A MIRY BOG PART II*: UDJA AND APA DECLARATORY JUDGMENT ACTIONS AND AGENCY STATEMENTS MADE OUTSIDE A CONTESTED CASE HEARING REGARDING THE MEANING OF THE LAW

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I. INTRODUCTION

In 1982, the Austin Court of Appeals *in dicta*, and for the first time in Texas jurisprudence, recognized the animal known as an interpretive rule.[1] This author has analyzed the subsequent Austin Court opinions demonstrating how the court has struggled with whether interpretive rules were covered by the APA and, more specifically, whether such rules were subject to declaratory relief under §2001.038 of the APA.[2] Since that time, the Austin Court of Appeals, in two memorandum opinions, appeared to hold that an interpretive rule did not constitute a "rule" for purposes of the APA.[3] However, recently, the Austin Court of Appeals has in fact recognized the logic of and existence of interpretive rules without naming them as such or determining they constituted rules for the purposes of the APA. Yet, the court found such statements were subject to declaratory and injunctive relief under the Uniform Declaratory Judgment Act (UDJA).[4] This author has also analyzed the Austin Court of Appeals creation of a miry bog by its inconsistent interpretation of the availability of declaratory relief for a challenge to an agency substantive rule under §2001.038 of the

* As to Miry Bog Part I, see Beal, Texas Administrative Practice and Procedure: (1) A Paved Road to A Miry Bog: A § 2001.038 Declaratory Judgment Action to Challenge the Validity of a Rule; (2) 2005 Update and Analysis, 58 BAYLOR L. REV. 331 (2006).

[1] First Federal Sav. & Loan Ass'n v Vandygriff, 639 S.W.2d 492, 498 (Tex. App.—Austin 1982, writ dism'd).

[2] Ron Beal, The APA & Rulemaking: Lack of Uniformity Within a Uniform System, 56 BAYLOR L. REV. 1, 26-47 (2004).

[3] Keeton v. Tex. Racing Comm'n, 2003 Tex. App. LEXIS 6925; W.L. 21939996 (Tex. App.—Austin 2003); Veterans for Foreign Wars v. Abbott, 2003 Tex. App. LEXIS 6326; W.L. 21705376 (Tex. App.—Austin 2003).

[4] T.D.I. v. Lumbermens Mut. Cas. Co., 2006 Tex. App. LEXIS 10976, W.L. 3754778 (Tex. App.—Austin 2006); Tex. Lottery Comm'n v. Scientific Games Int'l, 99 S.W.3d 376, 379-80 (Tex. App.—Austin 2003).

APA.[5] The Austin Court of Appeals has now further confused the use and applicability of such declaratory vehicles and deepened the miry bog as to the availability of a UDJA action to challenge agency statements issued outside the context of a contested case hearing declaring the meaning and applicability of the regulatory statutes that they administer.

II. THE INTERRELATIONSHIP OF INTERPRETIVE RULES AND A §2001.038 DECLARATORY JUDGMENT ACTION TO CHALLENGE THE VALIDITY OF A RULE

A. Interpretive Rules and the Texas APA

The Austin Court of Appeals held *in dicta* that an interpretive rule was an agency statement which interprets and applies the provisions of an applicable statute. The court held no sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute which the rule merely interprets.[6] The Texas APA defines a rule in part as an agency statement of general applicability that "implements, **interprets**, or prescribes law or policy."[7] The Texas APA was based on the Revised Model State Administrative Procedure Act of 1961,[8] and the drafters of the Model Act made a deliberate choice to include all statements setting forth the agency's position on questions of statutory interpretation and questions of policy within the definition of a rule.[9] The Model Act noted that the concept of an interpretive rule was based on precedent developed under the Federal APA and judicial interpretations thereof.[10]

The United States Supreme Court has held that a "substantive rule" is a legislative-type rule that affects the individual rights and obligations of persons. They are issued pursuant to statutory authority and implement the statute pursuant to the delegation of requisite legislative authority by

[5] Ron Beal, *Texas Administrative Practice and Procedure*: (1) *A Paved Road to A Miry Bog: A § 2001.038 Declaratory Judgment Action to Challenge the Validity of a Rule*; (2) *2005 Update and Analysis*, 58 BAYLOR L. REV. 331 (2006).

[6] First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 498 (Tex. App.—Austin 1982, writ dism'd).

[7] TEX. GOV'T CODE §2001.003(6)(A)(i)(Vernon's 2000)(emphasis added).

[8] John J. Watkins & Deborah S. Beck, *Judicial Review of Rulemaking Under the Texas Administrative Procedure and Texas Register Act*, 34 BAYLOR L. REV. 1,3 (1982).

[9] 1 Cooper, STATE ADMINISTRATIVE LAW 185-86 (1965).

