Declaratory Judgment Before Exhausting Administrative Remedies Under Illinois Law

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1. This Article represents the views of the authors, not of their firms and does not constitute legal advice for any specific situation. This Article does not attempt to discuss all issues related to declaratory judgments generally, but rather, focuses on use of the procedure by parties in the regulatory enforcement environment.

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I. INTRODUCTION

A state administrative agency has delivered a notice accusing your company of violating regulations. Those regulations carry heavy penalties and sanctions. The notice says you may request an administrative hearing on the alleged violations. You conclude that doing so would be time consuming, expensive, and probably futile. The threat of heavy fines, coupled with a time-consuming and futile administrative review procedure, gives the regulatory agency much leverage to extract a settlement.

Suppose your company believes, however, that the agency is exceeding its authority. You may believe the agency's regulation conflicts with a statute or is unconstitutional. Perhaps complying with a questionable regulation will be very expensive, while non-compliance would risk large fines or penalties. Does your company have an alternative to settlement?

It does. From our nation's founding, the judicial branch has been the check on the executive branch's regulatory agencies. This Article explores how the declaratory judgment procedure in Illinois may be used to test the validity of agency actions before exhausting administrative remedies. We first describe the doctrine of exhaustion of administrative remedies and the related primary jurisdiction doctrine. We then overview the Illinois declaratory judgment statute, and summarize cases illustrating exceptions to the exhaustion doctrine. The Article concludes with strategic practice considerations for using the declaratory judgments to challenge improper agency actions.

II. THE DOCTRINES OF EXHAUSTION OF ADMINISTRATIVE REMEDIES AND PRIMARY JURISDICTION

A. EXHAUSTION DOCTRINE

Under the exhaustion of administrative remedies doctrine, a party must first pursue all administrative remedies provided by statute before seeking review in the courts.[2] The purposes for requiring exhaustion of remedies include: (a) to allow "the administrative agency to fully develop and consider the facts of the case before it"; (b) to allow "the agency to utilize its expertise"; (c) to allow "the aggrieved party to ultimately succeed before the agency, making judicial review unnecessary"; (d) to help "protect agency processes from impairment and avoidable interruptions"; (e) to allow "the agency to correct its own errors"; and (f) to conserve "valuable judicial

2. People v. NL Indus., 604 N.E.2d 349, 354 (Ill. 1992).

time by avoiding piecemeal appeals."[3] The doctrine has been codified in the Illinois Administrative Procedure Act (APA) at chapter 735, act 5, section 3-102 of the Illinois Compiled Statutes.[4] The Illinois APA allows the parties to appeal a final decision of an administrative agency to the circuit court after the administrative review procedure has been exhausted.[5]

"The exhaustion of remedies doctrine is applied only where the agency has exclusive jurisdiction to hear an action."[6] "The legislature may vest exclusive jurisdiction in an administrative agency. However, if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly."[7]

B. PRIMARY JURISDICTION DOCTRINE

The related but distinct doctrine of primary jurisdiction provides that "where a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of a controversy, or some portion of it, to an administrative agency having expertise in the area."[8] "The doctrine of primary jurisdiction only applies when a court has either original or concurrent jurisdiction over the subject matter in dispute."[9] Under the primary jurisdiction doctrine, "a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy or when there is a need for uniform administrative standards."[10]

The doctrines of primary jurisdiction and exhaustion of administrative remedies do not necessarily bar actions for declaratory or injunctive relief. Declaratory judgment actions may be indispensable in certain circumstances, such as where irreparable harm would occur while exhausting administrative remedies.

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3. Castaneda v. Ill. Human Rights Comm'n, 547 N.E.2d 437, 439 (Ill. 1989).

4. *See* 735 ILL. COMP. STAT. 5/3-102 (2010) ("Article III of this Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency . . . adopts the provisions of Article III of this Act . . . . In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not hereafter be employed.").

5. 735 ILL. COMP. STAT. 5/3-110 (2010).

6. *NL Indus.*, 604 N.E.2d at 354 (citing Bd. of Educ. v. Warren Twp. High Sch. Fed'n of Teachers, Local 504, 128 Ill. 2d 155, 163 (1989)).

