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# EXHAUSTION OF ADMINISTRATIVE REMEDIES IN TEXAS

## *FIRST PRINCIPLES AND RECENT DEVELOPMENTS*

Steven Baron
Susan A. Kidwell

Steven Baron
Steven Baron Consulting & Legal Services
Post Office Box 5573
Austin, Texas 78763
(512) 535-3104
(512) 479-8070 (fax)
sbaron@baroncounsel.com

Susan A. Kidwell
Locke Lord LLP
600 Congress Avenue
Suite 2200
Austin, Texas 78701
(512) 305-4766
(512) 391-4766 (fax)
skidwell@lockelord.com

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# EXHAUSTION OF ADMINISTRATIVE REMEDIES IN TEXAS
## *FIRST PRINCIPLES AND RECENT DEVELOPMENTS*

Steven Baron
Susan A. Kidwell[1]

## I. Introduction

This paper provides an overview of the exhaustion-of-administrative-remedies doctrine in Texas law and reports on recent case law developments. Section II of the paper discusses the basic principle and rationale of the exhaustion doctrine, including the doctrine's relationship to the doctrines of exclusive jurisdiction and sovereign and governmental immunity. Section III identifies exceptions to the exhaustion requirement recognized by the Texas courts. Section IV describes the consequences of a party's failure to exhaust administrative remedies. Section V surveys and comments on how the exhaustion doctrine applies in various substantive areas with an emphasis on recent case law. Section VI concludes with a suggested framework for analyzing exhaustion issues. The authors hope that the paper will provide a useful reference for both new and experienced practitioners.

## II. Foundation of the Exhaustion-of-Administrative-Remedies Doctrine

### A. The Exhaustion Requirement and its Rationale

The requirement that a person "exhaust" administrative remedies is a core principle of Texas administrative law. Over half a century ago, the Texas Supreme Court held:

> A board or commission created by the Legislature with authority and responsibility for determining in the first instance whether certain action shall be taken is not subject to restraints by the courts whenever it appears that an erroneous conclusion has been reached on some preliminary or procedural question.[2]

The exhaustion doctrine accordingly "requires a party in an administrative proceeding to await that proceeding's completion, thereby securing all available administrative relief before seeking judicial review of the agency's action."[3]

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[1] This paper presents the views of the authors which do not necessarily reflect the views of the authors' law firms or clients.

[2] *Tx. State Bd. of Exam'rs in Optometry v. Carp*, 343 S.W.2d 242, 246 (Tex. 1961).

[3] *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000).

In 1975, the Texas Administrative Procedure and Texas Register Act (APTRA) codified this exhaustion-of-administrative-remedies requirement for contested cases.[4] Section 2001.171 of the present-day Administrative Procedure Act (APA) maintains the requirement. Only "[a] person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review" of the agency's decision.[5]

The requirement to exhaust administrative remedies serves four policy purposes. First, it safeguards "the orderly disposition of cases of administrative law."[6] Without an exhaustion requirement there would be "opportunity for constant delays in the course of administrative proceedings."[7] Exhaustion "demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."[8]

Exhaustion of administrative remedies is thus "designed primarily to control the timing of judicial relief from adjudicative action of an agency."[9] As a general rule, "administrative bodies are entitled to and should exercise the duties and functions conferred by statute without interference from the courts."[10]

Second, the exhaustion requirement respects the Legislature's delegation of authority to agencies that were created to develop expertise in a specific area. Because of their expertise, administrative agencies are the appropriate forum to resolve technical fact disputes and complex policy issues without judicial interference.[11] For this reason, a regulatory

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[4] *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681, 683 (Tex. 1983). *See* 64th Leg., R.S., ch. 61, 1975 Tex. Gen. Laws 136 (compiled as TEX. REV. CIV. STAT. art. 6252-13a).

[5] APA, TEX. GOV'T CODE §§ 2001.171, 2001.176(b)(1).

[6] *Westheimer Indep. Sch. Dist. v. Brockette*, 567 S.W.2d 780, 781 (Tex. 1978). *See also Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (recognizing that the exhaustion doctrine "protects" administrative agencies both by giving agencies an opportunity to correct their own mistakes before being haled into court and by discouraging parties from disregarding the agency's procedures).

[7] *Carp*, 343 S.W.2d at 247.

[8] *Woodford*, 548 U.S. at 90.

[9] *Cash America*, 35 S.W.3d at 15.

[10] *Westheimer Indep. Sch. Dist.*, 567 S.W.2d at 785.

[11] *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d. 772, 780 (Tex. App.—Austin 2004), *aff'd*, 209 S.W.3d 83 (Tex. 2006).

scheme may confer on an agency exclusive original jurisdiction to address a matter. Indeed, "[p]erhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive."[12]

Third, the exhaustion requirement encourages parties to use the prescribed administrative process to resolve their disputes if possible without resorting to litigation.[13] Compared to courthouse litigation, administrative procedures are typically tailored and provide a more effective and efficient means to resolve disputes in a special area. [14]

Fourth, administrative exhaustion discourages the filing of lawsuits before the plaintiff has suffered concrete injury giving rise to a justiciable claim. "Generally the plaintiff has not actually suffered any injury until the administrative processes have been completed and the ruling complained of has been put into effect."[15] Therefore, "there is no real need for equitable relief [from the courts] in the ordinary case until a final administrative determination has been made."[16]

### B. Exhaustion as a Corollary of Exclusive Jurisdiction

The requirement to exhaust administrative remedies derives from Article V, Section 8 of the Texas Constitution, which states in relevant part:

> District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body.[17]

This provision states a general rule that Texas district courts are courts of general jurisdiction with original jurisdiction to resolve disputes. But it also carves out an exception that applies when other law confers exclusive jurisdiction on an administrative body.

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[12] *McKart v. U.S.*, 395 U.S. 185, 193 (1969). *See infra*, § III. A.

[13] *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d at 780.

[14] *See Woodford*, 548 U.S. at 89 ("Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court.").

[15] *Glen Oaks Util., Inc. v. City of Houston*, 340 S.W.2d 783, 785 (Tex. 1960).

[16] *Carp*, 343 S.W.2d at 245.

[17] TEX. CONST. Art. V, §8. *See In re Entergy Corp*., 142 S.W.3d 316, 321 (Tex. 2004); *Subaru of Am. v. David McDavid Nissan*, 84 S.W.3d 212, 220-22 (Tex. 2002).

A law that grants an agency exclusive jurisdiction "gives the agency alone the authority to make an initial determination in a dispute."[18] And, when an agency has exclusive jurisdiction, "a party must exhaust all administrative remedies before seeking judicial review of the agency's action."[19] Only after exhaustion does a district court acquire subject-matter jurisdiction.[20] The exhaustion doctrine is, therefore, a corollary to exclusive jurisdiction.

1. Determining whether an agency has exclusive jurisdiction

Because administrative agencies exercise only those powers granted by statute, determining whether an agency has exclusive jurisdiction requires statutory interpretation.[21] The exercise is straightforward when the Legislature uses the words "exclusive original jurisdiction," as was the case in *Subaru of America v. David McDavid Nissan*.[22] There, the Texas Supreme Court "held that statutory language granting the Texas Motor Vehicle Board 'exclusive original jurisdiction' meant exactly what it said: that the Texas Motor Vehicle Board has exclusive jurisdiction over matters governed by the Texas Motor Vehicle Commission Code."[23]

Identical language in the Public Utility Regulatory Act led the court in *In re Entergy* to conclude that the Legislature granted the Public Utility Commission (PUC) exclusive jurisdiction over a claim that an electric utility breached a merger agreement previously approved by the agency.[24] Similarly, in *In re Southwestern Bell*, the court concluded that statutory language granting the PUC "exclusive original jurisdiction over the business and property of a telecommunications utility" gave the agency exclusive jurisdiction over claims that Southwestern Bell Telephone Company had improperly collected a surcharge from its customers.[25]

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[18] *Cash America*, 35 S.W.3d at 15.

[19] *In re Entergy*, 142 S.W.3d at 321.

[20] *Id.* at 321-22.

[21] *Id.* at 322.

[22] *David McDavid Nissan*, 84 S.W.3d at 212.

[23] *In re Entergy*, 142 S.W.3d at 323.

[24] *Id.* at 323-24.

[25] *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 625 (Tex. 2007).

Plain statutory language was also central to the court's decision in *Blue Cross Blue Shield of Tex. v. Duenez*.[26] The statute in *Duenez* granted the executive director of the Employees Retirement System (ERS) "exclusive authority to determine all questions relating to enrollment in or payment of" certain health care benefit claims. The statute further authorized an appeal of the executive director's decision to the ERS Board of Trustees followed by judicial review. The statute declared these to be "the exclusive remedies available to an employee, participant, annuitant, or dependent." Based on the express statutory language, the court held that ERS had exclusive jurisdiction requiring exhaustion of administrative remedies that could not be circumvented by a declaratory judgment lawsuit.[27]

Exclusive jurisdiction can also be established by a pervasive regulatory scheme.[28] In both *Entergy* and *Southwestern Bell*, not only express language but the statute's pervasive scheme showed "that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed."[29] In *Thomas v. Long*,[30] the court found that, even without the words "exclusive jurisdiction," the statute authorizing creation of a sheriff's department civil service system and a commission granted such commissions exclusive jurisdiction. The statutory scheme in *Thomas* required persons whose employment had been terminated to exhaust administrative remedies for claims relating to reinstatement.

Last year, the Houston (First) Court of Appeals twice held that the regulatory scheme in the Gas Utility Regulatory Act conferred exclusive jurisdiction on the Railroad Commission to resolve gas utility billing disputes.[31] Also last year, the Dallas Court of Appeals held that the Texas Labor Code grants the Workers' Compensation Division of the Texas Department of Insurance exclusive original jurisdiction to resolve certain medical fee disputes between health care providers and an insurance company.[32] And earlier this year, the Austin Court of Appeals held that the Division's exclusive jurisdiction extends to

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[26] *Blue Cross Blue Shield of Tex. v. Duenez*, 201 S.W.3d 674 (Tex. 2006).

[27] *Id.* at 676.

[28] *David McDavid Nissan*, 84 S.W.3d at 221.

[29] *In re Sw. Bell*, 235 S.W.3d at 624-25.

[30] *Thomas v. Long*, 207 S.W.3d 334, 341-42 (Tex. 2006).

[31] *See City of Houston v. CenterPoint Energy Houston Elec.*, No. 01-11-00885-CV, 12 WL 6644982, at *8 (Tex. App—Houston [1st Dist.], Dec. 20, 2012, no pet.); *Tara Partners, Ltd. v. CenterPoint Energy Houston Elec.*, 371 S.W.3d 441, 446-47 (Tex. App—Houston [1st Dist.] 2012, no pet.).

[32] *Main Rehab. & Diagnostic Ctr., LLC v. Liberty Mut. Ins. Co.*, 376 S.W.3d 825, 832 (Tex. App.—Dallas 2012, no pet.).

resolving such disputes on remand after reversal of an agency's decision on judicial review under the APA.[33]

In another recent case, the Houston (Fourteenth) Court of Appeals held that the Texas Commission on Environmental Quality's statutory authority to approve projects relating to the issuance and approval of bonds did not confer exclusive jurisdiction on the agency. The court rejected a water district's exhaustion argument to dismiss a suit involving a contractual dispute between the district and a developer regarding the district's obligation to make bond-related payments. The court recognized that "a party is required to exhaust administrative remedies only when the legislature has vested exclusive jurisdiction in an agency to make an initial determination in a dispute."[34]

The Houston (Fourteenth) Court of Appeals also considered the relationship between exclusive jurisdiction and exhaustion of administrative remedies in *United Residential Properties, L.P. v. Theis*.[35] The exhaustion issue in that case turned on whether the Texas Manufactured Housing Standards Acts (TMHSA) confers either exclusive or primary jurisdiction on the Manufactured Housing Board that would require buyers to exhaust administrative remedies before suing a vendor for fraud and DTPA violations. The court observed that the TMHSA "does not include clear and express statutory language conferring exclusive jurisdiction to [the] agency" for the fraud and non-warranty DTPA claims at issue; to the contrary, the TMHSA only addresses warranty claims.[36] Nor did the vendor make any argument that the agency has primary jurisdiction. Accordingly, the vendor's jurisdictional challenge was overruled.[37]

2. Impact on the availability of other court claims and remedies

In addition to requiring exhaustion of administrative remedies, a pervasive regulatory scheme that confers exclusive original jurisdiction on an agency can limit or preclude claims available on judicial review. That is, a comprehensive statute can both require exhaustion of

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[33] *See Vista Med. Ctr Hosp. v. Tex. Mut. Ins. Co.*, Nos. 03-11-00641, 03-11-00643, 03-11-00742, 03-11-00785, 2013 WL 2631732 (Tex. App.—Austin June 6, 2013, no pet. h.).

[34] *Harris Cnty. Fresh Water Supply Dist. No. 61 v. FWO Dev., Ltd.*, 396 S.W.3d 639, 644 (Tex. App.—Houston [14th Dist.] 2013, pet. filed).

[35] *United Residential Props., L.P. v. Theis*, 378 S.W.3d 552, 560 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

[36] *Id*. at 561.

[37] *Id*. at 562. Note: the trial court's judgment for the buyers was reversed on other grounds.

administrative remedies and bar judicial causes-of-action and remedies that might otherwise have been available in the absence of regulation.

The Texas Supreme Court found that to be the case last year when it reviewed amendments to the Workers' Compensation Act. In *Texas Mutual Insurance Company v. Ruttiger*,[38] the court concluded that the detailed procedures and remedies set out in the amended Act reflected a legislative intent to preclude workers' compensation claimants from filing claims against an insurance company for unfair and deceptive practices under the Insurance Code or the Deceptive Trade Practices Act. The court further found that the statutory scheme also barred claims for breach of the company's common law duty of good faith and fair dealing.[39] The court followed *Ruttiger* in *Texas Mutual Insurance Company v. Morris*,[40] a case that was pending at the same time.[41]

*Ruttiger* is not the first time the Texas Supreme Court has held that an administrative scheme precludes other causes of action. In *Hoffman-La Roche v. Zeltwanger*,[42] the court examined the Texas Commission on Human Rights Act (TCHRA) which prohibited and provided remedies for sexual harassment. The court held that the statutory scheme bars common-law claims for intentional infliction of emotional distress where the gravamen of the complaint is the same.

*Zeltwanger* led to a similar ruling in *Waffle House v. Williams*.[43] The court in *Waffle House* held that the TCHRA provides the exclusive remedy for sexual harassment so as to foreclose common-law suits for negligence based on the same facts. Acknowledging that the TCHRA does not contain an express exclusivity provision, the court explained:

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[38] *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012).

[39] The court further found, however, that workers' compensation claimant could file suit under the Insurance Code claim for misrepresentation of an insurance policy because that type of claim did not conflict with the workers' compensation scheme. *See id*. at 445-46.

[40] *Tex. Mut. Ins. Co. v. Morris*, 383 S.W.3d 146 (Tex. 2012). In *Morris*, the court rejected the argument for dismissal of the case in its entirety on the ground that the plaintiff had failed to exhaust his administrative remedies by not pursing them promptly. Finding no provision in the statute that imposed time constraints, the court ruled that any delay was not jurisdictional but went to the issue of mitigation of damages. *Id*. at 148-49.

[41] *See also Bean v. Tex. Mut. Ins. Co.*, No. 09-11-00123-CV, 2012 WL 5450826, at *2 (Tex. App.—Beaumont Nov. 8, 2012, no pet.) (mem. op.) (following Ruttiger and noting that "[t]he judicial doctrine of exhaustion of remedies is part and parcel of the exclusive jurisdiction granted to an agency by statute").

[42] *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447-48 (Tex. 2004).

[43] *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010).

> Our view is that the TCHRA, the Legislature's specific and tailored anti-harassment remedy, is preemptive when the complained-of negligence is entwined with the complained-of harassment. Here, the alleged negligence is rooted in facts inseparable from those underlying the alleged harassment. We do not believe the Legislature's comprehensive remedial scheme allows aggrieved employees to proceed on dual tracks—one statutory and one common-law, with inconsistent procedures, standards, elements, defenses, and remedies.[44]

To permit a negligence action, the court found, would allow the plaintiff to evade "[t]he statutory requirements of exhaustion of administrative remedies and the purposes behind the administrative phase of proceedings" along with "all other special rules and procedures governing the statutory sexual-harassment claim."[45]

3. Primary jurisdiction distinguished

"Primary jurisdiction" is a misnomer because, unlike exclusive jurisdiction, the doctrine is prudential, not jurisdictional.[46] Primary jurisdiction refers to situations where a court and an agency "*both* have authority to make an initial determination in a dispute."[47] The primary jurisdiction question, therefore, is which entity *should* make that initial determination. The choice is the court's and will depend on the circumstances. One consideration is whether the case presents complex issues that fall within the agency's purview and expertise. A second factor is whether a decision by the agency would promote uniformity in the laws, rules and regulations governing the industry in question.[48] When these policy considerations are present, courts will defer to the agency to make the initial determination.[49]

Although the primary jurisdiction doctrine is not jurisdictional and does not require a party to exhaust administrative remedies, the practical consequence in a particular case nonetheless may be the same. If a court determines that an agency should make the initial

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[44] *Id*. at 799.

[45] *Id*. at 807.

[46] *David McDavid Nissan*, 84 S.W.3d at 220.

[47] *Id*. at 221 (emphasis in original).

[48] *Id.*

[49] *Cash Am.*, 35 S.W.3d at 18.

determination in a dispute, the court will abate the litigation to give the agency an opportunity to act.[50]

### C. Exhaustion as a Corollary of Sovereign and Governmental Immunity

The exhaustion doctrine can be viewed as a corollary not only of the exclusive jurisdiction doctrine but also of the doctrines of sovereign and governmental immunity. In 1847, Texas recognized the common-law principle of sovereign immunity that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."[51] The requirement to exhaust administrative remedies indicates "the manner" in which the Legislature has consented to suit in administrative appeals.

Section 2001.171 of the APA illustrates this principle. In *Texas Department of Protective & Regulatory Services v. Mega Child Care*, the Texas Supreme Court held that Section 2001.171 waives sovereign immunity to authorize suits for judicial review of contested-case final orders unless the agency's enabling statute provides otherwise.[52] The waiver is conditional: the plaintiff must first exhaust administrative remedies. In cases where the agency's enabling statute governs, the need to exhaust administrative remedies will depend on the statute. Section V below surveys recent and other notable cases that apply the exhaustion doctrine in various substantive areas of the law.

The exhaustion and immunity doctrines also overlap in their treatment of *ultra vires* actions by government officials. Exhaustion is not a precondition to filing a lawsuit to enjoin *ultra vires* actions,[53] and sovereign and governmental immunity likewise do not bar suits against government officials for declaratory and injunctive relief from *ultra vires* acts.[54] This commonality recently presented itself in *Janek v. Gonzalez*.[55] There, the Austin Court of Appeals held that the trial court properly dismissed a lawsuit against the Commission of the

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[50] *David McDavid Nissan*, 84 S.W.3d at 221.

[51] *Hosner v. DeYoung*, 1 Tex. 764 (1847).

[52] *See Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 198 (Tex. 2004).

[53] *See supra*, § II.B.1.

[54] *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009) (holding that *ultra vires* exception to sovereign and governmental immunity allows suit for declaratory and injunctive relief against government officials who allegedly acted without legal authority or failed to perform a purely ministerial act).

[55] *Janek v. Gonzalez*, No. 03-11-00113-CV, 2013 WL 1748795 (Tex. App.—Austin Apr. 17, 2013, no pet.) (mem. op.).

Texas Health and Human Services Commission because the plaintiffs failed to show that they had exhausted administrative remedies and further failed to "invoke the ultra-vires exception to the doctrine of sovereign immunity and to the exhaustion requirement."[56]

## III. Exceptions to the Exhaustion Requirement

Texas courts have recognized that the exhaustion-of-administrative-remedies requirement should not apply in situations where its foundation and rationale are absent. Accordingly, there are certain exceptions to the requirement. The essential lesson is that exhaustion may be excused when the agency is acting beyond its jurisdiction; when the agency cannot grant relief, especially timely relief to prevent irreparable harm; or when the agency lacks authority to address an issue such as a challenge to a statute's constitutionality. In addition, the APA permits challenges to the validity or applicability of agency rules without requiring completion of the administrative process.

### A. Exhaustion is not required when an agency is acting outside its statutory powers

The requirement to exhaust administrative remedies does not apply "when an agency is exercising authority beyond its statutorily conferred powers."[57] In such situations, exhaustion would not serve judicial and administrative efficiency, and agency policies and expertise are irrelevant.[58] Prompt judicial intervention is therefore permissible when the agency has no jurisdiction to begin with.[59]

*City of Sherman v. Public Utility Commission*[60] is a good example. There, the PUC set for hearing a complaint by a water supply corporation that a municipality planned to drill water wells within the water supply corporation's PUC-certificated area. The municipality filed suit for declaratory and injunctive relief, alleging that the PUC lacked jurisdiction to consider the water supply corporation's complaint. The trial court agreed and issued a judgment enjoining the PUC from conducting administrative proceedings on the water supply corporation's complaint.