[10] *Id.*

Congress.[11] In contrast, an interpretive rule is an agency statement issued to **advise** the public of the agency's **construction** of a statute or even a substantive rule which it administers. Thus, an interpretive rule does not have the force and effect of law, and when an issue as to the meaning of the law arises in a contested case proceeding, an interpretive rule is not given controlling weight.[12] Therefore, if the agency statement merely applies the canons of construction to the words of a statute or rule and considers the overall policy encompassed within the statute and/or rule in light of the language, purpose, and legislative history, it is simply an interpretive rule.[13] However, an interpretive rule is of legal significance, for it is the declared view of the agency as to the meaning of the legislative intent and such statement binds agency employees.[14]

An interpretive rule is not every statement made by an agency and its employees. As was thoroughly analyzed in this author's prior analysis of Austin Court decisions,[15] an interpretive rule is a rule for purposes of the APA under the following conditions:

It is issued by an agency board, commission, executive director or other officer vested with the power to act on behalf of the agency,

It is issued with the intent of the agency to notify persons or entities that are similarly situated or within a class described in general terms,

It is issued to notify those persons or entities of the agency's interpretation of a statutory provision which has been crystallized following reflective examination in the course of the agency's interpretive process and,

Such interpretation was not labeled as tentative or otherwise qualified by arrangement for consideration at a later date.[16]

In addition, the Texas APA definition of a rule excludes agency statements if they are in regard to "only the internal management or organization of a state agency and not affecting private rights or procedures."[17] By definition, the mere issuance of an interpretive rule does

[11] Chrysler Corp. v. Brown, 441 U.S. 281, 302-04 (1979).

[12] Shalala v. Guernsey Memorial Hosp., 514 U.S. 87, 99-1000 (1995).

[13] General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1987).

[14] Warder v. Shalala, 149 F.3d 73, 82 (1st Cir. 1998).

[15] Ron Beal, The APA & Rulemaking: Lack of Uniformity Within a Uniform System, 56 BAYLOR L. REV. 1, 26-47 (2004).

[16] *Id.* at 40-41.

[17] TEXAS GOV'T CODE §2001.003(6)(C).

not "affect" the rights, duties, privileges and obligations of parties, for as the Austin Court held long ago, no sanction actually attaches based only on an interpretive rule, but from a violation of the statute which the rule interprets.[18] The key to this exclusion is that it only includes statements that in addition to not directly affecting a party's rights, the statements must only be in regard to agency management or organization of the agency.[19] Thus, this exclusion only includes agency statements made to its staff on how to enforce the statute and rules adopted hereunder. Therefore, administrative guidelines to employees, staff manuals, agency training conferences and the like would be wholly excluded from the definition of an interpretive rule. Further, advice given by the Board, Commission, or Executive Director in handling enforcement actions or inspections would be wholly exempt from an interpretive rule for the intent of the agency is not to place the public on notice of how the law will be interpreted, but the agency is simply intending to implement its regulatory scheme by providing the necessary uniform guidance to agency staff in the context of administering a complex regulatory scheme. Therefore, it is only statements that are deliberately issued by agencies with the intent to inform the regulated public and the public at-large of its interpretation of existing law and how it intends to apply that interpretation consistently in all future agency actions that constitutes an interpretive rule.[20]

B. Availability of Judicial Review Upon the Issuance of a Rule

The APA allows a person to challenge the validity or applicability of an agency "rule" pursuant to a declaratory judgment action if it is alleged that the rule or its threatened application interferes with or impairs a legal right or privilege of the plaintiff.[21] The Austin Court of Appeals has consistently held that the APA declaratory judgment vehicle of §2001.038 is a legislative grant of subject matter jurisdiction.[22] It is in fact a legislative

[18] First Fed. Sav. & Loan v. Vandygriff, 639 S.W.2d 492, 498 (Tex. App.—Austin 1988, writ dism'd).

[19] Bd. of Ins. Comm'rs v. Guardian Life Ins. Co., 142 Tex. 630, 180 S.W.2d 906, 908-09 (1944)(the term "or" and "and" are in no sense interchangeable terms, but on the contrary are used in the structure of language for purposes entirely variant, the former being strictly of a conjunctive and the latter of a disjunctive nature).

[20] Ron Beal, The APA & Rulemaking: Lack of Uniformity Within a Uniform System, 56 BAYLOR L. REV. 1, 36-41 (2004).

[21] TEXAS GOV'T CODE §2001.008(a).

[22] Keeter v. Tex. Dep't.of Agric., 844 S.W.2d 901, 902 (Tex. App.—Austin 1992); Dep't of

grant of original, not appellate, jurisdiction in the district court,[23] for the APA expressly provides that the court may render judgment without regard to whether the plaintiff requested the state agency to rule on the validity or applicability of the rule in question.[24] In addition, the Austin Court has held that the legislature intended the §2001.038 action to constitute an express statutory authorization for an agency to be sued and it thus provides an express waiver of sovereign immunity.[25] Thus, the §2001.038 declaratory judgment action's primary purpose is to allow one to obtain a final declaration of a rule's validity and applicability **before** the rule is applied.[26] Primary jurisdiction does not require the district court to defer to the agency whether or not there is a pending contested case proceeding applying the same rule as challenged by way of a §2001.038 declaratory judgment action. This is so for the critical question in the primary jurisdiction context is what tribunal should make the initial decision and the agency did in fact make the initial decision by deciding to adopt the rule.[27] Therefore, even with a pending contested case proceeding, the sole issue before the court is the validity of the rule, and the agency has already acted and intends to apply the same because it believes such rule to be valid. Thereby, primary jurisdiction does not forbid but in fact allows the declaratory judgment action to proceed to determine the validity of rule.[28]

