* court should have noted the temporal orientation of the Social Security Act (requiring treating physician evidence to be evaluated prior to that obtained from a consulting physician) and contrasted it with the SSA's regulation that merely required all medical evidence to be evaluated and specifying the weight to be accorded such evidence.²⁰¹

²⁰⁰ Reform Act § 9 (emphasis added) (amending the Social Security Act § 221(d)(5), 42 U.S.C. § 423(d)(5)(B) (1988)).

²⁰¹ Under these regulations, the SSA applies six factors to determine what weight to give opinions from treating sources, consulting physicians (consultants whose examination of a claimant is paid for by the SSA), and nonexamining sources (generally disability personnel employed by the SSA who draw medical conclusions based solely on the record). These factors are: (1) the length of the treatment relationship; (2) the nature and extent of the treatment relationship; (3) supportability; (4) consistency; (5) specialization; and (6) other factors. 20 C.F.R. §§ 404.1527(d), 416.927(d) (1993).

These regulations differ significantly from the Second Circuit's treating physician rule. A treating physician's opinion that is both supported by medical evidence and uncontradicted by other evidence is no longer binding on the SSA. Instead, under the regulations the SSA considers all of the opinion evidence at the same time, assigning weight by applying the six factors. The detailed explanation accompanying the final rules are helpful in discerning these differences. As the SSA has stated:

Under the Act, a claimant is required to prove to us that he or she is disabled by providing medical and other evidence of disability. We consider medical opinions, including treating source opinions, to be evidence that must be evaluated *together* with all of the other evidence in a person's case record. Sometimes, medical opinions may be entitled to so much weight that they control the issues they address; other times opinions may be entitled to less weight.

56 Fed. Reg. 36,932 (1991) (emphasis added). Section nine of the Social Security Disability Benefits Reform Act may be read as requiring the SSA to determine whether enough evidence exists from a claimant's treating physician to even war-

Had the court in *Schisler III* done so, it then could have decided—pursuant to *Chevron*—whether the SSA's regulation was "reasonable" given this statutory context.

The *Schisler III* court also failed to consider the degree to which the SSA's regulation effectively reversed Second Circuit precedents beyond the treating physician rule. For example, by determining the weight to be accorded all opinion evidence, the regulation rendered obsolete the court's holdings regarding the weight given to opinions by non-treating physicians.²⁰²

rant commissioning an examination by a consulting examiner. For a discussion of the Act, see *supra* note 162 and accompanying text. The SSA's explanation of its regulation, however, provides no indication that treating source opinion evidence will be evaluated to make this initial determination. Rather, this evidence will be evaluated together with other opinion evidence.

The SSA stated that "we must give controlling weight to any treating source medical opinion on the issues of the nature and severity of the impairment when the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the record." 56 Fed. Reg. 36,932. First, the explanation itself reveals that the SSA will give controlling weight to the opinion of a treating physician only when it is already consistent with other evidence, that is, upon the receipt of a treating physician's opinion, the SSA must also evaluate whether other evidence is warranted. The SSA will in fact purchase a consulting examiner's report at some point in its disability determination, whatever the conclusions of a claimant's treating physician. Second, the explanation specifically permits the SSA to impeach a treating physician's opinion by comparing it to the opinions rendered by consulting examiners and reports issued by SSA disability personnel ("other substantial evidence in the record"). Third, what represents "medically acceptable clinical and laboratory diagnostic techniques" is left not to the judgment of medical professionals, but to the SSA itself. For example, the SSA explained that "medical opinions are particularly difficult to assess since they always reflect judgments or beliefs of the person offering the opinion that we may not be able to verify or that we may find questionable based on our understanding of all the evidence." *Id.* (emphasis added). This procedure permits a nonexamining physician employed by the SSA or a consulting physician whose examination of the claimant is solicited by the SSA to question the validity of a laboratory technique or clinical finding reported by a treating physician, and to place such questions in the administrative record created at the hearing. This might well represent a sufficiently contradictory record to justify according less weight to the opinions of a treating physician. For a discussion of how this problem was treated in the Second Circuit before *Schisler III*, see *infra* note 202.

²⁰² Since 1987, the Second Circuit has held that the opinion of a nonexamining physician cannot by itself overrule the opinion of a treating physician. *Hidalgo v. Bowen*, 822 F.2d 294 (2d Cir. 1987); *Havas v. Bowen*, 804 F.2d 783 (2d Cir. 1986) (stating the nonexamining physician rule in dicta). The *Stieberger* court dismissed the allegation by class plaintiffs that the SSA nonacquiesced in the nonexamining physician rule on the ground that before the Second Circuit's decision in *Hidalgo* the SSA's policy differed from the Second Circuit's holding for only four months. *Stieberger III*, 738 F. Supp. at 737. In contrast, the degree to which the opinion of

Finally, the *Schisler III* court failed to account for the unique context of the treating physician rule. Specifically, the court ignored the fact that the SSA's nonacquiescence had prolonged both the *Schisler* and *Stieberger* class actions. The court did properly distinguish an agency rule from a regulation as a matter of administrative law (the latter deserving of more deference), and correctly acknowledged differences between the SSR approved in *Schisler II* and the regulation at issue in *Schisler III*. It failed, however, to comprehend the true magnitude of these differences and the resulting affect on the *Stieberger* settlement.²⁰³

a consulting physician (one who generally examines a claimant once) could overrule the opinion of a treating physician remained an open question in the Second Circuit.

The regulations at issue in *Schisler III* may be read to reverse *Hidalgo*. On the one hand, in evaluating the length of the treatment relationship the regulation does provide:

Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it if it were from a nontreating source.

20 C.F.R. § 404.1527(d)(2)(i) (1993). Moreover, the regulation recognizes that treating source opinions "may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations." 20 C.F.R. § 404.1527(d)(2) (1993). The SSA accords special deference to such opinions. On the other hand, the SSA's detailed explanation in its Notice of Final Rulemaking specifically discusses how the SSA may use an opinion rendered by a nonexamining physician to overrule the opinion by a treating physician:

[T]he weight to which the opinion of a nontreating source will be entitled depends on such factors as the consistency of the opinion with other evidence, the qualifications of the source, and the degree to which the source offers supporting explanations for the opinion. Even though we may ultimately find the opinion of a nontreating medical source entitled to greater weight than that of a treating source, the opinions of nontreating sources are not entitled to the special deference that we give to treating source opinions.

56 Fed. Reg. 36,936-37 (1991), see also *Odorozzi v. Sullivan*, 841 F. Supp. 72, 74-75 (E.D.N.Y. 1993) (focusing on the role of a nonexamining medical advisor and noting that he found "a great discrepancy in the medical evidence").

Under the regulations, whether the opinion of a nonexamining or consulting physician may override the opinion of a treating physician is a question of fact. See *Hawkins v. Shalala*, No. CV-92-5587, slip op. at 9 (E.D.N.Y. Sept. 1, 1993) (a post-*Schisler III* decision holding that a report of a consulting physician and testimony of a nonexamining physician cannot separately or together constitute substantial evidence to override the opinion of a treating physician).

²⁰³ Compare, for example, the regulations upheld in *Schisler III* and the pro-

As a result of the Second Circuit's decision in *Schisler III*, the SSA formally rescinded the *Schisler II*-approved SSR in favor of its regulation.²⁰⁴ The *Stieberger* settlement, which had primarily prohibited SSA nonacquiescence in the treating physician rule, now involved a much more limited set of substantive requirements.

