TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE:

(1) A PAVED ROAD TO A MIRY BOG: A SECTION 2001.038 DECLARATORY JUDGMENT ACTION TO CHALLENGE THE VALIDITY OF A RULE;

(2) 2005 UPDATE AND ANALYSIS

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I. INTRODUCTION

In 2005, the Texas judiciary confirmed its lack of a coherent, consistent interpretation of the statutory right to challenge the validity of a rule within a section 2001.038 declaratory judgment action as provided under the Texas Administrative Procedure Act (APA). The current case law will be examined to demonstrate how the courts have become caught in a miry bog of their own making and a suggested unified, coherent theory of interpretation will be set forth. In addition, an overview and analysis of decisions rendered during the 2005 year will be set forth under the broad categories of rulemaking and contested case proceedings.

II. A SECTION 2001.038 DECLARATORY JUDGMENT ACTION TO CHALLENGE THE VALIDITY OF A RULE—A PAVED ROAD TO A MIRY BOG

A. The Paved Road: A Declaration of the Validity of a Rule Before the Rendition of a Final Agency Order

The legislature adopted the APA in 1975 and it went into effect on January 1, 1976.[1] The APA included a new type of judicial review

[1] Act of April 22, 1975, 64th Leg., R.S., ch. 61, § 1975 Tex. Gen. Laws 136.

mechanism that allowed a person to challenge the validity of an agency rule pursuant to a declaratory judgment action if it was alleged that the rule, or its threatened application, interfered with, threatened to interfere with, or impaired a legal right or privilege of the plaintiff.[2] Such action was new in the sense that prior to the adoption of the APA, a challenge to the validity of a rule could be solely asserted within the appeal of an agency order.[3] The adoption of the declaratory judgment action was not intended by the legislature to be the exclusive method to challenge the validity of a rule,[4] and in the post-APA period, a party to a contested case proceeding may assert and the court will determine within the appeal of the agency order whether or not the rule is valid.[5]

The main purpose of creating the declaratory judgment vehicle was to provide for the advance determination of the validity of rules that would be applied in the future in contested cases.[6] The Austin Court of Appeals has described its purpose as a method to obtain a final declaration of a rule's validity before the rule is applied.[7] The vehicle was designed to remove certain grounds upon which the courts had historically denied relief under a declaratory judgment action, such as the absence of a justiciable controversy, exclusivity of another remedy, or the exhaustion of administrative remedies.[8]

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[2] TEX. GOV'T CODE ANN. § 2001.038(a) (Vernon 2000).

[3] *See, e.g.*, Gerst v. Oak Cliff Sav. & Loan Ass'n, 432 S.W.2d 702, 707 (Tex. 1968); Gerst v. Oak Cliff Sav. & Loan Ass'n, 421 S.W.2d 449, 453 (Tex. Civ. App.—Austin 1967), *rev'd on other grounds*, 432 S.W.2d 702 (Tex. 1968).

[4] Hosps. & Hosp. Sys. v. Cont'l Cas. Co., 109 S.W.3d 96, 100–01 n.9 (Tex. App.—Austin 2003, pet. denied).

[5] *See* Employees Ret. Sys. v. Jones, 58 S.W.3d 148, 153–54 (Tex. App.—Austin 2001, no pet.); Fulton v. Associated Indem. Corp., 46 S.W.3d 364, 373 (Tex. App.—Austin 2001, pet. denied); Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 757 (Tex. App.—Austin 1982, no writ).

[6] MODEL STATE ADMIN. PROCEDURES ACT, 15 U.L.A. 179 cmt. (2000) (explaining the major principles guiding the content of the 1961 Model Act).

[7] Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995, writ dism'd w.o.j.); Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ); *see also* Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth., 96 S.W.3d 519, 528–29 (Tex. App.—Austin 2002, pet. denied); Yamaha Motor Corp. v. Motor Vehicle Div., 860 S.W.2d 223, 229 (Tex. App.—Austin 1993, writ denied).

[8] Lopez v. Pub. Util. Comm'n of Tex., 816 S.W.2d 776, 782 (Tex. App.—Austin 1991, writ denied).

The Austin Court of Appeals has held that a section 2001.038 declaratory judgment action is in fact a legislative grant of subject matter jurisdiction.[9] The court has further held that it is clear that this is a statutory grant of original not appellate jurisdiction in the district court,[10] because the APA expressly provides that "a court may render a declaratory judgment without regard to whether the plaintiff requested the state agency to rule on the validity or applicability of the rule in question."[11] This same APA provision has been construed as waiving the general requirement that one must exhaust his administrative remedies before challenging the validity of a rule in a court of law.[12] If the declaratory judgment action requests the court to determine the validity of the rule when there are no pending or threatened contested case proceedings, primary jurisdiction is simply irrelevant and does not apply.[13] The critical question in the primary jurisdiction context is what tribunal should make the initial decision, and in this context, the agency did make the initial decision by deciding to adopt the rule.[14] Thus, the Austin Court of Appeals has held: "[W]e are unable to envision a situation in which the primary-jurisdiction doctrine could apply . . . ."[15]

The section 2001.038 declaratory judgment action challenging the validity of a rule has proven to be an effective tool for the parties to obtain a definitive ruling by the courts as to a rule's validity prior to the agency enforcing the same.[16] It is simply the duty of the court to make the

[9] *See* Keeter v. Tex. Dep't of Agric., 844 S.W.2d 901, 902 (Tex. App.—Austin 1992, writ denied); Tex. Dep't of Human Servs. v. ARA Living Ctrs., Inc., 833 S.W.2d 689, 693 (Tex. App.—Austin 1992, writ denied); *Lopez*, 816 S.W.2d at 782; Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ); Sw. Bell Tel. Co. v. Pub. Util. Comm'n, 735 S.W.2d 663, 669 (Tex. App.—Austin 1987, no writ).

[10] *Sw. Bell Tel. Co.*, 735 S.W.2d at 669.

[11] TEX. GOV'T CODE ANN. § 2001.038(d) (Vernon 2000).

[12] R.R. Comm'n v. Arco Oil & Gas Co., 876 S.W.2d 473, 479 (Tex. App.—Austin 1994, writ denied); *see also* Hammerman & Gainer, Inc. v. Bullock, 791 S.W.2d 330, 331 (Tex. App.—Austin 1990, no writ), *superseded by statute*, TEX. TAX CODE ANN. § 112.108 (Vernon 2001), as *recognized in* First State Bank of Dumas v. Sharp, 863 S.W.2d 81, 82–83 (Tex. App.—Austin 1993, no writ).

[13] *R.R. Comm'n*, 876 S.W.2d at 478.

[14] *Id*.

[15] *Id*. at 478 n.4.

[16] *See* Tex. Workers' Comp. Comm'n v. Patient Advocates, 136 S.W.3d 643, 647 (Tex. 2004); Pub. Util. Comm'n v. City Public Serv. Bd., 53 S.W.3d 310, 314–15 (Tex. 2001); R.R. Comm'n v. Lone Star Gas Co., 844 S.W.2d 679, 682 (Tex. 1992); Tex. Med. Ass'n v. Tex.

section 2001.038 declaratory judgment action a useful tool in the resolution of legal problems and controversies. The action was intended for use by the courts to make a correct declaration of the matters at issue, once jurisdiction has attached.[17]

This interpretation and application of the section 2001.038 declaratory judgment action has been applied even when there is a pending action before the agency regarding the rule challenge. The Austin Court of Appeals has held that the section 2001.038 declaratory judgment action clearly implies that a party may bring a declaratory judgment action challenging the validity of the rule even after the initiation of contested case proceedings.[18] This is true whether the petition was filed by the agency[19] or the party seeking declaratory relief requested the agency hearing.[20] Exhaustion of administrative remedies is simply not required.[21] Because the sole issue is the validity of the rule, primary jurisdiction does not require abatement or dismissal, for the agency has already acted by

Workers' Comp. Comm'n, 137 S.W.3d 342, 347 (Tex. App.—Austin 2004, no pet. h.); Brazoria County v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 728, 732–33 (Tex. App.—Austin 2004, no pet.); Unified Loans, Inc. v. Pettijohn, 955 S.W.2d 649, 650 (Tex. App.—Austin 1997, no pet.); McCarty v. Tex. Parks & Wildlife Dep't, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ); Tex. Hosp. Ass'n v. Tex. Workers' Comp. Comm'n, 911 S.W.2d 884, 885–86 (Tex. App.—Austin 1995, writ denied), *superseded by statute*, TEX. GOV'T CODE ANN. § 2001.039 (Vernon 2000), *as recognized in* Lower Laguna Madre Found., Inc. v. Tex. Natural Res. Conservation Comm'n, 4 S.W.3d 419, 421 n.4 (Tex. App.—Austin 1999, no pet.); Chrysler Motors Corp. v. Tex. Motor Vehicle Comm'n, 846 S.W.2d 139, 140 (Tex. App.—Austin 1993, no writ); Hollywood Calling v. Pub. Util. Comm'n, 805 S.W.2d 618, 619 (Tex. App.—Austin 1991, no writ); Methodist Hosps. v. Tex. Indus. Accident Bd., 798 S.W.2d 651, 653 (Tex. App.—Austin 1990), *superseded by statute*, TEX. GOV'T CODE ANN. § 2001.039 (Vernon 2000), *as recognized in* Lower Laguna Madre Found., Inc. v. Tex. Natural Res. Conservation Comm'n, 4 S.W.3d 419, 421 n.4 (Tex. App.—Austin 1999, no pet.); Hammerman & Gainer, Inc. v. Bullock, 791 S.W.2d 330, 331 (Tex. App.—Austin 1990), *superseded by statute*, TEX. TAX CODE ANN. § 112.108 (Vernon 2001), *as recognized in* First State Bank of Dumas v. Sharp, 863 S.W.2d 81, 82–83 (Tex. App.—Austin 1993, no writ); Bellegie v. Tex. Bd. of Nurse Exam'rs, 685 S.W.2d 431, 434 (Tex. App.—Austin 1985, writ ref'd n.r.e.); State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 796–97 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

[17] *Bellegie*, 685 S.W.2d at 434.

[18] Tex. Dep't of Human Servs. v. ARA Living Ctrs. Inc., 833 S.W.2d 689, 692 (Tex. App.—Austin 1992, writ denied).

[19] Pub. Util. Comm'n v. City of Austin, 728 S.W.2d 907, 910–11 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[20] *See* Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ); *see also Tex. Dep't of Human Servs*., 833 S.W.2d at 692.

[21] *Tex. Dep't of Human Servs*., 833 S.W.2d at 692.

adopting the rule and the sole issue before the court is a pure question of law as to the rule's validity.[22] Once again, the Austin Court of Appeals has held that even when a contested case proceeding is pending, if the declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties to those matters upon which the parties join issue.[23]

Based on these holdings of the Austin Court of Appeals, it has been established that a section 2001.038 declaratory judgment action is an effective tool to obtain a final determination of the validity of a rule before an agency applies the rule to affected persons within a contested case proceeding. There exists a smooth, paved road to effective declaratory relief devoid of potholes, detours, or misleading directions. Exhaustion of administrative remedies and primary jurisdiction may not be asserted by an agency to deprive a person of the right to activate the original jurisdiction of the district court to obtain a final declaration as to the validity of a rule.[24] The Austin Court of Appeals has effectively fulfilled the legislative intent for the pre-enforcement challenges to agency rulemaking. But, the actual wording of section 2001.038 does not restrict the use of this vehicle to pre-enforcement review of an agency rule.[25]

B. The Miry Bog: The Right to Declaratory Relief After Rendition of a Final Agency Order

Unfortunately, the Austin Court of Appeals has issued a number of inconsistent and contradictory holdings as to the availability of a section 2001.038 declaratory judgment action after the party has been subject to an agency's application of the same rule within an agency hearing and after the agency has rendered a final order. Even if it can be discerned that the majority of these holdings stand for the proposition that a section 2001.038 declaratory judgment action is generally not available after the rule has been specifically applied, it will be established that the court initially held that a party could avoid such a consequence by timely seeking a temporary injunction to preserve the status quo prior to the rendition of the final agency order. However, in 2005, the Austin Court of Appeals wholly disregarded that holding, and its validity and efficacy has

[22] *See id*. at 693.