A §2001.038 action requires a showing of standing for a person must allege and prove that the rule, or its threatened application, interferes with

Human Services v. ARA Living Centers of Tex., Inc., 833 S.W.2d 689, 692 (Tex. App.—Austin 1992, writ denied); Lopez v. PUC of Tex., 816 S.W.2d 776, 782 (Tex. App.—Austin 1991, writ denied); Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989); Southwestern Bell Telephone Co. v. PUC of Tex., 735 S.W.2d 663, 669 (Tex. App.—Austin 1987).

[23] Southwestern Bell Telephone Co. v. PUC of Tex., 735 S.W.2d 663, 669 n.2 (Tex. App.—Austin 1987).

[24] TEXAS GOV'T CODE §2001.038(d).

[25] Dep't of Human Services v. ARA Living Centers of Tex., Inc., 833 S.W.2d 689, 693 (Tex. App.—Austin 1992, writ denied).

[26] Tex. Mutual Ins. Co. v. T.D.I., 2006 Tex. App. LEXIS 10698, W.L. 3679997 (Tex. App.—Austin 2006); Ford, Inc. v. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995); Rutherford Oil Corp. v. General Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989).

[27] R.R. Comm'n of Tex. v. Arco Oil & Gas Co., 876 S.W.2d 473, 378 (Tex. App.—Austin 1994, writ denied).

[28] Dep't of Human Services v. ARA Living Centers of Tex., Inc., 833 S.W.2d 689, 693 (Tex. App.—Austin 1992, writ denied); . Rutherford Oil Corp. v. General Land Office, 776 S.W.2d 232, 235-36 (Tex. App.—Austin 1989).

or threatens to interfere with or impair a legal right or privilege of the plaintiff.[29] If a party can establish that she falls within the coverage of the rule and the statute upon which it is based, one has demonstrated a legal right or privilege.[30] The Austin Court has further explained that a "legal right or privilege" as used in §2001.038, was merely intended to require that the party prove (1) a party comes within the parameters of the relevant statute, (2) that the statute provides certain substantive or procedural rights or privileges to persons subject to the same, (3) that the rule is outside the scope of or inconsistent with the statutory rights or privileges, and (4) thereby the party's statutory rights or privileges have been or will be impaired by the rule adopted.[31]

Initially, the Austin Court held the party must in addition show an affirmative act by the agency to apply the rule.[32] However, in a subsequent decision, it clarified its holding by stating that sufficient evidence of an "affirmative act" could merely be the adoption of the rule, for it would be presumed that at some point in time the agency would attempt to apply such standard in the ongoing course of its regulatory duties.[33] For if the agency had no intention of applying the rule, it could so state in its pleadings in response to the commencement of the declaratory judgment action.[34]

These cases are particularly relevant to an interpretive rule. As was set forth above, by definition an interpretive rule merely interprets existing statutory authority and in and of itself standing alone, has no legal impact upon a party.[35] However, an interpretive rule declares an agency's interpretation of existing statutory authority and the agency's intention to apply such interpretation in the future.[36] Further, such interpretive rule is binding upon agency employees who will administer the relevant statute.[37] Thus, if a party establishes that it falls within the parameters of the relevant

[29] TEXAS GOV'T CODE §2001.038(a).

[30] PUC of Tex. v. City of Austin, 728 S.W.2d 907, 910-11 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[31] Watson v. North Tex. Higher Educ. Authority, 2001 Tex. App. LEXIS 7017, W.L. 1534905 (Tex. App.—Austin 2000)(memo op.).

[32] Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 797 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

[33] PUC of Tex. v. City of Austin, 728 S.W.2d 907, 910-11 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[34] *Id.* at 911.

[35] *See supra* text accompanying notes 6-14.

[36] *See supra* text accompanying note 16.

[37] *See supra* text accompanying note 14.

statute that the rule interprets, and if it asserts the agency interpretation is inconsistent with or outside the scope of the statutory language, the party has established the interference with or impairment of a legal right or privilege. Yet, one may assert there is no evidence that such mere declaration of law will be utilized by the agency nor or in the future. However, by definition, an interpretive rule is a statement by an agency notifying the regulated public of its intent to so interpret the law now and in the future which statement was not qualified or subject to further revision in the future.[38] This may be confirmed by the Austin Court's holding that upon commencement of the challenge to the agency rule, the agency through its pleadings may withdraw its pronouncement and decline to follow its interpretation within the future.[39] This was exactly the intended purpose of a §2001.038 action; to declare the rights, duties, privileges, and obligations of regulated parties before the government acts.