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[56] *Id.* at *9.

[57] *Westheimer Indep. Sch. Dist.*, 567 S.W.2d at 785.

[58] *Strayhorn v. Lexington Ins. Co.*, 128 S.W.3d. at 780.

[59] *Westheimer Indep. Sch. Dist.*, 567 S.W.2d at 785.

[60] *City of Sherman v. Pub. Util. Comm'n*, 643 S.W.2d 681 (Tex. 1983).

The Texas Supreme Court affirmed. The court rejected the PUC's argument that the municipality was required to exhaust administrative remedies before filing suit. Reviewing the Public Utility Regulatory Act, the court found that PUC had neither express nor implied statutory authority to regulate groundwater production by municipalities or to adjudicate correlative groundwater rights. The court accordingly concluded that the exhaustion of administrative remedies should not be required because the PUC was acting outside its jurisdiction.

1. Conceptual ambiguity

The scope of this exception is often not clear-cut. The courts have sought to distinguish between: (1) an agency acting outside its statutory powers, or *ultra vires*, and (2) an agency committing error in the course of exercising its acknowledged powers. While the exception applies only to the former, not the latter, the distinction between the two is not always clear. Sections 2001.171 and 2001.174 of the APA expressly require exhaustion of administrative remedies prior to judicial review of agency actions alleged to be "in excess of statutory authority." When does agency action "in excess of statutory authority," which requires exhaustion, become agency action "beyond statutorily conferred powers," which does not require exhaustion?

The Texas Supreme Court drew a line in *Texas Education Agency v. Cypress-Fairbanks Independent School District*.[61] There, it was argued that exhaustion was not required because the agency acted outside its statutory authority by deciding to apply an unlawful, extra-statutory standard in an administrative proceeding. The court rejected this characterization and held that the error could be corrected on judicial review of the agency's final order.

In a recent case, *Janek v. Gonzalez*, the Austin Court of Appeals explained more generally that, to invoke the *ultra vires* exception, a plaintiff must allege that an agency official is acting "wholly outside [the official's] jurisdiction."[62] Allegations that the official is "not fully complying with [applicable] regulatory requirements when performing [the official's] duties" are insufficient to invoke the exception.[63]

Last year the Fort Worth Court of Appeals in *Brennan v. City of Willow Park*[64] found the exception applicable when a tax appraisal district sent a notice requiring homeowners to

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[61] *See Tex. Educ. Agency v. Cypress-Fairbanks I.S.D.*, 830 S.W.2d 88, 90 (Tex. 1992).

[62] *Janek*, 2013 WL 1748795 at *7.

[63] *Id*. at *8.

[64] *Brennan v. City of Willow Park*, 376 S.W.3d 910, 922 (Tex. App.—Fort Worth 2012, pet. denied).

pay supplemental taxes because their tax bills for certain prior years had erroneously failed to include city taxes. The appraisal district added the cities as taxing units to the appraisal record for those years and required the homeowners to pay the city taxes. The homeowners refused to pay the back taxes and filed suit for declaratory and injunctive relief. They claimed that the appraisal district lacked statutory authority to add the city taxes after the property had been appraised and taxes paid for the prior years.

The trial court dismissed the suit for failure to exhaust administrative remedies, but the court of appeals reversed. The Fort Worth court held that, while the Tax Code authorized a district to add property omitted from an appraisal roll, the district had no authority to add omitted taxing units (the cities). The court concluded that the homeowners were not required to pursue an administrative tax protest prior to filing suit because suit fell "within the acting-outside-statutory-powers exception to the exhaustion-of-administrative-remedies doctrine."[65]

Earlier this year, the Corpus Christi Court of Appeals found the *ultra vires* exception applicable in another tax appraisal case. In *Ike & Zack v. Matagorda County*,[66] a suit to recover delinquent ad valorem taxes, the summary judgment evidence failed to show that the defendant taxpayers had ever received notice of the delinquent taxes owed for the contested years. In the court's view, the appraisal district would be acting outside of its statutory powers if it attempted to assess taxes without providing notice. On this basis the court indicated that the taxpayers were not required to exhaust their administrative remedies as a precondition to maintaining their claim that the taxes were not owed.[67]

2. A practical consideration – irreparable harm

An important practical factor in determining the *ultra vires* exception's applicability is whether judicial intervention is necessary to prevent irreparable harm. As discussed in the next section, courts regard irreparable harm as a separate, independent exception to the exhaustion requirement. But the prospect of irreparable harm often becomes an influential if not decisive factor when courts assess arguments that the agency is acting outside its powers. In *City of Sherman*, the court noted that the PUC's assertion of jurisdiction "effectively stopped [the municipality's] water acquisition program which is necessary to meet the needs of [its] citizens" and "prevented [the sale of] the revenue bonds necessary to pay for the

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[65] *Id.*.

[66] *Ike & Zack, Inc. v. Matagorda Cnty.*, 13-12-00314-CV, 2013 WL 1091812, at *5 (Tex. App.—Corpus Christi Mar. 14, 2013, no pet.) (mem. op.).

[67] *See also Morris v. Houston Indep. Sch. Dist.*, 388 S.W.3d 310 (Tex. 2012) (holding that Tax Code exhaustion requirement does not apply to prevent taxpayer from contesting liability on the basis of non-ownership when the taxing unit non-suited and taxpayer was realigned as plaintiff).

water acquisition program."[68] The likelihood of irreparable harm also figured prominently in *Westheimer Independent School District v. Brockette*, where the court again found the exhaustion requirement inapplicable because an agency was acting outside its jurisdiction. The record indicated that "the mere pendency of the [administrative] proceeding would cloud the validity of the [school district], would impair its financial standing, and would thwart its functioning."[69]

### B. Exhaustion is not required when judicial intervention is necessary to prevent irreparable harm

"Parties are not required to pursue the administrative process regardless of the price."[70] Courts therefore do not require exhaustion of administrative remedies in cases where a party faces irreparable harm and the agency cannot grant relief.[71] *City of Sherman* and *Westheimer ISD*, discussed above, illustrate how the threat of irreparable harm can support the exhaustion exception for *ultra vires* agency action. Irreparable harm also qualifies as its own exception.

The Texas Supreme Court recognized irreparable harm as an independent exception to the exhaustion requirement in *Houston Federation of Teachers v. Houston Independent School District, Local 2415*.[72] In that case, high school teachers filed suit to enjoin their employer school district from extending the length of the school day. The trial court granted a temporary injunction. The court of appeals dissolved the injunction and dismissed the suit, holding that the teachers were first required to pursue their complaint through the administrative process.

The Supreme Court reversed. The court held that the teachers were not required to exhaust their administrative remedies before filing suit because the administrative process could not provide relief from irreparable harm. The trial court had made an "undisturbed finding" that the proposed extended school day would immediately and irreparably harm the teachers' child care arrangements, transportation arrangements, and second jobs. Moreover,

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[68] *City of Sherman*, 643 S.W.2d at 682-83. The Texas Water Commission (a predecessor to the Texas Commission on Environmental Quality) had previously approved the municipal project and authorized a municipal water district to issue revenue bonds for the project's construction.

[69] *Westheimer Indep. Sch. Dist.*, 567 S.W.2d at 788-89.

[70] *Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987).

[71] *Id.*

[72] *Houston Fed'n of Teachers, Local 2415*, 730 S.W.2d 644 (Tex. 1987).

the Commissioner of Education possessed no authority to grant immediate injunctive relief to prevent that harm. The Supreme Court held that, in these circumstances "the courts may properly exercise their jurisdiction in order to provide an adequate remedy."[73]

In a recent case, *Roma Independent School District v. Guillen*,[74] the San Antonio Court of Appeals followed *Houston Federation of Teachers* and held that the plaintiffs were not required to exhaust administrative remedies under the irreparable harm exception. The dispute arose when school district board members passed a resolution changing the board-member election dates and extending the terms of the current members. A voter in the school district filed suit to declare the resolution void and sought injunctive relief. The trial court rejected the school district's argument that the voter was required to exhaust her administrative remedies before filing suit.

The San Antonio court affirmed. The appellate court acknowledged that, as a general rule, an aggrieved party whose claim relates to the administration of school laws must exhaust administrative remedies. But the court found that the irreparable harm exception applied to at least some of the plaintiff's claims. Harm, which could not be measured in monetary terms, would occur because absent injunctive relief board members would remain in office beyond their original terms and there would be insufficient time to call an election for the claimed lawful date. Moreover, the Commissioner of Education lacked statutory authority to issue an injunction to prevent the harm.[75]

*Imminent harm is not necessarily irreparable harm*

The threat of imminent harm does not excuse exhaustion when the administrative process can prevent the harm. In *Blue Cross Blue Shield of Texas v. Duenez*,[76] a state employee filed suit when his health insurance company notified him that it planned to discontinue coverage of nursing care for his daughter who had been seriously injured in a car accident. The trial court issued a temporary injunction requiring the insurance company to continue making payments. The Texas Supreme Court held that the trial court lacked jurisdiction because the plaintiff had failed to exhaust administrative remedies. The court rejected the plaintiff's claimed exception for irreparable harm because the record did not

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[73] *Id.* at 646.

[74] *Roma Indep. Sch. Dist. v. Guillen*, No. 04-13-00133-CV, 2013 WL 684781 (Tex. App.—San Antonio Feb. 25, 2013, pet. denied).

[75] *Id.* at *4-5. The court also found that some claims were not "school law" grievances over which the Commissioner had any jurisdiction and, moreover, fell within a provision of the Education Code that expressly excused exhaustion. *Id.* at *4.

[76] *Blue Cross Blue Shield of Tex. v.. Duenez*, 201 S.W.3d 674 (Tex. 2006).

show that Texas Employees Retirement System (ERS) could not have provided relief. The court explained that payments had not been terminated at the time the suit was filed; resolving benefit claims was a main purpose of dispute resolution process in the ERS statute; and immediate review of a coverage decision was available in potentially life-threatening situations.[77]

The Houston (Fourteenth) Court of Appeals made a similar determination in a recent tax-protest case. In *Harris County Appraisal District v. ETC Marketing*,[78] the taxpayer appealed a tax appraisal board's decision to district court. The lawsuit raised claims previously presented to the appraisal board but also asserted for the first time that the property was used in interstate commerce and therefore tax exempt. The court of appeals held that this new claim could not be maintained because the taxpayer had not exhausted its administrative remedies as to the claim. The court rejected the taxpayer's irreparable harm argument because the taxpayer could have obtained the requested relief, removal of the property from the appraisal rolls, in the administrative proceeding.[79]

### C. Exhaustion might not be required when a "substantial constitutional question" is presented

In *Texas State Board of Pharmacy v. Walgreen Texas Company*, the Austin Court of Appeals stated that "exhaustion [of administrative remedies] may be excused wherein substantial constitutional questions are involved."[80] This seemingly broad statement belies the limited dispute and its resolution in the case. Upon being charged by an agency with violating regulatory requirements, the plaintiffs filed suit challenging the constitutionality of the underlying regulatory statute. The court held that the suit could be maintained. The court reasoned that it would be "futile" to require exhaustion of administrative remedies because "[a]dministrative agencies have no power to determine the constitutionality of statutes."[81]

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[77] *Id.* at 676-77.

[78] *Harris Cnty. Appraisal Dist. v. ETC Mktg., LTD*, 2013 WL 130330 (Tex. App.—Houston [14th Dist.] Apr. 2, 2013, pet. filed).

[79] *Id.* at *3.

[80] *Tex. State Bd. of Pharmacy v. Walgreen Tex. Co.*, 520 S.W.2d 845, 848 (Tex. Civ. App.—Austin 1975 writ ref'd n.r.e.).

[81] *Id.*

*Walgreen* might seem all the more limited because it involved a temporary injunction appeal, not the merits. In *Central Power and Light Company v. Sharp*,[82] however, the Texas Supreme Court cited and quoted the *Walgreen* opinion with approval. In *Central Power and Light*, the court held that the plaintiff in an administrative appeal could maintain a challenge to the constitutionality of the underlying statute even though that point was not included in the party's motion for rehearing before the agency.[83] The court concluded that there was no need to apprise the agency of the constitutional challenge in the motion because the agency lacked authority to decide the issue.[84]

While it approved *Walgreen*, *Central Power and Light* itself should be viewed as a limited exception to the exhaustion requirement. As in *Walgreen*, the issue in *Central Power and Light* was the constitutionality of the underlying statute. Exhaustion was not required both because the agency lacked the authority to decide that issue and because the administrative process could not "rectify the error claimed."[85] By contrast, exhaustion is required where the administrative process could rectify, or at least prevent, a constitutional error. In *City of Dallas v. Stewart*, decided last year, the Texas Supreme Court recognized that "a party asserting a [constitutional] taking [of property] must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit" because doing so "may moot its takings claim."[86]

*Walgreen* and *Central Power and Light* therefore stand for a limited "constitutional" exception to the exhaustion requirement. A party is not required to pursue and complete the administrative process in order to challenge the constitutionality of the underlying statute when the agency has no authority to decide the question. Exhaustion is required, however, in those instances where the agency has such authority[87] or, even in the absence of such

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

[83] *Id.* at 618.

[84] *Id.*.

[85] *Id*.

[86] *City of Dallas v. Stewart*, 361 S.W.3d 562, 579 (Tex. 2012). *Accord, Patel v. City of Everman*, 361 S.W.3d 600 (Tex. 2012).

[87] *See, e.g., Houston Indep. Sch. Dist. v. Rose*, No. 01-13-00018-CV, 2013 WL 3354724 (Tex. App.—Houston [1st] July 3, 2013, no pet. h.), discussed *infra*., § V.F. *Cf. Finance Comm'n v. Norwood*, No. 10-0121, 2013 WL 3119481 (Tex., June 21, 2013) (recognizing that Section 50(u) of the Constitution empowers legislatively-designated agencies to interpret constitutional provisions governing home equity lending).

authority, the administrative process nonetheless may result in an outcome that avoids or moots the constitutional claim.

A constitutional claim can also establish a right to judicial review without exhausting administrative remedies when the regulatory scheme is silent on the question. In *Spring Branch Management District v. Valco Instruments Company*,[88] property owners filed suit against a municipal management district for a declaration that their property should have been excluded from the district and taxation by the district. The Texas Local Government Code made express provision for property owners to petition a district requesting exclusion but was silent on the availability of judicial review thereafter. The statute also included administrative procedures for the district's determination of a specific tax assessment for property in the district, and on that issue authorized judicial review.

The court of appeals held that, because they raised constitutional claims, the property owners could maintain their suit for exclusion from the district notwithstanding the statute's silence on such appeals. The court cited Texas Supreme Court precedent recognizing a party's inherent right to appeal administrative action that allegedly violates the constitution.[89] The property owners' suit alleged that the district's failure to exclude the property resulted in a taking of property, denial of equal protection of the law, and denial of the right to uniform taxation in violation of the Texas Constitution.[90]

In *Spring Branch*, there was no dispute that the property owners had pursued the administrative remedies that were available to them. Had they not done so, it is doubtful in light of *City of Dallas v. Stewart* that the court would have recognized the right to judicial review of the constitutional claims.[91]

The courts are less likely to recognize an exhaustion exception for constitutional claims that are intertwined with other claims requiring exhaustion. In *Cameron Appraisal District v. Rourk*,[92] the Texas Supreme Court held that exhaustion was required because the

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[88] *Spring Branch Mgmt. Dist. v. Valco Instruments Co.*, No. 01-11-00164-CV, 2012 WL 2923151 (Tex. App.—Houston [1st Dist.] July 12, 2012, no pet.).

[89] *Id.* at 5 (citing *City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788, 790 (1951)).

[90] *Valco Instruments Co.*, 2012 WL 2923151, at *6.

[91] *Compare City of Grapevine v. CBS Outdoor, Inc.*, No. 02-12-00040-CV, 2013 WL 1830375 (Tex. App.—Fort Worth, May 2, 2013, no pet. h.) (affirming dismissal of some claims for failure to exhaust administrative remedies; affirming dismissal of constitutional due process claim for failure to base it on a vested property right; but reversing dismissal to allow inverse condemnation claim that was not dependent on failure to exhaust administrative remedies).

[92] *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501 (Tex. 2006).

plaintiff taxpayers were seeking not only a declaration that taxing their property was unconstitutional but also to have their individual tax assessments set aside. The court found that exhaustion was required because "[w]hile the former claim need not be brought administratively, the latter must."[93] The Corpus Christi and Beaumont Courts of Appeals cited *Rourk* and reached similar conclusions in tax appraisal cases last year.[94]

The Houston (First) Court of Appeals recently took the same approach in a school district employment contract termination case. In *Houston Independent School District v. Rose*,[95] the court dismissed a declaratory judgment suit because the former employee failed to exhaust her administrative remedies under the Texas Education Code. The former employee argued that exhaustion was not required because the suit raised claims that the school district had violated her free speech rights under the Texas Constitution. The court found the constitutional exception to exhaustion inapplicable because: (1) the constitutional claim was intertwined with the school district's employment termination decision under the state school laws, a matter within the Education Commissioner's exclusive jurisdiction, and (2) the claim required the resolution of disputed fact issues.[96]

### D. Exhaustion might not be required when a "pure question of law" is presented

In its 1986 opinion in *Grounds v. Tolar Independent School District*, the Texas Supreme Court stated: "Generally, the doctrine of exhaustion of administrative remedies does not apply when there are purely questions of law."[97] The court found the exception inapplicable in that case, however, and the argument is one that does not often succeed.

The "pure question of law" exception has a pragmatic underpinning: the judiciary's core function, after all, is to resolve legal questions. Pragmatism, however, will not override a legislative delegation of decision-making authority to the agency. In *Rourk*, discussed above, the Texas Supreme Court rejected a "pure question of law" exception that had been

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[93] *Id.* at 502.

[94] *See Groves v. Cameron Appraisal Dist.*, No. 13-12-00149-CV, 2012 WL 3792102 (Tex. App.—Corpus Christi Aug. 31, 2012, no pet.) (mem. op.); *Atl. Shippers of Tex., Inc. v. Jefferson Cnty.*, 363 S.W.3d 276, 284-85 (Tex. App.—Beaumont 2012, no pet.).

[95] *Houston Indep. Sch. Dist. v. Rose*, No. 01-13-00018-CV, 2013 WL 3354724 (Tex. App.—Houston [1st] July 3, 2013, no pet. h.).

[96] *Id.* at *4.

[97] *Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 892 (Tex. 1986), abrogated by *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000).

coupled with a claimed constitutional exception. The court held that the Tax Code required exhaustion of administrative remedies because the statute gave appraisal boards exclusive original jurisdiction to decide matters relating to ad valorem taxes.[98] The court criticized the lower appellate court's decision to the contrary: "By finding 'no sound reason' to require exhaustion . . . the court of appeals simply substituted its own judgment for that of the Legislature."[99]

*Rourk* is indicative of the Texas courts' current reluctance to apply the "pure question of law" exception. The exception was conceived at a time when judges felt more at liberty to base their decisions overtly on pragmatic policy considerations. Courts today instead focus on statutory construction and emphasize the importance of adhering to legislative intent reflected in a specific statutory scheme.[100]

### E. Exhaustion is not required for challenges to the validity or applicability of an agency rule

Section 2001.038(d) of the APA states:

> A court may render a declaratory judgment [on the validity or applicability of a rule] without regard to whether the plaintiff requested the state agency to rule on the validity or applicability of the rule in question.

The courts have held that this provision authorizes judicial review of a rule without regard to whether the plaintiff has exhausted administrative remedies.[101] This holding rests on the statutory language and Section 2001.038's purpose to allow for a final declaration of a rule's validity or applicability before the rule is applied.[102]

Three limitations apply to this exhaustion exception. First, the declaratory judgment must address only whether a rule is valid or applicable. Section 2001.038 does not authorize judicial review of other issues that may arise in the course of a contested case proceeding.[103]

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[98] *Rourk*, 194 S.W.3d at 502.

[99] *Id.*

[100] *See Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 444 (Tex. 2011) (Willett, J., concurring) (observing that Texas jurisprudence has evolved into Texas "legisprudence").

[101] *R.R. Comm'n v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 74-75 (Tex. 2003).

[102] *Tex. Mut. Ins. Co. v. Tex. Dep't of Ins.*, 214 S.W.3d 613, 622 (Tex. App.—Austin 2006, no pet.).

[103] *See Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 528-29 (Tex. App.—Austin 2002, pet. denied).

Second, Section 2001.038 is permissive: a court "may" render a declaratory judgment. A court therefore may decline to exercise jurisdiction in a particular case in deference to the agency's "primary jurisdiction."[104] Third, by its terms Section 2001.038 cannot be used to delay or stay an administrative hearing in a case involving the suspension, revocation, or cancellation of a license.[105]

## IV. Consequences of Failure to Exhaust Administrative Remedies

A party's failure to exhaust administrative remedies can have varying consequences depending upon the type of case. If the lawsuit seeks judicial review of agency action in which the agency is the defendant, the result typically (though not always) will be dismissal for lack of subject-matter jurisdiction. If the suit involves agency action or matters within an agency's exclusive original jurisdiction but is filed against a non-governmental entity, then the result may be abatement of the suit, dismissal without prejudice, or a remand to provide an opportunity to remedy the failure to exhaust.