[23] *Pub. Util. Comm'n*, 728 S.W.2d at 910.

[24] *See, e.g.*, *Tex. Dep't of Human Servs.*, 833 S.W.2d at 692.

[25] *See* TEX. GOV'T CODE ANN. § 2001.038 (Vernon 2000).

been thrown into doubt. Simply, the smooth, paved road to effective declaratory relief turns into a miry bog. In order to fully understand these issues, the Austin Court of Appeals' holding must be carefully analyzed in each distinct scenario that has come before the court by a party seeking declaratory relief after the rendition of a final agency order.

1. Commencement of a Declaratory Action After Rendition of a Final, Unappealable Agency Order

The first scenario is when either the final order of the agency issued after a contested case hearing was unappealable or the plaintiff failed to lawfully perfect an appeal of the final order in the district court. Under either scenario, the Austin Court of Appeals has held that a section 2001.038 declaratory judgment action would not activate the subject matter jurisdiction of the district court in order to allow the plaintiff to try the issues in a piecemeal fashion in an attempt to obtain a different judgment than that issued by the agency in a judicial proceeding involving the same controversy. A party simply cannot cloak its complaint in the mantel of an action for declaratory judgment that is merely an attempt to obtain a different judgment in the same controversy.[26] The court held that a section 2001.038 declaratory judgment action must be construed in the context of, and is therefore limited by, the separation of powers doctrine.[27] Under this doctrine, the legislature may not confer upon the district court a power that lies outside of the parameters of judicial power.[28] Such a grant in this context, if intended by the legislature, would be an attempt to grant the court the power to render an advisory opinion.[29] One form of an advisory opinion is the power to decide a controversy that has become moot, that is, determining a case involving a right that cannot be effectuated by the court's judgment.[30] Even if the district court should declare the validity of the rule, the court would be powerless to revive in some manner

[26] S.C. San Antonio, Inc. v. Tex. Dep't of Human Servs., 891 S.W.2d 773, 779 (Tex. App.—Austin 1995, writ denied) (attempting to appeal an unappealable order); Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995, writ dism'd w.o.j.) (failing to lawfully perfect an appeal of the agency order); s*ee also* Lopez v. Pub. Util. Comm'n, 816 S.W.2d 776, 782 (Tex. App.—Austin 1991, writ denied) (failing to timely file a motion for rehearing).

[27] *Lopez*, 816 S.W.2d at 782.

[28] *Id*.

[29] *See id*.

[30] *Id*.

the appeal of the agency order, which is the only context in which the declaratory judgment could have legal effect.[31] The declaratory judgment simply cannot have legal effect outside the context of the agency order, and if such order is unappealable for whatever reason, the controversy is moot.[32] The fact that if the declaratory judgment could affect the validity of the final, unappealable agency order, it would constitute a collateral attack of that order buttresses this conclusion. An agency order may only be collaterally attacked on the basis that it is void.[33] An agency order is void only if (1) the order shows on its face the agency exceeded its authority, or (2) a complainant demonstrates the order was procured by extrinsic fraud.[34] A section 2001.038 declaratory judgment action challenging the validity of a rule construed and applied within an agency hearing fits neither basis for the court to set aside the agency order and the court would thereby be powerless to revive the plaintiff's appeal of the now final, unappealable order.[35]

These clear, straightforward holdings of the Austin Court of Appeals are in direct conflict with the same court's decision in *Keeter v. Texas Department of Agriculture*.[36] The agency revoked the plaintiff's license after conducting a contested case hearing, and the plaintiff failed to timely appeal the contested case order rendering it final and unappealable.[37] The plaintiff did commence a section 2001.038 declaratory judgment action after the issuance of the contested case order seeking to challenge the validity of a rule which was construed and applied within the contested case hearing.[38] The Austin Court of Appeals held that the declaratory judgment action could be maintained even though the licensee had failed to exhaust his administrative remedies as to the contested case order.[39] The court allowed the plaintiff to collaterally attack the contested case order on the

[31] *Id.*

[32] Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995, writ dism'd w.o.j.).

[33] Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 476 (Tex. 1993); Chocolate Bayou Water Co. & Sand Supply v. Tex. Natural Res. Conservation Comm'n, 124 S.W.3d 844, 853 (Tex. App.—Austin 2003, pet. denied).

[34] *Chocolate Bayou Water Co. & Sand Supply*, 124 S.W.3d at 853.

[35] *Lopez*, 816 S.W.2d at 782.

[36] 844 S.W.2d 901, 902–03 (Tex. App.—Austin 1992, writ denied).

[37] *Id.* at 901–02; *see also* TEX. GOV'T CODE ANN. § 2001.176(a) (Vernon 2000).

[38] *Keeter*, 844 S.W.2d 901–02.

[39] *Id.* at 902.

basis that the rule applied within that proceeding was void.[40] The district court denied the plaintiff's challenge, upholding the validity of the final, unappealable agency order revoking the license, and the Austin Court of Appeals affirmed the district court order.[41] Even if the Austin Court of Appeals allowed the action on the basis that the declaratory judgment action on the merits would not prevail based on its own prior holdings, the court violated separation of powers by rendering an advisory opinion. Further, it directly contradicted its own holding that the purpose of the section 2001.038 declaratory judgment action was to obtain a final declaration of the rule's validity before the rule is applied.[42]

The Austin Court of Appeals took this contradiction to an even higher plane of confusion by holding that a section 2001.038 declaratory judgment action lawfully activated the subject matter jurisdiction of the district court, even though commenced after the rendering of a final, unappealable order, if that agency order was rendered in an agency proceeding not subject to the contested case proceedings of the APA.[43] The court held that one licensed nursing facility may challenge the validity of a rule applied to a second licensed nursing facility that granted an exemption to the second nursing facility from other rules of the agency.[44] The exemption was granted by the agency on the basis of a paper hearing wherein the competing nursing home facility merely applied for and was granted the exemption in an informal manner.[45] The court first held that the plaintiff had no right to directly appeal the final agency order granting an exemption to the competing nursing facility.[46] The court, without directly addressing the issues of whether a section 2001.038 declaratory judgment action could be utilized for this purpose, heard and denied a challenge to the validity of the rule that was used to grant the exemption of the competing nursing facility.[47] Once again, even if the court proceeded due to the fact that it determined that a

[40] *Id.*

[41] *Id.* at 902–03.

[42] Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995, writ dism'd w.o.j.).

[43] Eldercare Props., Inc. v. Tex. Dep't of Human Servs., 63 S.W.3d 551, 554–57 (Tex. App.—Austin 2001, pet. denied), *abrogated by* Tex. Dep't of Protective & Regulatory Servs., 145 S.W.3d 170, 173 (Tex. 2004).

[44] *Id.* at 553.

[45] *Id.* at 554.

[46] *Id.* at 557.

[47] *Id.* at 557–61.

declaratory judgment action on the merits would not prevail, the court issued an advisory opinion as to the validity of a rule after denying the same plaintiff the right to appeal the order granting the exemption. This clearly implies that the court would have voided the rule and allowed an impermissible collateral attack of an unappealable order if the merits were to the contrary.

Amazingly, the Austin court's actual legal basis for so holding was articulated in an unpublished opinion issued the year before in *Watson v. North Texas Higher Education Authority*.[48] In *Watson*, the court held that when the agency action did not consist of an agency proceeding or hearing conducted by an agency examiner or an administrative law judge, when the parties had not engaged in discovery, and when the party did not receive a final agency order or a formal agency decision, then the informal agency decision "does not present a question regarding an agency decision. Instead we conclude the question before us concerns a challenge to the validity and applicability of a Board rule."[49] The truly confusing aspect of this rationale is that in both cases, the informal agency actions were in fact final decisions in that they determined the rights, duties, and privileges of persons or entities seeking agency action, and in both cases, the plaintiff commencing the declaratory judgment action was seeking to set aside the agency's decision on the basis that the agency had acted pursuant to invalid rules.[50] Likewise, in both cases, it was undisputed that the informal decisions, even though final and binding in nature, were otherwise unappealable to a court of law.[51] Therefore, in direct contradiction to the cases set forth above, the Austin Court of Appeals allowed final, unappealable orders to be challenged by way of a section 2001.038 declaratory judgment action and thus, the parties were entitled to litigate and appeal the case in a piecemeal fashion.

Finally, these holdings are also directly contradictory to the Austin Court of Appeals' holdings related to the use of the Uniform Declaratory Judgment Act (UDJA) by a party to assert, after an agency has issued an informal, but final order, that the agency order was ultra vires for reasons other than the application of an invalid rule. In multiple holdings, the Austin Court of Appeals held such UDJA challenges, including

[48] No. 03-00-00139-CV, 2000 Tex. App. LEXIS 7017, at *16 (Tex. App.—Austin Oct. 19, 2000, no pet.).

[49] *Id*.

[50] *Eldercare Props., Inc*., 63 S.W.3d at 553; *Watson*, 2000 Tex. App. LEXIS 7017, at *23.

[51] *Eldercare Props., Inc*., 63 S.W.3d at 553; *Watson*, 2000 Tex. App. LEXIS 7017, at *23.

constitutional or statutory challenges to the power of an agency to act, must be asserted prior to the rendition of the agency order.[52] The court held that to address such legal challenges by way of the UDJA, after the agency order was issued, would constitute an impermissible collateral attack upon the order and it would merely serve as an unconstitutional advisory opinion rather than remedying the actual harm.[53] The inconsistency of these holdings clearly places a district court in a miry bog as to whether it has jurisdiction to hear and decide such claims.

2. Commencement of a Declaratory Action with a Pending Appeal of the Final Agency Order

Despite these contradictory holdings, one may surmise that a party may lawfully activate the district court's subject matter jurisdiction if the section 2001.038 declaratory judgment action is commenced simultaneously with the lawful appeal of the agency order. That is, even though the rule has been applied, the court has the power to afford complete relief for the contested case order that has been lawfully appealed. Furthermore, the lawful appeal of the order is not an impermissible collateral attack, because the agency order has been directly appealed and remains pending before the court as to its legal validity. In *Bullock v. Marathon Oil Co.*, the plaintiff properly perfected its tax protest to the district court to seek a refund of monies paid and simultaneously commenced a section 2001.038 declaratory judgment action to challenge the validity of a rule applied by the comptroller in the agency protest proceeding.[54] The Austin Court of Appeals affirmed the district court's denial of the comptroller's plea to jurisdiction of the section 2001.038 declaratory judgment action, holding that there was no reason to prevent the petitioner from contesting both the applicability and validity of the rule in the same proceeding.[55] The court so held even upon the argument by the

[52] Chocolate Bayou Water Co. & Sand Supply v. Tex. Natural Res. Conservation Comm'n, 124 S.W.3d 844, 852–53 (Tex. App.—Austin 2003, pet. denied); Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth., 96 S.W.3d 519, 519 (Tex. App.—Austin 2002, pet. denied); Yamaha Motor Corp. v. Motor Vehicle Div., 866 S.W.2d 223, 229 (Tex. App.—Austin 1993, writ denied).

