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The History and Scope of the Virginia Declaratory Judgments Act

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THE HISTORY AND SCOPE OF THE VIRGINIA DECLARATORY JUDGMENTS ACT

I. INTRODUCTION

The Virginia Declaratory Judgments Act[1] ("Act") was passed in 1922 with "a view to making the courts more serviceable to the people."[2] The purpose of the Act "is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor."[3] The Act derives from the equitable bill *quia timet* to which parties resorted when apprehensive of future damage. While the Virginia courts applied the bill *quia timet* in narrow, historically limited contexts, the scope of the Act was developed through extensive litigation. While the focus of this litigation was over the meaning of "actual controversy" and "actual antagonistic assertion and denial of right,"[4] the courts, in their sound discretion, fashioned additional limitations on the Act's utility.

Section II of this comment defines the principle of *quia timet*, traces the historical use of the bill *quia timet* in Virginia, and places the Act in perspective. Section III defines the scope of the Act, concentrating on the application of the "actual controversy" requirement, the necessity of the "justiciable interest" requirement, and the traditional and modern discretionary limitations. Section IV concludes that the courts are confronted with counterweighing considerations of basic fairness to the parties and judicial restraint when they determine whether to entertain an action for declaratory judgment.

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1. VA. CODE ANN. §§ 8.01-184 to -191 (Repl. Vol. 2000 & Cum. Supp. 2006).
2. *Id.* § 8.01-191 (Repl. Vol. 2000).
3. *Id.*
4. *Id.* § 8.01-184 (Repl. Vol. 2000).

II. HISTORY OF THE DECLARATORY JUDGMENTS ACT

A. *The Principle of* Quia Timet

The Declaratory Judgments Act of Virginia is rooted in the equitable principle of *quia timet*. The principle was well summarized by the Supreme Court of Virginia in *Randolph v. Kinney*:

> When a person is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen, or be occasioned by the neglect, inadvertence or culpability of another, or where any property is bequeathed to one after the death of another, and which the former is desirous of having [it] secured safely for his use; or where a surety is fearful of injury, from the neglect of his principal to pay the debt; in all these cases, and others of this kind, the bill *quia timet* may be resorted to.[5]

Thereby, the court defined the equitable principle of *quia timet* as a remedy for a person apprehensive of possible or probable future damage.

In *Turpin v. Locket*, the court found occasion to apply the principle of *quia timet* to an illustrative set of facts.[6] In *Turpin*, members of the Episcopal Church sued to enjoin the defendants, overseers of the poor, from selling glebe lands claimed by the church for the benefit of the poor.[7] The Act of 1802 directed the defendants to sell the lands under the theory they were held by the Church of England, and when that church was disestablished by the British government after the American Revolution, such lands revested in the Commonwealth.[8] The plaintiffs claimed the land belonged to the church under laws establishing the Church of England as an independent church of the Commonwealth and enabling churches to purchase glebe lands for the use of the ministers of the church.[9] The plaintiffs also argued that the Act of

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5. Randolph v. Kinney, 24 Va. (3 Rand.) 394, 397–98 (1825) (alteration in original) (internal quotations omitted) (holding that the plaintiff could not maintain a bill *quia timet* because he was not a "surety; no expectant of a bequest after the death of another; nor [did he have] any thing to apprehend from the neglect, inadvertence, or culpability of another").

6. *See* Turpin v. Locket, 10 Va. (6 Call) 113 (1804).

7. *Id.* at 113–14, 157.

8. *See id.* at 114–15.

9. *See id.* at 113–14.

1802 was an unconstitutional deprivation of their property.[10] The court, in holding for the plaintiffs, found:

> [N]o doubt as to the [court's] jurisdiction. For it is, in substance, a bill of *quia timet*, brought to protect a whole society against disturbance, under colour of a statute, alleged to be unconstitutional; and to prevent injury to its property, in consequence of the sales, and the multiplicity of suits, which would follow from them.[11]

The facts presented a classic case of the use of the bill *quia timet*: two parties claiming vested rights in the same property, a dispute over the validity and constitutionality of a statute, a risk of loss to the plaintiffs from the imminent actions of the defendants, and prevention of a number of subsequent suits that would result through future application of the challenged statute. The specific requirements for properly sustaining a bill *quia timet* developed through application of the bill in certain distinct contexts.