B. Problems of Implementation in the *Stieberger* Settlement

Apart from substantive limitations, four major problems impede implementation of the *Stieberger* settlement and may adversely affect claimants. First, despite their complexity, the procedures to reopen claims do not guarantee that any claim will be reopened—even those claims that were denied by an obvious application of the SSA's nonacquiescence policy. Second, the settlement's provision of de novo review allows the SSA to redetermine the factual and legal underpinnings of a reopened claim. As part of the de novo review process, the settlement allows the regulation overriding the treating physician rule to have retroactive effect. The result is ironic: claimants who were denied benefits because the SSA had nonacquiesced in the treating physician rule and who, as *Stieberger* class members, are entitled to have their claims

posed SSR invalidated in *Schisler II*. See *supra* note 170. In essence, the regulations return SSA's disability determination procedures to where they were before the *Schisler* and *Stieberger* class actions were brought. While the *Stieberger* settlement proscribes nonacquiescence, *Schisler III* eliminated the very rule by which the SSA's nonacquiescence was challenged.

In fact, with only minor modifications, the regulations upheld in *Schisler III* are identical to the SSA's regulations effective in 1968:

The function of deciding whether or not an individual is under a disability is the responsibility of the Secretary. . . . The weight to be given such [treating] physician's statement [that a claimant is disabled] depends on the extent to which it is supported by specific and complete clinical findings and is consistent with other evidence as to the severity and probable duration of the individual's impairment.

20 C.F.R. § 404.1526 (1968). The inclusion of the supportability and consistency clauses in the *Schisler III* regulations return the SSA's disability determination procedures to a point even before the Second Circuit first articulated the treating physician rule. See *Gold v. Secretary of HEW*, 463 F.2d 38 (2d Cir. 1972); *Bastien v. Califano*, 572 F.2d 908, 912 (2d Cir. 1978) (holding that the "expert opinions of a treating physician as to the existence of a disability are binding on the factfinder, unless contradicted by substantial evidence to the contrary").

²⁰⁴ 58 Fed. Reg. 60,042 (1993).

reopened because the *Stieberger* court found this very practice unlawful,²⁰⁵ must now allow their claims to be adjudicated by the application of a regulation that overrides the treating physician rule.²⁰⁶ Third, the combined effects of de novo review and retroactivity are especially restrictive in cases brought in district court and remanded to the SSA to receive a reopening. Finally, the settlement's provision for a *Manual of Second Circuit Disability Decisions* falls far short of the goal of ensuring that ALJs and Appeals Council judges will faithfully follow Second Circuit precedents.

1. The Procedures to Reopen Claims

The *Stieberger* settlement establishes complex procedures for identifying potential class members, sending individual notices and acknowledgments, requiring the SSA to apply holdings of the Second Circuit in adjudicating reopened claims, and for providing statistical reports to class counsel about its progress in reopening claims.²⁰⁷ It does not require, however, that the SSA actually reopen any claims or impose a deadline on the adjudication of claims that are reopened.

Since the settlement imposes no deadline on the SSA either to determine if a class member meets the threshold standards for reopening, or to adjudicate a properly reopened claim, it is likely that the SSA's decisionmaking process for reopened claims will be prolonged. In fact, evidence drawn from statistical reports and provided to class counsel shows that the SSA has received approximately 135,000 requests for reopening since notices were mailed in March, 1993. Of these requests, not one has resulted in the reopening of a claim.²⁰⁸

In addition, the settlement does not require the SSA to reopen any claims. The settlement only requires that the SSA follow detailed procedural rules for those claims it does decide

²⁰⁵ See *supra* note 47 and accompanying text.

²⁰⁶ For a discussion of the regulation, see *supra* notes 153-204 and accompanying text.

²⁰⁷ For a discussion of these provisions of the *Stieberger* settlement, see *supra* notes 93-112 and accompanying text.

²⁰⁸ Telephone interview with Jill Boskey, Staff Attorney, MFY Legal Services (Nov. 8, 1994).

to reopen.²⁰⁹ Even if the SSA reopens a previously denied or terminated claim, the settlement does not require the SSA to show that the decision was not simply the result of its nonacquiescence policy. Such an approach, had it been adopted, would have placed the initial burden of proof on the SSA to show that the previous denial had not been based on nonacquiescence before the SSA may declare that the denial was not erroneous as a matter of law. The SSA could have met its initial burden by pointing to factual findings, or the lack of sufficient findings, that made its decision attributable to other than simple legal error.²¹⁰ In cases where the SSA could not meet their initial burden, the Settlement then could have required the SSA to begin or resume disability payments. The advantage of this approach is that the SSA—in distinguishing which of its denials might arguably be supported on factual or statutory grounds—would identify precisely those cases best suited for reopening and de novo review. Instead, under the existing settlement the claimant bears the burden of proof concerning whether the SSA's decision was tainted by nonacquiescence. In addition, the claimant bears the burden of proving that the medical evidence supporting her reopened claim for disability benefits is sufficient, even if it may have sufficed initially if not for the SSA's refusal to apply a Second Circuit holding.

2. De Novo Review of Previously Submitted Medical Evidence

Rather than initially determining whether a reopened claim had been decided in accordance with Second Circuit holdings,²¹¹ the settlement allows the SSA to review the entire claim de novo.²¹² Under de novo review, the SSA's adjudi-

²⁰⁹ See *supra* notes 93-112 and accompanying text.

²¹⁰ Having met its initial burden of proof, the SSA would not be entitled to shift the burden of proof to the claimant. Rather, the SSA would still be required to meet a subsequent burden of proof by showing that its decision was based on substantial evidence, pursuant to 42 U.S.C. § 405(g) (1988).

²¹¹ For a discussion of the failure of the *Stieberger* settlement to require that the SSA make a threshold showing that its initial decision was based on something other than simple nonacquiescence, see *supra* note 210 and accompanying text.

²¹² *Stieberger Settlement*, 792 F. Supp. at 1385 (¶ 10(a)).

cators are free to redetermine both the factual and legal underpinnings of a reopened claim. For example, a reopened claim that was originally denied or terminated because the Secretary failed to acquiesce in one or more Second Circuit holdings may be dismissed on factual grounds alone. The adjudicator may never be required to reach the legal issue of nonacquiescence challenged by *Stieberger*.

De novo review may substantially disadvantage claimants in two distinct ways. First, the SSA is required to develop the record, but the claimant bears the burden of producing medical evidence substantiating the disability.²¹³ In essence, the claimant must meet his or her burden of production twice: once in the initial claim, and again upon the SSA's reopening of the claim. As a result, claimants required to reproduce such evidence dating from as far back as the early 1980s may find it extremely difficult or even impossible to meet their burden. For instance, even if hospital records exist, a treating physician's notes and records may be lost or unavailable. In other cases, a claimant may be unable to obtain a treating physician's narrative report because the doctor retired or died. As a result, many reopened claims will be decided based upon evidence that the claimant happened to keep or was able to develop, or that remained in the file. This evidence in turn may well be limited precisely because the SSA nonacquiesced in the Second Circuits requirement to fully develop the administrative record for pro se claimants and to solicit and evaluate opinions of treating physicians.²¹⁴

Second, the settlement's requirement that SSA decision-makers follow the law in effect on the date of its determination of the reopened claim,²¹⁵ rather than the law in effect when it originally adjudicated the claim,²¹⁶ may reduce the amount of benefits paid for reopened claims. The law would thus be ap-

²¹³ A claimant bears the burden of proving eligibility for disability benefits under the Social Security Act by demonstrating that he is unable to engage in any substantial gainful activity by reason of a physical or mental impairment which has lasted or can be expected to last for a continuous period of at least twelve months, and that the impairment is supported by medically acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. § 423(d)(1)(A), (d)(3) (1988).