Finally, ripeness is required where the court should examine (1) the fitness of issues for judicial resolution, and (2) the hardship occasioned to a party by the court's denying judicial review.[40] The doctrine focuses on conserving judicial time and resources which should be expended only for controversies that are real and present as opposed to those that are merely abstract, hypothetical or remote.[41]

Ripeness *per se* has not been an issue when the §2001.038 action is to challenge the validity of a substantive or procedural rule. The fitness of the issues for judicial resolution is unquestioned, for an issue of validity is a question of law to be determined *de novo* by the court to determine if the rule is outside the scope of[42] or inconsistent with the legislative intent.[43] As to the hardship occasioned to a party by the court's denying judicial review, such consideration has been usurped by the mere fact a §2001.038 action by definition provides for a challenge to a rule upon its mere issuance and

[38] *See supra* text accompanying note 16.

[39] INSERT CITE

[40] Save our Springs Alliance v. City of Austin, 149 S.W.3d 674, 680-81 (Tex. App.—Austin 2004).

[41] Hays County v. Hays County Water Planning P'ship, 106 S.W.3d 349, 357 (Tex. App.—Austin 2003).

[42] Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., Inc., 136 S.W.3d 643, 657-58 (Tex. 2004).

[43] PUC of Tex. v. City Public Serv. Bd. of San Antonio, 53 S.W.3d 310, 315-17 (Tex. 2001); Edgewood I.S.D. v. Meno, 893 S.W.2d 450, 482 (Tex. 1995).

there is no need to seek consideration by the agency[44] nor even delay proceeding if there is a pending administrative proceeding.[45] Thus, in effect, the second prong of the classic ripeness requirement is fulfilled for the legislature intended for the pre-enforcement review of the validity of a rule.[46]

An interpretive rule is also a pure question of law as to the validity of an agency interpretation of a statute.[47] As the Austin Court held in the challenge to an interpretive rule, if the party has challenged by way of declaratory judgment the validity of an interpretive rule under the APA, the claim is simply ripe for judicial declaration.[48]

C. Oh How Can It Be? Will This Result in Agency Impotence if Interpretive Rules are Subject to §2001.038 Declaratory Relief?

Justice Powers, on behalf of the Austin Court of Appeals, held that agencies routinely issue letters, guidelines, reports, and occasionally file briefs in court proceedings, any of which might contain statements that intrinsically implement, interpret or prescribe law or policy or procedure or practice requirements. He concluded that if such statements constituted APA "rules," agencies would be reduced to impotence if such views could only be expressed through contested case proceedings or formal rulemaking. How, Justice Powers wondered, under such a theory could an agency practically express its views in an informal conference or advisory committee, or state its reasons for denying a petition to adopt a rule or file a brief in a court or agency proceeding?[49] What Justice Powers ignored was a case he cited within the decision[50] wherein the Texas Supreme Court held, "not every statement by an administrative agency is a rule for which the APA prescribes procedures for adoption and for judicial review."[51] As set

[44] TEXAS GOV'T CODE §2001.038(d).

[45] Dep't of Human Services v. ARA Living Centers, Inc., 833 S.W.2d 689, 692 (Tex. App.—Austin 1992).

[46] Ford, Inc. v. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995); Rutherford Oil Corp. v. General Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989).

[47] Dodd v. Meno, 870 S.W.2d 4, 7 (Tex. 1994); Tarrant County Appraisal Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993).

[48] Tex. Alcoholic Beverage Comm'n v. AMOT, 997 S.W.2d 651, 656 (Tex. App.—Austin 1999).

[49] Brinkley v. Tex. Lottery Comm'n, 986 S.W.2d 764, 769-70 (Tex. App.—Austin 1999).

[50] Tex. Educ. Agency v. Leeper, 893 S.W.2d 432 (Tex. 1994).

[51] *Id.* at 443.

forth above,[52] and thoroughly analyzed by this author previously,[53] not every statement is an interpretive rule. An agency statement is only an interpretive rule when it represents the views of an agency approved by the agency board, commission, or a person vested with authority to act on behalf of the agency, such as an executive director; when it is the product of the process provided by the agency taking into account the position of agency staff as well as outside presentations, and when the interpretation is not labeled as tentative or otherwise qualified by arrangement for reconsideration.[54] An agency has every right to label its interpretation as conditional or subject to reexamination, thereby asserting that such interpretation is tentative in nature, however, absent language to that effect, the issue of finality should be and will be presumed when the appropriate officer who released the opinion signs the statement.[55]

This analysis is consistent with the Texas Supreme Court holding that whether an agency statement is a rule is determined in part by the intent of the agency in the context wherein the agency statement was made.[56] Thus, when the agency is in fact intending to notify all interested persons of its interpretation of its governing authority and how it intends to apply that law in the future, such statement constitutes an interpretive rule and thus, it is a rule under the APA which is subject to declaratory judgment relief. The courts and the agencies are capable of understanding the distinguishing characteristics of an agency statement that constitutes an interpretive rule. To simply hold that all statements that are not clearly substantive or procedural rules do not constitute a rule for purposes of the APA is to literally throw the baby out with the bath water. Such statements can be identified and distinguished from other statements of an agency where it is glaringly apparent that its views are tentative in nature or have been formulated related to the specific facts of a specific controversy or merely relate to internal organization or management of the agency.