7. Emp'rs Mut. Cos. v. Skilling, 644 N.E.2d 1163, 1165 (Ill. 1994).

8. *Id.*

9. *Id.* (citing *NL Indus.*, 604 N.E.2d at 354).

10. *Skilling*, 644 N.E.2d at 1165-66.

III. ILLINOIS DECLARATORY JUDGMENT STATUTE 735 ILCS 5/2-701

A. INHERENT POWER TO GRANT DECLARATORY RELIEF

Illinois state courts "have original jurisdiction over all justiciable matters."[11] Long before the passage of a declaratory judgment statute in Illinois, courts construed trusts and wills, quieted titles, and settled competing claims to funds.[12] These were declaratory remedies that courts afforded without statutory authorization.[13] Before the first federal declaratory judgment statute in 1934, the U.S. Supreme Court had a long history of adjudicating rights of litigants in cases where no damages were required to be paid, and no acts were required to be performed by the parties.[14] As one commentator stated, "[a]ll courts of record, both at law and in equity, have inherited the power and the jurisdiction to grant declaratory relief without the aid of legislative enactments . . . this power is broader in scope and wider in application than that contemplated by the recent statutory enactments."[15]

Recent Illinois cases, however, arise under the Illinois declaratory judgment statute rather than under a court's inherent power to render declaratory judgments.[16] We now, therefore, turn to the statute.

B. ILLINOIS DECLARATORY JUDGMENT STATUTE

The Illinois General Assembly first passed a declaratory judgment statute (Statute) in 1945.[17] It was modeled after a similar statute then in force in Michigan.[18] The current Statute's scope is broad. It specifically

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11. ILL. CONST. art. VI, § 9.

12. 735 ILL. COMP. STAT. 5/2-702 (2010) (Historical and Practice Notes).

13. *Id.*

14. *See* Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249, 263 (1933) (listing cases and upholding the constitutionality of the Tennessee declaratory judgment statute).

15. 1 WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS 1, 2 (2d ed. 1951). *See also* Sharon v. Tucker, 144 U.S. 533 (1892). In *Sharon* the Court said the following in an action to quiet title after the plaintiff had been in possession for over 20 years:

> Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate, or interest of parties,- [sic] that is, their title,- [sic] may be proved or secured, or to remove obstacles which hinder its enjoyment. The form of remedy will vary according to the particular circumstances of each case.

Id. at 544 (citation omitted).

16. *See, e.g.*, Ill. Gamefowl Breeders Assoc. v. Block, 75 Ill. 2d 443, 452 (1979) (giving liberal interpretation to the declaratory judgment act).

17. *See* 735 ILL. COMP. STAT. 5/2-702 (2010) (Historical & Practice Notes).

18. *Id.*

encompasses the construction of statutes, ordinances, and other government regulations:

> The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, *of the construction of any statute, municipal ordinance, or other governmental regulation*, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy.[19]

The Statute envisions a court adjudicating a controversy after a dispute has arisen but before action is taken which gives rise to claims for damages or other relief.[20] "[The Statute] must be given a liberal construction and should not be unduly restricted by a technical interpretation."[21] The Statute's use of the word "may" demonstrates that the legislature intended to allow a trial court to have discretion to decide whether to use the Statute in a given case.[22]

There are two statutory requirements to bring a declaratory judgment action: there must be an "actual controversy," and the party bringing the action must be "interested in the controversy."[23] In *Illinois Gamefowl Breeders Assoc. v. Block*, the court stated:

> 'Actual' in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events.[24]

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19. 735 ILL. COMP. STAT. 5/2-701 (2010) (emphasis added).

20. Kaske v. City of Rockford, 450 N.E.2d 314, 317 (Ill. 1983).

21. Morr-Fitz v. Blagojevich, 901 N.E.2d 373, 384 (Ill. 2008) (citing First of Am. Bank, Rockford, N.A. v. Netsch, 651 N.E.2d 1105, 1109 (Ill. 1995)).

22. *In re* Marriage of Rife, 878 N.E.2d 775, 784 (Ill. App. Ct. 2007).