²¹⁴ See *supra* note 59 and accompanying text.

²¹⁵ *Stieberger Settlement*, 792 F. Supp. at 1384 (¶ 10).

²¹⁶ See *supra* note 125 and accompanying text.

plied retroactively. While this doctrine has long been established by the Supreme Court,²¹⁷ the Court has not extended the presumption of retroactivity to administrative rulemaking.²¹⁸

²¹⁷ *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (a court must apply the law in effect at the time it renders the decision). At the time the Court decided *Schooner Peggy*, it did not contemplate a division between the common law, a statute and an administrative regulation. Moreover, the essential problem at issue in *Stieberger* is that a regulation was validated by a circuit court, thus conflating the different rules applicable to administrative regulations and case law.

Until 1991, the Supreme Court declined to give retroactive effect automatically to a decision overruling a precedent when adjudicating conduct occurring before the precedent was overruled in a subsequent case. Rather, the Court applied a three-part inquiry to determine whether to give the law-changing decision retroactive or prospective effect. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (weighing litigants' reliance interests and the inequity of retroactive application against the advantages of retroactivity). In *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990), the Court applied the *Chevron Oil* test:

When the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law. . . . In order to protect such reliance interests, the Court first identifies and defines the operative conduct or events that would be affected by the new decision. . . . If the operative conduct or events occurred before the law-changing decision, a court should apply the law prevailing at the time of the conduct.

Id. at 2338. In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the Court declined to follow these "well-established principles of civil retroactivity." *American Trucking Ass'n*, 110 S. Ct. at 2339. In limiting the reach of *Chevron Oil*, the Court applied a formalist model of *stare decisis*:

Nor, finally, are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.

Beam Distilling Co., 501 U.S. at 543. Thus, new rules announced in a judicial decision generally are applied retroactively. *Id.* at 538. The Court, however, left open the possibility that members of a class action might have an additional opportunity to press their reliance interest in arguing against retroactivity: "Of course, the generalized enquiry permits litigants to assert, and the courts to consider, the equitable and reliance interests of parties absent but similarly situated." *Id.* at 543.

²¹⁸ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (stating that a statutory grant of legislative power to promulgate regulations "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms"). See generally GREENE, *supra* note 197, at 276.

Although at least one district court interpreted the Second Circuit's decision in *Butts v. City of New York Dep't of Housing*, 990 F.2d 1397 (2d Cir. 1993), as mandating the retroactive application of the regulations validated in *Schisler III*,

Understood within the context of the *Stieberger* settlement and its provisions requiring the SSA to acquiesce in the treating physician rule and other Second Circuit disability decisions, retroactivity effectively rewards the SSA for nonacquiescing.²¹⁹ The SSA is not required to apply subsequently overridden Second Circuit holdings in reopened claims—decisions that it should have properly acquiesced to at the time of its initial decision. Further, the *Stieberger* settlement allows the SSA to apply whatever new regulations it has promulgated to a reopened claim when it renders a decision on the reopened claim. The SSA may apply regulations such as those promulgated in 1991 and upheld in *Schisler III* in 1993,²²⁰ even if those regulations override a Second Circuit decision. When the SSA is allowed to apply a regulation promulgated after the claim was initially decided to a reopened claim, it is engaging in retroactive rulemaking.²²¹ Since *Stieberger* was brought to enjoin agency nonacquiescence in the treating physician rule, allowing the SSA to give retroactive effect to new regulations represents a substantial concession.

Butts, in fact, dealt with the complex case of statutory retroactivity. *Id.* at 1404-11; *Odorizzi v. Sullivan*, 841 F. Supp. 72, 76 (E.D.N.Y. 1993). Since the Supreme Court in *Georgetown Univ. Hosp.*, 488 U.S. at 208, denied retroactivity to administrative rulemaking, the only way that the regulations at issue in *Schisler* could be applied retroactively is under the theory that the Second Circuit, in finally validating the regulations, established a new rule that as case law, could then be applied retroactively. See *Beam Distilling Co.*, 501 U.S. at 538 (rules established in a judicial decision are to be applied retroactively).

²¹⁹ The ultimate rewards of nonacquiescence may be seen by analyzing nonacquiescence as a temporal analogue of forum shopping. Here, the SSA, dissatisfied with Second Circuit disability precedents, refuses to follow them until they are changed.

A particularly poignant example occurred in *Odorizzi*. Here, the court was faced with applying the regulations validated in *Schisler III* even though the older treating physician rule and not the regulations were in effect when the claimant had his hearing. 841 F. Supp. at 76. Sensitive to the ramifications of this problem, the court admitted that it was "in the awkward position of applying the new regulations retroactively to this appeal." *Id.*

²²⁰ See *supra* notes 185-204 and accompanying text.

²²¹ See *supra* notes 215-19.

3. The Effect of a District Court Remand on a *Stieberger* Reopening

Under the *Stieberger* settlement, a class member entitled to a reopening who has a civil action pending in district court or the Second Circuit may elect to remand his or her case to the SSA to receive a reopening.²²² The disadvantage to claimants whose reopened claims are determined by a de novo standard of review and adjudicated by the retroactive application of a regulation, is especially clear in the context of a remand from a district or appellate court to the SSA.

The disability claim of a litigant who agrees to a remand is reopened at the second, or reconsideration, level of administrative review.²²³ A claimant who is denied at the reconsideration level must proceed once again through the remaining two administrative levels—the ALJ hearing and Appeals Council review—before again seeking judicial review.

In district court a litigant must show that proof of his or her disability is based on substantial evidence and, concomitantly, that the SSA's denial was not based on substantial evidence.²²⁴ On remand to the SSA, under the de novo standard of review, a claimant's application is susceptible to denial on both factual and legal grounds.²²⁵ Most significantly, the

²²² *Stieberger Settlement*, 792 F. Supp. at 1385 (¶ 10(b)). For a discussion of the remand procedure, see *supra* note 104 and accompanying text. A class member with a pending civil action who does not stipulate to a remand waives all relief under the settlement. *Id.* at 1385 (¶ 10(b)(2)).

²²³ *Stieberger Settlement*, 792 F. Supp. at 1385-87 (¶ 10(b)(1), (e)(3)). The four levels of administrative review are (1) the initial application, (2) a request for reconsideration, (3) an ALJ hearing, and (4) an Appeals Council review. For a discussion of the SSA's administrative review process, see *supra* note 4.

In addition, there is a current disagreement between the SSA and class counsel over whether a remand to the Secretary dismisses the district court case, pursuant to 42 U.S.C. § 405(g) (1988) (sentence 4), or whether the district court retains jurisdiction pursuant to 42 U.S.C. § 405(g) (1988) (sentence 6). See Laforest Letter, *supra* note 7; Udell Letter, *supra* note 7. This remand procedure assumes, of course, that the remanded claim is actually reopened by the Secretary, an assumption susceptible to challenge. For a discussion of this problem, see *supra* notes 207-10 and accompanying text.