[53] *Chocolate Bayou Water Co. & Sand Supply*, 124 S.W.3d at 853.

[54] 798 S.W.2d 353, 360 (Tex. App.—Austin 1990, no writ), *superseded by statute*, TEX. TAX CODE ANN. § 112.108 (Vernon 2001), *as recognized in* First State Bank of Dumas v. Sharp, 863 S.W.2d 81, 82–83 (Tex. App.—Austin 1993, no writ).

[55] *Id.*

comptroller that the relief sought under the tax protest statute would provide complete relief to the petitioner.[56] The Austin Court of Appeals affirmed the district court judgment awarding the tax refund and declaring the rule void.[57] The court held explicitly that the tax protest appeal provisions were not an exclusive remedy and may be joined with a declaratory judgment action.[58]

It was clear in this decision that in the tax protest proceeding, and the appeal thereof, the petitioner challenged the validity of the rule in question as well as so asserting the rule's invalidity in the section 2001.038 declaratory judgment action.[59] It is unclear whether the result would be the same if the plaintiff had failed to raise the rule's invalidity within the agency proceeding, but solely asserted such challenge in the section 2001.038 declaratory judgment action. Within a contested case proceeding before an agency, a party must timely and properly submit a motion for rehearing[60] unless one of the narrow exceptions to such a requirement apply.[61] The motion for rehearing must be sufficiently definite to apprise the agency of the error claimed so it can have the opportunity to correct it or prepare to defend it.[62] It is undisputed that a party may challenge the validity of a rule within an individual agency proceeding to preserve the right of appeal of such issue to the district court.[63] However, failure to set forth such error in the motion for rehearing with sufficient particularity will constitute waiver of the error for purposes of judicial review.[64] If a plaintiff lawfully perfected the appeal of an agency order but did not lawfully preserve the issue of the rule's validity applied in that proceeding, may the plaintiff save that issue by simultaneously

[56] *Id.* at 359.

[57] *Id*. at 357.

[58] *Id*. at 360.

[59] *See id*. at 353.

[60] TEX. GOV'T CODE ANN. § 2001.146(a) (Vernon 2000).

[61] *Id.* § 2001.144(3)–(4).

[62] Suburban Util. Corp. v. Pub. Util. Comm'n, 652 S.W.2d 358, 365 (Tex. 1983).

[63] *See* Hosps. & Hosp. Sys. v. Cont'l Cas. Co., 109 S.W.3d 96, 100–02 (Tex. App.—Austin 2003, pet. denied).

[64] Hammack v. Pub. Util. Comm'n, 131 S.W.3d 713, 732 (Tex. App.—Austin 2004, pet. denied); Fleetwood Cmty. Home v. Bost, 110 S.W.3d 635, 642–43 (Tex. App.—Austin 2003, no pet.); Coal. for Long Point Pres. v. Tex. Comm'n on Envtl. Quality, 106 S.W.3d 363, 373 (Tex. App.—Austin 2003, pet. denied).

commencing a section 2001.038 declaratory judgment action to challenge the validity of the rule?

Following what appears to be the dominate thinking of the Austin court in the admittedly inconsistent cases set forth above, the section 2001.038 declaratory judgment action cannot be utilized to revive this issue since the rule's validity is not properly before the district court in the appeal of the agency order, and therefore, the court is powerless to address the issue.[65] The contrary argument is that the agency order and its validity is currently pending before the court and, as set forth in *Bullock*, the Austin court expressly held that there is no reason to prevent the plaintiff from contesting both the applicability and validity of a rule in the same proceeding by the use of alternative pleadings.[66] If one couples this holding with the court's holding set forth above, that once jurisdiction has attached, it is the duty of the courts to make the section 2001.038 declaratory judgment action a useful tool in the resolution of legal problems and controversies,[67] it is asserted the court should find that jurisdiction exists and the issue has been lawfully preserved.

3. Commencement of a Declaratory Action Prior to the Rendition of a Final Agency Order

In direct contradiction to *Bullock*, the Austin Court of Appeals held in the case of *Pantera Energy Co. v. Railroad Commission of Texas*, that even when the section 2001.038 declaratory judgment action had been commenced prior to the issuance of the final agency order, if the declaratory action had not been decided before the appeal of the agency order to the district court, it was not error to dismiss the declaratory judgment action if it was requesting the same relief as the administrative appeal.[68] In citing a case under similar circumstances which was subject to the UDJA, the court noted approvingly the holding that when a statute provides a method for attacking an agency order, a declaratory judgment

[65] *Fleetwood Cmty. Home*, 110 S.W.3d at 643.

[66] 798 S.W.2d 353, 360 (Tex. App.—Austin 1990, no writ), *superseded by statute*, TEX. TAX CODE ANN. § 112.108 (Vernon 2001), *as recognized in* First State Bank of Dumas v. Sharp, 863 S.W.2d 81, 82–83 (Tex. App.—Austin 1993, no writ).

[67] Bellegie v. Tex. Bd. of Nurse Exam'rs, 685 S.W.2d 431, 434 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

[68] 150 S.W.3d 466, 476 (Tex. App.—Austin 2004, no pet.).

will not lie.[69] This was true, in the court's mind, because a party is not entitled to redundant remedies.[70] This rationale of denying the right to proceed by declaratory judgment action simultaneously with directly appealing an agency order is directly contradictory to the court's holding in *Bullock*.[71] Therefore, it is wholly unclear under the Austin Court of Appeals' precedent whether or not a party may simultaneously commence and proceed with a section 2001.038 declaratory judgment action as well as directly appealing the agency order.

These holdings raise the issue of whether a declaratory judgment action lawfully commenced before the issuance of a final agency order in an agency proceeding may be maintained if the agency order is unappealable. In all decisions cited above, the issue was whether a section 2001.038 declaratory judgment action may be commenced after an agency rendered a final order. It has been established above that when a party commences a section 2001.038 declaratory judgment action before the issuance of a final order, and if the declaratory judgment action is determined before the issuance of the final order, a party may obtain a lawful judgment declaring the validity of the rule. This was held by the Austin Court of Appeals due to the fact that a section 2001.038 declaratory judgment action was an original grant of subject matter jurisdiction in the district court and that the doctrines of the exhaustion of administrative remedies and primary jurisdiction were found not to prevent the litigation of the rule's validity before the agency acted in a specific agency hearing.[72] The intriguing issue in the present context is whether the agency can, by rendering an order prior to the court acting on and deciding the issues in the declaratory judgment action, effectively oust the district court of subject mater jurisdiction to hear and decide the declaratory judgment action. In *Pantera*, the Austin Court of Appeals did not address this issue, but merely held that the declaratory judgment action could be dismissed on the basis that the party was not entitled to redundant remedies, and since the court was not deprived of determining the legal issue asserted in the declaratory judgment action because the same issue was raised in the appeal of the agency order, there simply was no continued viability to the declaratory judgment action.[73]

[69] *Id*. (citing Young Chevrolet, Inc. v. Tex. Motor Vehicle Bd., 974 S.W.2d 906, 911 (Tex. App.—Austin 1998, pet. denied)).

[70] *Young Chevrolet, Inc.*, 976 S.W.2d at 911.

[71] 798 S.W.2d at 360.

[72] *Id.*

[73] 150 S.W.3d 466, 476 (Tex. App.—Austin 2004, no pet.).

However, in *Southwest Airlines Co. v. Texas High-Speed Rail Authority*, Southwest Airlines commenced a declaratory judgment action to challenge the validity of the agency's rules while the agency proceeding was pending.[74] After the agency order was rendered, Southwest then attempted to appeal the agency order to the district court.[75] The court first determined that no right of appeal of the agency order existed.[76] Consistent with most of the decisions of the Austin Court of Appeals set forth above, the court, in this case, made no distinction between a declaratory judgment action commenced before or after the rendition of the final agency order.[77] It merely held that declaratory relief was not available unless the court's judgment would determine the controversy between the parties.[78] Once again, the court's concern was that its judgment would amount to no more than an advisory opinion.[79] Therefore, the court held that a declaratory judgment action could not be utilized to allow a party to try a case piecemeal and the court would prevent a party from merely attempting to obtain a different judgment in the same controversy.[80]

4. The Right to Injunctive Relief Pending Declaration of the Validity or Invalidity of a Rule

In *Southwest Airlines Co.*, the court held that "[t]he original object of Southwest's suit for declaratory and injunctive relief was to control the agency proceeding in which the authority reached its final order."[81] Southwest, in its original suit, sought injunctive relief of the agency proceeding but did not pursue the remedy until after the agency had rendered the final order and Southwest's appeal of that order had been dismissed.[82] If Southwest had immediately proceeded with its request for injunctive relief to preserve the status quo after commencing its declaratory judgment action, would such relief have been granted by the district court? This decision makes two points clear. First, the object of a

[74] 863 S.W.2d 123, 124 (Tex. App.—Austin 1993, writ denied).
[75] *Id.*
[76] *Id.* at 125–26.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 126.
[82] *Id.* at 124–25.

section 2001.038 declaratory judgment action is to control the rules that will be applied within the proceeding. Second, if such declaration is not made by the court before the agency renders and there is no right of judicial review of such order, the declaratory judgment action is extinguished or barred by separation of powers, the doctrine of mootness, or both. Therefore, a party should be entitled to a temporary injunction in order to prevent the issuance of the agency order from extinguishing one's rights under a declaratory judgment action that has been lawfully activated.

The answer to this question was clearly set forth in *Rutherford Oil Corp. v. General Land Office*.[83] In *Rutherford*, the appellant sought a section 2001.038 declaratory judgment action to challenge the validity of agency rules and immediately sought injunctive relief of the agency hearing in order to allow the court sufficient time to render declaratory relief.[84] The agency argued that the injunction should be denied, for the appellant had a right to appeal the final agency order.[85] Unlike *Southwest Airlines Co.*, wherein there was no right of judicial review,[86] Rutherford retained a subsequent right of appeal of the agency order.[87] The court wholly rejected the agency's assertion and held that Rutherford had an unqualified right to a temporary injunction to prevent the agency from proceeding with the agency hearing.[88] The court held that a section 2001.038 cause of action evidenced a legislative intent to allow a party the right to a final declaration of a rule's validity before the rule is applied, and the flip side of that coin is that if a party has lawfully activated the court's subject matter jurisdiction before the agency has applied the law, the party "is entitled to a declaratory judgment regarding the [rule's] validity."[89] The court held that to allow the agency to merely speed ahead with the hearing, render a final order, and leave the party to merely appeal the final agency order, would "wholly nullify" the purpose of a section 2001.038 declaratory judgment action.[90] Thus, the mere occurrence of the agency hearing constituted a probable, irreparable injury.[91]

[83] 776 S.W.2d 232, 236 (Tex. App.—Austin 1989, no writ).

[84] *Id*. at 233–34.

[85] *Id*. at 235.

[86] *Sw. Airlines Co.*, 863 S.W.2d at 124–25.

[87] *Rutherford Oil Corp.*, 776 S.W.2d at 235–36.

[88] *Id*. at 236.

[89] *Id*. at 235.

[90] *See id*. at 236.

[91] *Id*. at 235.