### A. Dismissal with prejudice for lack of jurisdiction

In *Lindsay v. Sterling* decided in 1985, the Texas Supreme Court held that "[t]he requirement of having a motion for rehearing overruled, thus exhausting administrative remedies, is a jurisdictional prerequisite to judicial review by the district court and cannot be waived by action of the parties."[106] In that case, the court dismissed the suit for lack of jurisdiction because the plaintiff had filed suit before her motion for rehearing before the agency had been overruled.

The validity of *Lindsay*'s jurisdictional ruling came into question in 2000 when the court decided *Dubai Petroleum Company v. Kazi*.[107] *Dubai* held that some statutory prerequisites to filing suit, though mandatory, are not jurisdictional.[108] In 2005, however, the Legislature settled the question by amending Section 311.034 of the Texas Government Code to provide:

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[104] *Am. Capitol Ins. Co. v. Montemayor*, No. 03-02-00658-CV, 2003 WL 1561451 (Tex. App.—Austin 2003 Mar. 27, 2003, no pet.). The primary jurisdiction doctrine is discussed in Section III, *infra*.

[105] TEX. GOV'T CODE § 2001.038(e).

[106] *Lindsay v. Sterling*, 690 S.W.2d 560, 563 (Tex. 1985).

[107] *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71 (Tex. 2000).

[108] *Id*. at 73.

> Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.[109]

Last year the Texas Supreme Court confirmed that, as a result of amended Section 311.034, the mandatory/jurisdictional distinction in *Dubai* has no applicability to administrative appeals and other suits against governmental entities. In *Prairie View A & M University v. Chatha*, the court found that:

> The Legislature's mandate [in Section 311.034] is clear: In a statutory cause of action against a governmental entity, the failure to adhere to the statute's mandatory provisions that must be accomplished before filing suit is a jurisdictional bar to suit.[110]

*Chatha* involved a lawsuit filed by a university professor against the university alleging race and nationality-based pay discrimination. The Texas Commission on Human Rights Act (TCHRA), which governs employment discrimination claims in Texas, requires that a person, prior to filing suit, file an administrative complaint with either the Texas Workforce Commission or the federal Equal Employment Opportunity Commission not later than the 180th day after the date an alleged unlawful employment practice occurs. The court held that this 180-day filing requirement in the TCHRA is mandatory – a "statutory prerequisite" to suit – and consequently, by operation of Section 311.034, a jurisdictional requirement. Because the plaintiff in *Chatha* failed to comply with the 180-day filing requirement, her suit was jurisdictionally barred.

The courts of appeals both anticipated and have followed *Chatha*. Like *Chatha*, *Lueck v. State*,[111] decided by the Austin Court of Appeals in 2010, held that the TCHRA 180-day requirement is mandatory and jurisdictional. A recent Austin court decision, *Booker v. City of Austin*, also involved the 180-day deadline and cited *Chatha*.[112] Consistent with these decisions, the Austin court in *Little v. Board of Law Examiners*[113] held that the trial court properly dismissed for lack of jurisdiction a suit for judicial review of a decision by the Board of Law Examiners because the plaintiff, a law license applicant, had failed to file suit

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[109] TEX. GOV'T CODE § 311.034; Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783.

[110] *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012).

[111] *Lueck v. State*, 325 S.W.3d 752, 758, 766 (Tex. App.—Austin 2010, pet. denied).

[112] *Booker v. City of Austin*, No. 03-09-00088-CV, 2013 WL 1149559, at *6-7 (Tex. App.—Austin Mar. 13, 2013, no pet.).

[113] *Little v. Tex. Bd. of Law Exam'rs*, 334 S.W.3d 860, 863-64 (Tex. App.—Austin 2011, no pet.).

within the 60-day period required by the Bar admission rules. As in *Chatha*, the court found the deadline to be a statutory jurisdictional prerequisite under Section 311.034. In *Goss v. City of Houston*,[114] a post-*Chatha* case, the Houston (First) Court of Appeals affirmed the trial court's dismissal of a TCHRA suit for lack of jurisdiction because the suit had been filed after the statutory two-year deadline. Other TCHRA suits have been dismissed for lack of jurisdiction because the claims were not included in the administrative complaint to the agency.[115]

The TCHRA cases illustrates that exhaustion of administrative remedies can require not only completion of the administrative process but presentation to the agency of all complaints to be preserved for appeal. The latter's purpose is to ensure that the agency is sufficiently apprised and has the opportunity to consider and rule on the complaint.[116] Therefore, failure to include or adequately explain a point in a contested-case motion for rehearing fails to preserve the point for appeal,[117] as can failure to present a point beginning at an earlier stage of the administrative process in some cases.[118]

Other recent exhaustion cases also resulted in dismissal on jurisdictional grounds. In *Texas State Board of Nursing v. Pedraza*,[119] the Corpus Christi Court of Appeals followed *Lindsay v. Sterling* in dismissing an administrative appeal of a professional license revocation order. As in *Lindsay*, the suit was filed while the plaintiff's motion for rehearing

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[114] *Goss v. City of Houston*, 391 S.W.3d 168, 173 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

[115] *See Walcott v. Tex. S. Univ.*, No. 01-12-00355-CV, 2013 WL 593488 (Tex. App.—Houston [1st Dist.] Feb. 14, 2013, no pet.); *Cnty. of Travis v. Manion*, , No. 03-11-00533-CV, 2012 WL 1839399 (Tex. App.—Austin May 17, 2012, no pet.); *Lopez v. Tex. State Univ.*, 368 S.W.3d 695 (Tex. App.—Austin 2012, pet. denied); *Tex. Dep't of Transp. v. Esters*, 343 S.W.3d 226 (Tex. App.—Houston [14th Dist.] 2011, no pet.). *See also Dallas Cnty. Sw. Inst. of Forensic Sciences & Med. Exam'r Dep't v. Ray*, 400 S.W.3d 219, 224-25 (Tex. App.—Dallas 2013, pet. filed) (distinguishing *Chatha* and holding that failure by the agency to provide statutory notice does not constitute plaintiff's failure to meet statutory prerequisites to suit or failure to exhaust administrative remedies).

[116] *Suburban Util. Corp. v. Pub. Util. Comm'n*, 652 S.W.2d 358, 365 (Tex. 1983); *Burke v. Cent. Educ. Agency*, 725 S.W.2d 393, 395-98 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[117] *See, e.g., Tex. Alcoholic Bev. Comm'n v. Quintana*, 225 S.W.3d 200, 203-04 (Tex. App.—El Paso 2005, pet. denied); *Combs v. Chapal Zenray, Inc.*, 357 S.W.3d 751, 754 n.3 (Tex. App.—Austin 2011, no pet.).

[118] *See, e.g., Taylor v. Lubbock Reg'l MHMR*, No. 07-12-00232-CV, 2013 WL 85977 (Tex. App.—Amarillo Jan. 8, 2013, pet. denied).

[119] *Tex. State Bd. of Nursing v. Pedraza*, 2012 WL 3792100 (Tex. App.—Corpus Christi Aug. 31, 2012, pet. filed).

remained pending before the agency. Last year, the Dallas Court of Appeals in *Main Rehabilitation & Diagnostic Center v. Liberty Mutual Insurance Company*[120] dismissed a suit by health care providers against a workers' compensation insurance carrier for medical fee payments because the providers failed to exhaust administrative remedies by not submitting the dispute to the Workers' Compensation Division of the Texas Department of Insurance.[121] The Dallas court in *Ollie v. Plano Independent School District*[122] upheld a trial court's dismissal of a teacher's breach-of-contract and wrongful-termination lawsuit against a school district for lack of jurisdiction because the teacher had failed to exhaust administrative remedies. The Austin court in *Assignees of Best Buy v. Combs* upheld the dismissal of a tax refund for lack of jurisdiction based on failure to exhaust administrative remedies under the Tax Code.[123]

### B. Opportunity to cure the jurisdictional defect

Statutes that require exhaustion of administrative remedies often include deadlines by which a party must act. When a party misses a deadline, the defect is incurable and the party's lawsuit will be dismissed with prejudice. In some cases, however, no deadline is implicated and a party's failure to exhaust administrative remedies could be curable. In those situations, the court may order abatement of the suit, dismissal without prejudice, or a remand to give the plaintiff an opportunity to cure the defect.

Abatement is a proper procedure when the plaintiff can cure a failure to exhaust by completing the required administrative process. The Texas Supreme Court stated the general principle in *American Motorists Insurance v. Fodge*:

> If a claim is not within a court's jurisdiction, and the impediment to jurisdiction cannot be removed, then it must be dismissed; but if the impediment to jurisdiction could be removed, then the court may abate proceedings to allow a reasonable opportunity for the jurisdictional problem to be cured.[124]

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[120] *Main Rehab. & Diagnostic Ctr., LLC v. Liberty Mut. Ins. Co.*, 376 S.W.3d 825, 832 (Tex. App.—Dallas 2012, no pet.).

[121] *Accord, In re Mid-Century Ins. Co. of Tex.*, No. 01-12-00446-CV, 2012 WL 4717884 (Tex. App.—Houston [1st Dist.] Oct. 4, 2012, no pet.).

[122] *Ollie v. Plano Indep. Sch. Dist.*, 383 S.W.3d 783, 792-93 (Tex. App.—Dallas 2012, pet. denied).

[123] *Assignees of Best Buy v. Combs*, 395 S.W.3d 847, 868-69 (Tex. App.—Austin 2013, pet. filed).

[124] *Am. Motorists Ins. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001).

In *Fodge*, the plaintiff sued an insurance carrier for, among other things, damages resulting from the carrier's bad-faith denial of worker's compensation benefits. The court held that this claim depended on whether the plaintiff was entitled to the underlying medical treatment, a determination within the exclusive jurisdiction of the Texas Workers' Compensation Commission under the Workers' Compensation Act. Therefore, the court ruled, abatement would be the proper remedy to allow the agency to make that underlying determination, unless the time for doing so has expired in which case the court claims should be dismissed.[125]

The court applied the same principle in *Subaru of America v. David McDavid Nissan*.[126] The court held that, under the Motor Vehicle Code, a party must exhaust administrative remedies to obtain a Motor Vehicle Board decision about certain Code violations necessary to support a Deceptive Trade Practices Act or bad-faith damages claim based on such violations.[127] Because the plaintiff in *Subaru* had filed its lawsuit before obtaining a Board decision, abatement was the appropriate procedure to allow the plaintiff to exhaust administrative remedies and thereby cure the jurisdictional problem.[128] The court also indicated that dismissal of the suit without prejudice would be a permissible alternative.[129]

In some cases, the pleadings simply may be unclear as to whether administrative remedies were exhausted. That was the situation in *Soto v. City of Edinburg, Texas*,[130] where a police officer had sued his employer, a city, for back-pay. The Texas Local Government Code authorizes suits for judicial review of such claims but requires the officer first to exhaust all applicable grievance procedures and other administrative remedies. In *Soto*, the officer's pleadings failed to allege facts indicating whether administrative procedures and remedies were available and if they had been pursued. The Corpus Christi Court of Appeals reversed the trial court's dismissal of the suit and remanded to give the officer an opportunity to amend his pleadings to establish jurisdiction.

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[125] *Id.*

[126] *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212 (Tex. 2002).

[127] *Id*. at 224-25.

[128] *Id.* at 228.

[129] *Id. Accord, O'Neal v. Ector Cnty. Indep. Sch. Dist.*, 251 S.W.3d 50 (Tex. 2008).

[130] *Soto v. City of Edinburg, Tex.*, No. 13-12-00419-CV, 2013 WL 593846 (Tex. App.—Corpus Christi Feb. 14, 2013, no pet.).

The Corpus Christi court took a similar approach in *Texas State Board of Nursing v. Pedraza*.[131] As discussed above, following *Lindsay v. Sterling*, the court dismissed for lack of jurisdiction the plaintiff's prematurely-filed administrative appeal for failure to exhaust administrative remedies. However, the plaintiff had independently alleged that the agency had interfered with his property rights and denied him procedural due process. Because the pleadings were insufficient to demonstrate or refute the trial court's jurisdiction on this due process claim, the court remanded to the trial court with direction to give the plaintiff an opportunity to amend his pleadings to demonstrate jurisdiction over the claim.

The Houston (Fourteenth) Court of Appeals acted similarly in a case involving alleged *ultra vires* actions. In *Lazarides v. Farris*,[132] the court ordered dismissal of most of the plaintiff's claims for failure to exhaust administrative remedies. In one claim, however, the plaintiff sought prospective declaratory and injunctive relief based on alleged *ultra vires* acts by a government official. The pleadings, however, lacked facts sufficient to determine whether the complaint was ripe and not moot so as to confer trial court jurisdiction. Therefore, as in *Soto* and *Pedraza*, the court of appeals ordered a remand to give the plaintiff an opportunity to amend his pleadings to demonstrate jurisdiction.

### C. Avoiding dismissal when exhaustion is mandatory but not jurisdictional

*Dubai*'s distinction between "mandatory" and "jurisdictional" statutory prerequisites continues to apply in lawsuits filed against non-governmental entities. That is because, as discussed above, Section 311.034 of the Government Code declares only that such prerequisites are jurisdictional in suits against governmental entities.

The leading non-governmental-entity case is the Texas Supreme Court's 2010 decision in *In re United Services Automobile Association*.[133] There, the court reexamined its earlier, pre-*Dubai* decision in *Schroeder v. Texas Iron Works*.[134] In *Schroeder*, the court had held that exhaustion of administrative remedies under the TCHRA was a mandatory and jurisdictional prerequisite to filing a lawsuit alleging age discrimination in violation of the TCHRA.[135] In a footnote, the *Schroeder* court stated that one of the statute's deadlines,

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[131] *Tex. State Bd. of Nursing v. Pedraza*, No. 13-11-00068-CV, 2012 WL 3792100 (Tex. App.—Corpus Christi Aug. 31, 2012, pet. filed).

[132] *Lazarides v. Farris*, 367 S.W.3d 788, 800 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

[133] *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010).

[134] *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483 (Tex. 1991).

[135] *Id*. at 488.

requiring suit to be filed within two years after filing the administrative complaint, was "mandatory and jurisdictional."[136]

The court in *USAA* reconsidered and overruled this statement in *Schroeder* in light of *Dubai*:

> In keeping with the statute's language, *Dubai* and subsequent cases, as well as the purposes behind TCHRA and federal interpretations of Title VII, we conclude that the two-year period for filing suit is mandatory but not jurisdictional, and we overrule *Schroeder* to the extent it held otherwise.[137]

Because the statutory filing period in *USAA* was mandatory but not jurisdictional, the court held that the period could be extended under the tolling statute, Section 16.064 of the Texas Civil Practice and Remedies Code.[138]

*USAA* is illustrative. Section 311.043 of the Government Code makes the statutory filing deadlines both mandatory and jurisdictional for suits against governmental entities.[139] But when the defendant is non-governmental, as in *USAA*, exhaustion of administrative remedies and other statutory prerequisites to suit are not necessarily jurisdictional. Such cases require a *Dubai* analysis as in *USAA* to ascertain whether a statutory requirement is mandatory only or both mandatory and jurisdictional.[140]

## V. Recent Applications of the Exhaustion Doctrine

Recent cases illustrate how Texas courts apply exhaustion principles in the context of specific areas of substantive law. This section discusses exhaustion requirements under statutes that generated multiple appellate decisions in 2012 and 2013: (a) the APA; (b) the Tax Code; (c) the Workers' Compensation Act; (d) the Whistleblower Act; (e) the Texas Commission on Human Rights Act; (f) the Education Code; and (g) Chapter 14 of the Civil

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[136] *Id*. at n.10.

[137] *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 310.

[138] *Id.* at 310-11. The court ultimately held that the plaintiff could not avail himself of the tolling provision because he had filed an earlier lawsuit "with intentional disregard of proper jurisdiction." *Id.* at 311-13.

[139] *Id.* at 308. *See Little*, 334 S.W.3d at 863-64 (distinguishing *In re United Servs. Auto. Ass'n*).

[140] *But see Martin v. Nat'l Instr. Corp.*, No. 03-12-00771-CV, 2013 WL 3013881 (Tex. App.—Austin June 6, 2013, no pet. h.) (affirming dismissal of TCHRA suit against non-governmental entity for lack of jurisdiction based on precedent without conducting *Dubai* analysis).

Practices and Remedies Code. The section concludes with a brief look at other cases of interest.

## A. Exhaustion under the Administrative Procedure Act

### 1. Contested Cases

The APA was enacted to "provide minimum standards of uniform practice and procedure for state agencies."[141] When an "agency's enabling statute neither specifically authorizes nor prohibits judicial review," the APA "creates an independent right to judicial review for those who satisfy the [APA's] threshold requirements."[142] Moreover, "[u]nless otherwise provided, the APA's contested-case and judicial-review procedures apply to agency-governed proceedings."[143]

That APA procedures apply is readily apparent when the agency statute expressly says so. For example, the threshold issue in *Texas State Board of Nursing v. Pedraza* was whether the applicable procedures were defined by the APA or the Nursing Practice Act.[144] Because the agency statute expressly stated that "an administrative proceeding brought under the Nursing Practice Act is subject to the APA," the Corpus Christi Court of Appeals quickly concluded that the APA governed its analysis.[145]

However, even when an agency statute sets forth its own requirements for judicial review, those requirements "must be read in conjunction with the APA provisions governing judicial review of contested cases."[146] Thus, unless the agency expressly provides to the contrary,[147] a party must satisfy the APA's requirements for judicial review.

Under Section 2001.171 of the APA, "[a] person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a

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[141] APA § 2001.001(1).

[142] *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 173, 196 (Tex. 2004).

[143] *Marble Falls Indep. Sch. Dist. v. Scott*, 275 S.W.3d 558, 563 (Tex. App.—Austin 2008, pet. denied).

[144] *Pedraza*, 2012 WL 3792100, at *2.

[145] *Id*. (citing TEX. OCC. CODE §§ 301.459, .577).

[146] *Tex. Nat. Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 812 (Tex. 2002).

[147] *See, e.g.*, TEX. LAB. CODE § 410.003 ("Except as otherwise provided by this chapter, Chapter 2001, Government Code, does not apply to a proceeding under this chapter.").

contested case is entitled to judicial review under this chapter." To exhaust administrative remedies, a party is generally required to file "a motion for rehearing before the agency as a prerequisite to judicial review."[148] The motion must be filed "not later than the 20th day after the date on which the party . . . is notified . . . of the decision or order that may become final under Section 2001.144."[149] However, a motion for rehearing is *not* required if a decision or order is final under either Subsection § 2001.144(a)(3) or (4).[150] Because the deadline to file a petition for judicial review is triggered when a decision becomes final,[151] it is critical to understand when these exceptions to the rehearing requirement apply.

A decision or order is final under Subsection (a)(3) when "a state agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision is rendered."[152] To make an order final under that subsection, the "agency must recite in the decision or order the [required] finding . . . and the fact that the decision or order is final and effective on the date rendered."[153] A decision or order is final under Subsection (a)(4) when the parties agree to make the order final on a specified date that "is not before the date the order is signed or later than the 20th day after the date the order was rendered."[154]

*When do the APA's requirements apply?*

"Parties must be able to determine with reasonable certainty when an administrative proceeding becomes ripe for judicial review."[155] That can be problematic if the agency's enabling statute and the APA appear to impose different exhaustion requirements.

In *Simmons v. Texas State Board of Dental Examiners*,[156] the Texas Supreme Court considered an alleged conflict between the Dental Practice Act (DPA) and the APA. The

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[148] *Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993); *accord* APA § 2001.145(a).

[149] APA § 2001.146(a).

[150] *Id.*

[151] *See id*. § 2001.171.

[152] *Id.* § 2001.144(a)(3).

[153] *Id.* § 2001.144(b).

[154] *Id.* § 2001.144(a)(4).

[155] *Big Three Indus., Inc. v. R.R. Comm'n of Tex.*, 618 S.W.2d 543, 548 (Tex. 1981).

[156] *Simmons v. Tex. State Bd. of Dental Exam'rs*, 925 S.W.2d 652 (Tex. 1996).

DPA required an aggrieved party to "appeal within thirty days from the service of notice of the Board's action."[157] That created a direct conflict with the APA's motion-for-rehearing requirement, because an aggrieved party could not "wait for the Board to overrule a motion for rehearing and still be assured of a timely appeal to district court."[158] The Court held that the aggrieved dentist "substantially satisfied the judicial-review requirements of the APA" and, therefore, invoked the district court's jurisdiction, by: (i) filing a petition for judicial review within the DPA's 30-day deadline; (ii) filing a motion to stay the case until the Board ruled on the motion for rehearing; and then (iii) filing a motion to reinstate the case after his motion for rehearing was denied.[159]

The Austin Court of Appeals reached a similar conclusion in *HEAT Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*.[160] There, a statutory conflict arose because the Water Code required an aggrieved party to seek judicial review "within thirty days after the effective date of the ruling, order, or decision."[161] Because an order could become "effective" before a motion for rehearing was overruled, the court recognized that the aggrieved party was in the "difficult position of having to file its petition to preserve its right to judicial review *before* it had received a ruling from the Commission on the motion for rehearing."[162] Attempting to satisfy both statutes, the aggrieved party filed a motion for rehearing and a "premature" petition for judicial review. However, unlike the litigant in *Simmons*, the aggrieved party in *HEAT* "did not seek to 'reinvoke' the jurisdiction of the district court after the motion for rehearing had finally been overruled."[163] Because the court did not read *Simmons* to require this action, it held that the "premature petition properly invoked the trial court's jurisdiction."[164]

But *Simmons* and *HEAT* have their limits, as illustrated by a recent case involving a different exhaustion requirement in the Water Code. To exhaust administrative remedies, an aggrieved party must, among other requirements, file a request for rehearing "in the district

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[157] *Id*. at 653.