²²⁴ 42 U.S.C. § 405(g) (1988). District courts, exercising judicial review of final decisions by the SSA denying disability benefits, apply the substantial evidence standard of review and do not review the decisions de novo. See *Richardson v. Perales*, 402 U.S. 389 (1971) (the substantial evidence standard of review in Social Security cases is appropriate).

²²⁵ There are occasions, however, where de novo review by a SSA adjudicator

settlement limits retroactive benefits to a maximum of four years. Therefore, there is a strong disincentive to agree to a remand.²²⁶

For example, if in 1994 a litigant in district court alleges that her disability began in 1988 and continues, but that her claim was denied at the ALJ hearing (or Appeals Council) level of administrative review in 1991, she qualifies as a *Stieberger* class member.²²⁷ If she declines the remand to the SSA for a reopening and wins in district court, her case may be remanded to the SSA for the calculation of benefits, including six years of retroactive benefits. If she chooses a *Stieberger* remand, however, her district court case would be dismissed²²⁸ and her claim reopened at the reconsideration level of administrative review.²²⁹ Even if she wins at this level, her total retroactive benefits would be limited to four years, causing her to lose two years of benefits. If she loses at the reconsideration level, but wins at the subsequent hearing or Appeals Council levels, she is not entitled to any additional retroactive benefits despite the SSA's delay. In sum, the clock runs against her in any scenario under which she agrees to take a *Stieberger* remand.²³⁰

may be preferable to the substantial evidence standard applicable under judicial review. A district court will not, with few exceptions, allow the introduction of evidence not first made available to SSA adjudicators. 42 U.S.C. § 404 (1988). For example, a claimant, whose initial denial was based on an undeveloped record and who now possesses new medical evidence, may prefer a remand under the *Stieberger* settlement to ensure that this evidence is considered.

²²⁶ *Stieberger Settlement*, 792 F. Supp. 1387 (¶ 10(e)(4)). For a discussion of this four-year period, see *supra* notes 103-04 and accompanying text.

²²⁷ *Stieberger Settlement*, 792 F. Supp. at 1387 (¶ 8(c)(ii)). This hypothetical assumes that the claimant applied for disability benefits in 1989.

²²⁸ See *supra* note 223.

²²⁹ *Stieberger Settlement*, 792 F. Supp. at 1385-87 (¶ 10(b)(1), (e)(3)). The example further assumes that the claimant meets each of the threshold requirements for a reopening, discussed *supra* at notes 103-06 and accompanying text, and that her claim is in fact reopened by the SSA without delay.

²³⁰ In comparison, retroactive benefits during administrative review not pursuant to the *Stieberger* settlement and judicial review continue to accrue. The clock runs against the SSA if the claimant ultimately wins (and proves that she was disabled from the initial period she alleged). The only exception under the *Stieberger* settlement is the provision concerning the payment of full retroactive benefits to several named plaintiffs, including Ms. Stieberger. *Stieberger Settlement*, 792 F. Supp. at 1391-92 (¶ 21).

4. The Effect of SSRs and the *Manual* on ALJ Application of Second Circuit Holdings

The *Stieberger* settlement creates a *Manual of Second Circuit Disability Decisions* and requires that it be distributed to all SSA adjudicators.²³¹ The *Manual* contains abstracts of selected Second Circuit disability decisions issued before the date of the Settlement.²³² At its option, the SSA may, issue instructions concerning additional Second Circuit disability decisions that were issued before the settlement.²³³ Further, the SSA must maintain a volume of Second Circuit disability decisions released after the date of the Settlement, and must ensure that copies are available to each adjudicator.²³⁴ The SSA also must update the *Manual* by instructing its adjudicators to follow the new holdings.²³⁵

These provisions represent one response to the SSA's perceived lack of educational support of its adjudicators. In particular, these provisions aim to compensate for the SSA's refusal to instruct its adjudicators to cite to Second Circuit case law.²³⁶ The SSA exacerbated the problems created by its policy of nonacquiescence by deliberately withholding Second Cir-

²³¹ *Stieberger Settlement*, 792 F. Supp. at 1379 (¶ 4(b)). Paragraph 4(b) provides that:

SSA shall provide a Manual of Second Circuit Disability Decisions ("Manual") to all decisionmakers and reviewers of decisions. The Manual shall contain statements of the principal holdings of Second Circuit disability decisions issued before the date of settlement. The Manual need not describe each Second Circuit disability decision issued before the date of settlement but must state principal holdings that address whether an individual or individuals is or are disabled . . . or the procedures and standards for making such determinations.

Id. The *Manual* is a 37-page typewritten document excerpting disability holdings of the Second Circuit issued since June 18, 1992. *Manual*, *supra* note 13, at ii. It contains abstracts concerning 19 separate disability issues, and is subdivided into specific issues. In addition, it contains cross-references to SSRs, regulations, internal memoranda and computerized instructions.

²³² *Stieberger Settlement*, 792 F. Supp. at 1379 (¶ 4(b)); *Manual*, *supra* note 13, at ii.

²³³ *Stieberger Settlement*, 792 F. Supp. at 1379 (¶ 4(d)).

²³⁴ *Id.* at 1379 (¶ 5(a)).

²³⁵ *Id.* at 1379 (¶ 5(b)).

²³⁶ For example, the Second Circuit, in *Schisler II*, recognized that "the volume of litigation implicating the [treating physician] rule made it clear" that SSA adjudicators "had no clue that the treating physician rule was the Secretary's established policy." *Schisler II*, 851 F.2d at 44.

cuit decisions from its adjudicators.²³⁷ This created a legacy of nonacquiescence resulting in the failure to educate SSA adjudicators in Second Circuit case law and a lack of communication to remedy the perceived problems.

The *Stieberger* settlement and the *Manual* attempts to irradicate these problems. An important result of the settlement is that for the first time the SSA is required to provide specific instructions to its adjudicators, and to update these instructions to conform to changes in Second Circuit case law. The *Manual* provides basic guidance in the meaning of stare decisis—for example, by differentiating a holding from dicta.²³⁸ Neither the Settlement nor the *Manual*, however, completely ensure that adjudicators will properly apply Second Circuit holdings in the future. The risk of continued nonacquiescence is particularly acute when the Second Circuit issues a ruling adverse to the SSA, because adjudicators must apply whatever instructions are contained in the SSR that reports the decision. If the SSA issues an SSR instructing its adjudicators to apply a Second Circuit holding in a manner that differs from the court's holding, the adjudicator must follow the instruction, not the holding.²³⁹

²³⁷ See *Stieberger III*, 738 F. Supp. at 736:

[U]ntil enjoined by this Court [the] SSA had never articulated the treating physician rule as its policy in any of the media through which it establishes its policies and communicates them to adjudicators At various times and at different levels of the administrative review process, Second Circuit decisions were not circulated to adjudicators. . . . In addition, except in response to this Court's decision in *Stieberger*, SSA adjudicators have not even been told that they must apply the holdings articulated by the Second Circuit.

Id.

²³⁸ *Manual*, *supra* note 13, at iii. In section B., "How to Apply Holdings," the *Manual* advises:

In general, a holding in a decision is a legal principle that is the basis of the court's decision on any issue in the case. There may be more than one holding in a decision. A holding must be applied whenever the legal principle is relevant.