If this is the result when a party has the subsequent right to appeal the agency order, it is even more compelling and necessary to enjoin the agency action when there is no right of appeal of the final agency order. In the *Southwest Airlines Co.* scenario, the agency proceeded in total disregard of the pending declaratory judgment action and rendered the final order, which barred the litigation of the declaratory judgment action and thus wholly barred the plaintiff from ever having its day in court to determine the validity of the rule.[92]

These holdings not only justify a party's right to enjoin the agency hearing, but give further logic to the Austin Court of Appeals' general attempt to prevent the use of a section 2001.038 declaratory judgment action when it is commenced after the agency order is rendered. If the purpose of this action is to obtain a pre-enforcement determination of the validity of a rule, and if the district courts are mandated to enjoin any pending or subsequently commenced agency proceeding due to the fact that there is a per se irreparable harm to the plaintiff in being subject to such a hearing, then the use of the declaratory judgment after the rendition of an agency order when one has not sought injunctive relief is clearly an attempt to engage in piecemeal litigation and an attempt to impermissibly collaterally attack a final order.

This logic is predicated on the right and the ability of a party to enjoin the agency proceeding or proceedings pending the outcome of the declaratory judgment action. Section 2001.038 only prohibits a court from enjoining an agency proceeding if it is used to "delay or stay a hearing in which a suspension, revocation or cancellation of a license by a state agency is at issue before the agency after notice of the hearing has been given."[93] The Austin Court of Appeals recently held that a temporary injunction is not only available but is often a necessity to protect one's rights in specific agency hearings pending the outcome of a declaratory judgment action to determine the validity of a rule.[94] In *Hospitals & Hospital Systems v. Continental Casualty Co.*, the court noted that a section 2001.038 action simply provides an additional but not exclusive vehicle to challenge the validity of a rule.[95] Such a challenge may also be

[92] *See generally* Sw. Airlines Co. v. Tex. High-Speed Rail Auth., 863 S.W.2d 123 (Tex. App.—Austin 1993, writ denied).

[93] TEX. GOV'T CODE ANN. § 2001.038(e) (Vernon 2000).

[94] *See* Hosps. & Hosp. Sys. v. Cont'l Cas. Co., 109 S.W.3d 96, 101–02 (Tex. App.—Austin 2003, pet. denied).

[95] *Id*. at 100 n.9.

made within individual hearings wherein the rule will be applied.[96] Therefore, in order to avoid the consequences of individual actions being prosecuted, thus becoming final and unappealable, a party must seek within the declaratory judgment action a temporary injunction during the pendency of that action.[97] In *Continental Casualty Co.*, the Texas Workers' Compensation Commission (T.W.C.C.) had adopted a valid rule requiring individual claims for reimbursement to be commenced within one year after the date that hospital services were provided.[98] During the pendency of a section 2001.038 declaratory judgment action seeking to invalidate rules that govern the amount to be paid for such services, the hospitals failed to commence actions for thousands of individual cases subject to the payment rules within the one year time period.[99] The court held that even though the hospitals were successful in the declaratory judgment action challenging the validity of the rules that govern the merits of each claim, the declaratory judgment could not revive the time-barred claims, nor did the declaratory judgment action automatically toll the period of limitations.[100] The court further held that the hospitals could have sought an injunction of the one–year bar rule while proceeding with its section 2001.038 declaratory judgment action.[101]

In essence, by the adoption of its one-year limitation rule, the T.W.C.C. mandated the prosecution of the individual claims prior to the determination of the declaratory judgment action.[102] Therefore, like *Rutherford Oil Corp.*, the parties were forced into hearings that were unlawful by virtue of the fact that they were subject to void rules, or they were forced to lose their right to reimbursement by failing to proceed with each individual claim in a timely manner.[103] Therefore, they were barred from the very rights they had lawfully asserted in the district court, and they had lawfully activated the subject matter jurisdiction of the court to decide the right to challenge the validity of such rules before they were applied in individual proceedings. Thus, the hospitals could have demonstrated irreparable harm to enjoin the enforcement of the time-bar rule, which by necessity would enjoin the

[96] *Id*. at 101.
[97] *Id*. at 101–02.
[98] *Id*. at 98–99.
[99] *Id*.
[100] *Id*. at 100–03.
[101] *Id*. at 101.
[102] *Id*. at 98–99.
[103] *See id*. at 98, 100.

agency from compelling the hospitals to pursue their individual claims pending the outcome of the declaratory judgment action.[104] Finally, like *Southwest Airlines Co.*, by the failure of the hospitals to enjoin the one-year rule and thereby the agency proceedings, the declaratory judgment order could not be used to revive the time-barred claims.[105] The reasoning and holding in *Continental Casualty Co.* validates the holdings of *Rutherford Oil Corp.* and *Southwest Airlines Co.* and the majority of the decisions set forth above that a section 2001.038 action cannot be used to revive time-barred or final, unappealable orders, for the parties in essence waive their challenges by failing to proceed with a declaratory judgment action to determine the validity of the rules before they were applied and, if necessary, to enjoin the agency to preserve the status quo as to all pending and future individual hearings that would apply to such rule or rules.[106]

However, the validity of *Rutherford Oil Corp.* has been thrown into doubt during the past year wherein the district court, the Austin Court of Appeals, and the Texas Supreme Court refused to grant a temporary injunction and gave no legal justification as to why the holding in *Rutherford Oil Corp.* was not controlling as to the grant of a temporary injunction. International Business Machines Corporation (IBM) commenced a section 2001.038 declaratory judgment action[107] to challenge rules adopted by the Texas Health & Human Services Commission (Commission) regarding protest procedures to be utilized when a contract had been tentatively awarded to another bidder.[108] IBM filed a formal protest to the contract awarded subject to the time limitations of the Commission's rules and the Commission proceeded to conduct the protest pursuant to the rules challenged by IBM in the declaratory judgment action.[109] IBM sought injunctive relief to enjoin the Commission from proceeding with the protest hearing.[110] The Commission's own rules provided that the contract could not be finally awarded until such time any

[104] *See id*. at 101.

[105] *Id*. at 100–02.

[106] *See generally id*.

[107] This author was Of Counsel to the plaintiff in this action.

[108] Plaintiff's Second Amended Petition for Declaratory Judgment & Verified Application for a Temporary Restraining Order & Temporary & Permanent Injunction at 7, Int'l Bus. Machs. Corp. v. Tex. Health & Human Servs. Comm'n, No. GN500839 (200th Dist. Ct., Travis County, Tex. Apr. 20, 2005).

[109] *Id.* at 20–22.

[110] *Id.* at 22–31.

lawfully filed protest had been decided.[111] IBM, in its supporting brief, argued to the district court that *Rutherford Oil Corp.* constituted controlling law and that the injunction should issue to prevent the conducting of the protest hearing and to ensure the Commission did not unlawfully award the contract.[112] IBM further informed the court of the fact that the Commission's rules and the applicable statute precluded judicial review of the protest decision.[113]

The district court denied without opinion the request for both a temporary restraining order and a temporary injunction.[114] IBM then sought a writ of mandamus in the Austin Court of Appeals and directly apprised the court of the applicability and effect of *Rutherford Oil Corp.*,[115] and the court denied the request without opinion.[116] IBM then sought a writ of mandamus in the Texas Supreme Court and directly apprised the court of the applicability and effect of *Rutherford Oil Corp.*,[117] and the court denied the request without opinion.[118] The Commission then sought a plea to the jurisdiction in the district court as to the section 2001.038 declaratory judgment action,[119] which was denied.[120] The Commission then appealed the denial of the plea to jurisdiction to the Austin Court of Appeals,[121]

[111] 1 TEX. ADMIN. CODE § 392.59 (2005).

[112] Plaintiff's Brief in Support of Application for Temporary Restraining Order at 4–5, Int'l Bus. Machs. Corp. v. Tex. Health & Human Servs. Comm'n, No. GN5-00839 (200th Dist. Ct., Travis County, Tex. Apr. 20, 2005).

[113] *Id.* at 9.

[114] Order Denying Plaintiff's Request for Temporary Injunction, Int'l Bus. Machs. Corp. v. Tex. Health & Human Servs. Comm'n, No. GN5-00839 (200th Dist. Ct., Travis County, Tex. Apr. 20, 2005).

[115] Petition for Writ of Mandamus at 4–5, *In re* Int'l Bus. Machs. Corp., No. 03–05–00192–CV (Tex. App.—Austin Apr. 4, 2005).

[116] *In re* Int'l Bus. Machs. Corp., No. 03-05-00192-C (Tex. App.—Austin Apr. 4, 2005, orig. proceeding), http://www.3rdcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=13620.

[117] *See generally* Petition for Writ of Mandamus and Request for Temporary Relief, *In re* Int'l Bus. Machs. Corp., No. 05–0260 (Tex. Apr. 5, 2005).

[118] Order Denying Petition for Writ of Mandamus, *In re* Int'l Bus. Machs. Corp., No. 05-0260 (Tex. Apr. 11, 2005), http://www.supreme.courts.state.tx.us/historical/2005/apr/041105.htm.

[119] Defendant's Plea to the Jurisdiction, Int'l Bus. Machs. Corp. v. Tex. Health & Human Servs. Comm'n, No. GN5-00839 (200th Dist. Ct., Travis County, Tex. Apr. 8, 2005).

[120] *See generally* Order Denying Defendant's Plea to the Jurisdiction, Int'l Bus. Machs. Corp. v. Tex. Health & Human Servs. Comm'n, No. GN5-00839 (200th Dist. Ct., Travis County, Tex. May 13, 2005).

[121] *See generally* Defendant's Notice of Appeal, Int'l Bus. Machs. Corp. v. Tex. Health &

which triggered an automatic stay of the proceedings in the district court thereby preventing the hearing and determination of the section 2001.038 declaratory judgment action challenging the protest rules.[122] IBM then sought an emergency request for temporary relief asking the Austin Court of Appeals to enjoin the Commission from issuing a final protest determination or a final award of the contract[123] pending the outcome of the appeal since the district court was forbidden from determining the validity of the rules pending the court of appeals' determination.[124] The court of appeals denied the emergency relief, the Commission denied the protest while the interlocutory appeal was pending, and the Commission awarded the contract to IBM's competitor.[125]

As set forth above, there simply is no answer or justification as to why *Rutherford Oil Corp.* did not mandate the issuance of a temporary injunction. IBM lawfully activated the subject matter jurisdiction of the district court for that court to declare the validity of rules governing the hearing that was being simultaneously conducted by the Commission. As set forth in *Rutherford Oil Corp.*, IBM suffered irreparable harm by having its protest hearing finally determined before the court could exercise its jurisdiction to determine whether and what type of hearing must be held in order to lawfully determine the protest.[126] If the non-action of the judiciary impliedly stands for the proposition that *Rutherford Oil Corp.* is no longer binding precedent, this case demonstrates the folly of this implied holding. The Commission, by its own actions, manipulated the legal process by proceeding with the protest, providing itself ample time to complete the protest process by filing a plea to the jurisdiction, and then utilizing an interlocutory appeal to bar the district court from timely hearing the declaratory claim. By determining the protest before the district court could

Human Servs. Comm'n, No. GN5-00839 (200th Dist. Ct., Travis County, Tex. June 1, 2005).

[122] TEX. CIV. PRAC. & REM. CODE ANN. § 51.04(b) (Vernon 1997 & Supp. 2005).

[123] *See generally* Appellee's Emergency Motion for Temporary Injunction, Tex. Health & Human Servs. Comm'n v. Int'l Bus. Machs. Corp., No. 03–05–00340–CV (Tex. App.—Austin June 17, 2005).