The failure to directly and squarely address the issue of interpretive rules in a published opinion creates an atmosphere of extreme uncertainty for agency officials, the practicing bar and the regulated public. The most serious problem with the Texas Supreme Court and Austin Court of

[52] *See supra* text accompanying notes 15-20.

[53] Ron Beal, The APA & Rulemaking: Lack of Uniformity Within a Uniform System, 56 BAYLOR L. REV. 1, 26-41 (2004).

[54] Nat'l Automatic Laundry & Cleaning Council, 443 F.2d 689, 701-03 (D.C. Cir. 1971).

[55] *Id.* at 702.

[56] Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 443 (Tex. 1994).

Appeals failing to recognize the existence of an interpretive rule and that such rule is subject to declaratory relief is that they are wholly ignoring their own precedent, the clear meaning of the APA and its legislative history. These conclusions are glaringly apparent as demonstrated by the actions of the Texas Board of Chiropractic Examiners. The Board had issued four separate letters in 1997, 1998, 1999, and 2002, sent to all licensed and regulated chiropractors that in its opinion under its authority to interpret its regulatory scheme, that the use of needle electromyography ("needle EMG"), a diagnostic technique that is used to study nerve conduction in patients by the insertion of a needle into a patient's muscles as a means of observing and recording electrical activity was within the scope of chiropractic practice. These state agency statements were expressly ratified by the Board, indicated the Board's interpretation of its statutory authority, and it was the clear intent of the Board to inform all licensed chiropractors that such activity was lawful under its licensing authority.[57] Therefore, it clearly fell within the parameters of an "interpretive rule," for it was issued by the Board with the intent to notify all licensed chiropractors based on the agency's interpretation of a statutory provision, which had been crystallized following reflective examination over at least a five-year period of time, and such interpretation was not labeled as tentative or otherwise qualified, but was considered to be the Board's final opinion on the matter.[58] This is an example of the essence of the meaning and reason for interpretive rules; a regulatory agency wanted to inform all licensees of how it intended to interpret the law and how the Board intended for the affect of the letters issued to allow all licensees to engage in such practices. Based on that interpretation, chiropractors engaged in such activity and submitted the cost of those procedures to a workers' compensation carrier for payment.[59]

In the case of *Continental Cas. Co. v. Tex. Bd. of Chiropractic Examiners*,[60] an insurance company sought declaratory relief against the Board seeking the court to declare such "interpretive rule" invalid due to the fact that based on such interpretive rule, the insurance company was confronted with chiropractors utilizing such medical procedures on

[57] O'Neal v. Tex. Bd. of Chiropractic Examiners, 2004 Tex. App. LEXIS 8254, W.L. 2027787 (Tex. App.—Austin 2004).

[58] *Id.*

[59] *Id.*

[60] Continental Cas. Co. v. Tex. Bd. of Chiropractic Examiners, 2001 Tex. App. LEXIS 2336, W.L. 359632 (Tex. App.—Austin 2001)(memo op.).

workers' compensation patients and submitting bills for payment as "medical care."[61] Based on a statutory provision that provided a chiropractor was only legally entitled to perform "non-surgical, non-incisive procedures, including adjustment and manipulation, to improve the sublacation complex or the biomechanics of the musuloskeletal system,[62] the affect and impact of the Board's interpretive rule was real, concrete, and actually relied upon by licensed chiropractors as if it had been issued as a substantive rule. The chiropractors believed it provided the legal authority to act in this manner and the insurance carrier was so inundated for claims for reimbursement that it had the wherewithal to commence and absorb the cost of the declaratory judgment action to stop chiropractors from engaging in such practices. Yet, the Austin Court refused to even consider the argument that the Board's letters were "rules" for purposes of a §2001.038 declaratory judgment action by the insurance carrier.[63]

This case demonstrates the glaring need for the judiciary to recognize the animal known as an "interpretive rule," and to hold that such agency statements, as defined, are subject to declaratory relief under §2001.038. Concerns as to agency impotence and its inability to enforce its regulatory scheme are simply without merit if the judiciary clearly defines the parameters of an interpretive rule as set forth above. By not allowing such agency challenges, agencies are not impotent but vested with omnipotence, and it is the licensees and other persons and entities subject to such agency statements who are impotent to prohibit such agency action by challenging the same through a pre-enforcement declaration as provided by §2001.038. Ironically, due to the continued use by state agencies of the animal known as an interpretive rule, the Austin Court of Appeals has created further confusion by allowing such challenges not under §2001.038, but by the use of a UDJA declaratory judgment action.