[158] *Id*.

[159] *Id*. at 654.

[160] *HEAT Energy Advanced Tech., Inc. v. W. Dallas Coalition for Envtl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied).

[161] *Id*. at 292 (quoting TEX. WATER CODE § 5.351(b)).

[162] *Id*. at 293.

[163] *Id*.

[164] *Id*.

office" by a 20-day deadline.[165] In *Gonzalez County Underground Water Conservation District*,[166] a permit applicant (WPA) attempted to satisfy the statute not by filing but by *emailing* its request for rehearing to the County Water District's counsel. Relying on *Simmons*, WPA argued that it had "substantially satisfied the statutory filing requirements."[167] The Corpus Christi Court of Appeals disagreed, holding that "no statutory conflict exists."[168] Because "[s]tatutes waiving sovereign immunity are to be strictly construed and do not provide for alternative filings or substantial satisfaction," the court held that "WPA did not exhaust its administrative remedies when it failed to timely file its request for rehearing in the County Water District office." The court concluded that WPA's failure to exhaust administrative remedies deprived the trial court of jurisdiction over WPA's petition for judicial review.[169]

*Lindsay v. Sterling*[170] illustrates a related but different situation. There, the Texas Supreme Court considered and harmonized the exhaustion requirements of APTRA and the Alcoholic Beverage Code. The Alcoholic Beverage Code required an aggrieved party to "appeal within thirty days from the date the order becomes 'final and appealable.'"[171] Because APTRA required a motion for rehearing, the Supreme Court harmonized the two statutes by holding that "a decision is not final and appealable until [a] motion for rehearing is overruled" and, therefore, the thirty-day period for appealing to the district court does not begin to run until after the motion for rehearing has been overruled."[172] Because the aggrieved party filed her petition for judicial review while her motion for rehearing was still pending, i.e., before the thirty-day period for appeals had expired, the Court dismissed her suit for failure to exhaust administrative remedies.[173]

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[165] TEX. WATER CODE § 36.412(c).

[166] *Gonzalez Cnty. Underground Water Conservation Dist. v. Water Prot. Ass'n*, No. 13-11-00319-CV, 2012 WL 1964549 (Tex. App.—Corpus Christi May 31, 2012, no pet.).

[167] *Id.* at 4

[168] *Id*. at *5.

[169] *Id*. at *6.

[170] *Lindsay v. Sterling*, 690 S.W.2d 560 (Tex. 1985); *see supra*, § IV.

[171] *Id*. at 563.

[172] *Id*.

[173] *Id*.

In a related case, *Reed v. State of Texas Department of Licensing and Regulation*,[174] the Austin Court of Appeals harmonized APTRA with an act regulating auctioneers (the "Licensing Act"). The applicable version of the Licensing Act provides that, "[i]f, after a hearing, the commissioner determines that a license should be denied, revoked, or suspended, the applicant or licensee has 30 days in which to appeal . . . ."[175] The Court held that, although the Licensing Act is "not a model of clarity," it "did not expressly repeal the application of APTRA."[176] Accordingly, an aggrieved party still had to file a motion for rehearing in order to exhaust administrative remedies. Because the plaintiff in *Reed* failed to do so and, instead, filed a "premature" petition for judicial review, the court affirmed the trial court's judgment dismissing the case for want of jurisdiction.[177]

To sum up: If an agency's enabling statute appears to conflict with the APA, practitioners should consider (i) filing a "premature" petition for judicial review *and* a motion for rehearing to ensure proper exhaustion of remedies, (ii) asking to have the case stayed pending resolution of the motion for rehearing, and (iii) filing a motion to reinstate once the motion for rehearing is overruled. Also consider filing a second petition for judicial review after the motion for rehearing is overruled and moving to consolidate the cases. *Always* be sure to file a motion for rehearing followed by a petition for review whenever it is possible that the agency statute could be construed in harmony with the APA.

What happens if an agency's enabling statute authorizes the agency to issue an emergency order that is "immediately final for purposes of enforcement and appeal," but the order neither contains the findings required by Subsection 2001.144(a)(3) of the APA nor states that it is "final and effective on the date rendered" as required by Subsection 2001.144(b)? Is a motion for rehearing required to satisfy the APA's exhaustion requirement, or should the aggrieved party treat the order as final and seek judicial review within 30 days? The Austin Court of Appeals is currently considering that issue in *AGAP Life Offerings, LLC v. Texas State Securities Board*.[178] The court's ruling will give practitioners additional guidance in harmonizing statutes to determine when administrative remedies are exhausted.

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[174] *Reed v. State of Tex. Dep't of Licensing & Regulation*, 820 S.W.2d 1 (Tex. App.—Austin 1991, no writ).

[175] *Id*. at 2 (quoting 1977 Tex. Gen. Laws, ch. 314, Sec. 1, § 7(f), at 843).+

[176] *Reed*, 820 S.W.2d at 4.

[177] *Id*. (recognizing the "longstanding rule that failure to file a motion for rehearing . . . defeats jurisdiction of the appellate court").

[178] *AGAP Life Offerings, LLC v. Tex. State Secs. Bd.*, No. 03-11-00535-CV (submitted May 9, 2012).

2. Rulemaking

The APA does not contain any express exhaustion requirements relating to judicial review of agency rules or rulemaking. Section 2001.035(b) provides only that "[a] person must initiate a proceeding to contest a rule on the ground of noncompliance with the procedural requirements of Sections 2001.0225 through 2001.034 not later than the second anniversary of the effective date of the rule." Section 2001.038 expressly permits a person to challenge the validity or applicability of a rule in an action for declaratory judgment "if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." Although standing may be an impediment to jurisdiction,[179] Texas courts have held that exhaustion is not a prerequisite to filing suit under Section 2001.038.[180]

## B. Exhaustion under the Tax Code

The Texas Tax Code "establishes a detailed set of procedures that property owners must abide by to contest the imposition of property taxes."[181] In short:

- the taxpayer must timely file a written notice of protest with the appraisal review board;[182]
- the appraisal review board must schedule and provide notice of a hearing on the protest;[183]
- the property owner must appear at the hearing;[184]

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[179] *See, e.g.*, *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 907 (Tex. App.—Austin 2009, no pet.) (holding that non-citizen with immigration documents that were valid for more than one year lacked standing to challenge rule that precluded non-citizens with documents issued for less than a year to obtain driver's licenses).

[180] *See supra*, § III.E.

[181] *Morris v. Houston Indep. Sch. Dist.*, 388 S.W.3d 310, 313 (Tex. 2012) (citing TEX. TAX CODE §§ 41.01-43.04).

[182] TEX. TAX CODE § 41.44.

[183] *Id.* §§ 41.45(a), 41.46(a).

[184] *See id.* § 41.45(b) ("The property owner initiating the protest is entitled to an opportunity to appear to offer evidence or argument."). The Texas Supreme Court has construed the statute to mean that "taxpayers contesting property valuation must appear, either personally, by representative, or by affidavit,

- the appraisal review board must "determine the protest and make its decision by written order";[185] and

- the property owner must timely file a petition for judicial review in district court.[186]

These administrative "procedures are exclusive and a taxpayer must exhaust the remedies provided in order to raise most grounds of protest in defense of a suit to collect taxes or as a basis for a claim for relief."[187] Recent cases show how Texas courts are applying these and related exhaustion principles in property tax cases.

1. Exhaustion is required for each and every tax year

In *Travis County Appraisal District v. Wells Fargo Bank Minnesota, N.A.*,[188] the taxpayer (Wells Fargo) claimed a partial exemption for property it owned and, based on the claimed exemption, protested the 2007 assessed value of the property, and then sought judicial review of the administrative decision. While the suit was pending, the Travis County appraisal district (TCAD) issued a 2008 notice of assessed value, applying the exemption the same way it did in 2007. "However, Wells Fargo did not protest the 2008 assessment, did not pay the taxes for that year under protest, did not amend its petition to include the 2008 assessment, and did not independently file suit with regard to the 2008 assessment."[189] After granting Wells Fargo's motion for summary judgment and ordering TCAD to apply the exemption "in a manner consistent with Wells Fargo's interpretation," the trial court granted

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at the protest hearing as a prerequisite to an appeal to district court." *Webb Cnty. Appraisal Dist. v. New Laredo Hotel, Inc.*, 792 S.W.2d 952, 955 (Tex. 1990).

[185] TEX. TAX CODE § 41.47(a).

[186] *Id.* § 42.21(a). The Tax Code has different procedures that apply when someone other than the property owner wants to appeal. *See id. §* 42.06(a).

[187] *Morris*, 388 S.W.3d at 313 (citing TEX. TAX CODE § 42.09(a)); *see also Harris Cnty. Appraisal Dist. v. Houston 8th Wonder Prop., L.P.*, No. 01-10-00154-CV, 2012 WL 5457448 (Tex. App.—Houston [1st Dist.] Nov. 8, 2012, pet. filed) (holding that "[t]he appraisal district's appeal was not barred for failure to exhaust administrative remedies; it had no predicate administrative remedy to exhaust in this situation"); *Haley v. Harris Cnty.*, No. 14-11-01051-CV, 2012 WL 4955257, at *3 (Tex. App.—Houston [14th Dist.] Oct. 18, 2012, no pet.) (rejecting argument that the tax authorities were required to exhaust administrative remedies; "it is property owners who have the burden to exhaust administrative remedies before seeking judicial review, not the taxing authorities").

[188] *Travis Cnty. Appraisal Dist. v. Wells Fargo Bank Minn., N.A.*, 382 S.W.3d 636 (Tex. App.—Austin 2012, no pet.).

[189] *Id*. at 637.

a motion for sanctions filed by Wells Fargo and "ordered that Wells Fargo recover as a sanction the portion of the ad valorem tax . . . [that] Wells Fargo had paid under protest for the 2007 year."[190]

The Austin Court of Appeals reversed and vacated the sanctions order. Recognizing that "courts lack jurisdiction to adjudicate disputed tax assessments for tax years not included in a petition requesting relief as well as those for which administrative remedies were not exhausted," the court rejected Wells Fargo's argument that "the summary judgment order in a suit pertaining only to the assessment for the 2007 tax year necessarily governed assessment protests for all subsequent tax periods . . . ."[191] Because the "case law makes it clear that litigation of a tax dispute as to one tax period does not apply to subsequent tax periods," the trial court "could not have granted relief beyond the 2007 tax year" and, therefore, "exceeded its jurisdiction when it sanctioned TCAD in relation to the 2008, 2009, and 2010 tax assessments."[192] The court of appeals confirmed that a taxpayer cannot avoid the consequences of failing to exhaust administrative remedies for subsequent tax years by seeking sanctions in a suit that pertained to only one tax year.[193]

2. A failure to exhaust administrative remedies under the Tax Code cannot be easily justified by asserting constitutional claims

As discussed above, the courts have recognized a limited exception to the exhaustion requirement to permit litigation of certain constitutional claims.[194] Recent tax cases illustrate that arguments for this exception do not often succeed.

In *Atlantic Shippers of Texas v. Jefferson County*,[195] the county filed suit against a taxpayer to recover delinquent taxes. Taking the position that the county had calculated the taxes based on the wrong footage, the taxpayer asserted counterclaims based on alleged constitutional violations. However, the taxpayer had never filed an administrative protest – much less exhausted its administrative remedies under the Tax Code. Citing Texas Supreme

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[190] *Id*. at 637-38.

[191] *Id*. at 640-41.

[192] *Id*. at 642.

[193] *See id*. at 640-41; *see also Jefferson Cnty. Appraisal Dist. v. Morgan*, No. 09-11-00517-CV, 2012 WL 403861, at *3 (rejecting argument that, because taxpayer contested the question of ownership, he was not required to "exhaust the 'yearly, repetitive administrative requirements'").

[194] *See supra*, § III.C.

[195] *Atl. Shippers of Tex. v. Jefferson Cnty.*, 363 S.W.3d 276 (Tex. App.—Beaumont 2012, no pet.).

Court precedent that the Tax Code's administrative procedures to resolve tax disputes are "detailed" and "exclusive," the Beaumont Court of Appeals upheld the trial court's summary judgment against the taxpayer on its takings and equal protection claims.[196]

In *Groves v. Cameron Appraisal District*,[197] the owner of a travel trailer similarly attempted to get around her failure to exhaust administrative remedies by asserting constitutional claims. After the taxpayer filed a protest, the county appraisal district reduced the value of her appraised property to zero. Despite having obtained relief, she then filed suit in district court asking for declaratory and injunctive relief that would require the appraisal district to remove her from the county appraisal rolls.

The Corpus Christi Court of Appeals affirmed the trial court's dismissal for lack of jurisdiction on the following grounds: (i) the taxpayer's request to be removed from the county appraisal rolls fell outside the Tax Code's exclusive remedies; (ii) other requested relief had not been presented to the appraisal district or the appraisal review board; and (iii) the taxpayer was "'seeking more than a declaration that taxing trailers is unconstitutional – [she was also] seeking to have her individual assessment' set aside."[198] These holdings underscore the difficulty – if not impossibility – of circumventing the Tax Code's "comprehensive and exclusive procedural scheme for resolving taxpayer grievances"[199] whether by constitutional claim or otherwise.

The taxpayer in *Harris County Appraisal District v. ETC Marketing, Ltd.*,[200] also failed to maintain a constitutional claim without first exhausting administrative remedies. Although the taxpayer had challenged its property appraisal on multiple grounds at the administrative level, in the trial court, it presented a new argument that the property was exempt from taxation based on the interstate commerce clause. The Houston (Fourteenth) Court of Appeals held that the taxpayer was "not relieved from the requirement of exhausting administrative remedies."[201] The court rejected the taxpayer's arguments that the constitutional and pure-question-of-law exceptions to the exhaustion doctrine applied, and

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[196] *Id*. at 285.

[197] *Groves v. Cameron Appraisal Dist.*, No. 13-12-00149-CV, 2012 WL 3792102 (Tex. App.—Corpus Christi Aug. 31, 2012, no pet.) (mem. op.).

[198] *Id*. at *3.

[199] *See id*. at *2.

[200] *Harris Cnty. Appraisal Dist. v. ETC Mktg., Ltd.*, No. 14-12-00171-CV, 2013 WL 1303330 (Tex. App.—Houston [14th Dist.] Apr. 2, 2013, no pet. h.) (extension of deadline to file pet. granted).

[201] *Id*. at *2.

that the failure to exhaust administrative remedies was cured by filing a tax protest on other grounds or by moving to correct the appraisal records. On this last point, the court acknowledged that "trial de novo generally cures all procedural errors from the proceedings below."[202] But the court concluded that "the failure to file a timely protest for an exemption based on interstate commerce is not a procedural error but is a jurisdictional one."[203]

3. Exhaustion of administrative remedies under the Tax Code is not required when the agency exceeds its statutory powers

As discussed above,[204] two recent cases illustrate how one of the well-recognized exceptions to the exhaustion doctrine – the *ultra vires* exception – applies when a taxing authority acts outside its statutory powers. In *Brennan v. City of Willow Park*,[205] the taxpayers had "paid all property taxes assessed against their properties for the years 2003-2007." However, because the city and other taxing authorities (the Cities) were not listed in the county appraisal records, the taxes assessed against the properties at issue – and paid by the taxpayers – did not include city taxes. Relying on Section 25.21 of the Tax Code, the Cities sent the taxpayers a notice that their property had been omitted from an appraisal roll and a bill for the tax years at issue. When the taxpayers refused to pay the bill, the Cities filed a collection action. After the taxpayers asserted counterclaims, the Cities challenged jurisdiction on grounds that (i) the taxpayers had failed to exhaust their administrative remedies and (ii) the taxpayers' suit is barred by governmental immunity. Because Section 25.21 does not provide a remedy for omitted "taxing units," the Fort Worth Court of Appeals held that the Cities "acted outside of their statutory authority by utilizing section 25.21 to add the Cities as taxing units of their properties."[206] Accordingly, the taxpayers' "failure to pursue any type of protest procedures" was no impediment to jurisdiction.[207] Exhaustion was not required.

In *Ike & Zack, Inc. v. Matagorda County*,[208] an appraisal district sued shrimp boat operators to recover delinquent taxes. The operators alleged that the appraisal district failed

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[202] *Id*. at *6.

[203] *Id*.

[204] *See supra*, § III.A.

[205] *Brennan v. City of Willow Park*, 376 S.W.3d 910, 919 (Tex. App.—Fort Worth 2012, pet. denied).

[206] *Id*.

[207] *Id*. at 922.

[208] *Ike & Zack, Inc. v. Matagorda Cnty.*, No. 13-12-00314-CV, 2013 WL 1091812 (Tex. App.—Corpus Christi Mar. 14, 2013, no pet.) (mem. op.).

to send notices. In response, the district argued that the operators "could have protested the delinquent taxes pursuant to section 25.25(c) of the Tax Code."[209] However, the applicable (pre-2008) version of the Tax Code "did not allow a taxpayer who received notice after the taxes became delinquent to file a protest."[210] Moreover, taxpayers are not required to exhaust administrative remedies when an agency acts outside its statutory powers. Although the trial court granted summary judgment for the district, there was no summary judgment evidence that the operators received the requisite notice. And, if the operators could show that the district acted outside its authority by levying taxes without notice, "the taxes would become void and any administrative requirements would be mere formalities."[211] For this reason, the Corpus Christi Court of Appeals reversed the trial court's summary judgment and remanded the case for further proceedings.[212]

4. Exhaustion is not required for affirmative defenses in tax cases

The Tax Code permits a person sued for delinquent taxes to plead non-ownership of the property as an affirmative defense in a suit to enforce personal liability on the tax, and to plead that the property is outside the tax district as an affirmative defense in a suit to foreclose on a tax lien.[213] In *Morris v. Houston Independent School District*,[214] the Texas Supreme Court recently explained that a taxpayer is not required to exhaust administrative remedies in order to maintain the affirmative defense of non-ownership. There, multiple taxing authorities sued taxpayers for the nonpayment of property taxes on 10.34 acres of real property. As permitted by Section 42.09(b)(1) of the Tax Code, the taxpayers asserted that they did not own 0.96 acres of the property at issue. The taxpayers had "never administratively challenged the inclusion of the 0.96 acres they did not own."[215] To avoid penalties and interest (and to avoid breaching a contract to sell the 9.38 acres they did own), the taxpayers paid taxes on the entire 10.34 acres under protest.[216] Then they counterclaimed for a refund of the amount overpaid. Having received payment in full, the taxing authorities

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[209] *Id*. at *4.

[210] *Id*.

[211] *Id*. at *5.

[212] *Id*.

[213] TEX. TAX CODE § 42.09(b).

[214] *Morris v. Houston Indep. Sch. Dist.*, 388 S.W.3d 310 (Tex. 2012).

[215] *Id*. at 312.

[216] *Id*. (noting that the taxing authorities "would not accept payment on only the 9.38 acres").

nonsuited their claims, at which point the trial court realigned the parties to make the taxpayers the plaintiffs. Once realigned, the taxing authorities filed a plea to the jurisdiction based on the taxpayers' failure to exhaust administrative remedies regarding their alleged non-ownership of the 0.96 acres. The court of appeals reversed the trial court's judgment and granted the plea to the jurisdiction.

The Supreme Court reversed. The court recognized a "technical distinction" between an affirmative defense of non-ownership and an affirmative claim for reimbursement of taxed paid under protest.[217] But the court concluded that the court of appeals' reading of the statute would discourage compliance with Section 42.08 (requiring prepayment of taxes under protest), contravene the principle that "[t]axing statutes are construed strictly against the taxing authority," and "allow[] the taxing authorities to thwart the Legislature's intent by accepting taxes paid under protest and then non-suiting, just as happened in this case."[218] The court thus held that "the Taxpayers did not lose their entitlement to contest tax liability on the basis of non-ownership when the taxing units non-suited and the Taxpayers were realigned as plaintiffs."[219]

### C. Exhaustion under the Workers' Compensation Act

"The Texas Workers' Compensation Act provides that the recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance for a work-related injury."[220] When the Act provides an exclusive remedy, a claimant may not circumvent exhaustion requirements by asserting other statutory or common-law claims.[221] Such claims are properly dismissed for lack of jurisdiction.[222]

The Workers' Compensation Act has different procedures for different types of disputes: (i) Chapter 410 governs disputes over compensability and extent of injury;[223] and

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[217] *Id*. at 313.

[218] *Id*.

[219] *Id*.

[220] *Thomas v. Am. Home Assurance Co.*, No. 05-11-01722-CV, 2013 WL 1857105, at *4 (Tex. App.—Dallas May 3, 2013, no pet. h.) (citing Tex. LAB. CODE § 408.001(a)).