Not all of the discussion in a decision is a holding. For example, the factual discussion in a holding is not a holding although it can help you understand the holding by placing it in context. Also, in their decisions courts may make observations or other remarks that are helpful in understanding the court's reasoning. You are required to apply the holdings, not those observations or other comments of the court.

Id.

²³⁹ SSRs constitute instructions to adjudicators on a general issue. For example,

Unfortunately, the *Stieberger* settlement also does not allow ALJ's to receive guidance from the Appeals Council at the hearing level unless a decision is on remand. The decisions rendered by the Appeals Council often hinge on interpretations of law, SSRs and regulations, and are rarely published in their entirety or made available to SSA adjudicators.²⁴⁰ Therefore,

SSR 88-13 provides detailed guidance on how an ALJ should proceed when a claimant alleges disabling pain; SSR 83-10 instructs ALJs how to decide whether a claimant is capable of the full range of sedentary employment; and SSR 93-2p concerns the evaluation procedure for claimants with HIV infection. In contrast, an Acquiescence Ruling ("AR") reports a specific court decision and instructs adjudicators on how they are to follow it. These ARs are binding on SSA adjudicators pursuant to 20 C.F.R. § 422.406(b)(2) (1993). See, e.g., AR 93-6(8) (reporting *Brewster ex rel. Keller v. Sullivan*, 972 F.2d 898 (8th Cir. 1992), and providing interpretation of the SSA's regulations regarding the presumption of death).

These instructions may differ from the holding itself, or from the way an individual ALJ might have applied the holding absent the instruction. The *Manual* addressed this problem in its initial instructions:

While SSA will take the steps described above to help you apply Second Circuit holdings, you must apply the holdings even in the absence of an instruction, and even if they are not included in the Manual.

Example: You have become aware of a Second Circuit disability decision (for example, a claimant draws it to your attention or you receive notification of it from SSA), but you have not yet received an instruction from SSA on how to apply the decision and it is not in the Manual. You must apply the holding(s) of that decision to all claims where it is relevant.

Manual, supra note 13, at iv. The *Stieberger* settlement does not address this contingency. Moreover, this instruction does not apply where the SSA issues a conflicting instruction.

²⁴⁰ A few Appeals Council decisions are published as SSRs and, as such, are binding on SSA adjudicators. 20 C.F.R. § 422.406(b)(1) provides that "Social Security Rulings are published in the *Federal Register* under the authority of the Commissioner of Social Security and are binding on all components of the Administration. These rulings represent precedent final opinions and orders and statements of policy and interpretations that have been adopted by the Administration." See, e.g., SSR 90-4a (reporting Appeals Council decision regarding value of lodging in computing unearned income for Supplemental Security Income purpose). Since the vast majority of all Appeals Council decisions, as well as decisions rendered at the hearing level by ALJ's, are not published as SSRs, they have no precedential authority. Indeed, these decisions remain unknown to other adjudicators, other claimants and their legal representatives, and the public. One very limited exception is that a handful of Appeals Council and ALJ decisions are made available to members of the Social Security bar, through advertisements placed in *Social Security Forum*, a newsletter published by the National Organization of Social Security Claimants' Representatives. See, e.g., 15 SOC. SEC. FORUM (Nat'l Org. of Soc. Sec. Claimants' Representatives), June 1993, at 15. A few Appeals Council decisions are abstracted in pamphlets published with the Social Security Reporting service, but are not included in the permanent volumes. The decisions of the ALJ and Appeals Council concerning an individual claimant are sent to the claimant, and her coun-

an ALJ whose determination of an individual disability claim might have been altered by applying an earlier relevant Appeals Council decision has no opportunity to apply this decision unless the Appeals Council decision is reported in a SSR. Instead, if the ALJ denies benefits and the claimant appeals, the Appeals Council may vacate the determination and remand to the ALJ.²⁴¹ These procedures effectively prevent ALJs from educating themselves in relevant holdings of the Appeals Council. Furthermore, they may force claimants to incur needless delay to ensure the proper adjudication of their cases.

These limitations impede ALJs from enjoying the freedom to act as judges, a position that assumes a degree of independence of thought tempered by the requirement to adhere to previous decisions rendered by a higher court. Instead ALJs will continue to share some of the attributes associated with an agency bureaucrat.²⁴² To be sure, the ability of the SSA to instruct ALJs on agency policies is crucial to their role as principal factfinder. Similarly, the SSA is best suited to educate its adjudicators. But the lack of a systematic body of Appeals Council precedent further restricts the effectiveness of the *Stieberger* settlement in transforming SSA decisionmaking.

A failure to resolve the issue of public availability of final decisions of the SSA further hampers the settlement.²⁴³ The SSA issues thousands of final decisions annually at each of the

sel if applicable.

²⁴¹ 20 C.F.R. § 404.977(a) (1993).

²⁴² ALJs are assured of a measure of independence by several related provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 1305 (1988) (prescribing the duties of the Office of Personnel Management and the Merit Systems Protection Board); 5 U.S.C. § 3105 (appointment); 5 U.S.C. § 5372 (entitling ALJs to pay, independent of agency ratings); 5 U.S.C. § 7521 (removal by the Merit Systems Protection Board only for good cause shown after an opportunity for a hearing). *See generally* Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984) (discussing challenge to ALJ independence by the Bellmon Review program).

²⁴³ Final decisions of the SSA may be unappealed decisions rendered at each of the three levels of administrative review—initial application, reconsideration, and hearing—and decisions by the Appeals Council, whether or not appealed to the district court.

The intent of this section is not to criticize the *Stieberger* settlement for failing to resolve this problem, since the litigation surrounding the settlement did not involve public availability of the SSA's final decisions. Rather, this issue is introduced to demonstrate that issues crucial to ensuring SSA acquiescence remain unaffected by the *Stieberger* litigation and settlement.

four levels of administrative review. Decisions of the Appeals Council concerning substantive issues of Social Security law are of particular concern. To a lesser extent, the limited availability of ALJ determinations are troublesome.²⁴⁴ Currently, final decisions of the SSA are not all published or otherwise indexed and made available to the public.²⁴⁵ The result is that claimants, their legal representatives, and others are denied a crucial tool in challenging individual decisions by ALJs and the Appeals Council.

The SSA's statutory duty under the Freedom of Information Act ("FOIA") to make its final decisions available to the public is clear.²⁴⁶ The FOIA mandates that each agency "make available for public inspection and copying" all final opinions and orders, except those that are published and offered for sale.²⁴⁷ The Act also requires each agency to maintain and publish an index of "identifying information" concerning each final decision or order.²⁴⁸ This index must be pub-

²⁴⁴ The Appeals Council, and to some extent determinations by ALJs, are more often based on questions of law, or mixed questions of law and fact, than decisions rendered at the initial application and reconsideration levels, which are most often grounded in factual determinations.

²⁴⁵ This practice represents a violation of the Freedom of Information Act, 5 U.S.C. § 552 (1988) [hereinafter FOIA].

²⁴⁶ FOIA § 552(a)(2). Subsection 2 of the FOIA states:

Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, made in the adjudication of cases;

(B) those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing.

Id.

²⁴⁷ *Id.* § 552(a)(2).

²⁴⁸ 5 U.S.C. § 553(a)(2). The indexing provision of the Act states:

Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information to the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each

lished at least quarterly and must be distributed to the public. If publication is impracticable the index still must be prepared and offered for sale to the public at cost.²⁴⁹ Moreover, none of the FOIA's nine exemptions apply to the publishing and indexing of the SSA's final opinions.²⁵⁰

agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such request at a cost not to exceed the direct cost of duplication.