23. Underground Contractors Assoc. v. City of Chicago, 362 N.E.2d 298, 300-301 (Ill. 1977).

24. Ill. Gamefowl Breeders Assoc. v. Block, 389 N.E.2d 529, 531 (Ill. 1979) (citing *Underground Contractors*, 362 N.E.2d at 300).

The Illinois Supreme Court has recognized that the "'mere existence of a claim, assertion or challenge to plaintiff's legal interests . . . which cast[s] doubt, insecurity, and uncertainty upon plaintiff's rights or status, damages plaintiff's pecuniary or material interests and establishes a condition of justiciability.'"[25]

Although not a required element under the Statute, a court may also engage in an analysis of whether the case is "ripe" for judicial determination.[26] In *Abbott Laboratories v. Gardner*, the U.S. Supreme Court formulated a two-prong inquiry to evaluate ripeness: first, courts look at whether the issues are fit for judicial decision; and second, they look at any hardship to the parties that would result from withholding judicial consideration.[27]

The Statute thus provides a vehicle to challenge the validity of agency rules and regulations. If, however, an administrative remedy is available and the agency's jurisdiction is exclusive under the statutory scheme, Illinois courts generally will not entertain such actions unless a recognized exception to the exhaustion doctrine applies.[28]

IV. EXCEPTIONS TO THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

The purpose of exceptions to the exhaustion doctrine is the "time-honored rule that equitable relief will be available if the remedy at law is inadequate."[29]

A. AGENCY EXCEEDS ITS STATUTORY AUTHORITY

An administrative agency's decision may be challenged without exhausting administrative remedies if the decision is unauthorized by law.[30] In *Millennium Park Joint Venture, LLC v. Houlihan*,[31] a taxpayer entered into a concession agreement with the city to operate a food concession in a city

25. *Morr-Fitz*, 901 N.E.2d at 384 (quoting First of Am. Bank, Rockford, N.A. v. Netsch, 651 N.E.2d 1105, 1109 (Ill. 1995)).

26. *Id.* (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)).

27. *Abbott Labs.*, 387 U.S. at 149. In *Bio-Medical Laboratories, Inc. v. Trainor*, 370 N.E.2d 223 (Ill. 1977), the Illinois Supreme Court adopted the *Abbott Laboratories* test for ripeness; it has continued to endorse that test since then. *See* Alt. Fuels, Inc. v. Ill. Envtl. Prot. Agency, 830 N.E.2d 444 (Ill. 2004); Nat'l Marine, Inc. v. Ill. Envtl. Prot. Agency, 639 N.E.2d 571 (Ill. 1994). Whether a case will be deemed "ripe" is sometimes a close question, as is apparent from the majority and dissenting opinions in *Morr-Fitz*, 901 N.E.2d 373.

28. Castaneda v. Ill. Human Rights Comm'n, 547 N.E.2d 437, 439 (Ill. 1989) (discussing the purposes of the exhaustion doctrine).

29. Ill. Bell Tel. Co. v. Allphin, 326 N.E.2d 737, 742 (Ill. 1975).

30. Millennium Park Joint Venture, LLC v. Houlihan, 948 N.E.2d 1, 10-12 (Ill. 2010).

31. *Id.*

park. The county assessor assessed the concession area as a *lease.*[32] The taxpayer maintained he had a nontaxable *license* and filed a declaratory judgment action.[33] The defendants filed a motion to dismiss arguing the taxpayer failed to exhaust administrative remedies.[34] The trial court denied the motion and the government appealed.[35] The Illinois Supreme Court affirmed, stating that the taxpayer's claim "fits squarely within the unauthorized-by-law exception, which allows challenges to be brought directly in circuit court without resort to any statutory remedy."[36]

B. AGENCY EXCEEDS ITS JURISDICTION

Similarly, where an agency's authority to determine certain matters is challenged on its face as not authorized by statute—thereby challenging the agency's subject matter jurisdiction—administrative remedies need not be exhausted. In *County of Knox ex rel. Masterson v. Highlands, LLC,*[37] Highlands sought to construct a large-scale hog farm.[38] The local zoning board refused.[39] Highlands filed a complaint for declaratory and injunctive relief against the zoning board.[40] The trial court granted Highland's motion for summary judgment, finding that the zoning board lacked jurisdiction to prevent construction, because Highlands was engaged in an agricultural purpose, which was exempt from zoning regulations.[41] The Illinois Supreme Court affirmed, stating that the "issue of an administrative body's authority presents a question of law and not a question of fact. The determination of the scope of the agency's power and authority is a judicial function and is not a question to be finally determined by the agency itself."[42]