B. *Uses of the Bill* Quia Timet

1. Use of Bill *Quia Timet* by Sureties and Creditors

A common use of the bill *quia timet* was by sureties seeking to be relieved of liability on a note, bond, or other obligation. It was well established that a surety, "apprehensive of loss from the neglect of the creditor to enforce his rights against the principal debtor," could bring suit directly against the principal debtor to compel him to pay the creditor "to avert the danger" and exonerate the surety from liability.[12] A surety's right to bring a bill *quia timet* was so well recognized that the denial of such an opportunity by the creditor released the surety from liability.[13] A creditor

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10. *See id.* at 116, 119.

11. *Id.* at 178 (alteration in original).

12. Wright's Adm'r v. Stockton, 32 Va. (5 Leigh) 153, 154–55 (1834); *e.g.*, Norris v. Crummey, 23 Va. (2 Rand.) 323, 334 (1824); *see, e.g.*, Stephenson v. Taverners, 50 Va. (9 Gratt.) 398, 404 (1852) (holding that a surety of a dead principal may file a bill *quia timet* against the creditor and the estate of the principal "to make payment of the debt so as to exonerate himself from his responsibility").

13. *See, e.g.*, Shannon v. McMullin, 66 Va. (25 Gratt.) 211 (1874). A surety, who has a right at any time to pay the debt, or by a bill *quia timet* to compel the principal to pay it, is released from liability:

> [I]f the creditor, without the consent of the surety, make[s] a new contract with the principal, found on valuable consideration, to postpone the day for the payment of the debt for a certain period (however short) beyond the day on which it was to be paid by the terms of the contract on which the surety

or surety often used the principle of *quia timet* to secure by attachment a debt payable at a subsequent day when the obligor was a nonresident.[14] For example, a surety could use a bill *quia timet* against an absconding principle debtor to attach his assets in the hands of another,[15] or by a partner upon the dissolution of a partnership to attach the assets of his nonresident partner and apply them to the debts of the partnership.[16]

Jones v. Clark is an example of another interesting use of the bill *quia timet* by a surety.[17] In *Jones*, it was alleged that the executor sold the testator's assets for bonds and subsequently converted the bonds for his own use.[18] It was further alleged that the purchasers of the bonds knew of the executor's intent to commit conversion and, therefore, were liable on the bonds for their fraudulent participation in the crime.[19] The court held that the sureties had a right to file on the bonds a bill *quia timet*.[20] Although "they had paid nothing, and nothing had been recovered against them," the sureties were parties to a separate suit brought by the beneficiaries of the estate against the executor, and an adverse judgment was imminent in that suit.[21] The court found that "[i]n this state of danger and apprehended loss" the sureties had an "unquestionable right" to file a bill *quia timet* against the executor and purchasers "to compel them to pay the amount for which they might be liable . . . in ease and exoneration of the sureties."[22]

In some instances, a surety's failure to bring a bill *quia timet* to protect his or her interest will justify the court finding him or her liable. In *Lacy v. Stamper*, the executor of an estate failed to use reasonable diligence when he did not collect amounts due on

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was liable; or if the creditor, without the consent of the surety, release[s] any lien which he may have on any property of the principal for the security of the debt.

Id. at 212. The surety will be released from liability "without regard to the extent of damage actually sustained by the surety." *Id.*

14. *See* Williamson v. Bowie, 20 Va. (6 Munf.) 176, 179 (1818).

15. *See id.*; Moore v. Holt, 51 Va. (10 Gratt.) 284, 285 (1853).

16. *See* M'Kim v. Fulton, 10 Va. (6 Call) 106, 106–07, 112 (1806).

17. Jones v. Clark, 66 Va. (25 Gratt.) 642 (1875), *rev'd*, Neal v. Clark, 95 U.S. 704 (1877).

18. *Id.* at 645.

19. *Id.*

20. *Id.* at 675.

21. *Id.*

22. *Id.*

bonds owed to the estate.[23] The executor did not institute an action to collect on the bonds while the obligors were solvent.[24] The executor's successor, upon his qualification, promptly filed suit to collect on the bonds.[25] Suit was delayed, however, because of the Civil War, and the obligors were no longer solvent by the time judgment could be obtained.[26] Holding that the beneficiaries of the estate could proceed against the negligent executor's sureties before proceeding against the executor, the court noted:

> [T]o the extent of any payment they may make in discharge of their liability . . . and even before making such payment, [the sureties] are entitled, by a proceeding *quia timet,* to compel [the executor] to account for and pay any money for which they may be liable, in exoneration of the sureties. In fact, so far as parties and subjects primarily liable for the claim are concerned, the sureties have heretofore, in effect, been coplaintiffs with the legatees [of the estate] in the prosecution of this suit . . . .[27]