III. INTERPRETIVE RULES ARE SUBJECT TO CHALLENGE AND DECLARATORY RELIEF UNDER THE UNIFORM DECLARATORY JUDGMENT ACT

If a party challenges the validity of a rule, he/she is bound to assert a §2001.038 declaratory judgment action and may not seek relief under the

[61] *Id.*

[62] TEX. OCC. CODE §202.151 (Vernon 2004).

[63] Continental Cas. Co. v. Tex. Bd. of Chiropractic Examiners, 2001 Tex. App. LEXIS 2336, W.L. 359632 (Tex. App.—Austin 2001)(memo op.).

Uniform Declaratory Judgment Act (UDJA)[64] because such relief would be redundant.[65] However, if the challenge to an agency's authority includes a determination of not only whether a rule is valid, but in addition, the statute was construed for a challenge to agency action beyond adopting such rule, a party may utilize a UDJA action.[66] Therefore, if an agency statement issued with the intent to notify all persons of an agency's construction of its relevant statutory authority does not constitute a rule for purposes of the APA, it is arguably subject to UDJA declaratory relief. It is asserted that in two opinions issued by the Austin Court of Appeals, the court held agencies statements that constituted interpretive rules were subject to UDJA declaratory relief.[67]

The UDJA provides a vehicle to establish, among other things, the rights, status, or other legal relations that are affected by a statute, and a person may have determined any question of construction or validity arising under the statute.[68] It has been established that the §2001.038 declaratory judgment action provision to challenge the validity of a rule is an original action that confers subject matter jurisdiction upon the district court.[69] It has long been held that the UDJA declaratory action merely provides a remedy and it is not a grant of subject matter jurisdiction; it is merely a procedural device for deciding cases already within the court's jurisdiction.[70] However, such holdings potentially mislead a practitioner as to the availability of a UDJA action.

It has been long held that a UDJA action is within the jurisdiction of the district courts when (1) there is a controversy between the parties, which (2) will be actually determined by the judicial declaration sought. To constitute a justiciable controversy, there must be a real and substantial controversy involving genuine conflicts of tangible interest and not merely a theoretical

[64] TEX. CIV. PRAC. & REM. CODE §37.004(a).

[65] Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 443-44 (Tex. 1994).

[66] Tex. State Bd. of Plumbing Examiners v. Assoc. of Plumbing-Heating-Cooling Contractors of Tex., Inc., 31 S.W.3d 750, 754 (Tex. App.—Austin 2000).

[67] T.D.I. v. Lumbermens Mut. Ins. Co., 2006 Tex. App. LEXIS 10976, W.L. 3754778 (Tex. App.—Austin 2006); Tex. Lottery Comm'n v. Scientific Games Int'l, 99 S.W.3d 376 (Tex. App.—Austin 2003).

[68] TEX. CIV. PRAC. & REM. CODE §37.004(a).

[69] *See supra* text accompanying notes 22-28.

[70] Chenault v. Phillips, 914 S.W.2d 140, 141 (Tex. 1996); Bonham State Bank v. Biddle, 907 S.W.2d 465, 467-68 (Tex. 1995).

dispute.[71] However, a suit under the UDJA is not confined to cases to which the parties have a cause of action apart from the UDJA itself. The legislature intended the UDJA to be remedial, to settle and afford relief from uncertainty and insecurity with respect to legal rights and should be liberally construed.[72] An actual right of action in one party against another in which consequential relief may be granted need not exist before one is entitled to declaratory relief.[73]

It is essential that one must establish he/she is not seeking an advisory opinion which has the distinctive feature of deciding an abstract question of law without binding the parties.[74] Thus, a UDJA action must establish that there is a real controversy between the parties which will actually be determined by the judicial declaration sought.[75] A party must also have standing, but standing in this context has been defined as requiring a real controversy between the parties which will actually be determined by the judicial declaration sought.[76] In addition, ripeness is also an element of subject matter jurisdiction which is meant to conserve judicial time and resources for real and current controversies, rather than abstract, hypothetical, or remote issues.[77] Yet, under the UDJA, it is not necessary for standing or ripeness purposes that the parties seeking relief shall have incurred actual damage or injury. It merely requires for an action to lie that the fact situation establish "ripening seeds of a controversy." The judiciary has found this test to be fulfilled when the claims are present and indicative of threatened litigation in the immediate future which seems unavoidable, even though the differences between the parties as to their legal rights have

[71] Bonham State Bank v. Biddle, 907 S.W.2d 465, 467 (Tex. 1995); U.S. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 860 (Tex. 1965).

[72] Bexar Metro Water Dist. v. City of Bulverde, 156 S.W.3d 79, 88-89 (Tex. App.—Austin 2004); Juliff Gardens, L.L.C. v. T.C.E.Q., 131 S.W.3d 271, 276-77 (Tex. App.—Austin 2004); City of Waco v. T.N.R.C.C., 83 S.W.3d 169, 177 (Tex. App.—Austin 2002); Tex. Dep't of Pub. Safety v. Moore, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998).