[221] *Bean v. Tex. Mut. Ins. Co.*, No. 09-11-00123-CV, 2012 WL 5450826, at *2 (Tex. App.—Beaumont Nov. 8, 2012, no pet.) (mem. op.) (describing the issue of whether the claimant exhausted his administrative remedies as being "subsumed within the larger issue [of] . . . whether the administrative agency's jurisdiction is exclusive").

[222] *See id*.

[223] TEX. LAB. CODE §§ 410.002-.308.

(ii) Chapter 413 governs disputes over medical necessity, preauthorization, and fees.[224] Because each chapter has different exhaustion requirements, it is critical for a claimant to satisfy the applicable requirements.[225] Recent cases illustrate exhaustion problems that may arise under both chapters.

1. Chapter 410 Disputes Regarding Compensability and Extent of Injury

Chapter 410 sets forth the requirements to exhaust administrative remedies relating to disputes over compensability and extent of injury. To obtain judicial review, a claimant must:

- Request and obtain a benefit review conference ("BRC");[226]
- Elect arbitration or proceed directly to a contested case hearing ("CCH");[227]
- File a written request for appeal to the appeals panel "not later than the 15th day after the date on which decision of the hearing officer is received";[228] and
- File a petition for judicial review "not later than the 45th day after the date on which the division mailed the party the decision of the appeals panel."[229]

*How much exhaustion is required?*

Although exhaustion is required, "[a] claimant is not required to continue through every step; the provisions of the Act contemplate that disputes may be resolved at any

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[224] *Id.* §§ 413.002-.055.

[225] *See Thomas*, 2013 WL 1857105, at *4 (noting that, "[i]f both types of dispute are present, a claimant may exhaust administrative remedies applicable to one, but fail to exhaust administrative remedies regarding the other").

[226] TEX. LAB. CODE § 410.024.

[227] *Id.* § 410.151(a). Note: issues that were not raised at the BRC or that were resolved at the BRC may not be considered at the CCH unless the parties consent or the commissioner determines there was good cause for not raising the issue at the BRC. *Id. §* 410.151(b).

[228] *Id.* § 410.202(a).

[229] *Id.* § 410.252(a). Note: "Judicial review of the appeals panel [decision] is limited to the issues [the appeals panel] decided." *Taylor v. Lubbock Reg'l MHMR*, No. 07-12-00232-CV, 2013 WL 85977, at *2 (Tex. App.—Amarillo Jan. 8, 2013, pet. denied).

level."[230] For example, in *Texas Mutual Insurance Co. v. Ruttiger*,[231] the issue of whether and when the claimant suffered a compensable injury was resolved at the BRC. The parties entered into a benefit dispute agreement, which was "sufficient resolution of *Ruttiger*'s claim by the WCD to constitute exhaustion of his administrative remedies as to whether he suffered an injury in the course of his employment for which medical and income benefits were payable, and as to the date when he became disabled from the injury."[232] Although the WCD has exclusive jurisdiction to determine whether a claimant is entitled to benefits, once that determination is made, a trial court has jurisdiction to consider claims for delayed payment of benefits.[233] Accordingly, the exhaustion requirement was met and the trial court had jurisdiction to consider Ruttiger's claims.[234]

Two recent decisions by Texas courts of appeals illustrate some limits in applying *Ruttiger*. In *Thomas v. American Home Assurance Co.*,[235] the claimant (Thomas) filed a lawsuit that included claims relating to the denial of compensability. Although Thomas "conceded that '[t]here was no hearing on the merits before the board' with respect to the compensability issue," he relied on *Ruttiger* to argue that "once there was a determination that the injury was compensable, there were no issues for the Division of Workers' Compensation to resolve."[236] However, as the Dallas Court of Appeals recognized, in *Ruttiger*, the disputed issues were resolved at the BRC, whereas in *Thomas*, there was no evidence that a BRC was ever held. Because Thomas failed to exhaust administrative remedies by obtaining an administrative resolution of disputed issues, his claims relating to compensability were properly dismissed for want of jurisdiction.

Similarly, in *In re New Hampshire Insurance Co.*,[237] the insurance carrier sought mandamus relief from an order denying a plea to the jurisdiction. Quoting the original opinion in *Ruttiger*, the Houston (Fourteenth) Court of Appeals recognized that "[t]he

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[230] *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 437 (Tex. 2012).

[231] *Id*.

[232] *Id*. "WCD" refers to the Workers' Compensation Division, which is also referred to as the Division of Workers' Compensation (DWC).

[233] *Id*.; *see also Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804-05 (Tex. 2001).

[234] *Ruttiger*, 381 S.W.3d at 437.

[235] *Thomas*, 2013 WL 1857105.

[236] *Id*. at *7.

[237] *In re N.H. Ins. Co.*, No. 14-12-00174-CV, 2012 WL 987859 (Tex. App.—Houston [14th Dist.] Mar. 22, 2012, no pet.).

Workers' Compensation Act 'does not require a claimant to seek review of issues not in dispute.'"[238] However, because the record in *New Hampshire Insurance* did not indicate whether all issues had been decided by the DWC, mandamus relief was denied.[239]

*City of Houston v. Rhule*[240] illustrates another situation in which exhaustion of administrative remedies may not be required. *Rhule* involved a dispute over an award in favor of a firefighter who was injured in a work-related accident in 1988. The City sought judicial review, but in 1990, the parties settled the case before trial. In 2004, after the City decided to stop paying agreed-upon benefits as "not reasonable, necessary and related to the 1988 work injury," the firefighter sued for breach of the settlement agreement. [241] The case was tried to a jury, which found in favor of the firefighter, and the trial court entered judgment on the verdict. On appeal, the City moved to dismiss the case for lack of jurisdiction on the ground that, "because Rhule's claim was not a claim for breach of contract, but instead was a claim for denial of benefits; [his] exclusive remedy lay under the [Workers' Compensation Act]."[242] The Houston (First) Court of Appeals disagreed. Recognizing that the "breach of a settlement agreement reached under the [Act] is not treated like an initial claim for benefits for an on-the-job injury, for which administrative remedies must be exhausted," the court denied the City's motion to dismiss.[243]

*Rhule* is now before the Texas Supreme Court, which has requested full briefing on the merits.[244] According to the City's brief, "[t]he First Court of Appeal made two assumptions that have no basis in Texas law: (1) that the parties to a workers' compensation agreed judgment are thereafter no longer subject to the Texas Workers' Compensation Act and (2) that medical treatment performed after the effective date of a workers' compensation agreed judgment is automatically reasonable and necessary, immune from dispute by the carrier and usurping the authority of the agency with exclusive jurisdiction over such disputes."[245] If the petition is granted, the Supreme Court's decision will clarify the extent of

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[238] *Id*. at *2 (quoting *Tex. Mut. Ins. Co. v. Ruttiger*, 2011 WL 3796353, at *5 (Tex. Aug. 26, 2011) (op. withdrawn on reh'g)).

[239] *In re New Hampshire Ins. Co.*, 2012 WL 987859, at *2.

[240] *City of Houston v. Rhule*, 377 S.W.3d 734 (Tex. App.—Houston [1st Dist.] 2012, pet. filed).

[241] *Id*. at 738-39.

[242] *Id*. at 739.

[243] *Id*. at 741.

[244] *City of Houston v. Rhule*, In the Supreme Court of Texas, No. 12-0721 (pet. filed Oct. 5, 2012).

[245] Petitioner's Br. on the Merits at xii (filed June 14, 2013).

the DWC's exclusive jurisdiction – and the circumstances in which exhaustion of administrative remedies is required.

*What are the consequences of missing deadlines?*

In addition to required procedures, Chapter 410 of the Workers' Compensation Act "contains certain deadlines that must be met."[246] For example, "an injured employee must give notice of injury to the employer not later than the thirtieth day after the injury occurs"[247] and "must file a claim for compensation not later than one year after the injury occurs" or is discovered.[248] And, following a contested case hearing under Chapter 410, an aggrieved party must seek review by the appeals panel "not later than the 15th day after the date on which the decision of the hearing officer is received."[249] There is also a 45-day deadline to file a petition for judicial review.[250] However, there is "no provision in the Act that specifies time limits for claimants to request benefit review conferences, penalizes claimants if they delay in requesting them, or requires the division to determine whether employees' benefit review conference requests are timely."[251] Accordingly, delays in requesting benefit review conferences are not jurisdictional but, rather, are matters that relate to the mitigation of damages.[252] "The same goes for interlocutory orders and delays in connection with contested case hearings."[253] In short, a delay in taking an action that is not governed by a statutory deadline is not jurisdictional in nature.

*Davis v. American Casualty Co. of Reading, Pennsylvania*[254] is another recent case that involves exhaustion issues relating to deadlines under Chapter 410. There, the claimant (Davis) sought judicial review of a decision to reduce the amount of temporary insurance benefits. The insurance carrier challenged the trial court's jurisdiction on the ground that

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[246] *Tex. Mut. Ins. Co. v. Morris*, 383 S.W.3d 146, 149 (Tex. 2012).

[247] *Id*. (citing TEX. LAB. Code § 409.001(a)).

[248] *Morris*, 383 S.W.3d at 149 (citing TEX. LAB. CODE § 409.003).

[249] TEX. LAB. CODE § 410.202(a).

[250] *Id.* § 410.252.

[251] *Morris*, 383 S.W.3d at 149.

[252] *Id*.

[253] *Id*.

[254] *Davis v. Am. Cas. Co. of Reading, PA*, No. 07-11-00256-CV, 2012 WL 263659 (Tex. App.—Amarillo Jan. 27, 2012, pet. denied).

Davis did not meet the 15-day deadline to request review by the appeals panel. The record showed that the request for review was not timely, but it also showed that "the Appeals Panel did, in fact, consider the case."[255] The Amarillo Court of Appeals thus held that Davis exhausted his administrative remedies. However, Davis filed his petition for judicial review before the Appeals Panel's decision. That mistake was fatal: "Because the original petition was filed before the Appeals Panel decision, it was ineffective to invoke the subject matter jurisdiction of the trial court."[256] Although Davis attempted to cure the problem by amending his petition, the amended petition was filed *after* the deadline to seek judicial review. The court thus held that the amended petition "cannot relate back and grant jurisdiction to the trial court where it did not previously exist."[257] *Davis* illustrates that, while courts may be willing to excuse imperfect attempts to invoke jurisdiction when a statutory deadline is unclear, missing a clear deadline is fatal.

### 2. Chapter 413 Disputes Regarding Preauthorization and Fees

Chapter 413 of the Workers' Compensation Act requires a claimant or provider to seek preauthorization for certain treatments or services.[258] The statute also sets forth reimbursement policies and guidelines to carriers. Claims governed by Chapter 413 have slightly different exhaustion requirements than claims under Chapter 410. And within Chapter 413 there are different exhaustion requirements for medical preauthorization claims and medical fee claims.

To exhaust administrative remedies and obtain judicial review of an adverse decision relating to *medical necessity* of a service that requires preauthorization, a claimant must take the following steps:

- Request reconsideration of the carrier's decision within thirty days of receiving the denial[259];
- Request a medical dispute resolution "by an independent review organization under Chapter 4202, Insurance Code"[260];

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[255] *Id*. at *4.

[256] *Id.*

[257] *Id.* at *5.

[258] TEX. LAB. CODE § 413.014.

[259] 28 TEX. ADMIN. CODE § 134.600(o)(1).

[260] TEX. LAB. CODE § 413.031(d).

- Request a contested case hearing under Section 413.0311[261];

- File a petition for judicial review "not later than the 45th day after the date on which the State Office of Administrative Hearings mailed the party the notification of the decision."[262]

In comparison, to exhaust administrative remedies and obtain judicial review of an adverse decision in a *medical fee dispute*, a claimant must take the following steps:

- Follow the commissioner's rules for the appropriate dispute resolution process;[263]

- Request a benefit review conference "in the manner required by Subchapter B, Chapter 410";[264]

- Request a contested case hearing under Section 413.0312;[265]

- File a petition for judicial review "not later than the 45th day after the date on which the State Office of Administrative Hearings mailed the party the notification of the decision."[266]

Several recent cases illustrate exhaustion problems that have arisen under Chapter 413.

*Preauthorization Disputes*

The claimant in *Thomas v. American Home Assurance Co.*,[267] discussed above, also challenged the "delay in approval for payment of [his] knee replacement surgery" arising from the carrier's initial decision to deny preauthorization for the surgery. However, instead of requesting reconsideration of that decision, the claimant's physician (Dr. Saunders) sent five additional requests. Dr. Saunders withdrew the first of those requests, but the remaining

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[261] *Id.* § 413.031(k).

[262] *Id.* § 413.031(k-1).

[263] *Id.* § 413.031(f).

[264] *Id.* § 413.0312(b).

[265] *Id.* § 413.0312(e).

[266] *Id.* § 413.031(k-1).

[267] *Thomas*, 2013 WL 1857105, at *1, *9.

four were approved. Thomas argued that he was not required to exhaust administrative remedies because, "'[o]nce a carrier grants a preauthorization request and acknowledges a surgery is medically necessary, a claimant would not need to seek further administrative determination on that issue.'"[268] However, Thomas's complaint about the allegedly bad-faith delay in approving benefits was, in essence, an attack on the carrier's initial decision to deny preauthorization. As the Dallas Court of Appeals recognized, "[t]he fact that [the carrier] ultimately approved Dr. Saunders's third, fourth, fifth, and sixth requests for preauthorization does not constitute any type of determination by the Division of Workers' Compensation that [the carrier's] denial of Dr. Saunders's first request for preauthorization was improper."[269] Because Thomas had not exhausted the applicable administrative remedies, the trial court did not err in dismissing his claims relating to medical necessity.[270]

*Medical Fee Disputes*

*Main Rehabilitation and Diagnostic Center, LLC v. Liberty Mutual Insurance Co.*[271] provides a useful overview of procedures that apply when a health care provider seeks to recover medical fees. After treating some injured workers, the providers in *Main* sued the workers' compensation carrier for failing to make statutory incentive payments under the Health Professional Shortage Area ("HPSA").[272] The DWC intervened and both it and the carrier argued that (i) the Division has exclusive jurisdiction over fee disputes and (ii) the providers failed to exhaust their administrative remedies before filing suit.[273] The Dallas Court of Appeals agreed, holding that "[t]he statutory scheme demonstrates the Legislature has granted to the Division the sole authority to make an initial determination of a medical fee dispute and that the Division has exclusive jurisdiction over [the providers'] claims for the HPSA incentive payments."[274] Attempting to excuse their failure to exhaust, the providers argued that "it was impossible to timely submit any dispute regarding an unpaid

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[268] *Id*. at *9 (quoting *In re Tex. Mut. Ins. Co.*, 360 S.W.3d 588 (Tex. App.—Austin 2011, orig. proceeding)).

[269] *Thomas*, 2013 WL 1857105, at *9.

[270] *Id*. at *10.

[271] *Main Rehab. & Diagnostic Ctr., LLC v. Liberty Mut. Ins. Co.*, 376 S.W.3d 825 (Tex. App.—Dallas 2012, no pet.).

[272] *Id*. at 828. Note: "[T]he Division adopted Medicare HPSA incentive payments for professional services provided under the workers' compensation in designated areas." *Id*. at 830.

[273] *Id*. at 828.

[274] *Id*. at 832.

HPSA incentive payment to the Division because the amount actually paid for a service was not determined until the underlying claim was submitted to [the Division's Medical Dispute Resolution Process]."[275] However, although Medicare guidelines only require HPSA incentive payments to be made quarterly, "Division rules require a HPSA incentive payment to be made on a per bill, per line basis."[276] Thus, the providers were required to invoke the administrative process if they received payment on a bill that did not include the incentive payment.[277] They failed to do so, and as a result, the trial court's order dismissing their claims for lack of jurisdiction was affirmed.[278]

For similar reasons, the Houston (First) Court of Appeals recently affirmed an order dismissing claims for lack of jurisdiction in *Hand & Wrist Center of Houston, P.A. v. SGS Control Services, Inc*.[279] The case involved a fee dispute governed by Chapter 413. Nevertheless, the health care provider (Hand & Wrist) argued that the trial court improperly granted the carrier's plea to the jurisdiction because Section 408.001(a) of the Labor Code does not apply to health care providers. The court of appeals agreed, but noted that "Hand & Wrist fails to consider Labor Code Chapter 413, entitled 'Medical Review.'"[280] Because the case involved "a fee dispute over how much Hand & Wrist should receive for medical care [it] provided," the court held that the dispute was within the Division's exclusive jurisdiction and, therefore, exhaustion of administrative remedies was required. Because Hand & Wrist failed to exhaust, its claims were properly dismissed.

*In re Mid-Century Insurance Co. of Texas*[281] also involves a fee dispute. There, a hospital provided medical services to a covered worker, but the carrier did not pay as much as the hospital expected. The hospital filed a lawsuit and, after the trial court denied the carrier's plea to the jurisdiction, the carrier sought mandamus relief from the Houston (First) Court of Appeals. The dispositive issue was whether the DWC had exclusive jurisdiction over the parties' dispute. The hospital argued that its claims fell "outside the DWC's

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[275] *Id*.

[276] *Id*.

[277] *Id*.

[278] *Id*.

[279] *Hand & Wrist Ctr. of Houston, P.A. v. SGS Control Servs., Inc.*, No. 01-12-00411-CV, 2013 WL 3716690 (Tex. App.—Houston [1st Dist.] July 16, 2013, no pet. h.).

[280] *Id*. at *9.

[281] *In re Mid-Century Ins. Co. of Tex.*, No. 01-12-00446-CV, 2012 WL 4717884 (Tex. App.—Houston [1st Dist.] Oct. 4, 2012, no pet.).

exclusive jurisdiction because [they involved] a 'private network contract dispute.'"[282] And, in an effort to bolster its position, the hospital pointed to a repealed agency rule that permitted the DWC to dismiss a request to resolve a fee dispute relating to "'services provided pursuant to a private contractual fee arrangement.'"[283] However, even though the DWC "clarified (if not altered) its understanding of its own jurisdiction during the pendency of this action," the Houston court recognized that "the statutory jurisdictional grant (and thus the DWC's jurisdiction) remain the same."[284] Accordingly, the court concluded that, because the case involved a "non-network" dispute that was within the DWC's exclusive jurisdiction, exhaustion was required, and, therefore, the carrier was entitled to mandamus relief.[285]

One final case involving a fee dispute underscores a recurring theme – exhaustion requirements cannot be circumvented by artful pleading. In *Vista Medical Center Hospital v. Texas Mutual Insurance Company*, [286] an insurer (Texas Mutual) sued a hospital (Vista) to obtain a refund of money that was allegedly overpaid to comply with an administrative order in a medical-fee dispute. Assuming that it lacked an administrative remedy to recover the fees at issue, Texas Mutual asserted a money-had-and-received claim against Vista. However, after a detailed analysis of the statutory scheme, the Austin Court of Appeals concluded that Texas Mutual's claim was not "rooted solely in equity or the common law" but, rather sought "redress for alleged injury that derives from the workers' compensation act – medical reimbursement Texas Mutual paid to Vista in excess of the amounts to which the carrier claims the provider is properly entitled under the act and Division rules."[287] Accordingly, the Austin court reversed the trial court's award of monetary relief and "render[ed] judgment dismissing Texas Mutual's money-had-and-received claims for want of jurisdiction."[288]

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[282] *Id*. at *2. Note: The opinion contains a detailed overview of the different dispute resolution procedures that are applicable to network and non-network medical fee disputes. *Id*. at *3-4.

[283] *Id*. at *5 (quoting 33 Tex. Reg. 3954 (2012) (repealing 28 TEX. ADMIN. CODE § 133.307(e)(3)(F))).

[284] *In re Mid-Century*, 2012 WL 4717884, at *6.

[285] *Id*. at *6-7.

[286] *Vista Med. Ctr. Hosp. v. Tex. Mut. Ins. Co.*, Nos. 03-11-00641, 03-11-00643, 03-11-00742, 03-11-00785, 2013 WL 2631732 (Tex. App.—Austin June 6, 2013, no pet. h.).

[287] *Id*. at *22.

[288] *Id*. at *23. The court remanded Texas Mutual's alternative constitutional and statutory claims to the district court for further proceedings without expressing any opinion as to that court's jurisdiction over those claims. In addition, the court remanded Vista's claims for reimbursement to the Division. *Id.* at *25.

### D. Exhaustion under the Whistleblower Act

The Texas Whistleblower Act[289] prohibits state and local governmental entities from suspending, terminating, or taking other adverse actions against public employees who, in good faith, report violations of the law committed by governmental entities or other public employees to appropriate law enforcement authorities.[290] The statute defines available relief[291] and expressly waives sovereign and governmental immunity from suit.[292] However, before bringing suit under the Act, a public employee must take the following steps to exhaust administrative remedies:

- The employee must "initiate action under the grievance or appeal procedures of the employing state or local governmental entity";[293]

- The applicable grievance procedures must be initiated "not later than the 90th day after the date on which the alleged violation of this chapter: (1) occurred; or (2) was discovered by the employee through reasonable diligence";[294] and

- If a final decision is not rendered before the 61st day after the date procedures are initiated," the employee may elect to exhaust the applicable grievance procedures and file suit not later than 30 days after those procedures are exhausted; or (2) terminate the applicable grievance procedures and file suit within the time remaining under the 90-day deadline to seek relief under the Act.[295]

"The statutory prerequisites to filing suit under the Whistleblower Act are mandatory and jurisdictional."[296] However, the Act "does not require that grievance or appeal

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[289] TEX. GOV'T CODE §§ 554.001-010.