[124] Brief in Support of Appellee's Motion for Temporary Injunction, Tex. Health & Human Servs. Comm'n v. Int'l Bus. Machs. Corp., No. 03–05–00340–CV (Tex. App.—Austin June 30, 2005).

[125] Order, Tex. Health & Human Services v. Int'l Business Machines Corp., No.: 03–05–00340–CV (Tex. App.—Austin July 1, 2005), http://www.3rdcoa.courts.state.tx.us/opinions/HTMLOpinion.asp?OpinionID=13880.

[126] *See generally* Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232 (Tex. App.—Austin 1989, no writ).

determine the declaratory judgment action, the Commission thereby extinguished IBM's declaratory judgment action per the holding in *Southwest Airlines Co.*[127] Such inaction by the judiciary and such action taken by the Commission makes a mockery of the right to a section 2001.038 declaratory relief to determine the validity of agency rules before the agency acts. To leave to the whim of an agency as to whether a district court has jurisdiction to determine the validity of an agency's rule is simply an untenable legal proposition wholly contrary to the legislative intent and deprives the court of its inherent power to protect its jurisdiction and, more importantly, the integrity of the judicial system.[128] Further, it destroys the logic of the right to deny declaratory relief after the rendition of a final agency order.

C. A Section 2001.038 Declaratory Judgment Action to Challenge the Validity of a Rule: A Consistent Interpretation as to Its Availability and the Right to Injunctive Relief

It has been established that a party to a contested case proceeding may challenge the validity of a rule before an agency and preserve the right to a judicial determination of that issue upon appeal of the agency order.[129] It has also been established that the APA included a new type of review mechanism that allowed a person to challenge the validity of an agency rule pursuant to a declaratory judgment action.[130] This declaratory judgment action did not require one to wait until the rule was attempted to be enforced against him but allowed pre-enforcement review of the rule's validity.[131] The Austin Court of Appeals has stated that its primary purpose is to allow a final declaration of a rule's validity before the rule is

[127] Sw. Airlines Co. v. Tex. High-Speed Rail Auth., 863 S.W.2d 123, 125–26 (Tex. App.—Austin 1993, writ denied).

[128] *See* Pub. Util. Comm'n v. Cofer, 754 S.W.2d 121, 123 (Tex. 1988) (stating that a court has the inherent power to preserve its independence and integrity).

[129] *See* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 756 (Tex. 1982); Gerst v. Oak Cliff Savs. & Loan Ass'n., 432 S.W.2d 702, 703–04 (Tex. 1968); Hosps. & Hosp. Sys. v. Cont'l Cas. Co., 109 S.W.3d 96, 100–02 (Tex. App.—Austin 2003, pet. denied); Employees Ret. Sys. v. Jones, 58 S.W.3d 148, 150 (Tex. App.—Austin 2001, no pet.); Fulton v. Associated Indem. Corp., 46 S.W.3d 364, 366 (Tex. App.—Austin 2001, pet. denied).

[130] TEX. GOV'T CODE ANN. § 2001.038(a) (Vernon 2000).

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

applied.[132] The section 2001.038 action is a grant of original subject matter jurisdiction in the district court.[133] There is no requirement that a party exhaust its administrative remedies before the agency.[134] And primary jurisdiction is inapplicable for the agency has already acted by virtue of adopting the rule.[135] Declaratory relief is available in all cases where there is no pending action[136] or there is a pending action but a final order has not been issued by the agency.[137]

Confusion has arisen in the practicing bar and within the various panels of the Austin Court of Appeals as to whether, if at all, a section 2001.038 action is viable after the agency has applied the rule within an agency hearing.[138] The critical factor is whether the plaintiff to the section 2001.038 declaratory judgment action is in fact utilizing the declaratory vehicle to set aside an otherwise unappealable agency order wherein the rule was applied. If the plaintiff intends to utilize the declaratory judgment action to set aside an agency order, whether or not the plaintiff commenced the declaratory action before or after the rendition of the final agency order, the Austin Court of Appeals should affirm the bulk of its case decisions wherein the order was unappealable or the party failed

[132] Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995, writ dism'd); Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ).

[133] Sw. Bell Tel. Co. v. Pub. Util. Comm'n, 735 S.W.2d 663, 669 (Tex. App.—Austin 1987, no writ).

[134] *See, e.g.*, R.R. Comm'n v. ARCO Oil & Gas Co., 876 S.W.2d 473, 479 (Tex. App.—Austin 1994, writ denied), *superseded by statute*, TEX. GOV'T CODE ANN. § 2001.039 (Vernon 2000), *as recognized in* Lower Laguna Madre Found., Inc. v. Tex. Natural Conservation Comm'n, 4 S.W.3d 419, 425 (Tex. App.—Austin 1999, no pet.); Hammerman & Gainer, Inc. v. Bullock, 791 S.W.2d 330, 331–32 (Tex. App.—Austin 1990, no writ), *superseded by statute*, TEX. TAX CODE ANN. § 112.108 (Vernon 2001), *as recognized in* First State Bank of Dumas v. Sharp, 863 S.W.2d 81 (Tex. App.—Austin 1993, no writ).

[135] *R.R. Comm'n*, 876 S.W.2d at 478 n.4.

[136] *See* Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643, 647 (Tex. 2004); Pub. Util. Comm'n v. City Pub. Serv. Bd., 53 S.W.3d 310, 314 (Tex. 2001); R.R. Comm'n v. Lone Star Gas Co., 844 S.W.2d 679, 682 (Tex. 1992).

[137] *See* Tex. Dep't of Human Servs v. ARA Living Ctrs. of Tex., Inc., 833 S.W.2d 689, 692 (Tex. App.—Austin 1992, writ denied); *Rutherford Oil Corp.*, 776 S.W.2d at 235; Pub. Util. Comm'n v. City of Austin, 728 S.W.2d 907, 910–11 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[138] *See generally* Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271 (Tex. App.—Austin 1995, writ dism'd); *see also* Keeter v. Tex. Dep't of Agric., 844 S.W.2d 901 (Tex. App.—Austin 1992, writ denied); Lopez v. Pub. Util. Comm'n, 816 S.W.2d 776, 782 (Tex. App.—Austin 1991, writ denied).

to lawfully perfect an appeal, because a section 2001.038 declaratory judgment action will not lawfully activate the subject matter jurisdiction of the district court, for such jurisdiction would violate separation of powers by allowing a court to render an advisory opinion.[139] The controversies determined within unappealable orders are simply moot,[140] and an attempt to utilize a declaratory judgment action to revive such controversies constitutes an impermissible collateral attack on the agency order.[141] All decisions to the contrary should be overruled.[142]

These holdings are consistent with, but should be distinguished from, the scenario where the plaintiff in the section 2001.038 declaratory judgment action has been subject to a final agency order applying the rule challenged, but the purpose of the declaratory judgment action is not to set aside the prior order, but to declare the validity of the rules to pending and future claims. The classic example is a hospital subject to new rules of the T.W.C.C. applying to payments for services rendered to worker compensation claimants wherein the hospital engages in such services on a daily basis.[143] The declaratory judgment action may proceed as to all pending or future claims, but all claims finally resolved pending the outcome of the declaratory judgment action cannot be revived by the rendering of the declaratory order.[144] Thus, even if a party to a section 2001.038 declaratory judgment action is clearly motivated to bring the

[139] *See* S.C. San Antonio, Inc. v. Dep't of Human Servs., 891 S.W.2d 773, 779 (Tex. App.—Austin 1995, writ denied); Sw. Airlines Co. v. Tex. High-Speed Rail Auth., 863 S.W.2d 123, 125–26 (Tex. App.—Austin 1993, writ denied); *Lopez*, 816 S.W.2d at 782.

[140] *See, e.g.*, *Charlie Thomas Ford*, 912 S.W.2d at 275.

[141] *See Lopez*, 816 S.W.2d at 781; *see also* Chocolate Bayou Water Co. & Sand Supply v. Tex. Natural Res. Conservation Comm'n, 124 S.W.3d 844, 852–53 (Tex. App.—Austin 2003, pet. denied) (noting Uniform Declaratory Judgment Act action where same issue arose).

[142] *See generally* Keeter v. Tex. Dep't of Agric., 844 S.W.2d 901 (Tex. App.—Austin 1992, writ denied); *see also* Eldercare Props. Inc. v. Tex. Dep't of Human Servs., 63 S.W.3d 551 (Tex. App.—Austin 2001, pet. denied); Watson v. N. Tex. Higher Educ. Auth. Inc., No. 03-00-00193-CV, 2001 WL 1534905 (Tex. App.—Austin Oct. 9, 2000, no pet.) (not designated for publication). There is no logic to allow a declaratory judgment action for an unappealable final order of an agency whether it is the result of a contested case hearing, a paper hearing, or no hearing at all. If the legislature does not allow judicial review in any context, separation of powers forbids a court to revive such final, unappealable orders. The remedy is to use the power of temporary injunction. *See infra* notes 160–163 and accompanying text.

[143] *See, e.g.*, Tex. Hosp. Ass'n. v. Tex. Workers' Comp. Comm'n, 911 S.W.2d 884 (Tex. App.—Austin 1995, writ denied).

[144] *See* Hosps. & Hosp. Sys. v. Cont'l Cas. Co., 109 S.W.3d 96, 102 (Tex. App.—Austin 2003, pet. denied).

cause due to the rendering of the prior, unappealable orders, the issue is not moot due to a showing that there are pending or future agency proceedings in which the same rules will be applied to the plaintiff and separation of powers would not demand the dismissal of the section 2001 declaratory judgment action. A party must merely establish that the rule has been adopted and that the party continues to fall within the coverage of the rule. It is presumed the agency will continue to apply the rule as adopted, and if the agency has no such intention, it may so simply state in the pleadings in response to the petition for declaratory relief.[145]

The truly perplexing scenario is when a party commences a section 2001.038 declaratory judgment action before or after the rendition of the final order, the final agency order is issued prior to the determination of the declaratory judgment action, and that agency order is lawfully appealed and pending before the court. It has been established that the Austin Court of Appeals did not dismiss the declaratory judgment action but allowed it to be maintained on the theory that a party may challenge the applicability of a rule by way of appealing the agency order, and may also assert its invalidity in an alternative pleading by way of a section 2001.038 declaratory judgment action.[146] Clearly, the agency order and underlying controversy are not moot, nor will the court be issuing an advisory opinion in violation of separation of powers, for the court may provide complete relief by way of both actions before this court. As pointed out above,[147] the sole inconsistency in this holding is that if the party did not preserve the issue of the rule's invalidity in its motion for rehearing in response to the final agency order, the party has waived its right for the court to hear and decide the issue.[148]

The net effect would be that the section 2001.038 declaratory judgment action would revive the waived issue and in essence allow an impermissible collateral attack on a final agency order. Yet, the agency order is still

[145] Pub. Util. Comm'n v. City of Austin, 728 S.W.2d 907, 911 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[146] *See* Bullock v. Marathon Oil Co., 798 S.W.2d 353, 360 (Tex. App.—Austin 1990, no writ), *superseded by statute*, TEX. TAX CODE ANN. § 112.108 (Vernon 2001), *as recognized in* First State Bank of Dumas v. Sharp, 863 S.W.2d 81, 82–83 (Tex. App.—Austin 1993, no writ).

[147] *See supra* notes 54–67 and accompanying text.