[73] Transportation Ins. Co. v. Franco, 821 S.W.2d 751, 754 (Tex. App.—Amarillo 1992, writ denied) *cited with approval in* Tex. Dep't of Pub. Safety v. Moore, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998).

[74] Tex. Assoc. of Business v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993).

[75] Bonham State Bank v. Biddle, 907 S.W.2d 465, 467-68 (Tex. 1995); U.S. Life Ins. Co. v. Delaney, 396 S.W.2d 855, 860 (Tex. 1965).

[76] Tex. Assoc. of Business v. Tex. Air Control Bd., 852 S.W.2d 440, 446-47 (Tex. 1993); Tex. Dep't of Banking v. Mt. Olivet, 27 S.W.3d 276, 281-82 (Tex. App.—Austin 2000).

[77] Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998).

not reached the status of an actual controversy.[78]

Without acknowledging the existence of the "animal" of an interpretive rule, the Austin Court of Appeals has utilized this arguably broad interpretation of the availability of a UDJA action to allow the direct challenge of the mere issuance of an interpretive rule by an agency.[79] In *Texas Lottery Commission v. Scientific Games International*,[80] the executive director within a public meeting where the specific legal issue was considered and discussed, orally announced that the Commission would reverse a three-year-old "policy" of how it interpreted the meaning of a statute related to considering a potential vendor's economic impact upon the state in awarding contracts over $100,000. Two potential vendors sued for declaratory relief which was granted by the district court and affirmed by the Court of Appeals. The parties challenged and the court enjoyed the "mere issuance" of the adopted policy by defining such policy statements as inconsistent with the statute governing the agency. The policy was not adopted as a "rule" pursuant to the notice and comment rulemaking procedures of the APA, nor was the policy adopted within a specific contested case hearing or in the process of awarding a contract and/or determining the protests of the award of a contract. Declaratory relief pursuant to the UDJA was granted merely by the agency issuing a statement of its intent to in the future interpret its statutory authority in a certain way related to all lottery contracts.[81]

It is clear that the only legal justification that would allow a court to exercise its jurisdiction to declare the validity of a mere statement of an agency as to how it intended to interpret the law in the future was if such statement was considered a final agency action because it was the adoption of an interpretive rule. The court should have set forth that such statement was in fact an interpretive rule, for the statement was (1) issued by the executive director, (2) with the intent to notify persons or entities that are similarly situated or within a class, *i.e.*, potential bidders on lottery contracts, (3) as to the agency's intent to interpret a statutory provision that

[78] Taylor v. State Farm Lloyds, Inc., 124 S.W.3d 665, 6668-69 (Tex. App.—Austin 2003); Tex. Dep't of Banking v. Mt. Olivet, 27 S.W.3d 276, 282 (Tex. App.—Austin 2000); Tex. Dep't of Public Safety v. Moore, 985 S.W.2d 149, 153-54 (Tex. App.—Austin 1998).

[79] T.D.I. v. Lumbermens Mut. Cas. Co., 2006 Tex. App. LEXIS 10976, W.L. 3754778 (Tex. App.—Austin 2006); Tex. Lottery Comm'n v. Scientific Games Int'l, 99 S.W.3d 376 (Tex. App.—Austin 2003).

[80] Tex. Lottery Comm'n v. Scientific Games Int'l, 99 S.W.3d 376 (Tex. App.—Austin 2003).

[81] *Id.* at 380-83.

had been crystallized following reflective examination in the course of the agency's interpretive powers, and (4) such interpretation was not labeled as tentative, but as the stated "policy" of the Texas Lottery Commission in awarding contracts in the future. By labeling and interpreting the agency act as an "interpretive rule," the court would validate its jurisdiction to determine the validity of a mere statement of an agency and why it had the power to enjoin its "use" within agency proceedings held in the future.

Similarly, in *T.D.I. v. Lumbermens Mutual Casualty Co.*,[82] the party challenged the "mere" issuance of two advisories issued by the Workers' Compensation Division which construed and interpreted a statutory provision that incorporated by reference "guides" of the American Medical Association. Again, without identifying what type of "legal act" the advisories constituted, the court held it had jurisdiction to determine their validity. The court never answered the agency's point of error as to why the mere issuance of agency statement subjected the agency to declaratory and injunctive relief, but merely held that relief was available under the UDJA.[83]

It is incumbent upon the Austin Court of Appeals and the Texas Supreme Court to directly address the issue of the existence of an "interpretive rule" and as to the availability of declaratory and injunctive relief upon the mere issuance of such a rule. Without recognizing its formal existence and by allowing challenges to such statements under the UDJA, the courts seemingly contradict existing case law that when a statute provides a method for attacking an agency statement, here being the ordering adopting a rule, the statutory vehicle must be complied with, for a party is not entitled to redundant remedies.[84] Thus, if the sole challenge of a party is to the validity of a rule, he/she is bound to assert an APA §2001.038 declaratory judgment action and may not seek relief under the UDJA because such relief would be redundant.[85] It has also been established that the APA declaratory judgment action does not allow for the

[82] T.D.I. v. Lumbermens Mut. Cas. Co., 2006 Tex. App. LEXIS 10976, W.L. 3754778 (Tex. App.—Austin 2006).