[290] *Id.* § 554.002(a).

[291] *Id.* § 554.003.

[292] *Id.* § 554.0035.

[293] *Id.* § 554.006(a).

[294] *Id.* § 554.006(b).

[295] *Id.* § 554.006(d).

[296] *Smith v. Univ. of Tex. Sw. Med. Ctr. of Dallas*, 101 S.W.3d 185, 189 (Tex. App.—Dallas 2003, no pet.) (failure to file suit within 90 days of the allegedly retaliatory act of termination deprived trial court of jurisdiction).

procedures be exhausted before suit can be filed."[297] Thus, a Whistleblower claim should not be dismissed because the plaintiff failed to *complete* her employer's grievance procedures.[298] The Act simply requires that grievance procedures "be timely initiated and that the grievance or appeal authority have 60 days in which to render a final decision."[299] Several recent cases illustrate other exhaustion issues that have arisen under the Whistleblower Act.

*Douglas v. Houston Housing Authority*[300] illustrates problems that arose because the Whistleblower Act "does not dictate what actions are required to 'initiate' the appeals procedure." There, an employee (Douglas) brought a Whistleblower claim against the Houston Housing Authority (HHA). The trial court dismissed the claim for lack of jurisdiction because "Douglas [had] not pursued HHA's grievance or appeal procedures prior to suit as required by the mandatory and jurisdictional requirements of sections 311.034 and 554.006(a) of the Texas Government Code."[301] On appeal, Douglas argued that: (i) the grievance policy was ambiguous and inapplicable to discharged employees; (ii) she tried to timely file a grievance but "her initial efforts to do so were thwarted by the HR Director"; and (iii) her verbal communications with HHA and a letter from counsel were "sufficient to invoke the grievance process."[302] The Houston (First) Court of Appeals rejected all three arguments, holding that: (i) HHA's grievance policy was applicable; (ii) the HR Director's actions did not excuse Douglas from initiating a grievance; and (iii) Douglas did not give HHA fair notice of her claims.[303] Accordingly, the trial court's dismissal order was affirmed.[304]

In *Fort Bend Independent School District v. Gayle*, [305] a former public school administrator initiated the school district's formal grievance procedures by sending the

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[297] *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005).

[298] *Gray v. City of Galveston*, No. 14-12-00183-CV, 2013 WL 2247386, at *12 (Tex. App.—Houston [14th Dist.] May 21, 2013, no pet. h.).

[299] *Barrett*, 159 S.W.3d at 632.

[300] *Douglas v. Houston Housing Auth.*, No. 01-11-00508-CV, 2013 WL 2389893, at *3 (Tex. App.—Houston [1st Dist.] May 30, 2013, no pet. h.).

[301] *Id*. at *2.

[302] *Id*.

[303] *Id*. at *5-7.

[304] *Id*. at *8.

[305] *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391, 393 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

school district a written complaint. After receiving the complaint, the district attempted to schedule a grievance hearing. However, due to scheduling conflicts, the hearing was set three months after the grievance was filed. The day before the hearing was supposed to occur, Gayle filed suit and sent the district a notice that the hearing was "moot."

Asserting that Gayle had not exhausted her administrative remedies, the district argued that Gayle was required to do more than file a written complaint; according to the district, she also had to "(1) give the [district] a reasonable opportunity to hear and decide the grievance and (2) attend and meaningfully participate in a hearing mandated by the grievance procedure."[306] The Houston (First) Court of Appeals disagreed. Following the statute's plain language, the court held that "the statute requires only 'initiat[ion]'" and, therefore, it refused to "engraft[] a requirement of meaningful participation."[307]

The district also argued that, because Gayle had not given the district 60 days to reach a decision, her suit was "premature."[308] Again, the court disagreed, holding that, "[w]hen a claimant has timely initiated a school's grievance procedure, the remedy for a failure to allow the school its sixty-day period for administrative adjudication is abatement, not dismissal."[309]

*Gayle* raises an interesting question. If statutory prerequisites for suit are jurisdictional under the Whistleblower Act, how can a litigant invoke the trial court's jurisdiction without first complying with the statutory requirement to give the governmental entity 60 days to resolve the administrative complaint? *Gayle*'s distinction between the jurisdictional requirement of initiating a grievance procedure and the non-requirement of "participation" fails to answer that question.

In *Alcala-Garcia v. City of La Marque*,[310] two municipal employees filed a Whistleblower suit without initiating their employer's grievance process. The employees argued that their failure to comply with "the Act's strict grievance-initiation requirement . . . should be excused because they were 'explicitly informed by the City Office holders that the [applicable grievance] procedures did not apply to them.'"[311] The Houston (Fourteenth)

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[306] *Id*. at 396.

[307] *Id*. at 398.

[308] *Id*.

[309] *Id*.

[310] *Alcala-Garcia v. City of La Marque*, No. 14-12-00175-CV, 2012 WL 5378118, at *5 (Tex. App.—Houston [14th Dist.] Nov. 1, 2012, no pet.).

[311] *Id*.

Court of Appeals rejected that argument for two reasons: (i) "the Act does not contemplate any exceptions"; and (ii) "the law is well-established that jurisdiction may not be conferred by estoppel."[312]

The employees also argued that invoking the city's grievance procedures would have been "futile because it was the city council that made the decision to terminate."[313] However, following other courts of appeals (and decisions by the Fifth Circuit), the Houston court "declin[ed] to graft a futility exception where the Act provides none."[314] The court also rejected the employees' argument that the city's grievance procedures only applied to "employees," not "exempt employees."[315] In the court's view, "[e]ven if appellants were exempt from federal laws pertaining to overtime pay, they were still 'employees' to whom the grievance procedure generally applied."[316]

Finally, the court rejected the argument that the employees' inquiry about the grievance process was sufficient to satisfy the "initiation" requirement. Although the court recognized that an employee might be excused from complying with the statutory exhaustion requirements "if the grievance procedures were unclear or conflicting *and* the claimant timely notified the employer of the grievance," in this case, the city's grievance procedures were "not unclear."[317] Nor did they conflict with any other applicable procedures. Because accepting the employees' arguments would require the court to "fundamentally rewrite the Whistleblower Act," the court held that the employees' claims were properly dismissed for lack of jurisdiction.[318]

### E. Exhaustion under the Texas Commission on Human Rights Act

The Texas Commission on Human Rights Act[319] (TCHRA) "was enacted to address the specific evil of discrimination and retaliation in the workplace."[320] Applicable to both

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[312] *Id*. at *6 (citing *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 354 (Tex. 2005)).

[313] *Id*.

[314] *Id*. (citing multiple cases).

[315] *Id*. at *7.

[316] *Id*.

[317] *Id*. (emphasis added).

[318] *Id*.

[319] TEX. LAB. CODE §§ 21.001-556.

[320] *City of Waco v. Lopez*, 259 S.W.3d 147, 153 (Tex. 2008).

private and public employees, the statute is "a comprehensive remedial scheme that grants extensive protections to employees in Texas, implements a comprehensive administrative regime, and affords carefully constructed remedies."[321] Before suing under the TCHRA, a plaintiff must exhaust administrative remedies.[322] "'[E]xhaustion of administrative remedies is a mandatory prerequisite to filing a civil action alleging violations of the [T]CHRA.'"[323]

To exhaust administrative remedies under the TCHRA,[324] a plaintiff must do the following:

- file a complaint with the Civil Rights Division of the Texas Workforce Commission ("TWC") within 180 days of the alleged discriminatory practice;[325]
- give the TWC up to 180 days to investigate the complaint, determine whether reasonable cause exists, and either dismiss the complaint or attempt to resolve it;[326]
- after receiving notice of dismissal or notice that the complaint was not resolved by the 181st day after filing, ask the TWC for notice of a right to file a civil action;[327] and
- file suit within 60 days of receiving notice (and within two years of filing the initial complaint).[328]

Each of these steps presents its own exhaustion issues.

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[321] *Id*. at 154.

[322] *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010).

[323] *Hoffmann-La Roche Inc.*, 144 S.W.3d 438, 446 (Tex. 2004) (quoting *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991)).

[324] The TCHRA is closely modeled on Title VII. Title VII has a two-step process to exhaust administrative remedies before filing suit. Under Title VII, a person alleging employment-related discrimination must: (1) file a charge with the EEOC; and (2) file suit within 90 days of receiving a right-to-sue letter from the EEOC. 42 U.S.C. §§ 2000e-5(e)(1), e-5(f)(1).

[325] TEX. LAB. CODE §§ 21.201-202.

[326] *Id.* §§ 21.205-207.

[327] *Id*. §§ 21.208, 21.252.

[328] *Id*. §§ 21.254, 21.256.

1. The 180-day deadline to file an administrative complaint

The TCHRA provides that "[a] person claiming to be aggrieved by an unlawful employment practice or the person's agent may file a complaint with the commission."[329] The complaint must "be filed not later than the 180th day after the date the alleged unlawful employment practice occurred."[330]

Texas courts have held that compliance with the 180-day deadline to file an administrative complaint begins the process of exhausting administrative remedies[331] and is a jurisdictional prerequisite to judicial review.[332] In cases involving a discrete act of discrimination, the 180-day deadline begins to run when that discrete act occurred.[333] The 180-day deadline is more difficult to apply when the unlawful discrimination manifests itself as a continuing violation over time. In that situation, the deadline does not begin to run until "acts supportive of a civil rights action are, or should be, apparent to a reasonably prudent person in the same or a similar position."[334] Not surprisingly, the case law confirms that parties may disagree about the timeliness of a complaint alleging a continuing violation.

*McAllen Independent School District v. Espinosa*,[335] a recent decision from the Corpus Christi Court of Appeals, resulted in the dismissal of claims for failure to comply

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[329] TEX. LAB. CODE § 21.201(a).

[330] *Id.* § 21.202(a).

[331] *See Waffle House*, 313 S.W.3d at 804 ("Unlike a common-law negligence action, a TCHRA action requires an exhaustion of administrative remedies that begins by filing a complaint with the Texas Workforce Commission civil rights division (Commission).")

[332] *See, e.g.*, *Martin v. Nat'l Instruments Corp.*, No. 03-12-00771-CV, 2013 WL 3013881, at *3 (Tex. App.—Austin June 11, 2013, no pet. h.) ("Failure to file the complaint within the 180-day period constitutes a failure to exhaust administrative remedies and deprives the court of subject-matter jurisdiction."); *El Paso Cnty. v. Kelley*, 390 S.W.3d 426, 429 (Tex. App.—El Paso 2012, pet. denied); *McAllen Indep. Sch. Dist. v. Espinosa*, No. 13-11-00563-CV, 2012 WL 3012657, at *4 (Tex. App.—Corpus Christi June 15, 2012, no pet.) (citing *Czerwinski v. Univ. of Tex. Health Sci. Ctr.*, 116 S.W.3d 119, 121 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The 180-day deadline to file an administrative complaint should not be confused with the two-year deadline to file a civil action. As previously explained (*supra*, § IV), the Texas Supreme Court has held that the two-year deadline to file a civil action is *not* jurisdictional. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010).

[333] *See, e.g.*, *McAllen Indep. Sch. Dist.*, 2012 WL 3012657, at *4 (recognizing that the 180-day period deadline to file a sexual harassment claim based on comments made at a staff meeting was triggered on the date when the meeting occurred).

[334] *Wal-Mart Stores Inc. v. Davis*, 979 S.W.2d 30, 41-42 (Tex. App.—Austin 1998, pet. denied).

[335] *McAllen Indep. Sch. Dist.*, 2012 WL 3012657.

with the 180-day deadline. There, Espinosa filed sex discrimination and retaliation claims. The sex discrimination claim arose from an event that took place more than 180 days before Espinosa filed her administrative complaint. Because the complaint was untimely as to the sex discrimination claim, Espinosa failed to invoke the trial court's jurisdiction to consider it. Espinosa also alleged a retaliation claim as a "continuing violation" that tolled the running of the 180-day deadline. However, "conclusive evidence" showed that "Espinosa should have been alerted to protect her rights" more than 180 days before she filed her administrative complaint.[336] Thus, she also failed to invoke the trial court's jurisdiction to consider the retaliation claim.

*City of El Paso v. Marquez*[337] involved a discrimination claim based on an allegedly hostile work environment. Because "one of [the alleged] acts of discrimination occurred during the 180-day statutory period," the El Paso Court of Appeals upheld the trial court's order denying the City's plea to the jurisdiction.[338]

Marquez could be read to suggest that an administrative complaint is timely as long as it references at least one allegedly discriminatory act that occurred no more than 180 days before the complaint was filed. However, the issue is not when the most recent discriminatory act allegedly occurred; it is when the plaintiff knew or should have known to protect her rights. If a plaintiff files suit more than 180 days after she knew or should have known to take action, the complaint is untimely and the fact that an allegedly unlawful act occurred within the 180-day period is immaterial.

2. The 180-day period for the TWC either to resolve or dismiss the complaint or to issue a right-to-sue letter

Once a complaint is filed, the Texas Workforce Commission – Civil Rights Division ("TWC") has 180 days to investigate the complaint.[339] "If the commission dismisses a complaint . . . or does not resolve the complaint before the 181st day after the date the complaint was filed, the commission *shall* inform the complainant of the dismissal or failure to resolve the complaint in writing by certified mail."[340] At that point, the employee "is entitled to request from the commission a written notice of the complainant's right to file a

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[336] *Id*. at *4.

[337] *City of El Paso v. Marquez*, 380 S.W.3d 335, 339 (Tex. App.—El Paso 2012, no pet.).

[338] *See id*. at 343-44.

[339] TEX. LAB. CODE § 21.208.

[340] *Id*. (emphasis added).

civil action."[341] "The executive director *may* issue the notice," but the failure to do so "does not affect the complainant's right . . . to bring a civil action against the respondent."[342]

The El Paso Court of Appeals recently construed these statutory provisions in *El Paso County v. Kelley*.[343] In that case, an employee filed suit *before* the 180-day period for the TWC to investigate had expired and *without* requesting a right-to-sue letter. The TWC argued that the employee had failed to exhaust his administrative remedies. But the El Paso Court disagreed. The court observed that there is "no jurisdictional language" in either statutory provision.[344] Instead, following a sister court's characterization, the court described the statutory provisions as "permissive and non-jurisdictional."[345] Based on that construction, it held that neither the failure to request a right-to-sue letter nor filing suit before the 180-day waiting period expired deprived the trial court of subject matter jurisdiction.[346]

This holding appears difficult to reconcile with *Waffle House v. Williams*, in which the Texas Supreme Court held that the statutory framework "*requires* the Commission to investigate the employee's complaint and make an initial determination as to whether a violation of law occurred."[347] If, as the court concluded in *Waffle House*, the "meticulous legislative design is circumvented when a plaintiff brings a common-law cause of action for conduct that is actionable under the TCHRA,"[348] is it not also circumvented when a plaintiff brings a TCHRA suit before giving the TWC an opportunity to complete its investigation?

The *Kelley* court further opined that "[e]ven if Section 21.208 was both mandatory and jurisdictional, . . . nothing would have prevented [the employee] from seeking an

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[341] *Id*. § 21.252(a).

[342] *Id*. § 21.252(c)-(d) (emphasis added); *cf. Dallas Cnty. Sw. Inst. of Forensic Scis. & Med. Examiner Dep't v. Ray*, 400 S.W.3d 219, 222 (Tex. App.—Dallas 2013, pet. filed) (holding that the statutory requirement to give notice about defective complaints is not a statutory prerequisite to suit that is necessary to exhaust administrative remedies).

[343] *El Paso Cnty. v. Kelley*, 390 S.W.3d 426 (Tex. App.—El Paso 2012, pet. denied).

[344] *Id*. at 430.

[345] *Id*. (quoting *City of Houston v. Fletcher*, 63 S.W.3d 920, 923 (Tex. App—Houston [14th Dist.] 2002, no pet.)).

[346] *Id*. at 431.

[347] *Waffle House*, 313 S.W.3d at 805 (emphasis added).

[348] *Id*.

abatement from the trial court to cure the jurisdictional defect inasmuch as jurisdiction would have vested once the time period elapsed."[349] Although the employee had not actually filed a motion to abate, the court concluded that, because the County waited two years to file its plea to the jurisdiction, "the case was effectively abated even though no motion was ever filed."[350]

*Kelley* provides some creative ideas for litigants facing exhaustion challenges. But the safer course is to wait the 180 days for the TWC to investigate and to request a right-to-sue letter before filing suit. Doing so would avoid the risk of a jurisdictional challenge based on the failure to exhaust administrative remedies.

3. The 60-day deadline and two-year statute of limitations to file a civil action

Section 21.254 of the TCHRA permits a complainant to bring a civil action "[w]ithin 60 days after the date a notice of the right to file a civil action is received."[351] Section 21.256 further provides that "[a] civil action may not be brought under this subchapter later than the second anniversary of the date the complaint relating to the action is filed."

The Texas Supreme Court has held that the two-year statute of limitations for filing a civil action is mandatory but *not* jurisdictional.[352] Several Texas courts of appeals have reached the same conclusion regarding the 60-day deadline.[353] Nonetheless, these statutory deadlines are mandatory and can still affect a litigant's right to maintain his or her action under the TCHRA.[354] Consequently, the prudent course of action is to: (i) request a notice of right to sue; (ii) if such notice is received, bring a civil action within 60 days, as required by Section 21.254, and not later than two years after filing the administrative complaint, as required by Section 21.256; and (iii) if such notice is not received, bring a civil action before the two-year deadline in Section 21.256.

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[349] *Kelley*, 390 S.W.3d at 430.

[350] *Id.*

[351] TEX. LAB. CODE § 21.254.

[352] *In re United Servs. Auto. Ass'n*, 307 S.W.3d at 310.

[353] *See, e.g.*, *Baldonado v. Tex. Dep't of Health & Human Servs. Comm'n*, No. 13-11-00167-CV, 2012 WL 1073278, at *3 (Tex. App.—Corpus Christi March 29, 2012, pet. denied); *McCollum v. Tex. Dep't of Licensing & Regulation*, 321 S.W.3d 58, 64 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Windle v. Mary Kay, Inc.*, No. 05-02-00252-CV, 2012 WL 21508782, at *2 (Tex. App.—Dallas July 1, 2003).

[354] *Kindle*, 2003 WL 21508782, at *2.

4. The scope of a TCHRA action

"It is well settled that the scope of . . . and TCHRA litigation is limited to claims that were included in the administrative charge of discrimination and to factually related claims that could reasonably be expected to grow out of the agency's investigation of the claims stated in the charge."[355] Not surprisingly, reasonable minds often differ as to what claims can reasonably be expected to grow out of the charge. Recent cases address this and other exhaustion issues affecting the scope of a TCHRA action.

In *Lopez v. Texas State University*,[356] the plaintiff (Lopez) alleged claims for race discrimination and for retaliation. However, because she had not checked the box for *race* discrimination on her charge form, the university argued that she had failed to exhaust her administrative remedies as to that claim. Invoking federal law under which similar claims may be asserted, the Austin Court of Appeals rejected that argument:

> The Fifth Circuit has made it clear that which boxes were checked on the charge form is not dispositive as to the scope and category of discrimination asserted in the complaint: "[T]he crucial element of a charge of discrimination is the factual statement contained therein . . . . The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal conclusion to the facts alleged."[357]

In the narrative portion of her administrative charge, Lopez stated that "she believes she was discriminated against because she is Hispanic."[358] Characterizing that as "the salient substantive fact," the court held that "Lopez exhausted her administrative remedies as to her race-discrimination claim."[359]

Other recent decisions also emphasize the importance of the factual allegations in the charge form and confirm that checking a box is not dispositive.[360] But may a court look

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[355] *Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 701(Tex. App.—Austin 2012, pet. denied).

[356] *Id.*

[357] *Id*. at 702 (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970)).

[358] *Id*. The Court's holding was premised, in part, on its observation that "the term 'Hispanic' does not literally designate either race or national origin and is instead commonly understood as implying both." *Id*. at 703.