In *Jones*, the sureties, who were in a state of "danger and apprehended loss," had an "unquestionable right" to file a bill *quia timet* against the negligent executor to compel him to recover the amounts due on the bonds while the obligors were still solvent, in exoneration of the sureties.[28] Failing to do so, the sureties were liable on the bonds. It is important to note, however, that the law was clear that a party's failure to bring a bill *quia timet* for "precautionary or preventive remedy" would not exonerate another from primary liability.[29]

A creditor could use a bill *quia timet* to avoid a multiplicity of suits. In *Smith v. Thompson*, the plaintiffs attempted to use a bill *quia timet* to short-cut a complicated web of liability on a bond.[30] A simplified account of the facts follow: Mitchell and Thompson were joint obligors on a bond; Mitchell paid half of the amount due on the note; Thompson executed to Mitchell an indemnity bond to secure Thompson's payment of the remainder due on the original bond; Smith was a surety on the indemnity bond; repre-

23. *See* Lacy v. Stamper, 68 Va. (27 Gratt.) 42, 47–49 (1876).

24. *Id.* at 49.

25. *Id.*

26. *Id.*

27. *Id.* at 60.

28. *See Jones*, 66 Va. (25 Gratt.) at 675 (alteration in original) (decided just a year earlier).

29. *See* Brown v. Lambert, 74 Va. (33 Gratt.) 256, 265 (1880).

30. Smith v. Thompson, 48 Va. (7 Gratt.) 112 (1850).

sentatives of Mitchell's executor, threatened with liability on the original bond, brought suit against Smith to indemnify themselves against any liability.[31] The court held that, because Mitchell's executor was not party to the indemnity bond, the plaintiffs could proceed "only by treating their suit as a bill *quia timet*" for "subrogation by anticipation to the successive remedies of others."[32] In other words, the bill *quia timet* allowed the plaintiffs to proceed directly against Smith on the indemnity bond.[33] While the plaintiffs' bill *quia timet*, which sought an equitable remedy, was ultimately barred under the defense of laches, this case still remains a great illustration of the use of the bill *quia timet* for "subrogation against those who ought ultimately to be subjected to the burthen with which [the plaintiffs] are threatened."[34]

2. Use of a Bill *Quia Timet* to Remove Cloud on Title

While the legal scope of the principle of *quia timet* and sureties was well settled in Virginia, the applicability of the principle to resolving title issues was not. In an 1877 case, *Carroll v. Brown*, the court quoted Judge Story:

> It is obvious that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments, may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest.[35]

Stearns v. Harmon was the perfect case for the court to apply the principle of *quia timet* to a dispute over title to land. In *Stearns*, "the owner was *in possession*, and could not bring ejectment against the adverse claimant, not in possession, to try the question of title."[36] In an effort to circumvent the plaintiff's remedy at law, "the adverse claimant standing off" was "content not to bring his action then against the owner . . . thus showing that he was

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31. *Id.* at 112–14.

32. *Id.* at 117 (alteration in original).

33. *Id.* at 117–18.

34. *Id.*

35. Carroll v. Brown, 69 Va. (28 Gratt.) 791, 795 (1877) (internal quotations omitted) (quoting 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 694 (F.V. Balch ed., 11th ed. 1873)).

36. Stearns v. Harmon, 80 Va. 48, 57 (1885).

holding back for some sinister purpose, the tendency of which was to seriously impair if not destroy the market value of the owner's title."[37] In subsequent decisions, the court interpreted *Stearns* narrowly, holding that a plaintiff could rely on a bill *quia timet* to quiet title to land only when the plaintiff was in possession of the land in dispute; and thus, could not maintain an action at law for ejectment.[38] The court, however, did not make a distinction based on the motives of the parties or on whether the dispute was a result of fraud or mistake.[39]

The White Act provided that whenever the court had jurisdiction to remove clouds from title to real estate by bill *quia timet* because the party was in possession, the court would have jurisdiction when the party was not in possession.[40] In *Payne v. Buena Vista Extract Co.*, the court held that subsequent to the passage of the White Act, the decision of whether the court had jurisdiction to hear a suit to quiet title remained "undoubtedly in the sound discretion of such courts, when the reality of the apprehended danger of injury from the alleged cloud upon the title is in question, as aforesaid, but not otherwise."[41] When two parties to the bill *quia timet* both claimed legal title to the same tract of land under separate deeds, and a third party exercised acts of ownership under color of title, there was "no doubt upon the point of the reality of such apprehended danger."[42]