[83] *Id.*

[84] Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth., 96 S.W.3d 519, 527-29 (Tex. App.—Austin 2002); Young Chevrolet v. Tex. Motor Vehicle Bd., 974 S.W.2d 906, 911 (Tex. App.—Austin 1998, writ denied); Ben Robinson Co. v. Workers' Compensation Comm'n, 934 S.W.2d 149, 153 (Tex. App.—Austin 1996, writ denied).

[85] Tex. Educ. Agency v. Leeper, 893 S.W.2d 432, 443-44 (Tex. 1994).

award of attorneys fees.[86] Therefore, by allowing challenges to interpretive rules through the use of the UDJA, the Austin Court of Appeals arguably abused its discretion by allowing for the award of attorneys fees under the UDJA when the relief sought is no greater than the relief available under §2001.038.[87]

V. CONCLUSION: THE NEED FOR UNIFORMITY AND CLARITY

One of the stated goals of the APA was ensure minimum standards of uniform practice and procedure.[88] The above analysis has established that agencies, practicing lawyers, and the regulated public are forced to live with a miry bog of conflicting judicial opinions as to the existence of and the right to challenge interpretive rules adopted by an agency. It appears the judiciary is hesitant to recognize such an animal due to the possible crippling affect it may have on an agency's power to administer the provisions of its statute if it is forced into court to defend itself every time it interprets the law. Yet, it has been established that an interpretive rule does not encompass every statement of every agency, officer, or employee, and which statements do or do not constitute interpretive rules is capable of clear definition. However, it may be, even though not yet articulated or acknowledged, that the judiciary realizes that if it finds such statements are in fact "rules" under the APA, such statements cannot be lawfully adopted without substantially complying with the notice and comment rulemaking procedures of the APA.[89] This would arguably further burden the agency in its ability to administer its statutory provisions on a day-to-day basis. Yet, such procedures are not overly burdensome. An agency would simply be required to provide statewide notice of its proposed interpretation within the *Texas Register*.[90] The entire notice and comment process can be completed in as little as 30 days.[91] However, the beneficial affects would be significant by allowing the agency to hear whether the regulated public

[86] Unified Loans, Inc. v. Pettijohn, 955 S.W.2d 649, 654 (Tex. App.—Austin 1997).

[87] Tex. State Bd. of Plumbing Examiners v. Assoc. of Plumbing-Heating-Cooling Contractors of Tex., Inc., 31 S.W.3d 750, 753 (Tex. App.—Austin 2000); Southwest Guaranty Trust Co. v. Hardy Road 13.4 Joint Venture, 981 S.W.2d 951, 956 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

[88] TEX. GOV'T. CODE §2001.001(1).

[89] TEX. GOV'T. CODE §2001.035(b).

[90] TEX. GOV'T. CODE §2001.023(b).

[91] *Id.* at §2001.023(a).

agrees with the interpretation and what practical impacts would such interpretation have upon the regulated public. In addition, the agency could be fully apprised of the competing legal theories as to what constituted the legislative intent as to any ambiguities within the regulatory scheme. Finally, if such statements were held to be APA rules and thereby subject to immediate declaratory relief under §2001.038, all parties concerned could obtain a definitive ruling by the judiciary as to the meaning of the relevant law. If the agency interpretation is upheld, the agency may proceed with enforcement knowing such actions fulfill the legislative intent and all parties would be willing to accept the cost of compliance knowing such interpretation would be upheld by the courts in any subsequent enforcement or contested case proceeding. Likewise, if the agency learns its interpretation is invalid, vast resources will be preserved by not enforcing the illegal interpretation and regulated parties will not have unnecessarily expended resources to comply with the illegal interpretation and application of the law.

It is possible that these recent opinions allowing the use of an UDJA action to challenge what is in effect an interpretive rule, is the Austin Court's implied holding that the legislature did not intend interpretive rules to exist under the APA, but that in limited circumstances one may still proceed by way of a UDJA action to obtain a pre-enforcement determination of the agency statement's validity. This would allow an agency to avoid compliance with the notice and comment process of the APA.

If this is the unarticulated position of the judiciary, it should state so expressly. Furthermore, it should recognize the existence of a "non-APA interpretive rule" and define its parameters in order to guide all individuals as to what agency statements are subject to UDJA relief. At present, the miry bog of conflicting precedent has created what is in effect a lottery game of chance as to what legal vehicle one should use to challenge such statements, and whether or not the judiciary will recognize such challenge as lawfully activating their jurisdiction. The judiciary has had 25 years to create this miry bog and it is time to dry it up and establish a straight paved highway as to when, if ever, one is entitled to pre-enforcement declaratory relief as to an agency's interpretation of the meaning of the law issued outside the context of a contested case hearing.