Id.

²⁴⁹ *Id.*

²⁵⁰ The FOIA exempts nine matters from its publication and indexing requirements: (1) issues classified as secret by an Executive Order; (2) issues related to an agency's internal personnel rules and procedures; (3) certain issues exempted from disclosure by a statute; (4) trade secrets and privileged commercial or financial information; (5) inter-agency or intra-agency memoranda or letters which would not be available to a party other than an agency in litigation with the agency; (6) personnel and medical files in which disclosure would constitute an unwarranted invasion of personal privacy; (7) investigatory records compiled for law enforcement purposes; (8) reports by agencies responsible for the supervision of financial institutions; and (9) geological and geophysical information. 5 U.S.C. § 552(b)(1)-(9) (1988).

Of these exemptions, the only one that could conceivably apply to the SSA's opinions is six, which involves medical files. ALJ disability decisions state and rely on each claimant's personal medical information, including the names and opinions of physicians, and laboratory tests. Claimants who have terminal conditions are identified, including, for example, those with AIDS. The Privacy Act of 1974, 5 U.S.C. § 552a (1988), creates certain legal protections of individual privacy, especially in the context of the release of information to third parties. Thus, the SSA could argue that its opinions disclose personal information, and as a result, the SSA is prohibited from publishing under the Privacy Act and exempt from the FOIA.

There are four reasons why this argument fails. First, the names of individual claimants in ALJ and Appeals Council decisions may be omitted and replaced with an identifying number (such as AC 94-10 for the tenth decision rendered by the Appeals Council in 1994) without unduly compromising the privacy of claimants. The SSA already reports a few Appeals Council decisions in SSRs each year by omitting the name of the claimant. See, e.g., SSR 90-4a, discussed *supra* at note 263.

Second, the Privacy Act does not apply when, as here, records concerning individuals are required to be disclosed under the FOIA. See 5 U.S.C. § 552a(b)(2) (exempting prohibition against agency disclosure of records to any person or another agency when the disclosure is required under § 552). These determinations are final decisions of the SSA and are required to be disclosed. 5 U.S.C. § 552(a)(2)(A). Moreover, many other agencies report all of their final decisions in unredacted form.

Third, when a claimant appeals a final decision of the SSA in district court, the court's decision includes the claimant's name and copious medical information.

In an important recent case, the Supreme Court, in *NLRB v. Sears, Roebuck & Co.*,²⁵¹ held that Appeals Memoranda that explained the Office of the General Counsel's decision not to file a complaint with the NLRB were final opinions made in the adjudication of cases and must be disclosed and indexed pursuant to the FOIA.²⁵² As the Court strongly noted:

This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public," represents a strong congressional aversion to "secret law," and represents an affirmative congressional purpose to require disclosure of documents that have "the force and effect of law."²⁵³

The SSA has attempted to circumvent the FOIA's unambiguously stated intent that all agency final opinions be made available for public inspection²⁵⁴ by issuing a selected number of final opinions in SSRs. These SSRs are available for purchase and may be inspected at district and branch offices,²⁵⁵ but SSA has failed to either issue all final opinions as SSRs or

The medical data concerning Ms. Stieberger herself is an example of the ready availability of this information. Fourth, the public interest in disclosure—at least of a partially redacted decision—outweighs the interest in privacy. Public availability of these final decisions will be of great benefit not only to future claimants, who may avoid a denial of benefits or delay by applying SSA case law, but also to the SSA itself, which may develop and maintain a body of case law by allowing its adjudicators access to all of it.

²⁵¹ 421 U.S. 132 (1975).

²⁵² *Id.* at 157-59. The Court determined that Appeals Memoranda, which directed the filing of a complaint with the NLRB, fell within the fifth exemption and were thus non-disclosable as "predecisional communications." *Id.* at 153-54. The SSA has applied *Sears, Roebuck* to distinguish the predecisional communications of the ALJ hearing process and Appeals Council review from final decisions rendered from either source.

The ALJ hearing process and the A[ppeals] C[ouncil] review are both deliberative processes which result in final agency decisions. An ALJ's decision on a claim becomes final if the AC does not review the decision. When the AC does accept a case for review, its decision becomes the agency's final decision.

SSR 92-1p.

²⁵³ *Sears, Roebuck*, 421 U.S. at 153 (citations omitted).

²⁵⁴ See *supra* note 246.

²⁵⁵ SSRs may be purchased through the Government Printing Office. 20 C.F.R. § 422.406(a)(4) (1993); 20 C.F.R. § 422.410(d) (1990). Each SSR is also published in the *Federal Register*. 20 C.F.R. § 422.406(b) (1993). SSRs may be inspected at district and branch offices, pursuant to 20 C.F.R. § 422.430(a)(4) (1993).

publish them in the Federal Register. Moreover, despite averments to the contrary, the SSA does not index final opinions either in SSRs or elsewhere, as the FOIA requires.²⁵⁶ The result is that, most of the time, a final opinion rendered by SSA adjudicators is not available in any form to anyone (including other SSA adjudicators) besides the specific case's claimant.

The SSA's practice of withholding final decisions places it in the minority among executive agencies. Many other agencies publish their final opinions in official reporters and provide cumulative indexes of the opinions.²⁵⁷ By joining the practice of other agencies, the SSA would fulfill the mandate of the FOIA. In addition, reporting its final decisions would provide the SSA with a crucial tool to educate its own adjudicators who could then apply administrative case law to new determinations. While the *Stieberger* settlement's requirements concerning publication of the *Manual* and future volumes of Second Circuit decisions represent an important first step, the settlement's failure to resolve disputes over administrative case law significantly limits its ultimate effectiveness.

²⁵⁶ 20 C.F.R. § 422.406(a) states:

Materials required to be published pursuant to the provisions of 5 U.S.C. [§] 552a(a)(1) and (a)(2) are published in one of the following ways:

...
(4) By publication in the "Social Security Rulings" of indexes of precedential social security orders and opinions issued in the adjudication of claims, statements of policy and interpretations which have been adopted but have not been published in the *Federal Register*, and of administrative staff manuals and instructions to staff that affect a member of the public.

Id. It would appear from this regulatory language that the SSA both concedes that indices of final orders are required and that the SSA publishes them. A review of all SSRs that the SSA alleges it published in 1992 and 1993, reveals that the SSA has not in fact published these indexes. See 1 C.F.R. § 305.89-8 (1993) (recommending that agencies index and make publicly available adjudicatory decisions of their highest "tribunals"); 1 C.F.R. § 305.90-4 (1993) (applying this recommendation specifically to the SSA's Appeals Council).

²⁵⁷ These agencies or agency bodies include the Federal Aviation Administration, the National Transportation Safety Board, the Securities & Exchange Commission, the National Labor Relations Board, the Employees' Compensation Appeals Board, the Board of Immigration Appeals, the United States Merit System Protection Board, and the Office of Hearings and Appeals of the Department of the Interior. It should be noted that in virtually all cases the name and identifying details of all parties are disclosed. One exception is the Federal Aviation Administration's civil penalty decisions concerning security breaches in airports. They do not disclose the identity of the airport.