[148] *See* Hammack v. Pub. Util. Comm'n, 131 S.W.3d 713, 732 (Tex. App.—Austin 2004, pet. denied); Fleetwood Cmty. Home v. Bost, 110 S.W.3d 635, 642–43 (Tex. App.—Austin 2003, no pet.); Coal. for Long Point Pres. v. Tex. Comm'n on Envtl. Quality, 106 S.W.3d 363, 373–74 (Tex. App.—Austin 2003, pet. denied).

pending and the declaratory judgment action could be construed as merely a direct attack upon a pending final yet appealable order of the agency. This logic is buttressed by the fact that one exception to the motion for rehearing requirement is that one may assert a constitutional issue in the district court for the first time even though it was not set forth in the motion for rehearing.[149] The theory behind this exception is that the agency simply has no power to engage in constitutional analysis.[150] Likewise, even though one may raise and preserve for appeal a challenge to the validity of a rule within an agency hearing,[151] it is unclear, but presumed that an agency cannot declare its own rule void within an agency hearing. If an agency has adopted a rule through notice and comment rulemaking, the rule has the force and effect of law and is binding on all within its terms, including the agencies and its officers and employees, until such time it is amended or repealed pursuant to the same notice and comment process.[152] The Texas Supreme Court has held that a rule adopted pursuant to notice and comment rulemaking cannot be amended by an agency in an ad hoc manner within an agency hearing.[153] Logic would dictate that an agency could not repeal a rule in an ad hoc manner.[154] Therefore, the purpose of the motion for rehearing process will not be frustrated, for the agency could not have determined the issue of the rule's validity within the contested case hearing.[155] Thus, a section 2001.038 declaratory judgment action properly preserves the right to challenge the validity of a rule, even if not raised before the agency in the motion for rehearing, as long as the final agency order has been lawfully appealed and is pending before the district court.

[149] Cent. Power & Light Co. v. Sharp, 960 S.W.2d 617, 618 (Tex. 1997); *see also* Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality, 131 S.W.3d 271, 279–80 (Tex. App.—Austin 2004, no pet.).

[150] *See Juliff Gardens, L.L.C.*, 131 S.W.3d at 279.

[151] *See* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 756 (Tex. 1982); Gerst v. Oak Cliff Savs. & Loan Assoc., 432 S.W.2d 702, 703–04 (Tex. 1968); Hosps. & Hosp. Sys. v. Cont'l Cas. Co., 109 S.W.3d 96, 100–02 (Tex. App.—Austin 2003, pet. denied); Employees Ret. Sys. v. Jones, 58 S.W.3d 148, 150 (Tex. App.—Austin 2001, no pet.); Fulton v. Associated Indem. Corp., 46 S.W.3d 364, 366 (Tex. App.—Austin 2001, pet. denied).

[152] *See* First Fed. Sav. & Loan Ass'n v. Vandygriff, 639 S.W.2d 492, 499 (Tex. App.—Austin 1982, writ dism'd w.o.j.).

[153] *See* Rodriguez v. Serv. Lloyd Ins. Co., 997 S.W.2d 248, 255 (Tex. 1999).

[154] *See Vandygriff*, 639 S.W.2d at 500.

[155] *Id.*

The Austin Court of Appeals should continue to follow its precedent allowing such a challenge by way of a declaratory judgment action.[156]

Finally, this unified theory based on sound constitutional and legal theories denying the use of a section 2001.038 declaratory judgment action to challenge the validity of a rule in order to impermissibly collaterally attack an agency order is not complete. If the declaratory judgment action straddles these two scenarios wherein the action is pending while an agency action to apply the rule to the party is also pending or soon to be commenced and decided by the agency, a party must have an ability to have the court hear and decide one's challenge to the validity of the rule before the agency acts. This assertion is predicated on the fundamental precepts of fulfilling the legislative intent. As the Austin Court of Appeals has held, the section 2001.038 declaratory judgment action is an original grant of subject matter jurisdiction in the district court wherein its sole purpose is to allow a party to have the validity of a rule, substantive or procedural, determined before the agency applies the same.[157] After lawful activation of the cause, it would wholly defeat the legislative intent to allow an agency to deprive a court of the jurisdiction to decide the matter, or through a court's inaction to extinguish the cause of action lawfully activated. A party must simply have the right to maintain the status quo pending the final determination of the declaratory judgment action.

The legislature has recognized this right by providing the only time such right cannot be honored is when the pending action is to suspend, revoke, or cancel an existing license.[158] Clearly, the legislature wanted to empower an agency to move swiftly and forcefully to remove those persons or entities that have abused the privilege bestowed upon them by the conference of a license. The public welfare in those circumstances must prevail over the right to a pre-enforcement challenge to a rule. This is buttressed by the fact that it would be the rare and truly exceptional case that such person or entity did not have the right to appeal such order and challenge the rule within the agency proceeding. Yet, the same provision acknowledges and clearly implies the power of a court to maintain the status quo in all other agency

[156] *See* Bullock v. Marathon Oil Co., 798 S.W.2d 353, 360 (Tex. App.—Austin 1990, no writ).

[157] Charlie Thomas Ford, Inc. v. A.C. Collins Ford, Inc., 912 S.W.2d 271, 275 (Tex. App.—Austin 1995, writ dism'd); Rutherford Oil Corp. v. Gen. Land Office, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989, no writ).

[158] TEX. GOV'T CODE ANN. § 2001.038(e) (Vernon 2000).

proceedings and thereby enjoining any pending or future agency action during the pendency of the declaratory judgment action.[159]

The Austin court recognized seventeen years ago that upon proper application for a temporary injunction by the plaintiff, a failure to grant the injunction and allow the agency to proceed with impunity would nullify the legislative intent and the right of a party to proceed by way of declaratory judgment.[160] As the court noted, "[h]aving complied with the statute's conditions, Rutherford is entitled to a declaratory judgment regarding the rules' validity" even if the party has the right to judicial review of the agency order.[161] At a minimum, a court must uphold this logic and holding when a party is subject to an agency proceeding that is unappealable, and it is equally applicable even if there is a subsequent right to judicial review of the agency order. As the Austin court has also noted, "[I]f a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue."[162] It is the duty of the court to make the section 2001.038 declaratory judgment action a useful tool in the solution of legal problems and controversies.[163] It is therefore incumbent upon the Austin Court of Appeals to reaffirm its holding and theory in *Rutherford Oil Corp.* in order to protect the viability of the section 2001.038 declaratory judgment action.

III. UPDATE AND ANALYSIS: 2005

A. Rulemaking

1. Interpreting Rules, Amending Rules, and Ad Hoc Rulemaking

When an issue arises as to the meaning of a rule adopted by an agency, the judiciary utilizes the canons of statutory construction.[164] The court's

[159] *Id*.

[160] *Rutherford Oil Corp.*, 776 S.W.2d at 236.

[161] *Id.* at 235.

[162] Pub. Util. Comm'n v. City of Austin, 728 S.W.2d 907, 910 (Tex. App.—Austin 1987, writ ref'd n.r.e.); Bellegie v. Tex. Bd. of Nurse Exam'rs, 685 S.W.2d 431, 434 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

[163] *Bellegie*, 685 S.W.2d at 434.

[164] *See, e.g.*, Lewis v. Jacksonville Bldg. & Loan Ass'n., 540 S.W.2d 307, 310 (Tex. 1976); Phillips Petroleum Co. v. Tex. Comm'n on Envtl. Quality, 121 S.W.3d 502, 507 (Tex. App.—

primary objective is to give effect to the agency's intent.[165] The judiciary accords substantial deference to an agency's interpretation of its own substantive rules by holding that it will not substitute judgment for that of the agency unless the interpretation is plainly erroneous or inconsistent with the language of the rule.[166] The Austin Court of Appeals held that an agency interpretation becomes a part of the rule itself and represents the view of the regulatory body that must deal with the particularities of administering the rule.[167] Such deference may embolden an agency to believe that through the guise of interpretation it may in essence fashion exceptions to a rule that it has adopted pursuant to notice and comment rulemaking. The Texas Supreme Court held that an agency may not amend a rule adopted pursuant to notice and comment rulemaking in such an ad hoc manner.[168] In *Myers v. State*, the Austin Court of Appeals reaffirmed that holding by providing that the comptroller could not create broad amendments to its rules through adjudication rather than through its rulemaking authority, for this would effectively undercut the goals of the APA rulemaking procedures.[169] The court further upheld the principle that despite the strong deference accorded an agency in interpreting its own rule, if it ignores the plain language of its rule, the court will substitute judgment for that of the agency.[170]

Austin 2003, no pet.); Perry Homes v. Strayhorn, 108 S.W.3d 444, 447–48 (Tex. App.—Austin 2003, no pet.).

[165] Rodriguez v. Serv. Lloyds Ins. Co., 997 S.W.2d 248, 254 (Tex. 1999); Eldercare Props., Inc. v. Tex. Dep't of Human Servs., 63 S.W.3d 551, 559 (Tex. App.—Austin 2001, pet. denied), *abrogated by* Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 174 (Tex. 2004).

[166] Pub. Util. Comm'n v. Gulf States Utils. Co., 809 S.W.2d 201, 207 (Tex. 1991) (citing United States v. Larionoff, 431 U.S. 864, 872 (1977)); Gulf Coast Coal. of Cities v. Pub. Util. Comm'n, 161 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.); El Paso County Hosp. Dist. v. Tex. Health & Human Servs. Comm'n, 161 S.W.3d 587, 591 (Tex. App.—Austin 2005, pet. filed); Cities of Alvin v. Pub. Util. Comm'n, 143 S.W.3d 872, 881 (Tex. App.—Austin 2004, no pet.).

[167] *El Paso County Hosp. Dist.*, 161 S.W.3d at 591; BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Group, 93 S.W.3d 570, 575 (Tex. App.—Austin 2002, pet. denied); McMillan v. Tex. Natural Res. Conservation Comm'n, 983 S.W.2d 359, 362 (Tex. App.—Austin 1998, pet. denied).

[168] Rodriguez v. Serv. Lloyds Ins. Co., 997 S.W.2d 248, 255–56 (Tex. 1999).

[169] 169 S.W.3d 731, 734–35 (Tex. App.—Austin 2005, no pet. h.).

[170] *Id*. at 734; *see also* Ackerson v. Clarendon Nat'l Ins. Co., 168 S.W.3d 273, 275 (Tex. App.—Austin 2005, pet. denied).

2. Procedural Due Process and Rulemaking

In *Texas Shrimp Ass'n v. Texas Parks & Wildlife Department*, the appellants challenged the validity of a rule on the basis that the agency had failed to substantially comply with the rulemaking procedures of the APA and that such error violated their constitutional procedural due process rights.[171] The Austin court held that the appellants had not sufficiently briefed the issue of procedural due process and that the error was waived.[172] The court indicated that the appellants failed to cite appropriate case authorities, thus the court could not evaluate the validity of the asserted due process claims.[173] The court could have responded by holding that there were no appropriate authorities to support this claim.

Some legal commentators have suggested that the due process clauses of the Texas[174] and United States[175] Constitutions are applicable to the rulemaking process by asserting that it requires the presence of fair play and substantial justice.[176] The Texas Supreme Court has interpreted the Texas due process clause, as it relates to procedural protections, to apply and require the same minimum protections as the Fourteenth Amendment due process clause as interpreted by the United States Supreme Court.[177] The United States Supreme Court has long held that when general statutes are adopted within a state's police power that affect the person or the property of an individual, sometimes to the point of ruin, one simply does not have a right to be heard except in the only way possible in a complex society, by the power over those who make the rules.[178] It would be simply "impracticable that everyone should have a direct voice in its adoption."[179]

Consistent with this analysis, the United States Supreme Court has held that procedural due process is simply inapplicable to a state agency acting

[171] No. 03-04-00788-CV, 2005 WL 1787453, at *1 (Tex. App.—Austin July 27, 2005, no pet. h.) (unreported mem. op.).