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32. *Id.* at 5-7.
33. *Id.*
34. *Id.* at 7.
35. *Millennium Park Joint Venture, LLC*, 948 N.E.2d at 7-10.
36. *Id.* at 12. On the merits, the court ruled that the taxpayer had a non-taxable license. *Id.*; *see also* Homefinders, Inc. v. City of Evanston, 357 N.E.2d 785, 792 (Ill. 1976) (finding that a review board acted outside its powers when it decided to impose fines on the company and therefore holding that the review board's decision was void).
37. Cnty. of Knox *ex rel.* Masterson v. Highlands, LLC, 723 N.E.2d 256 (Ill. 1999).
38. *Id.* at 259.
39. *Id.*
40. *Id.*
41. *Id.* at 259.
42. *Knox*, 723 N.E.2d at 262; *see also* Bd. of Governors of State Colls. and Univs. for Chi. State Univ. v. Ill. Fair Emp't Practices Comm'n, 399 N.E.2d 590, 592-93 (Ill. 1979) ("[W]here an administrative body's assertion of jurisdiction is attacked on its face and in its entirety on the ground that it is not authorized by statute, exhaustion of administrative remedies and compliance with the Administrative Review Act is not required.").

C. PURE QUESTIONS OF LAW

If a pure question of law is presented, agency actions may be challenged without exhausting administrative remedies.[43] In *Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board*,[44] the state's attorney filed an action seeking declaratory and injunctive relief over a collective-bargaining matter, which sought to include assistant state's attorney positions.[45] The trial court granted the labor board's motion to dismiss, concluding that factual issues remained and that the state's attorney had failed to exhaust its administrative remedies.[46] On appeal, the Illinois Supreme Court reversed, finding there were no factual issues and that it was unnecessary to exhaust administrative remedies: "[T]he present matter may be determined as a matter of law . . . [as] [t]he issue before us is one of statutory and case law interpretation, and therefore falls within the scope of our particular expertise . . . ."[47] On the merits, the court held that assistant state's attorneys were not subject to the collective-bargaining provisions.[48]

D. RULE, REGULATION, OR STATUTE IS UNCONSTITUTIONAL ON ITS FACE[49]

An administrative agency's action may be challenged if the constitutionality of the statute, ordinance, or regulation is challenged on its face. In *Tri-State Coach Lines, Inc. v. Metropolitan Pier & Exposition Authority*, ground transportation drivers who drove passengers from airports brought a class action seeking a declaratory judgment that the Federal Interstate Commerce Commission Termination Act preempted a city airport departure tax.[50] The parties filed cross-motions for summary judgment, which were granted in part. The appellate court rejected the argument that the plaintiffs were required to exhaust administrative remedies.[51] The court stated that the plaintiffs raised a constitutional preemption claim and were "in essence,

43. *See* Office of the Cook Cnty. State's Attorney v. Ill. Local Labor Relations Bd. 652 N.E. 2d 301, 305-06 (Ill. 1995).

44. *Id.*

45. *Id.* at 302.

46. *Id.*

47. *Office of the Cook Cnty. State's Attorney*, 652 N.E. 2d at 305-06.

48. *Id.* at 300-05.

49. If the declaratory judgment action seeks a ruling on the constitutionality of a statute, ordinance, or regulation, or preemption by federal law, the plaintiff is required by Illinois Supreme Court Rule 19 to issue a special notice. The notice must be sent "at the time of suit" to any agency or political subdivision that is not already named as a party that may seek to defend the law or regulation challenge. ILL. SUP. CT. R. 19.

50. Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth., 732 N.E.2d 1137, 1139-41 (Ill. App. Ct. 2000).