Any postmortem of the *Stieberger* settlement must therefore take into account the current structural weakness of SSA decisionmaking. Without the flexibility and independence on the part of ALJs to integrate holdings of the Second Circuit with specific factual settings, the *Stieberger* settlement—despite all that it has accomplished—remains something of a Pyrrhic victory. It is for this reason that transforming the Appeals Council into an Article III Court of Social Security Appeals represents the most effective solution to the practice of nonacquiescence and its unfortunate legacy of educational deficiency, excessive bureaucratization and overt politicization.

IV. TRANSFORMING THE APPEALS COUNCIL INTO AN ARTICLE III COURT OF SOCIAL SECURITY APPEALS

The *Stieberger* and *Schisler* litigations, spanning nearly a decade, have renewed public attention on the structural weaknesses of the SSA's disability adjudication. The SSA differs fundamentally from other administrative agencies because of the number of claims it adjudicates, the persons (often disabled, poor, and unrepresented) who stand before it, and the complex web of statutory law, regulations, rulings, and case law involved. Decisionmaking at the initial levels of application, reconsideration and hearing is based primarily on factual determinations made in accordance with applicable regulations, rulings, and the Social Security Act.²⁵⁸

Review by the Appeals Council—a twenty-member body based in Virginia—is based less often on solely factual determinations.²⁵⁹ The Council rarely sits in panels and rarely conducts oral argument, although regulations provide for it.²⁶⁰ Instead, in most cases one member performs a paper review of the ALJ decision, relying primarily on “boilerplate” language

²⁵⁸ For a discussion of the levels of administrative review under the Social Security Act, see *supra* note 4.

²⁵⁹ The Appeals Council most often exercises summary review, given its huge caseload. Administrative Conference of the United States (“ACUS”), A New Role for the Social Security Appeals Council, 1 C.F.R. § 305.87-7 (1993). The ACUS estimated that the Appeals Council's caseload numbered 50,000 (equaling up to 500 cases per member per month).

²⁶⁰ See 20 C.F.R. § 404.976(c) (1993); 1 C.F.R. § 305.87-7.

rather than original legal analysis.²⁶¹ According to the Administrative Conference of the United States ("ACUS"), of the cases the Council reviews, 5% are reversed and 7% to 15% are remanded to the ALJ.²⁶² The remaining 80 to 88% of the cases affirm the ALJ's denial of benefits to the claimant.²⁶³ Historically, many of these cases have been reversed by the district court.²⁶⁴

A number of proposals have been made to respond to the overwhelming caseload and relative ineffectiveness of the Appeals Council. These proposals have ranged from a reduction in cases adjudicated by the Appeals Council (by empowering it to deny a petition for review) to transformation of the Council into an Article I Court of Social Security Appeals (with judicial review vested in the Court of Appeals for the Federal Circuit). Other proposals have included creation of a centralized ALJ corps, and outright abolition of the Appeals Council.²⁶⁵ A brief review of these proposals demonstrates the need for a new proposal to transform the current Appeals Council into an Article III Court of Social Security Appeals.

A. Reducing the Appeals Council's Caseload

Responding to the SSA's request to analyze the operation of the Appeals Council, the ACUS considered completely abol-

²⁶¹ 1 C.F.R. § 305.87-7 (1993).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See *supra* note 44. A district court judge would only have the opportunity to review the determination of the Appeals Council if the claimant appealed. The majority of claimants denied at the Appeals Council do not appeal. Statistics issued by the SSA reveal that only 28% of claimants who were denied benefits by the Appeals Council appealed to district court. Kubitschek, *supra* note 30, at 637.

²⁶⁵ See 1 C.F.R. § 305.87-7; 1 C.F.R. § 305.92-7 (1993); Rains, *supra* note 26, at 16-19. For example, the American Council of the United States ("ACUS") stated:

Serious consideration was given to recommending outright abolition of the Appeals Council. This view was premised on the Appeals Council's present inability to do little more than add one more layer to the already-lengthy review bureaucracy. (This criticism was not intended as a denigration of Appeals Council members, whom the study found to be competent, dedicated, and cooperative.) 1 C.F.R. § 305.87-7. The ACUS concluded that if the Appeals Council's performance did not improve pursuant to their recommendations, "serious consideration should be given to abolishing it."

Id.

ishing the Council as useless additional bureaucracy, but instead opted for "fundamental changes."²⁶⁶ ACUS recommended that the SSA restructure the Appeals Council by empowering it to restrict its caseload through the authority to deny petitions for review, and focusing on policymaking and decisional standards.²⁶⁷ It asserted that the Appeals Council would be able to work more collaboratively with a reduced caseload, and could encourage the submission of briefs and oral arguments, in order to write "more elaborate" opinions.²⁶⁸ The ACUS further recommended a restriction in the introduction of new evidence at the Appeals Council level, and greater opportunities for Council reopenings.²⁶⁹ It noted, however, that if these recommendations did not produce improved results, "serious consideration" should be given to the outright elimination of the Appeals Council.²⁷⁰ If the SSA had implemented this recommendation, the effect would have been to reduce the traditional case review function of the Appeals Council significantly and to replace it with a policy determination purpose. The ACUS, however, did recommend that the Appeals Council "focus on important issues on which it could issue precedential opinions."²⁷¹

B. *An Article I Court of Social Security Appeals*

A number of proposals to create an Article I Court of Social Security Appeals were introduced in Congress or recommended by commentators and the Federal Courts Study Committee.²⁷² The Social Security Procedural Improvements Act

²⁶⁶ 1 C.F.R. § 305.87-7 (1993).

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* The ACUS also devoted a substantial portion of its recommendation to enhancing the status and visibility of the Appeals Council. A subsequent recommendation focused on limiting the evidence available for Appeals Council review to that presented to the ALJ at the hearing level. ACUS, Social Security Disability Program Appeals Process: Supplementary Recommendation, 1 C.F.R. § 305.90-4 (1993).

²⁷⁰ 1 C.F.R. § 305.87-7 (1993).

²⁷¹ 1 C.F.R. § 305.90-4 (1993).

²⁷² ACUS, Specialized Review of Administrative Action, 1 C.F.R. § 305.91-9 (1993); JERRY MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS (1978); Rains, *supra* note 26. The Federal Courts Study Committee was empaneled by Congress to examine problems facing the courts and to develop plans to address

of 1986, for example, proposed to abolish the Appeals Council and replace it with an Article I Social Security Court.²⁷³ This court would consist of twenty judges appointed by the President and confirmed by the Senate to serve a term of ten years, but subject to removal by the President for cause. The proposed statute also would have vested exclusive appellate jurisdiction in the United States Court of Appeals for the Federal Circuit.²⁷⁴

Similarly, the Social Security Reorganization Act of 1986 proposed the establishment of a Social Security Court. Under this proposal, the ALJ effectively would have been replaced with a "hearing officer" and the Appeals Council member with an ALJ.²⁷⁵ This proposed statute would have vested appellate jurisdiction in the Court of Appeals for the Federal Circuit except for claims arising under the Constitution or challenging a regulation. These claims would be adjudicated by federal district courts.²⁷⁶

In 1990 the Federal Courts Study Committee empaneled by Congress issued its recommendations.²⁷⁷ The Committee rejected a proposal to create an Article III court to adjudicate all Social Security appeals.²⁷⁸ It did, however, recommend the creation of an Article I court to review Social Security disability claims.²⁷⁹ Responding to this proposal, the ACUS recommended that Congress also establish judicial review by an Article III court for questions of constitutional or statutory interpretation.²⁸⁰

Proponents of an Article I Court of Social Security Appeals argue that the combination of a large number of cases and the perceived need for uniformity, technical expertise, and efficien-

these problems. The Committee issued its report in April 1990. 1 C.F.R. § 305.91-9 (1993). For a discussion of the Committee's proposal for an Article I Court of Social Security Appeals, see *infra* notes 279-82 and accompanying text.