[172] *Id*. at *7–*8.

[173] *See id*. at *7.

[174] TEX. CONST. art. I, § 19.

[175] U.S. CONST. amend. XIV, § 2.

[176] *See* Bob E. Shannon & James B. Ewbank, II, *The Texas Administrative Procedure & Texas Register Act Since 1976—Selected Problems*, 33 BAYLOR L. REV. 393, 430 (1981).

[177] *See, e.g.*, NCAA v. Yeo, 171 S.W.3d 863, 867–69 (Tex. 2005); Univ. of Tex. Med. Sch. at Houston v. Than, 901 S.W.2d 926, 929 (Tex. 1995); Tarrant County v. Ashmore, 635 S.W.2d 417, 422–23 (Tex. 1982).

[178] Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

[179] *Id*.

in a rulemaking capacity.[180] The Court held that to recognize a constitutional right to participate in government policymaking would work a revolution in existing governmental practices.[181] Moreover, the Court held that "[a]bsent statutory restrictions, the state must be free to consult or not to consult whomever it pleases."[182] Thus, the Austin Court of Appeals could have held that despite the lack of proper briefing, there simply is no procedural due process challenge to the adoption of an agency rule and all rights to be heard are solely provided within the statutory procedural protections of the APA.

B. Contested Case Proceedings

1. Right to a Contested Case Proceeding

In the memorandum opinion *Shrieve v. Texas Parks & Wildlife Department*, the Austin Court of Appeals continued to misstate its own precedential authority regarding the right to a contested case proceeding under the APA.[183] The court held in *Shrieve*, citing to *Eldercare Properties, Inc. v. Texas Department of Human Services*, that the APA does not independently provide a right to a contested case hearing and that such right must be conferred expressly by a separate statute other than the APA.[184] It is true that *Eldercare Properties, Inc.* held that an independent statute must expressly provide for a contested case hearing, but the court cited its own precedent that held to the contrary.[185] In *Eldercare Properties, Inc.*, the court relied on its own precedent of *Best & Co. v. Texas State Board of Plumbing Examiners*.[186] In *Best & Co.*, the court did in fact hold that the APA did not require the conducting of a contested case hearing every time an agency finally determined the rights, duties, and privileges of a party simply because the agency was generally subject to the

[180] *See* Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283–84 (1984).

[181] *Id*. at 284.

[182] *Id*. at 285.

[183] *See generally* No. 03-04-00640-CV, 2005 WL 1034086 (Tex. App.—Austin May 5, 2005, no pet. h.) (unreported mem. op.).

[184] *Id*. at *4–*5 (citing Eldercare Props., Inc. v. Tex. Dep't of Human Servs., 63 S.W.3d 551, 557 (Tex. App.—Austin 2001, pet. denied), *abrogated by* Tex Dep't of Protective Servs. v. Mesa Childcare, Inc., 145 S.W.3d 170, 196 (Tex. 2004)).

[185] *See Eldercare Props., Inc.*, 63 S.W.3d at 557 (citing Best & Co. v. Tex. State Bd. of Plumbing Exam'rs, 927 S.W.2d 306, 308–09 (Tex. App.—Austin 1996, writ denied)).

[186] *Id*.

provisions of the APA.[187] It simply held that when an agency is subject to the APA, but the governing statute does not require an adjudicative hearing, the agency is not required to provide a contested case hearing.[188] It defined an adjudicative hearing as one "at which the decision-making agency hears evidence and based on that evidence and acting in a judicial or quasi-judicial capacity, determines the rights, duties or privileges of parties before it."[189] If an adjudicative hearing was required by statute, then the contested case provisions would apply.[190] In the alternative, this analysis would not be required if the statute expressly required the conducting of a contested case hearing.[191]

On the same day that the Austin Court of Appeals issued the *Best & Co.* decision, it handed down the opinion of *Ramirez v. Texas State Board of Medical Examiners*, where in direct contradiction to *Eldercare Properties, Inc.*, but consistent with *Best & Co.*, the court held that a contested case hearing was mandated when the governing statute implied that an adjudicative hearing was necessary.[192] In quoting *Best & Co.*, the court held that the key phrase in the APA definition of a contested case proceeding was the requirement that it be an adjudicative hearing wherein the court defined it as requiring "a hearing at which the decision-making agency hears evidence and, based on that evidence and acting in a judicial or quasi-judicial capacity, determines the rights, duties, or privileges of parties before it."[193] Therefore, even when the governing statute does not expressly call for an evidentiary hearing, but it is clearly implied, such a statutory mandate requires an adjudicative hearing which under the APA definition is a contested case proceeding.[194]

It is clearly incumbent upon the Austin Court of Appeals to overrule *Eldercare Properties, Inc.*, as simply inconsistent with existing precedent. The reasoning in *Best & Co.* and *Ramirez* most definitely fulfills the overall intent and language of the APA and should be followed. If it is in fact the intent of the Austin Court of Appeals to reject its reasoning in *Best & Co.*

[187] *Best & Co.*, 927 S.W.2d at 308–09.

[188] *Id*. at 309.

[189] *Id*. at 309 n.1.

[190] *Id*. at 309.

[191] *Id*.

[192] 927 S.W.2d 770, 772 (Tex. App.—Austin 1996, no writ).

[193] *Id.*

[194] *See id.* at 772–73.

and *Ramirez*, it should do so expressly and not continue to cite such decisions for a proposition that was not held within either decision.

2. Burden of Proof: A Preponderance of the Evidence Standard?

The APA does not set forth the burden of proof for the findings of fact within a contested case proceeding.[195] The Austin Court of Appeals has long held that unless a specific, controlling statute provides otherwise, the burden of proof in contested case proceedings is the civil standard of a preponderance of the evidence.[196] Recently, there has been a renewed effort to assert the need for the use of a clear and convincing evidence standard within licensing proceedings.[197] The Austin Court of Appeals has firmly rejected that argument and held that absent a statute setting forth a different burden of proof, APA contested case proceedings are civil in nature.[198] It is firmly established that issues of fact are determined by a preponderance of the evidence standard of proof.[199] The court held that in Texas, the clear and convincing standard in civil cases is only utilized in extraordinary circumstances, such as civil commitment hearings and involuntary termination of parental rights.[200] Thus, one clearly must seek legislative action to change the long-held and firmly established principle of Texas jurisprudence that contested case proceedings are and continue to be subject to the preponderance of the evidence burden of proof.

3. Agency Modification of ALJ Findings: Are Recommended Sanctions a Finding of Fact or Conclusion of Law Subject to the Provisions of Section 2001.058(e)?

The APA provides that if a contested case hearing was conducted by an ALJ of the State Office of Administrative Hearings (SOAH) who is not

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[195] *See generally* TEX. GOV'T CODE ANN. §§ 2001.051–.147 (Vernon 2000).

[196] Sw. Pub. Serv. Co. v. Pub. Util. Comm'n, 962 S.W.2d 207, 213 (Tex. App.—Austin 1998, pet. denied); Prof'l Mobile Home Transp. v. R.R. Comm'n, 733 S.W.2d 892, 899 (Tex. App.—Austin 1987, writ ref'd n.r.e.); Beaver Express Serv., Inc. v. R.R. Comm'n, 727 S.W.2d 768, 775 n.3 (Tex. App.—Austin 1987, writ denied).

[197] *See* Granek v. Tex. State Bd. of Med. Exam'rs, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet. h.); Pretzer v. Motor Vehicle Bd., 125 S.W.3d 23, 38–39 (Tex. App.—Austin 2003), *rev'd on other grounds*, 138 S.W.3d 908 (Tex. 2004).

[198] *Granek*, 172 S.W.3d at 777.

[199] *Id*.

[200] *Pretzer*, 125 S.W.3d at 39.

within the natural resource[201] or utility divisions,[202] an agency may change a finding of fact or conclusion of law set forth in an ALJ proposal for decision, subject to certain limitations and exceptions.[203] In fact, this APA provision not only applies to a finding of fact or a conclusion of law, but also applies to an agency that intends to vacate or modify an order of an ALJ.[204] Reading the provision as a whole, the section applies to any finding or determination of an ALJ that is set forth in the ALJ's proposed order and it is not simply limited to findings of fact or conclusions of law. The main requirement of the APA provision is that if the agency modifies the ALJ proposed order, it must set forth in writing the specific reason and legal basis for the change.[205] This requirement has been held to be significant as the Austin Court of Appeals has reversed decisions solely on the basis that the agency failed to explain its decision[206] or that its explanation was irrational.[207]

In two recent cases, the Texas State Board of Medical Examiners asserted that the written justification requirement does not apply to an ALJ's recommendation for sanctions within a proposed order, for they do not constitute findings of fact or conclusions of law.[208] The Austin Court of Appeals held that an agency must explain a modification of a proposed sanction and that such modification must have a contemporaneous, rational explanation for doing so.[209] The court avoided the question of whether a sanction is a finding of fact or conclusion of law, but it held that the APA provisions applied.[210] It would seem clear that the imposition of a sanction,

[201] TEX. GOV'T CODE ANN. § 2003.047(m) (Vernon 2000).

[202] *Id.* § 2003.049(g)(1)–(2).

[203] *Id.* § 2001.038(e)(1)–(3).

[204] *Id.* § 2001.038(e).

[205] *Id.* § 2001.038(e)(3).

[206] *See, e.g.*, Levy v. Tex. State Bd. of Med. Exam'rs, 966 S.W.2d 813, 815–16 (Tex. App.—Austin 1998, no pet.); Ret. Sys. v. McKillip, 956 S.W.2d 795, 800–01 (Tex. App.—Austin 1997, no pet.).

[207] *See, e.g.*, Tex. State Bd. of Med. Exam'rs v. Dunn, No. 03-03-00180-CV, 2003 WL 22721659, at *3–*4 (Tex. App.—Austin Nov. 20, 2003, no pet.) (unreported mem. op.); Smith v. Montemayor, No. 03-02-00466-CV, 2003 WL 21401591, at *7–*8 (Tex. App.—Austin June 19, 2003, no pet.) (unreported mem. op.).

[208] *See* Granek v. Tex. State Bd. of Med. Exam'rs, 172 S.W.3d 761, 781 (Tex. App.—Austin 2005, no pet. h.); Grotti v. Tex. State Bd. of Med. Exam'rs, No. 03-04-00612-CV, 2005 WL 2464417, at *9 (Tex. App.—Austin Oct. 6, 2005, no pet. h.) (unreported mem. op.).

[209] *Granek*, 172 S.W.3d at 781; *Grotti*, 2005 WL 2464417, at *9.

[210] *Granek*, 172 S.W.3d at 781; *Grotti*, 2005 WL 2464417, at *9.

which is authorized by statute, would clearly be an ultimate finding of fact or what is also called a mixed application of law to fact finding. As the Austin Court of Appeals has previously held for why these findings are "phrased in factual language, these broad postulates are easily seen as conclusions relative to legal standards for they purport to apply in a specific case legal norms or 'criteria' which are applicable in all similar cases."[211] The imposition of sanctions is the applying of a range of possible sanctions to the specific facts of a case and setting forth policy as to what type of punishment is necessary for the public welfare. Despite whether one calls it an ultimate fact question or a question of law, the Austin Court of Appeals correctly held that it was subject to the provisions of the APA. Furthermore, as pointed out above, the APA provision is not limited to changes to findings of fact or conclusions of law, but also requires an explanation whenever the agency modifies an order of the ALJ.[212] Clearly, modifying sanctions would constitute a modification of the ALJ's proposed order.