51. *Id.* at 1144.

challenging the [tax ordinance] as being facially invalid, rather than invalid as applied to them."[52]

A claim that a statute, rule, or regulation is unconstitutional "as applied" to the plaintiff must first be submitted to the agency, however.[53]

E. AGENCY FAILS TO FOLLOW ITS OWN RULES

The decisions of an administrative agency may be challenged if the agency fails to follow its own rules and regulations. In *Heavner v. Illinois Racing Board*, the Illinois Department of Agriculture sponsored a horse race.[54] A dispute arose when an owner claimed his trainer had put an entry form for his horse in the entry box. When the entry box was opened, the horse's form was not found. Department stewards therefore ruled that the horse could not race. The owner obtained an injunction preventing racing officials from keeping his horse out of the race. The horse finished in second, entitling the owner to $60,000. The owner then sought administrative review of the stewards' ruling that his horse could not race. The Illinois Racing Board upheld the stewards' ruling. The owner appealed to the circuit court, contending that the racing officials violated the board's own rules that required that the entry box be opened by a state steward.[55] The circuit court found that the box was opened improperly by someone other than a state steward. The appellate court affirmed, holding that the person who opened the box could not be relied upon because he was not authorized under the rules, and that the board acted arbitrarily by failing to enforce its own rule.[56]

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52. *Id.*; *see also* Kaske v. City of Rockford, 450 N.E.2d 314 (Ill. 1983) (holding that a declaratory judgment action was an "optional, alternative remedy" to proceeding under administrative review law where officers challenged police department policy on its face); Landfill, Inc. v. Pollution Control Bd., 387 N.E.2d 258, 260 (Ill. 1978) ("[W]here an administrative rule asserting administrative authority is challenged on its face as not authorized by the enabling legislation, exhaustion is not required."). On the merits, however, the appellate court ruled that the tax was not preempted. *Tri-State Coach Lines, Inc.*, 732 N.E.2d at 1151.

53. *See* Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 389, 393-94 (Ill. 2008).

54. Heavner v. Ill. Racing Bd., 432 N.E.2d 290, 291 (Ill. App. Ct. 1982).

55. *Id.* at 294.

56. *Id.* at 294-95; *see also* Service v. Dulles, 354 U.S. 363 (1957) (holding, in a declaratory judgment action, that a claimant successfully challenged employment termination on the ground that the agency failed to follow its own regulations); United States *ex rel*. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) ("[W]e object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations.").

F. IRREPARABLE HARM

In *Bio-Medical Laboratories, Inc. v. Trainor*, the plaintiff was a vendor licensed to participate in the Medicaid program.[57] After an audit, the Department of Public Aid discovered the plaintiff had been overpaid by $320,000. Department auditors recommended that the plaintiff be suspended from the Medicaid program. The plaintiff, alleging that the department lacked the authority to take such action, sought an injunction to restrain the department from suspending him. The circuit court granted the injunction and the Illinois Supreme Court affirmed. The department claimed the plaintiff had failed to show irreparable harm or an inadequate remedy at law. The court rejected these contentions, noting that ninety percent of the plaintiff's business was Medicaid payments.[58] The court said that it could reasonably be inferred that the wrongful suspension of the plaintiff from the Medicaid program would cause damages of uncertain magnitude.[59]

G. ADMINISTRATIVE REMEDY WOULD BE FUTILE

In *Morr-Fitz, Inc. v. Blagojevich*, pharmacists brought an action against state officials and the State Board of Pharmacy, seeking a declaration that a rule requiring pharmacies to dispense "morning after" contraceptive pills violated their rights under state statutes and their free exercise rights under the First Amendment.[60] The trial court granted the agency's motion to dismiss and the appellate court affirmed. The Illinois Supreme Court reversed, holding that the claims were ripe for review, and the pharmacists were not required to exhaust administrative remedies. The court found, inter alia, that the futility exception to the exhaustion requirement applied. The court relied on statements from the Governor wherein he allegedly said "pharmacists with moral objections [to dispensing Plan B contraceptives] should find another profession,"[61] and that they "must fill prescriptions without making moral judgments."[62] The agency had also declared that the rule would be "vigorously enforced." [63]