²⁷³ H.R. 4419, 99th Cong., 2d Sess. (1986); Rains, *supra* note 26.

²⁷⁴ Rains, *supra* note 26, at 16-17.

²⁷⁵ Rains, *supra* note 26, at 17-18; see also H.R. 4647, 99th Cong., 2d Sess. (1986).

²⁷⁶ Rains, *supra* note 26, at 19.

²⁷⁷ See 1 C.F.R. §305.91-9 (1993).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* (Recommendation 5(C)).

cy justify its establishment.²⁸¹ As one commentator has argued, however, none of these justifications warrant the creation of an Article I court.²⁸² The twenty judges who would sit on the proposed court would be just as overwhelmed with their caseload as the Appeals Council continues to be. In addition, substantial differences among the circuits would not be resolved by such a court. There is also no evidence that district court judges lack expertise.²⁸³ Most importantly, the creation of an Article I court might endanger independent judicial review, since these judges would be appointed to a ten-year term and might be more susceptible to "agency capture" than are judges with life-tenure.²⁸⁴ Article I judges would "become, essentially, another set of administrative law judges superimposed over the ALJs who hear the administrative cases."²⁸⁵ Finally, vesting exclusive or residual appellate jurisdiction in the United States Court for the Federal Circuit would hardly facilitate expertise or efficiency, since requiring that a claimant and counsel appear in Washington D.C. would likely cause extreme hardship to many.²⁸⁶

C. *An Article III Court of Social Security Appeals*

There are substantial advantages to eliminating the existing Appeals Council and establishing an Article III Court of Social Security Appeals. First, an Article III Court would have a more generalized scope than either an Article I Court or the existing Appeals Council since it would be exposed to a broad range of related statutory, regulatory and constitutional issues.²⁸⁷ Although SSDI and SSI disability claims would likely

²⁸¹ See Rains, *supra* note 26, at 20-22.

²⁸² See Rains, *supra* note 26, at 22.

²⁸³ Rains, *supra* note 26, at 22-29.

²⁸⁴ Rains, *supra* note 26, at 25-26.

The recent history of the Social Security Administration . . . emphasizes the critical need for truly independent judicial review. Replacing Article III lifetime tenure judges with Article I judges hardly advances this independence. Varying the proposed term length of Article I judges may have some effect on the sense of independence of these judges, but it cannot provide the independence intended for Article III judges.

Id. at 26.

²⁸⁵ Rains, *supra* note 26, at 26.

²⁸⁶ Rains, *supra* note 26, at 27-29.

²⁸⁷ See 1 C.F.R. § 305.91-9 (1993). The ACUS specifically recommended that

constitute the majority of its caseload, such a court also would exercise appellate jurisdiction over such related claims as Social Security retirement, Medicare cases and attorney's fee questions under the Equal Access to Justice Act.²⁸⁸ The court also would exercise original jurisdiction over controversies concerning rulemaking by the SSA. As part of the federal judiciary, the court would improve the representation of pro se claimants by the addition of pro se clerks.²⁸⁹

Second, nomination of judges by the President with the advice and consent of the Senate,²⁹⁰ with lifetime appointment and removal only by impeachment would guarantee expertise and decisional independence. An Article III Court would be free of excessive politicization resulting from congressional oversight and of the problems that potentially plague an Article I court, such as the indirect executive branch supervision characteristic of the existing Appeals Council and agency capture.²⁹¹

Additionally, the SSA could never use an Article III Court to nonacquiesce in decisions of federal courts of appeals or to review the performances of ALJs. The SSA would be prevented from such troublesome actions because SSRs and SSA memoranda are binding only on SSA personnel. Rather, not only would an Article III court develop special expertise in adjudicating cases involving highly technical fact patterns and inter-related statutory and regulatory provisions, most significantly it would develop its own case law, creating binding precedent for SSA adjudicators and persuasive authority for courts of

"[w]hen review has been assigned to an Article I specialized court, [Congress should] provide a subsequent layer of judicial review by an Article III court for questions of constitutional or statutory interpretation." *Id.*

²⁸⁸ 5 U.S.C. § 504 (1988) and 28 U.S.C. § 2412(d) (1988) brought under 42 U.S.C. § 405(g) (1988).

²⁸⁹ Vesting appellate review of decisions rendered by the Court of Social Security Appeals in United States Courts of Appeal, rather than the restricting review to the Court of Appeals for the Federal Circuit, would represent an important advantage to many pro se claimants. *See Rains, supra* note 26, at 29-30 (arguing that vesting exclusive appellate jurisdiction in the Federal Circuit is illogical and fundamentally unfair to claimants).

²⁹⁰ U.S. CONST. art. II, § 2, cl. 2.

²⁹¹ Although the ACUS recommended that "avoidance of the fact or appearance of capture by special interests" could best be ensured by diversity of subject matter jurisdiction, 1 C.F.R. § 305.91-9 (1993), only Article III judges retain the independence necessary to avoid such agency capture.

appeals.²⁹² By synthesizing agency regulations, case law, and statutory and constitutional considerations, as the Appeals Council has never done, an Article III Court would provide crucial guidance to ALJs and SSA adjudicators at the initial application and reconsideration levels.²⁹³

V. CONCLUSION

While the *Stieberger* settlement crafted significant relief, its ultimate reach will be more limited. These substantive limitations result from the restrictive definition of "nonacquiescence" by the *Stieberger* court and from the Second Circuit's excessive deference to the SSA in *Schisler III*. Four "problems of implementation," including the reopening and remand procedures, de novo review and retroactivity, and the absence of any body of precedent to guide SSA adjudicators will further restrict the practical effectiveness of the *Stieberger* settlement.

The *Stieberger* settlement ended the SSA's nonacquiescence in decisions of the Second Circuit. While the practice of nonacquiescence was eliminated, its powerful legacy continues to affect the quality of SSA decisionmaking. For example, rather than creating a body of decisional law designed to integrate Second Circuit holdings and administrative regulations within specific factual settings, the SSA merely supplies instructional materials to ALJs in the form of SSRs. Such a practice hardly succeeds in solving the educational weaknesses and politicization that remains the most significant legacy of nonacquiescence.

The creation of an Article III Court of Social Security Appeals would provide the specialized expertise and independence needed to resolve statutory and regulatory questions posed by the Social Security Act, and to develop a body of precedent. Replacing the outmoded and unworkable Appeals Council,

²⁹² For a discussion of the problem concerning the Appeals Council's failure to develop its own case law, see *supra* notes 243-54 and accompanying text.

²⁹³ The Court's development of a body of precedent to be followed by all SSA adjudicators would fulfill an objective identified by the ACUS as early as 1978 but never implemented. For example, the ACUS recommended that the "Social Security Administration should devote more attention to the development and dissemination of precedent materials" including "publication of fact-based precedent decisions." 1 C.F.R. § 305.78-2 (1993).

would promote the adjudicative consistency and efficiency characteristic of many other executive agencies—an as yet elusive goal of the Social Security Administration.

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