[359] *Id.*

[360] *See, e.g., Williams-Pyro, Inc. v. Barbour*, No. 08-11-00355-CV, 2013 WL 1150214, at *6 (Tex. App.—El Paso March 20, 2013, MET to file pet. granted); *Walcott v. Tex. S. Univ.*, No. 01-12-00355-CV,

beyond the charge and consider supplemental materials in determining the scope of claims for which administrative remedies have been exhausted? The Austin court also considered that issue in *Lopez*. Looking again to federal law, the court observed that there are two approaches: one is to consider supplemental materials, such as the intake questionnaire, "as a matter of course"; and the other is to "consider intake questionnaires only if (1) the facts set out in the questionnaire are a reasonable consequence of a claim set forth in the EEOC charge, and (2) the employer had actual knowledge of the contents of the questionnaire during the course of the EEOC investigation."[361] Over a dissenting opinion, the *Lopez* majority adopted the second approach.[362]

The exhaustion doctrine not only limits the scope of TCHRA claims; it also precludes other claims based on the same conduct.[363] As the Texas Supreme Court observed, when a statute "'implements a comprehensive administrative regime, and affords carefully constructed remedies,' and allowing the alternative remedy 'would render the limitations in the [statute] utterly meaningless'" a plaintiff cannot evade the statutory scheme by asserting alternative claims for relief.[364] Accordingly, common-law claims cannot be used to escape the TCHRA's exhaustion requirements.[365]

The Texarkana Court of Appeals recently applied these principles in *Pruitt v. International Association of Fire Fighters*.[366] There, Pruitt, a former fire chief, sued a labor union and various union officers asserting a TCHRA claim for aiding and abetting discrimination as well as common-law claims for intentional infliction of emotional distress,

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2013 WL 593488, at *10 (Tex. App.—Houston [1st Dist.] Feb. 14, 2013, no pet.); *Cnty. of Travis v. Manion*, No. 03-11-00533-CV, 2012 WL 1839399, at *4-5 (Tex. App.—Austin May 17, 2012, no pet.).

[361] *Lopez*, 368 S.W.3d at 704.

[362] *Id*. at 704, 708 (Henson, J., dissenting, "would consider the intake questionnaire to determine whether the pay-grievance claim would be within the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charge").

[363] *Waffle House*, 313 S.W.3d at 807 (holding that the TCHRA precludes common-law claims for negligent supervision and retention); *see also City of Waco v. Lopez*, 259 S.W.3d 147, 155 (Tex. 2008) (holding that the TCHRA provides "the sole statutory remedy for retaliatory discharge claims premised on complaints of the type of discrimination made unlawful under the CHRA" and, therefore, "forecloses relief under the more general Whistleblower Act"); *Hoffmann-La Roche Inc.*, 144 S.W.3d at 450 (holding that TCHRA precludes common-law tort claim for intentional infliction of emotional distress).

[364] *Waffle House*, 313 S.W.3d at 807 (quoting *Lopez*, 259 S.W.3d at 154)).

[365] *See supra*, § II.B.

[366] *Pruitt v. Int'l Ass'n of Fire Fighters*, 366 S.W.3d 740 (Tex. App.—Texarkana 2012, no pet.).

breach of fiduciary duty, and tortious interference with employment relationship. The trial court ruled that Pruitt failed to exhaust his administrative remedies under the TCHRA and that his common-law claims were preempted by the TCHRA. Accordingly, the court dismissed all claims for lack of subject matter jurisdiction.

The court of appeals affirmed. Pruitt had no apparent answer to his failure to exhaust administrative remedies, and, as the Texarkana court noted, "Texas Supreme Court precedent requires the exhaustion of administrative remedies with the TWC prior to filing suit for intentionally aiding or abetting discrimination."[367] Nor could Pruitt salvage his common-law claims. Following *Waffle House*, the court concluded that, because the "complained-of acts constitute a statutory violation of Chapter 21, they cannot also serve as the basis of an independent tort claim."[368] In reaching this conclusion, the court rejected Pruitt's attempt to "remove race discrimination from the fact scenario."[369] In the court's view, "a racial discrimination complaint was the gravamen of Pruitt's action" and "allowing his complaint to proceed without meeting the requirement of exhaustion of remedies would 'collide with the elaborately crafted statutory scheme.'"[370] Accordingly, the court held that "Pruitt's common-law claims were pre-empted by Chapter 21."[371]

*Pruitt* thus confirms: If the gravamen of a complaint involves conduct that may be covered by a comprehensive statutory scheme, the prudent course is to determine applicable exhaustion requirements and exhaust administrative remedies before filing suit. Failure to do so may result in dismissal of the entire action for lack of subject matter jurisdiction.

*Booker v. City of Austin*, [372] a recent case from the Austin Court of Appeals, shows how the 180-day deadline to file an administrative complaint affects the scope of a TCHRA case. There, an employee filed an administrative charge alleging racial, sexual, and "other" discrimination. After the 180-day deadline to file the complaint had expired, she amended the charge to add a claim based on retaliation. She attempted to justify the amendment by invoking the "relation back" doctrine. However, that doctrine only applies when the amended complaint alleges "'additional facts that constitute unlawful employment practices

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[367] *Id*. at 746.

[368] *Id*. at 748.

[369] *Id*. at 749.

[370] *Id*. (quoting *Waffle House*, 313 S.W.3d at 804).

[371] *Id*.

[372] *Booker v. City of Austin*, No. 03-09-00088-CV, 2013 WL 1149559 (Tex. App—Austin Mar. 13, 2013, no pet.).

relating to or arising from the subject matter of the original complaint.'"[373] As the court recognized, because "retaliation is a different legal theory" than discrimination, the amended charge did not "relate back" to the original one.[374] Accordingly, the court affirmed the trial court's order dismissing the claim for lack of jurisdiction.[375]

5. Determining whether additional (non-TCHRA) administrative remedies must be exhausted

Two recent cases address whether administrative remedies available beyond those in the TCHRA must also be exhausted in order to maintain a TCHRA suit.

In *City of El Paso v. Marquez,*[376] a firefighter brought a TCHRA suit against his former employer, the City of El Paso, without having participated in "any step of the [El Paso Fire Department's] grievance procedure." The City filed a plea to the jurisdiction alleging that the firefighter had failed to exhaust administrative remedies. In affirming the trial court's order denying the plea, the El Paso Court of Appeals held that the TCHRA did not require the firefighter to exhaust the EPFD's internal grievance procedures before filing suit.[377]

*Port Arthur Independent School District v. Edwards*[378] involved a TCHRA suit filed by a public school teacher. It was undisputed that the teacher exhausted her administrative remedies under the TCHRA. Nevertheless, the school district challenged the trial court's jurisdiction on the ground that the teacher had not exhausted her remedies under the district's local grievance procedures as required by the Education Code. The Beaumont Court of Appeals rejected the argument. The court acknowledged that the Education Code gives the Commissioner of Education exclusive jurisdiction over claims involving "the school laws of this state."[379] Thus, "an aggrieved party is required to exhaust local administrative remedies as a prerequisite to filing suit if the party's claim (1) concerns the administration of school

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[373] *Id*. at *8 (quoting TEX. LAB. CODE § 21.201(f)).

[374] *Booker*, 2013 WL 1149559, at *8.

[375] *Id*. at *9.

[376] *City of El Paso v. Marquez*, 380 S.W.3d 335, 340 (Tex. App.—El Paso 2012, no pet.).

[377] *Id*. at 342.

[378] *Port Arthur Indep. Sch. Dist. v. Edwards*, No. 09-11-00628-CV, 2012 WL 489052, at *1 (Tex. App.—Beaumont Feb. 16, 2012, no pet.).

[379] *Id*. at *2 (quoting TEX. EDUC. CODE § 7.057(a)).

laws, and (2) involves questions of fact."[380] However, "employment discrimination suits brought under the [TCHRA] do not involve 'school laws of this state.'"[381] Accordingly, the teacher "was not required to exhaust her remedies under the Education Code prior to filing her [TCHRA] civil suit."[382]

*Edwards* underscores another important point: Although non-TCHRA administrative remedies (such as an employer's internal grievance procedures) may be available and worth pursuing, practitioners should take care not to miss the statutory deadline for filing suit under the TCHRA.

### F. Exhaustion Under the Education Code

Section 7.057 of the Texas Education Code permits an appeal to the Commissioner of Education by a person who is aggrieved by "(1) the school laws of this state; or (2) actions or decisions of any school district board of trustees that violate: (A) the school laws of this state; or (B) a provision of a written employment contract between the school district and a school district employee, if a violation causes or would cause monetary harm to the employee."[383] A person aggrieved by the Commissioner of Education's decision may then appeal to Travis County District Court.[384]

These provisions do not apply, however, to appeals to the Commissioner from hearings before hearing examiners (governed by Subchapter G of Chapter 21) or to student disciplinary actions (governed by Chapter 37).[385] Thus, the applicable exhaustion requirements depend on who is suing whom for what type of claim. Recent cases illustrate the types of problems that arise in determining whether exhaustion is required and, if so, what remedies need to be exhausted.

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[380] *Port Arthur Indep. Sch. Dist.*, 2012 WL 489052, at *2. The Education Code's exhaustion requirements are discussed in more detail in the next section.

[381] *Id*. at *2.

[382] *Id*. at *6.

[383] TEX. EDUC. CODE § 7.057(a).

[384] *Id*. § 7.057(d).

[385] *Id*. § 7.057(e).

1. Claims against a district arising under the "school laws of this state"

Section 7.057 expressly applies to persons aggrieved by "the school laws of this state" or by a school district's actions or decisions that violate "the school laws of this state."[386] Thus, an aggrieved party must "exhaust all remedies provided under the applicable administrative scheme if the claim (1) concerns the administration of school laws, and (2) involves questions of fact."[387] Exhaustion requires the following steps:

- The aggrieved person must appeal in writing to the Commissioner;[388]
- The Commissioner is then required to hold a hearing within 180 days and "shall issue a decision based on a review of the record developed at the district level under a substantial evidence standard of review";[389] and
- A person aggrieved by the Commissioner's decision may then appeal to a district court in Travis County.[390]

Until these remedies are exhausted, the Commissioner has exclusive jurisdiction over a covered dispute.[391]

As illustrated by *Roma Independent School District v. Guillen*,[392] a key issue is determining whether the action at issue involves "the school laws of this state." In *Guillen*, a

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[386] TEX. EDUC. CODE § 7.057(a). The "school laws of this state" are defined to mean "Title 1 [General Provisions] and this title [2, Public Education] and rules adopted under those titles." *Id*. § 7.057(f)(2).

[387] *Ollie v. Plano Indep. Sch. Dist.*, 383 S.W.3d 783, 792 (Tex. App.—Dallas 2012, pet. denied).

[388] TEX. EDUC. CODE § 7.057(a).

[389] *Id*. § 7.057(b)-(c).

[390] *Id*. § 7.057(d).

[391] *See Ollie*, 383 S.W.3d at 792 (recognizing that the Commissioner has exclusive jurisdiction over "actions or decisions of any school district board of trustees that violate a provision of a written employment contract between the school district and a school district employee if a violation causes or would cause monetary harm to the employee.").

[392] *See Roma Indep. Sch. Dist. v. Guillen*, No. 04-13-00133-CV, 2013 WL 684781 (Tex. App.—San Antonio Feb. 25, 2013, pet. denied); *see also Fort Worth Indep. Sch. Dist. v. Serv. Emp't Redev.*, 243 S.W.3d 609, 610 (Tex. 2007) (holding that a vendor was not required to exhaust remedies under Section 7.057, because "a vendor's claim for breach of a contract . . . does not complain of a violation of Texas school laws"); *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 128-29 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding that police officer's retaliatory discharge claim did not involve the "school laws of this state"; also compiling cases showing examples of claims involving – and not

school district voter sued the district for changing board member election dates, which, in turn, allowed current board members to extend their terms. The district challenged jurisdiction on the ground that the voter had failed to exhaust administrative remedies as required by Section 7.057. In response, the voter (Guillen) argued that she was not required to exhaust remedies because her claims were not related to "school laws" and, therefore, the Commissioner lacked authority to review them.

The San Antonio Court of Appeals held that "several of Guillen's claims, i.e., the alleged violations of the Texas Election Code and the Texas Administrative Code, are not grievances under Texas 'school laws' as that term is defined in the Education Code."[393] Therefore, no exhaustion was required for those claims. As to the remaining claims that "might" require exhaustion, the court held that Guillen was excused from the requirement because she "would suffer irreparable harm and the Commissioner of Education could not provide her with adequate relief."[394] The court thus upheld the trial court's order denying the district's plea to the jurisdiction.[395]

As explained above, because employment discrimination claims brought under the TCHRA do not involve the "school laws of this state," a teacher is not required to exhaust remedies under the Education Code to bring a discrimination suit under the TCHRA.[396] Other recent cases involving "school law" claims provide additional examples of what claims are – and are not – covered by Section 7.057.[397]

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involving – school laws); *Port Arthur Indep. Sch. Dist. v. Edwards*, 2012 WL 489052, at *3 (holding that teacher was not required to exhaust remedies under the Education Code to assert a claim under the TCHRA); *Austin Indep. Sch. Dist. v. Lowery*, 212 S.W.3d 827, 832 (Tex. App.—Austin 2006, pet. denied) (holding that employment discrimination claim does not involve the "school laws of this state" and, therefore, the plaintiff was not required to exhaust administrative remedies under the Education Code).

[393] *Id*. at *4.

[394] *Id*.

[395] *Id*. at *6.

[396] *See Port Arthur Indep. Sch. Dist. v. Edwards*, 2012 WL 489052, at *6.

[397] *See, e.g., Fort Worth Indep. Sch. Dist.*, 243 S.W.3d at 610 (holding that a vendor was not required to exhaust remedies under Section 7.057, because "a vendor's claim for breach of a contract . . . does not complain of a violation of Texas school laws"); *Larsen v. Santa Fe Indep. Sch. Dist.*, 296 S.W.3d 118, 128-29 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding that police officer's retaliatory discharge claim did not involve the "school laws of this state"; also compiling cases showing examples of claims involving – and not involving – school laws); *Austin Indep. Sch. Dist. v. Lowery*, 212 S.W.3d at

2. Claims arising under a contract

"The Texas Commissioner of Education has exclusive jurisdiction over actions or decisions of any school district board of trustees that violate a provision of a written employment contract between the school district and a school district employee if a violation causes or would cause monetary harm to the employee."[398] Thus, until the employee has exhausted her administrative remedies, a trial court lacks jurisdiction over breach-of-contract and wrongful-termination claims.[399]

For example, in *Farran v. Canutillo Independent School District*,[400] a construction administrator (Farran) sued his former school district for allegedly terminating him in violation of the Whistleblower Act, breaching his employment contract, and discharging him in violation of public policy. Asserting that Farran had failed to exhaust administrative remedies, the district filed a plea to the jurisdiction on all claims. Focusing on his efforts to comply with the Whistleblower Act, Farran argued that he was not required to appeal to the commissioner before filing his breach-of-contract claim. The El Paso Court of Appeals disagreed, holding that "[a]n employee who alleges that a school district wrongfully terminated an employment contract must apply to the school authorities before filing suit in the district court."[401] Because there was a fact issue as to whether the district had good cause to terminate Farran, the trial court lacked jurisdiction over Farran's breach-of-contract claim.[402]

Similarly, in *Houston Independent School District v. Rose*,[403] a teacher (Rose) attempted to sue the school district without exhausting administrative remedies. The trial court granted the district's plea to the jurisdiction on most claims, but it refused to dismiss Rose's request for a declaration that the district violated her constitutional rights by not renewing her term contract. The Houston (First) Court of Appeals reversed. As the court

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832 (holding that employment discrimination claim does not involve the "school laws of this state" and, therefore, the plaintiff was not required to exhaust administrative remedies under the Education Code).

[398] *Ollie*, 383 S.W.3d at 792 (citing TEX. EDUC. CODE § 7.057(a)(2)(B)).

[399] *See Ollie*, 383 S.W.3d at 792-93.

[400] *Farran v. Canutillo Indep. Sch. Dist.*, No. 08-10-00289-CV, 2012 WL 2127727 (Tex. App.—El Paso June 13, 2012, pet. filed).

[401] *Id*. at *10.

[402] *Id*.

[403] *Houston Indep. Sch. Dist. v. Rose*, No. 01-13-00018-CV, 2013 WL 3354724 (Tex. App.—Houston [1st Dist.] July 2, 2013, no pet. h.).

recognized, "[a] determination of the constitutionality of the district's actions with respect to Rose necessarily implicates the validity of the district's actions affecting Rose's employment status."[404] Because that determination involved fact issues, the court held that "the administrative exhaustion requirement applies to Rose's claim for declaratory relief."[405]

*Farran* and *Rose* confirm that employees must exhaust remedies to sue on school employment contracts. The more difficult question is *how* to do so. That depends, at least in part, on what type of employee is suing on what type of claim.

The Education Code requires a school district to "employ each classroom teacher, principal, librarian, nurse, [and] counselor under: (1) a probationary contract, as provided by Subchapter C; (2) a continuing contract, as provided by Subchapter D; or (3) a term contract, as provided by Subchapter E."[406] Each of these subchapters requires the district to provide notice and an opportunity for a hearing if the district decides to take specified actions on a contract:

| Subchapter | Notice<br>District must notify teacher of: | Hearing<br>Teacher may request hearing: |
|---|---|---|
| C:<br>Probationary Contracts | decision to terminate contract at the end of the contract period;[407]<br>decision to discharge or suspend without pay during the contract period.[408] | regarding decision to discharge or suspend without pay during contract period;[409]<br>[*no right to a hearing regarding decision to terminate contract at end of period*] |
| D:<br>Continuing Contracts | decision to discharge, suspend without pay, or release due to necessary reduction in personnel.[410] | within 10 days of receiving notice of a decision to discharge, suspend without pay, or release due to necessary reduction in personnel.[411] |

[404] *Id*. at *4.

[405] *Id*. at *5 (also holding that Rose did not meet her burden to establish an exception to the exhaustion doctrine).

[406] TEX. EDUC. Code §21.002(a).

[407] *Id*. § 21.103.

[408] *Id*. § 21.104.

[409] *Id*. § 21.1041.

[410] *Id*. § 21.158.

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|---|---|---|
| E:<br>Term Contracts | proposed decision of contract renewal or nonrenewal.[412] | within 15 days of receiving notice of nonrenewal.[413] |

Subchapter F sets forth procedures for hearings,[414] and Subchapter G sets forth additional procedures for appeals to the commissioner.[415] Because a teacher under a term contract need not request a hearing regarding a proposed decision not to renew a term contract, Subchapter G procedures apply to appeals from decisions made after hearings and to appeals from decisions not to renew a term contract.[416] Neither hearings under Subchapter F nor appeals to the commissioner under Subchapter G are subject to the APA.[417] Instead, exhaustion involves the following steps:

- The teacher may file a petition for review with the commissioner "not later than the 20th day after the date the board of trustees or the board subcommittee announces its decision under Section 21.259 [i.e., a decision following a Subchapter F hearing] or the board advises the teacher of its decision not to renew the teacher's contract under Section 21.208 [i.e., the provisions for teachers under term contracts]";[418]

- The school district must file a response within 20 days;[419]

- The commissioner must "consider the appeal solely on the basis of the local record and may not consider any additional evidence or issue" (but may hear oral argument

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[411] *Id.* § 21.159.

[412] *Id.* § 21.206.

[413] *Id.* § 21.207. Note: if the teacher does not request a hearing, the district shall take action to renew or not renew the contract and notify the teacher of that action within 30 days after the notice of proposed nonrenewal was sent. *Id.* § 21.208(a).

[414] *See id.* §§ 21.251-.260.

[415] *See id.* §§ 21.301-.307.

[416] *See id.* § 21.301(a).

[417] *Id.* §§ 21.256(b), 21.301(e).

[418] *Id.* § 21.301(a).

[419] *Id.* § 21.301(b).

or consider written submissions);[420]

- The commissioner must issue a written decision with findings of fact and conclusions of law within 30 days after the district's response (or the district's decision is affirmed);[421]

- Either party may – but is not required to – request a rehearing;[422]

- Either party may file a petition for judicial review within 30 days after receiving notice of the commissioner's decision or, if a request for rehearing was filed, within 30 days after the request is denied by order or by operation of law.[423]

Recent cases address various issues that have arisen under this statutory scheme. In *Ollie v. Plano Independent School District*,[424] a teacher (Ollie) sued her former school district for various discrimination claims. Following mediation, the parties agreed to settle their dispute. The settlement agreement required Ollie to resign after 20 months. When that period expired, the district sent a letter terminating Ollie's employment. Amidst ongoing litigation over whether the 20-month period was a "mistake," Ollie filed a new complaint for breach of contract and wrongful termination. The trial court concluded that it did not have jurisdiction over the breach-of-contract and wrongful-termination claims because Ollie failed to exhaust her administrative remedies.

On appeal, Ollie attempted to justify her failure to exhaust administrative remedies by contending that she did not receive notice of termination under Chapter 21 of the Education Code. However, the commissioner had previously determined that "Ollie is not claiming her contract was terminated by the settlement agreement. Rather, she claims her contract is still in effect and is complaining the [school district] has refused to allow her return to work and refused to pay her after [the end of the 20-month period]."[425] The Austin Court of Appeals thus held that "the procedures set out in chapter 21 of the education code do not apply to

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[420] *Id*. § 21.301(c).

[421] *Id*. § 21.304.

[422] *Id*. § 21.3041.

[423] *Id*. § 21.307.

[424] *Ollie*, 383 S.W.3d at 786.

[425] *Id*. at 792.