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37. *Id.*

38. *See, e.g., id.*; Austin v. Minor, 107 Va. 101, 104, 57 S.E. 609, 610 (1907). The bill *quia timet* was perfect for an adverse possessor seeking to remove any cloud from title to the land he possessed. *See Austin*, 107 Va. at 104, 57 S.E. at 610. In *Kane v. Va. Coal & Iron Co.*, 97 Va. 329, 331, 33 S.E. 627, 628 (1899), the court held:

> Whether or not the jurisdiction will be exercised, depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate where the estate or interest is legal—a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done.

(internal quotations omitted) (quoting IV JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1399 (Spencer W. Symons ed., 1994)).

39. *Stearns*, 80 Va. at 57.

40. *See* Payne v. Buena Vista Extract Co., 124 Va. 296, 306–08, 98 S.E. 34, 37–38 (1919). Prior to passage of the White Act, one could not remove cloud from title without legal title and actual possession. *Id.* at 307, 98 S.E. at 38.

41. *Id.* at 308, 98 S.E. at 38.

42. *Id.*

III. SCOPE OF THE DECLARATORY JUDGMENTS ACT

A. *Early Applications of the Declaratory Judgments Act*

The Act was passed in 1922.[43] The first attempts to apply the Act were efforts to cure procedural deficiencies so that a decision on the merits could be obtained. In *Schmelz Bros., Bankers, Inc. v. Quinn*, a deed of trust provided for a commission of five percent to the trustee following the sale of the real estate.[44] Under the circumstances of the case, however, "[t]he court undertook by [] decree to administer the trust created by the deed."[45] The trustees appealed an order of the trial court fixing their commission at the rate prescribed for judicial sales.[46] The Supreme Court of Virginia held that a ruling on the issue was "possibly warranted" by the Act because the issue was "said to be a question upon which the trial courts are not in harmony, and counsel on both sides have asked the ruling of this court on the subject."[47] The court entertained the appeal despite finding that the trial court's ruling was in favor of the appellant, and "it ha[d] no just ground of complaint."[48] In *Craig-Giles Iron Co. v. Epling*, the trial court granted the defendant's demurrer based on a lack of jurisdiction; but on appeal, both parties requested that the court "proceed to a consideration of the case upon its merits as if no demurrer had been filed."[49] Without explanation, the court decided the question on the merits, "feeling warranted in so doing" in light of the Act.[50]

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43. VA. CODE ANN. § 8.01-184 (Repl. Vol. 2007) provides that:

> In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Id.

44. Schmelz Bros., Bankers, Inc. v. Quinn, 134 Va. 78, 96, 113 S.E. 845, 850 (1922).
45. *Id.*, 113 S.E. at 851.
46. *See id.* at 97, 113 S.E. at 851.
47. *Id.* at 96, 113 S.E. at 851.
48. *Id.*
49. Craig-Giles Iron Co. v. Epling, 135 Va. 74, 77, 115 S.E. 534, 535 (1922).
50. *Id.* at 78, 115 S.E. at 535.

In another early case, *Mullins v. Morgan*, the court rebutted the defendants' argument that they were prejudiced by the plaintiffs' delay in bringing a lawsuit because the defendants could have asserted their rights under the Act.[51] The court opined that subsequent to the passage of the Act, "it is as much incumbent upon an alleged wrongdoer to assert his rights in a court of law as it is incumbent upon one whose alleged rights are being violated to assert them in a court of equity."[52] Furthermore, "[a]fter knowledge that a controversy has arisen, the duties of the respective parties are reciprocal."[53]

B. *The Requirement of Actual Controversy*

The court formally upheld the constitutionality of the Act in *Patterson v. Patterson*.[54] In *Patterson*, the plaintiffs purchased land from executors who, under the terms of the will, had no right to sell the land.[55] The defendants were the infant heirs of the devisee who assented to the sale.[56] "Construing the act liberally," the court held that the purchasers could "avail themselves of the statute and have their rights adjudicated" before "such time as the infant defendants might see fit to sue to recover possession" of the land.[57] The court noted that the plaintiffs' bill and the infant defendants' cross-bill were, in effect, bills *quia timet*, but jurisdiction "was clearly conferred" upon the courts by the Act whether or not the principle of *quia timet* conferred jurisdiction.[58]