4. May an Agency Change Its Interpretation of a Statutory Provision That Has Not Been Amended? If So, Is a Court Bound by the Reinterpretation?

The Austin Court of Appeals recently confronted the issue of whether an agency can modify its interpretation of a statute that the Texas Legislature has not amended or modified.[213] The court held that the agency had the authority to change a previous interpretation "as long as the new interpretation does not contradict either statutory language or a formally promulgated rule."[214] It merely cited to authority that held that an agency's interpretation of the law that it administers is entitled to substantial deference, but this decision did not so hold in light of an agency's reinterpretation of unamended statutory language.[215] It also cited to authority that upheld an agency's reinterpretation of its own rule, rather

[211] Charter Med.-Dallas, Inc. v. Tex. Health Facilities Comm'n, 656 S.W.2d 928, 934 (Tex. App.—Austin 1983), *rev'd on other grounds*, 665 S.W.2d 446 (Tex. 1984).

[212] *See* TEX. GOV'T CODE ANN. § 2001.058(e) (Vernon 2000).

[213] First Am. Title Ins. Co. v. Strayhorn, 169 S.W.3d 298, 306–07 (Tex. App.—Austin 2005, no pet. h.).

[214] *Id.* at 306.

[215] *See id.* at 304 (citing Tarrant Appraisal Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993)).

than an existing statute.[216] Moreover, in *Grocers Supply Co.*, the court upheld the reinterpretation of the rule on the basis that the agency had the power to modify such rule on an ad hoc basis in a particular contested case proceeding.[217] Subsequent to that Austin Court of Appeals holding, the Texas Supreme Court held that a rule adopted pursuant to notice and comment rulemaking could not be modified by an agency within a contested case proceeding in an ad hoc manner.[218] Thus, the Austin Court of Appeals' cited authority for upholding the right of an agency to change its interpretation of an existing, unamended statute wholly fails to support that holding, and the court's holding was in fact one of first impression.

But, the legitimacy of the court's holding can be justified. The United States Supreme Court, in *Chevron v. Natural Resources Defense Council*, upheld the power of a federal agency to modify its interpretation of an existing statute that had not been amended.[219] The Court held that the court of appeals committed a basic legal error of determining that an existing statute had a static judicial definition.[220] If the agency's construction of a statutory provision "really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by the Congress," the United States Supreme Court held that the challenge must fail.[221] The Austin Court of Appeals held that the agency's new interpretation was reasonable and consistent with the language of the statute.[222] What the Austin Court of Appeals did not answer is whether the court is bound to accept the agency's reinterpretation of the statute even if it is reasonable. In other words, what if the court believes that the agency's initial reasonable interpretation better reflects the legislative intent versus the agency's reinterpretation of the statute, even though it is found by the court to be reasonable?

In *Chevron*, the United States Supreme Court not only held that an agency could reinterpret an existing, unamended statute, it held that if the statute is in fact ambiguous, and the agency adopts one of a number of

[216] *See id*. at 306 (citing Grocers Supply Co. v. Sharp, 978 S.W.2d 638, 642 (Tex. App.—Austin 1998, pet. denied)).

[217] 978 S.W.2d at 642 n.7.

[218] Rodriguez v. Serv. Lloyds Ins. Co., 997 S.W.2d 248, 255–56 (Tex. 1999).

[219] 467 U.S. 837, 842–43 (1984).

[220] *Id.* at 842.

[221] *Id.* at 866.

[222] First Am. Title Ins. Co. v. Strayhorn, 169 S.W.3d 298, 313 (Tex. App.—Austin 2005, no pet. h.).

reasonable interpretations of that ambiguity, the court is bound by the choice made by the agency.[223] The Texas Supreme Court and Austin Court of Appeals have held that the construction of a statute by an agency charged with its enforcement is entitled to serious consideration so long as it is reasonable and does not contravene the plain language of the statute.[224] But, the Texas Supreme Court has never held that it is bound by an agency's choice between two reasonable interpretations of a statute as to what constitutes the legislative intent. Yet in a 1997 decision, the Austin Court of Appeals held that if a statutory provision can reasonably be interpreted as the agency has ruled, and if the agency's "reading is in harmony with the rest of the statute, then the court is bound to accept that interpretation even if other reasonable interpretations exist."[225] This holding constituted an extreme departure from previous judicial precedent and appeared to be based on improper authority. The Austin Court of Appeals relied on one of its prior decisions as authority for this proposition.[226] However, that earlier decision did not involve the mere interpretation of a statutory provision, but rather it was concerned with whether a substantive rule adopted by the agency was consistent with the statutory provision.[227] The Austin Court of Appeals has inconsistently applied this precedent since its holding in 1997. It has ignored the holding in virtually every decision rendered since that time, indicating that the agency interpretation is merely to be given substantial deference.[228]

[223] *See Chevron*, 467 U.S. at 842–45.

[224] Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 531 (Tex. 2002); *see also* Fleming Foods of Tex., Inc. v. Rylander, 6 S.W.3d 278, 282 (Tex. 1999); Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd., 156 S.W.3d 91, 99 (Tex. App.—Austin 2004, pet. denied); Brazoria County v. Tex. Comm'n on Envtl. Quality, 128 S.W.3d 728, 734 (Tex. App.—Austin 2004, no pet.).

[225] City of Plano v. Pub. Util. Comm'n, 953 S.W.2d 416, 421 (Tex. App.—Austin 1997, no writ).

[226] *Id*. (citing Quorum Sales, Inc. v. Sharp, 910 S.W.2d 59, 64 (Tex. App.—Austin 1995, writ denied)).

[227] *See Quorum Sales, Inc.*, 910 S.W.2d at 64.

[228] *See* Cities of Alvin v. Pub. Util. Comm'n, 143 S.W.3d 872, 881 (Tex. App.—Austin 2004, no pet.); Amaral-Whittenberg v. Alanis, 123 S.W.3d 714, 720 (Tex. App.—Austin 2003, no pet.); Sergeant Enters., Inc. v. Strayhorn, 112 S.W.3d 241, 246 (Tex. App.—Austin 2003, no pet.); State v. Pub. Util. Comm'n, 110 S.W.3d 580, 584–85 (Tex. App.—Austin 2003, no pet.); GTE Sw., Inc. v. Pub. Util. Comm'n, 102 S.W.3d 282, 289 (Tex. App.—Austin 2003, pet. abated); Equitable Trust Co. v. Fin. Comm'n, 99 S.W.3d 384, 387 (Tex. App.—Austin 2003, no pet.); Hartford Underwriters Ins. Co. v. Hafley, 96 S.W.3d 469, 474 (Tex. App.—Austin 2002, no pet.); Tex. Workers' Comp. Comm'n v. Cont'l Cas. Co., 83 S.W.3d 901, 905 (Tex. App.—Austin 2002, no pet.).

Recently, however, the court held that if a statute can reasonably be read as the agency has construed it, and the reading is in harmony with the rest of the statute, then the court is bound to accept the determination even if other reasonable interpretations existed.[229] It is incumbent upon the Austin Court of Appeals to clarify its holdings as to whether it believes the judiciary is bound by an agency's reasonable interpretation of a statute, and furthermore, whether a court is bound by an agency's reasonable reinterpretation of a statute. This radical departure from judicial precedent must be justified and, at a minimum, consistently applied in all cases involving statutory ambiguities of a regulatory scheme administered by an administrative agency. Furthermore, it must be noted that the Texas Supreme Court has not addressed either of these issues nor recognized this deference standard as articulated by the Austin Court of Appeals.

5. Motion for Rehearing: Failure to Assert Federal Preemption—Waiver?

In a motion for rehearing, a party must point out agency error with sufficient clarity so that the agency can correct it or prepare to defend it.[230] Failure to do so constitutes waiver of the error for purposes of judicial review.[231] The one recognized exception is that one need not raise before an agency nor assert in one's motion for rehearing a constitutional challenge, for the agency simply has no power to hear and decide such an issue.[232] The Austin Court of Appeals was confronted with the issue of whether federal preemption could be raised in the constitutional courts when it had not been asserted before the agency nor specifically in the motion for rehearing.[233] The court relied upon Texas Supreme Court precedent, for the general proposition that a preemption argument that affects the forum, rather than the choice of law to resolve the merits of the

[229] *See* Steering Comms. for the Cities Served by TXU Elec. v. Pub. Util. Comm'n, 42 S.W.3d 296, 300 (Tex. App.—Austin 2001, no pet.); Berry v. State Farm Mut. Auto. Ins. Co., 9 S.W.3d 884, 892–93 (Tex. App.—Austin 2000, no pet.); Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc., 997 S.W.2d 298, 305 (Tex. App.—Austin 1999, pet. denied).

[230] Suburban Util. Corp. v. Pub. Util. Comm'n, 652 S.W.2d 358, 365 (Tex. 1983).

[231] *See* Hammack v. Pub. Util. Comm'n, 131 S.W.3d 713, 732 (Tex. App.—Austin 2004, pet. denied); Fleetwood Cmty. Home v. Bost, 110 S.W.3d 635, 644 (Tex. App.—Austin 2003, no pet.).

[232] Cent. Power & Light Co. v. Sharp, 960 S.W.2d 617, 618 (Tex. 1997).

[233] Entergy Gulf States, Inc. v. Pub. Util. Comm'n, 173 S.W.3d 199, 203 (Tex. App.—Austin 2005, pet. filed).

case, cannot be waived and may be raised on appeal.[234] Applying this doctrine when the forum of original jurisdiction was an agency contested case hearing rather than an original action in the district court, the Austin Court of Appeals held that if preemption goes to a determination of jurisdiction, the issue cannot be waived by failure to assert it before the agency or specifically in the motion for rehearing.[235] But if federal preemption merely goes to an issue of what substantive law will determine the merits of the case, failure to so assert within the motion for rehearing constitutes waiver.[236] This holding is bolstered by the fact that a party to an administrative hearing may commence an independent, concurrent declaratory judgment action in the district court if it is asserted that the agency is exercising authority beyond its statutorily conferred powers, that is, ultra vires.[237] If the agency can be bypassed while a contested case proceeding is pending in order to determine the issue of preemption, the judiciary should be able to hear such an issue even if the agency has rendered a final, but appealable decision, wherein the issue is whether there was a total absence of jurisdiction.

IV. CONCLUSION

The section 2001.038 declaratory judgment action to challenge the validity of a rule, that is commenced and determined prior to the rendition of an agency order applying the same rule, is an effective vehicle that fulfills the legislative intent of allowing a person to learn of the validity of a rule before it is enforced by an agency. However, it has also been established that this smooth road turns into a miry bog filled with inconsistent decisions as to whether the declaratory device can be utilized after the agency has acted. Most importantly, the current case law interpretations arguably allow an agency to extinguish one's right to declaratory relief by acting more expeditiously than the judiciary. Such a doctrine, if intended by the Austin Court of Appeals, is clearly inconsistent with the legislative intent and should be overruled, or the courts must allow a timely request for temporary injunction to maintain the status quo to prevent such a result.

[234] *Id*. at 210 (citing Gorman v. Life Ins. Co. of N. Am., 811 S.W.2d 542, 544 (Tex. 1991)).

[235] *Id*. at 207–09.

[236] *Id*. at 210.

[237] *See* Westheimer Indep. Sch. Dist. v. Brockette, 567 S.W.2d 780, 785–86 (Tex. 1978).