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57. Bio-Med. Labs., Inc. v. Trainor, 370 N.E.2d 223, 225 (Ill. 1977).
58. *Id.* at 227.
59. *Id.*
60. Morr-Fitz v. Blagojevich, 901 N.E.2d 373, 377 (Ill. 2008).
61. *Id.* at 390.
62. *Id.* at 391.
63. *Id.*; *see also* Canel v. Topinka, 818 N.E.2d 311, 319 (Ill. 2004) (adjudicating a case where an owner of unclaimed property filed a class action against the state treasurer and the director of the Unclaimed Property Division to recover the state's unconstitutional retention of dividends and interest under state law; holding that the owner was not required to exhaust administrative remedies, as exhaustion would have been futile; and further holding

Under the futility exception, however, even clear indications that the agency will rule adversely may not be enough.[64] The exhaustion of remedies requirement cannot be avoided simply because relief may be, or even probably will be, denied by the agency.[65]

V. PRACTICE CONSIDERATIONS

Anticipate that the agency will vigorously oppose a declaratory or injunction action. Agencies understandably seek to guard their rules and regulations from judicial scrutiny. Agencies typically file motions to dismiss contending that the plaintiff failed to exhaust administrative remedies, that the plaintiff lacks standing, or that the case is not ripe.[66] The following points may help defeat such a motion.

Legal Issues. Before filing a declaratory judgment complaint, identify the legal issue(s), such as the specific rule, regulation, or statute that impairs the party's rights or is otherwise unlawful. Pure questions of law are most likely to survive a motion to dismiss. Consider narrowing the legal issues to the one or two claims that are strongest, rather than a scatter-shot approach. Weak claims will likely dilute the strong claims.

Avoid Factual Issues. Factual disputes with the agency, particularly those related to factual matters that are typically resolved during administrative hearings, should be omitted from a declaratory judgment complaint. Such matters are easy targets for the agency's failure to exhaust argument.

Circuit Court Jurisdiction. Determine whether the statute conferring power on the agency "explicitly" divests, through a comprehensive scheme, the circuit courts of their original jurisdiction to consider the issue.[67] If the circuit courts are not divested of jurisdiction, assert that the exhaustion of remedies doctrine is inapplicable.[68]

Adequacy of Administrative Remedy. Analyze any administrative remedy the agency provides. Determine whether your legal issues could be resolved in the administrative hearing. Administrative law judges generally lack authority to hear statutory or constitutional challenges to agency rules

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that the dividends remained the property of the owner who was entitled to just compensation).

64. *See* AEH Constr., Inc. v. Ill. Dep't of Labor, 743 N.E.2d 1102, 1106 (Ill App. Ct. 2001).

65. Nw. Univ. v. City of Evanston, 383 N.E.2d 964 (Ill. 1978).

66. A plaintiff's failure to exhaust administrative remedies is an affirmative defense that is waived if not raised in the trial court. Hawthorne v. Vill. of Olympia Fields, 790 N.E.2d 832, 840 (Ill. 2003).

67. Emp'rs Mut. Cos. v. Skilling, 644 N.E.2d 1163, 1165 (Ill. 1994).

68. *Id.* (stating that, because the commission and circuit courts have concurrent jurisdiction, the doctrine of exhaustion of remedies is inapplicable).

and regulations.[69] If the agency *has* provided a hearing within which to raise such a challenge, consider whether the procedures provided are adequate and fair. In administrative hearings before the agency, are parties allowed to create a record supporting statutory or constitutional claims? If not, state this in the declaratory judgment complaint. In appeals from an administrative hearing under chapter 735, act 5, section 3-110 of the Illinois Compiled Statutes, the circuit courts are limited to the record created in administrative proceedings—"No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court."[70] Therefore, if a record cannot be created in the administrative hearing for the issue, the agency's remedy is inadequate.

Hardship from Withholding Review. Allege the hardships you would sustain if required to exhaust administrative remedies. Hardship to the parties from withholding judicial review is a key element of ripeness analysis. Because declaratory relief, in the end, is at the judge's discretion, state facts to stimulate the court's empathy. Also, allege facts, where applicable, showing that administrative review would be futile, or that there will be significant delay. If the administrative law judge is required to follow and apply the agency's rules and regulations, and you seek to challenge an agency rule or regulation, allege that administrative review would be futile.