Ollie's claims."[426] Instead, because the school district's grievance policies apply to "all employee complaints," Ollie was required to exhaust remedies before filing suit.[427]

In *Nairn v. Killeen Independent School District*,[428] a teacher (Nairn) filed suit alleging multiple claims arising from the non-renewal of her term contract. The El Paso Court of Appeals recognized that Nairn was required to exhaust administrative remedies under the Term Contract Nonrenewal Act in Chapter 21 of the Education Code. The court also noted that Nairn had initiated the district's administrative grievance process, obtained a decision, and appealed to the commissioner. But, because Nairn missed the 30-day deadline to file her petition for judicial review, the trial court lacked jurisdiction over any issues decided by the commissioner. Although Nairn argued that she was not required to exhaust remedies to pursue other statutory and constitutional claims, the court of appeals held that, "[u]nder the principle of collateral estoppel, the Commissioner's fact-findings on the nonrenewal of Nairn's contract bind the trial court."[429] Thus, the trial court lacked jurisdiction to consider *any* claim related to the nonrenewal.[430] *Ollie* highlights a recurring theme in the case law: the failure to exhaust cannot be cured by artful pleading.

3. Suits against school district employees

Section 22.0514 of the Education Code provides that "[a] person may not file suit against a professional employee of a school district unless the person has exhausted the remedies provided by the school district for resolving the complaint." Two recent cases involve exhaustion issues that arose when people attempted to sue school district employees regarding actions involving students.

In *Venegas v. Silva*,[431] a parent sued an assistant principal for allegedly using excessive force in disciplining a student. The parent "followed the [school district's] procedures for the first two levels but failed to present her grievance to the school board of trustees as required in the third level."[432] The Eastland Court of Appeals thus affirmed the

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[426] *Id*.

[427] *Id*. (citing TEX. EDUC. CODE § 7.057(a)(2)(B)).

[428] *Nairn v. Killeen Indep. Sch. Dist.*, 366 S.W.3d 229 (Tex. App.—El Paso 2012, no pet.).

[429] *Id*. at 243.

[430] *Id*. at 244.

[431] *Venegas v. Silva*, No. 11-04-00246-CV, 2012 WL 2865824 (Tex. App.—Eastland July 12, 2012, no pet.).

[432] *Id*. at *1.

trial court's order granting the assistant principal's plea to the jurisdiction. When the student turned eighteen, he attempted to file a second suit on his own behalf. But that could not remedy the failure to exhaust. The court concluded that "the issue of subject-matter jurisdiction is barred by collateral estoppel" and, even if not, the trial court lacked subject-matter jurisdiction because the student "failed to exhaust the available administrative remedies prior to bringing suit."[433]

In *Moore v. Miller*,[434] the next friend for a special-needs student sued a teacher's aide, for personal injuries sustained in a discipline-related incident. It was undisputed that the friend (Miller) did not exhaust administrative remedies, but she claimed she was excused from the requirement by an exception relating to "complaints regarding the discipline of a student with a disability within the scope of the Individuals with Disabilities Education Act."[435] The aide (Moore) filed a plea to the jurisdiction that "simply denie[d] that the . . . exception applies and assert[ed] that Miller failed to plead the exception."[436] However, as the Waco Court of Appeals recognized, "a defendant cannot simply deny the existence of jurisdictional facts and force the plaintiff to raise a fact issue."[437] Because "Miller pleaded sufficient jurisdictional facts and presented some evidence demonstrating that a disputed fact question exists on whether the [IDEA] exception applies," the trial court did not err in denying the plea to the jurisdiction.[438]

### G. Exhaustion by Indigent Inmates Under Chapter 14 of the Civil Practice and Remedies Code

Chapter 14 of the Texas Civil Practice and Remedies Code governs claims by indigent inmates.[439] The chapter was enacted "to control the flood of frivolous lawsuits being filed in the courts of this State by prison inmates, consuming valuable judicial resources with little offsetting benefit."[440]

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[433] *Id*. at *2.

[434] *Moore v. Miller*, No. 10-11-00127-CV, 2012 WL 309512 (Tex. App.—Waco Feb. 1, 2012, no pet.).

[435] *Id*. at *2.

[436] *Id*. at *3.

[437] *Id*.

[438] *Id*.

[439] TEX. CIV. PRAC. & REM. CODE §§ 14.001-.014. Note: Chapter 14 does not apply to suits brought under the Family Code. *Id*. § 14.002(b).

[440] *Hickson v. Moya*, 926 S.W.2d 397, 399 (Tex. App.—Waco 1996, no writ).

Section 14.005 imposes special requirements for claims subject to the Texas Department of Criminal Justice's grievance system.[441] "A remedy provided by the TDCJ grievance system is the exclusive administrative remedy available to an inmate for a claim for relief against the department that arises while the inmate is housed in a [covered] facility."[442] Consequently, "[a]n inmate may not file a claim in state court regarding operative facts for which the grievance system provides the exclusive remedy until:

- the inmate receives a written decision issued by the highest authority provided for in the grievance system; *or*

- if the inmate has not received a written decision, the 180th day after the date the grievance is filed."[443]

If an inmate files a claim that is subject to the grievance system, he or she must file with the court:

- an affidavit or unsworn declaration stating the date that the grievance was filed and the date the written decision was received by the inmate; and

- a copy of the written decision.[444]

"[I]f the inmate fails to file the claim before the 31st day after the date the inmate receives the written decision," the claim shall be dismissed.[445]

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[441] TEX. CIV. PRAC. & REM. CODE § 14.005; *see also* TEX. GOV'T CODE § 501.008(a) (requiring the TDCJ to "develop and maintain a system for the resolution of grievances by inmates housed in facilities operated by the department or under contract with the department . . . ."). Note: Section 14.005 does not apply to claims by inmates who are not housed in TDCJ facilities. *See Frey v. Foster*, No. 06-12-00074-CV, 2012 WL 6674438, at *3 (Tex. App.—Texarkana Dec. 21, 2012, no pet.) (holding that claims brought by an inmate in a county jail are *not* subject to the TDCJ grievance system and, therefore, are not subject to Section 14.005). Nor does Section 14.005 apply to claims that are not grievable under the TDCJ system established pursuant to Government Code § 501.008. *See Ayers v. Smith*, No. 02-11-00254-CV, 2012 WL 3499807, at *2 (Tex. App.—Fort Worth Aug. 16, 2012, no pet.) (holding that claims involving the denial of inmate mail are subject to a separate administrative appeal procedure and, therefore, not subject to CPRC § 14.005).

[442] TEX. GOV'T CODE § 501.008(a).

[443] *Id.* § 501.008(d).

[444] TEX. CIV. PRAC. & REM. Code § 14.005(a).

[445] *Id.* § 14.005(b). Conversely, if the claim is filed prematurely – before the grievance system procedure is complete – the proceedings shall be stayed for up to 180 days. *Id.* § 14.005(c).

As the Tyler Court of Appeals recently explained:

> These requirements serve two purposes. First, the inmate will demonstrate through compliance that he has exhausted his administrative remedies, and second, the information provided by the inmate will enable the court to determine whether the inmate has filed his claim within the requisite time period.[446]

Recent cases show that the courts of appeals require strict compliance with Section 14.005. Any failure to meet the statutory requirements is treated as a failure to exhaust administrative remedies.[447] If an inmate fails to exhaust administrative remedies, his claim has "no arguable basis in law," which is a statutory ground for dismissal under Chapter 14.[448] Thus, courts have dismissed cases because the inmate:

- failed to attach the affidavit or declaration required by Subsection 14.005(a)(1);[449]
- failed to attach a copy of written decision as required by Subsection 14.005(a)(2);[450] or
- failed to file suit by the 30-day deadline set forth in Subsection 14.005(b).[451]

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[446] *McBride v. Tex. Dep't of Crim. Justice – Correctional Insts. Div.*, No. 12-11-00117-CV, 2013 WL 174186, at *3 (Tex. App.—Tyler Jan. 16, 2013, pet. filed).

[447] *See, e.g., Autry v. Thayler*, No. 12-11-00360-CV, 2013 WL 776309, at *2 (Tex. App.—Tyler Feb. 28, 2013, no pet.); *McBride*, 2013 WL 174186, at *2-3.

[448] *See* TEX. CIV. PRAC. & REM. CODE §§ 14.003(a)(2) (permitting dismissal of "frivolous" claims) & (b)(2) (defining "frivolous or malicious" claims to include claims that have "no arguable basis in law or in fact").

[449] *Walters v. Livingston*, No. 10-12-00065-CV, 2012 WL 5381414, at *3-4 (Tex. App.—Waco Nov. 1, 2012, no pet.) (holding that, without an affidavit or unsworn declaration showing when the grievance was filed and when the written decision was received, it was "entirely reasonable for the trial court to conclude that over thirty-one days had elapsed since [the inmate] was informed of the final administrative decision").

[450] *Autry*, 2013 WL 776309, at *2 (because the inmate failed to "provide a written decision from the highest authority provided by the grievance system," he "has not complied with the requirement that he exhaust his administrative remedies, and his lawsuit could not be filed pursuant to Section 501.008(d)(1), Texas Government Code").

[451] *Thomas v. Basse*, No. 07-11-0321-CV, 2013 WL 308990, at *3 (Tex. App.—Amarillo Jan. 25, 2013, no pet.) (dismissing case because the inmate did not file his petition before the deadline in Section 14.005(b)).

*Thomas v. Basse*,[452] a recent decision by the Amarillo Court of Appeals, confirms the reluctance of appellate courts to excuse compliance with statutory requirements. There, the inmate alleged that his grievance investigator caused him to miss the deadline in Section 14.005. The court rejected this excuse, declining "to employ a tolling provision in a statute when the statute's plain language contains none."[453] As the court explained:

> For a prisoner who has already pursued a grievance through administrative channels and has exhausted his administrative remedies, 31 days to convert that grievance into a lawsuit is ample time to act.[454]

Other recent cases involve inmate claims that were dismissed for being beyond the scope of the factual allegations raised in the grievance proceeding. In *Pate v. Grounds*,[455] the Texarkana Court of Appeals dismissed claims that "were not previously addressed by the administrative process." In *Johnson v. Ivey*,[456] the Fort Worth Court of Appeals dismissed an inmate's lawsuit because it was based on different operative facts than those alleged in the administrative grievance. These cases underscore the need to ensure that the factual allegations in the complaint presented during the administrative phase correspond to the factual allegations that support the claims asserted in the trial court.

Finally, the Corpus Christi Court of Appeals' recent decision in *Comeaux v. TDCJ-ID*,[457] shows that a litigant cannot circumvent state-law exhaustion requirements by asserting a claim based on federal law. The inmate in *Comeaux* argued that his federal section 1983 claim should not be dismissed under CPRC Chapter 14, because the "state statute does not apply to federal claims."[458] However, invoking "[w]ell-established law" that "'[s]tates may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted

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[452] *Id*.

[453] *Id*.

[454] *Id*. (quoting *Randle v. Wilson*, 26 S.W.3d 513 (Tex. App.—Amarillo 2000, no pet.).

[455] *Pate v. Grounds*, No. 06-12-00076-CV, 2012 WL 4358632, at *3 (Tex. App.—Texarkana Sept. 26, 2012, pet. denied).

[456] *Johnson v. Ivey*, No. 02-11-00350-CV, 2012 WL 2036447, at *4 (Tex. App.—Fort Worth June 7, 2012, no pet.).

[457] *Comeaux v. TDCJ-ID*, No. 13-11-00446-CV, 2013 WL 398937 (Tex. App.—Corpus Christi Jan. 31, 2013, pet. denied).

[458] *Id*. at *5.

by federal law,'" the court of appeals affirmed the trial court's order of dismissal.[459] As the court noted, "Texas appellate courts often dismiss section 1983 claims pursuant to chapter 14."[460]

### H. Other Recent Exhaustion Cases

Several other recent cases are worthy of mention because they underscore important principles related to the exhaustion doctrine.

*Castillo v. State*[461] illustrates that claims dismissed for failure to exhaust administrative remedies cannot later be resurrected in response to an enforcement action. There, an engineer (Castillo) attempted to challenge an administrative order suspending his professional license. He failed to meet the APA's deadline to file his petition for judicial review, so his lawsuit was dismissed for failure to exhaust administrative remedies. The state then filed a lawsuit to enforce the order. On appeal from a summary judgment in the state's favor, Castillo argued that the order was "arbitrary and unjustified."[462] However, as the Austin Court of Appeals recognized, Castillo's arguments were "impermissible collateral attacks on a final Board order."[463] The court thus overruled the issue and affirmed summary judgment.[464]

In *City of Jacksboro, IESI TX Landfill, LP v. Two Bush Community Action Group*,[465] the Austin Court of Appeals rejected three different challenges relating to the exhaustion of administrative remedies. The case arose from the Texas Commission on Environmental Quality's (TCEQ's) decision to grant a permit for the city to build a solid waste landfill. A community action group (Two Bush), which had opposed the permit request, filed a motion for rehearing that was subsequently amended and overruled by operation of law. After Two Bush filed a petition for judicial review, the city and the landfill company (IESI) filed a plea

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[459] *Id*. at *5 (quoting *Thomas v. Bush*, 23 S.W.3d 215, 217-18 (Tex. App.—Beaumont 2000, pet. denied)). The *Thomas* case cited *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

[460] *Comeaux*, 2013 WL 398937, at *5.

[461] *Castillo v. State*, No. 03-11-00503-CV, 2012 WL 3793276 (Tex. App.—Austin Aug. 29, 2012, no pet.).

[462] *Id*. at *3.

[463] *Id*. at *4.

[464] *Id*.

[465] *City of Jacksboro, IESI TX Landfill, LP v. Two Bush Cmty. Action Grp.*, No. 03-10-00860-CV, 2012 WL 2509804, at *1 (Tex. App.—Austin June 28, 2012, no pet.).

to the jurisdiction on the ground that Two Bush's original motion for rehearing was "legally insufficient to preserve any error for judicial review" and the amended motion was untimely.[466] The trial court denied the plea but reversed the order granting the permit. All parties appealed.

It was undisputed that the original motion for rehearing was faxed to the TCEQ on the November 25, 2009 deadline. Nevertheless, IESI argued that, because the motion admitted into evidence was date-stamped November 30, the trial court lacked jurisdiction. The court of appeals disagreed. As the court explained, "Two Bush pleaded facts sufficient to affirmatively demonstrate the district court's subject-matter jurisdiction" and those facts were not challenged.[467] Accordingly, the "failure to include documentary evidence of the timely filing did not affect the district court's subject-matter jurisdiction."[468]

In its second challenge, IESI argued that, even if the original motion for rehearing was timely, "the APA does not allow a party to file an amended motion for rehearing after the filing deadline" and, therefore, the trial court lacked jurisdiction over claims based on the amended motion for rehearing.[469] Again, the court of appeals disagreed. Because the timely motion conferred jurisdiction, the court recognized that "the filing of an amended motion for rehearing, depending on the sufficiency or adequacy of the original motion for rehearing, may affect preservation-of-error considerations."[470] However, IESI had not challenged preservation of error, so its second issue was overruled.

In the third and final challenge to jurisdiction, IESI and the city argued that, because Two Bush's petition for judicial review was filed before the amended motion for rehearing was overruled by operation of law, the trial court's jurisdiction was not properly invoked. Again, the court of appeals disagreed. As the court observed:

> the request for an extension of time, the purported grant of that extension, and the filing of the amended motion all occurred after the filing deadline. If the APA does not allow a party to amend a motion for rehearing after the filing deadline, then it follows that it would not allow an agency to grant a request to extend the filing deadline that was made after the deadline passed.

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[466] *Id*. at *2.

[467] *Id*. at *5.

[468] *Id*.

[469] *Id*. at *6.

[470] *Id*.

> Accordingly, the APA provision allowing an agency to extend motion-for-rehearing deadlines was not triggered.[471]

In *City of San Antonio v. Rogers Shavano Ranch, Ltd.*,[472] property owners and developers sued the city for a declaration recognizing their allegedly vested rights in a development project. "Assuming without deciding that the City has exclusive jurisdiction over requests for the recognition of vested rights," the San Antonio Court of Appeals rejected the city's argument that the plaintiffs had not exhausted administrative remedies.[473] The plaintiffs followed the city's administrative procedure and obtained a final decision from the city council before filing suit. The fact that the lawsuit sought recognition of only part of the original acreage at issue was immaterial, because the lesser amount was included in the original tract and "vested rights attach to the project, not the land, and are not affected by subsequent conveyances of portions of the original acreage."[474]

In *Holmes v. Southern Methodist University*,[475] a graduate student (Holmes) who failed her comprehensive examinations and was not awarded a graduate degree sued SMU for breach of contract, fraud, and DTPA violations. The trial court granted SMU's motion to dismiss for lack of jurisdiction, which was based on Holmes's alleged failure to exhaust administrative remedies. Holmes challenged that decision, arguing that "SMU's affirmative defense of failure to exhaust administrative remedies was supported by only the arguments of SMU's attorneys."[476] The Dallas Court of Appeals agreed, concluding that a short, conclusory affidavit from a school administrator, which was the only document attached to SMU's motion to dismiss, "makes no showing" to support SMU's failure-to-exhaust argument.[477] Without evidence of SMU's academic administrative procedure, the trial court erred in dismissing the case.[478]

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[471] *Id*. at *7.

[472] *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, 383 S.W.3d 234 (Tex. App.—San Antonio 2012, pet. denied).

[473] *Id*. at 247.

[474] *Id*. at 248.

[475] *Holmes v. S. Methodist Univ.*, No. 05-11-01178-CV, 2013 WL 1857932, at *1 (Tex. App.—Dallas May 1, 2013, no pet. h.).

[476] *Id*. at *3.

[477] *Id*. at *4.

[478] *Id*. at *5.

## VI. Conclusion

The "first principles" of exhaustion may be well established, but their precise application depends on the particular statutory and regulatory scheme and the facts in a given case. Recent case law illustrates various problems that may arise and should be anticipated by practitioners. This section offers a suggested framework for analyzing exhaustion issues. Five basic questions should be asked: (1) Is exhaustion required? (2) What procedures must be exhausted? (3) What are the applicable deadlines? (4) Are the pleadings and proof sufficient to demonstrate exhaustion? (5) Can an apparent failure to exhaust be excused or cured?

*Is exhaustion required?*

The threshold question to be considered in any case is whether exhaustion is required. The answer will depend on statutory construction: (i) does an agency have exclusive jurisdiction to make an initial determination; and (ii) in suits against governmental entities, is a waiver of immunity conditioned on exhaustion of administrative remedies? If the answer to either question is yes, exhaustion is required unless an exception applies.

Section III of the paper highlighted recognized exceptions to the exhaustion requirement. Any party intending to rely on an exception should carefully evaluate the risks. If a court concludes that the exception is inapplicable, the consequences could be fatal, especially if an applicable deadline has passed and exhaustion is no longer possible.

*What procedures must be exhausted?*

As recent cases confirm, it is often difficult for practitioners to determine what administrative remedies must be exhausted. The agency's enabling statute, construed in conjunction with the APA to the extent applicable, provides the best starting point. In addition, recent cases surveyed in Section V illustrate that a party sometimes must exhaust remedies found elsewhere, such as in an agency's rules, an employer's grievance policy, or a local tax district's procedures. But be aware that prudence has two edges: "over-exhaustion" may be fatal if, by trying to comply with procedures that are *not* required, a plaintiff misses a mandatory and/or jurisdictional statutory deadline.

*What are the applicable deadlines?*

Not all procedural requirements have specific deadlines, but when they do, practitioners must pay close attention to what actions trigger the deadline and what actions are needed to comply with the deadline. In this regard, it is important to keep in mind the case as a whole. Even if some initial actions are not subject to specific deadlines, time limits may apply to subsequent actions. A party therefore may need to take prompt action early on,

even in the absence of an immediate deadline. Not planning ahead could result in a failure to properly exhaust administrative remedies and dismissal of a case for lack of jurisdiction.

*Are the pleadings and proof sufficient to demonstrate exhaustion?*

Recent cases also underscore the importance of pleadings and proof when exhaustion might be an issue. Plaintiffs should allege (and be ready to prove) facts establishing jurisdiction, *i.e.*, facts that set out a procedural history showing that all administrative remedies were timely exhausted. Defendants challenging jurisdiction should be prepared to establish what remedies were applicable and document which of those were not exhausted.

*Can an apparent failure to exhaust be excused or cured?*

If the statutory requirements are clear, the consequence of failing to exhaust administrative remedies is usually dismissal with prejudice. Courts are generally unwilling to apply exceptions to exhaustion requirements, excuse failures to comply, or hold that the government is estopped from challenging jurisdiction. Nor are courts receptive to plaintiffs who try to circumvent exhaustion requirements by artful pleading or collateral attack. However, if the statutory requirements to exhaust administrative remedies are unclear, courts on occasion may give those who attempt to comply with all potentially applicable requirements some leeway. In addition, when a failure to exhaust does not involve missed deadlines, courts may order abatement, dismissal without prejudice, or a remand to provide an opportunity to cure the failure.

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The foregoing framework emphasizes the need for careful analysis of exhaustion issues at the outset and throughout any administrative law case. Jurisdictional challenges are common, and recent cases show that exhaustion requirements sometimes can be complex and compliance difficult. Following the guidelines discussed above should help to ensure that administrative claims are fully presented for consideration by the agency and that administrative remedies are properly exhausted prior to judicial review.