Multiple Exceptions to Exhaustion. Determine which exceptions to exhaustion may apply—and the more exceptions, the better. For example, in *Blagojevich*, the court found that multiple exceptions to exhaustion applied: (1) no issues of fact, nor agency expertise involved;[71] (2) exhaustion would have been futile;[72] (3) facial challenge on constitutional grounds;[73] and (4) inadequate administrative procedure for granting a variance.[74]

The Agency's Ripeness Argument. The agency may say the case is unripe and that it needs more time and experience from adjudicating specific cases in the administrative review procedure before judicial review occurs. This will allow the agency, while applying its expertise, to revise its

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69. *See, e.g.*, Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 676 n.6 (1986). *Bowen* involved a regulation that stated:

> The [hearing officer] may not overrule the provisions of the law or interpret them in a way different than HCFA does when he disagrees with their intent; nor may he use hearing decisions as a vehicle for commenting upon the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program.

Id.

70. 735 ILL. COMP. STAT. 5/3-110 (West 2006).

71. Morr-Fitz v. Blagojevich, 901 N.E.2d 373, 390 (Ill. 2008).

72. *Id.* at 390-91.

73. *Id.* at 392.

74. *Id.*

policies, rules, or regulations without judicial interference. Such an argument requires a strong response and might include the following points.

First, administrative "agencies typically have both legislative and judicial powers concentrated in them . . . . They have authority to issue rules and regulations that have the force of law (power that is legislative in nature) and authority to decide cases (power judicial in nature)."[75] The Illinois Administrative Review Law and exhaustion doctrine do not apply to the legislative acts of legislative bodies.[76] When exercising legislative functions (issuing rules and regulations), administrative agencies pose the greatest danger for infringing the rights of the greatest number. If the statutes, rules, or regulations are unlawful, infringements of private rights proliferate. Hence, once the agency has completed its legislative function and has established its rules and regulations, there is nothing "premature" about a court considering their facial validity. Nothing is gained by waiting for the agency to perform its quasi-judicial function of deciding cases.

Nor is the agency likely to "fix" its bad rules or regulations on its own when deciding individual cases.[77] Agency administrators who must bear the administrative inconvenience of revising their rules or conferring greater due process are unlikely, while deciding individual cases, to "repair the breach." The U.S. Supreme Court has agreed with this view: "It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context."[78]

Primary Jurisdiction Results in a Stay. The agency may similarly argue that under the primary jurisdiction doctrine, the claim should be referred to the agency so that it may employ its specialized technical expertise. In response, consider asserting that "[i]t is the particular province of the courts to resolve questions of law . . . . Administrative agencies are given wide latitude in resolving factual issues, but not in resolving matters of law."[79] Further, "[s]hould primary jurisdiction be found to exist [with the agency], the action should never be dismissed from the court but may only be stayed."[80] Thus, if there is to be a referral of *factual* matters to the agen-

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75. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 9 (3d ed. 1991).

76. *See* Hawthorne v. Vill. of Olympia Fields, 790 N.E.2d 832, 839 (Ill. 2003).

77. In arguing for an independent federal judiciary, Alexander Hamilton stated:

> From a body which had had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in application . . . [s]till less could it be expected that men who had infringed the constitution, in the character of legislators, would be disposed to repair the breach in the character of judges.

THE FEDERALIST No. 81, at 543-44 (Alexander Hamilton) (Jacob Cooke ed., 1961).

78. Mathews v. Eldridge, 424 U.S. 319, 330 (1976).

79. Emp'rs Mut. Cos. v. Skilling, 644 N.E.2d 1163, 1166 (Ill. 1994).

80. People v. NL Indus., 604 N.E.2d 349, 355 (Ill. 1992).

cy, the declaratory judgment action should only be stayed, and the circuit court should retain jurisdiction to finally determine all issues.[81]

VI. CONCLUSION

Parties aggrieved by an administrative agency's unfair rules, regulations, or other actions have an alternative to settlement. The declaratory judgment remedy is available before exhausting administrative remedies where the agency's jurisdiction is not exclusive. Even where agency jurisdiction is found to be exclusive, if established exceptions to the exhaustion doctrine apply, a court may, in its discretion, entertain the action and grant necessary relief.

81. *Id.*