The court could "find nothing in the statute which contravenes any of the provisions of the State or Federal Constitutions."[59] The effect of the Act was merely "to increase the usefulness of the courts and remove doubt and uncertainty as to the final result of legal controversies, by empowering the courts to enter declaratory judgments and decrees touching the rights of the parties in such cases."[60] In upholding the Act's constitutionality, the court noted that England, Australia, and Canada enacted similar statutes

51. Mullins v. Morgan, 176 Va. 201, 211, 10 S.E.2d 593, 597 (1940).
52. *Id.*
53. *Id.*
54. Patterson v. Patterson, 144 Va. 113, 118, 131 S.E. 217, 218 (1926).
55. *Id.* at 115–16, 131 S.E. at 218.
56. *Id.* at 115, 131 S.E. at 217–18.
57. *Id.* at 122, 131 S.E. at 219–20.
58. *Id.* at 118, 131 S.E. at 218.
59. *Id.* at 119, 131 S.E. at 219.
60. *Id.* at 119–20, 131 S.E. at 219.

and that "[t]he constitutionality of these statutes has been considered by the courts of several states, and sustained in each instance, except in Michigan."[61] The court distinguished the Michigan statute because "it authorize[d] the courts to make binding declarations of rights where no judicial controversy [was] involved" and therefore required "the performance of nonjudicial acts, in violation of the clause of the Constitution which vests judicial power in the courts."[62] The key distinction between the unconstitutional Michigan statute and constitutional Virginia statue was the Michigan statute "did not limit the operation of the statute to cases of actual controversy and actual antagonistic assertion and denial of right."[63] *Patterson* suggests that the Virginia statute's express requirements of actual controversy and actual antagonistic assertion and denial of right are constitutional limitations on the scope of the Act. [64]

The court, in *Patterson*, expounded upon the constitutional requirement of actual controversy with the following language:

> The act contemplates that the parties to the proceeding shall be adversely interested in the matter as to which the declaratory judgment is sought and their relation thereto such that a judgment or decree will operate as *res adjudicata* as to them. It authorizes the entry of such judgment before the right is violated, and even though no consequential relief is or could be asked for or granted. It does not, however, confer upon the courts the power to render judicial decisions which are advisory only.[65]

The court found that the facts in *Patterson* met the actual controversy constitutional requirement because:

> The bill avers that the purchasers of the lots have a right to retain them in their possession and have their titles to them confirmed, while the cross-bill of the infant defendants asserts that the purchasers have no right to the lots and that these defendants' ownership of an undivided one-half interest in them should be established by the court.[66]

In *Chick v. MacBain*, the court reaffirmed that the actual controversy requirement is the central issue in the court's determi-

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61. *Id.* at 120, 131 S.E. at 219.
62. *Id.* at 121, 131 S.E. at 219.
63. *Id.* (internal quotations omitted).
64. *See id.*
65. *Id.* at 120, 131 S.E. at 219.
66. *Id.* at 119, 131 S.E. at 219.

nation of whether a case may be properly adjudicated in a declaratory judgment action.[67] In *Chick*, the plaintiff's predecessor leased a storehouse to the defendants for a period of five years at a fixed rate for the first thirty months and at a higher fixed rate for the remaining thirty months.[68] The lease provided that either party could terminate the lease at the end of the five-year period by written notice to the other party; but that otherwise the lease would continue "upon the same terms and conditions as herein contained for another period of five years."[69] When no such notice was given, the plaintiff brought suit seeking a declaratory judgment that the defendants should pay the higher rate for the entire second period of five years according to the terms of the lease.[70] The defendants contended that they should pay the lower rate for the first thirty months and the higher rate for the second thirty months, just as they had done in the prior five-year period.[71] The court held that it had jurisdiction under the Act to adjudicate the dispute despite an available and complete remedy at law:

> The test of the applicability of the statute is the determination of the existence of an actual controversy. The manifest intention of the legislature . . . was to provide for a speedy determination of actual controversies between citizens, and to prune, as far as is consonant with right and justice, the dead wood attached to the common law rule of "injury before action" and a multitude of suits to establish a single right.
>
> The fact that a plaintiff or complainant might, by the institution of an action or suit or series of actions or suits, eventually, through protracted and continuous litigation, have determined the same questions that may be determined once and for all in a declaratory judgment proceeding, has never, so far as we find, been held by the

67. Chick v. MacBain, 157 Va. 60, 66–67, 160 S.E. 214, 216 (1931). While the focus of the court's inquiry is whether there is an actual controversy, a finding of actual controversy does not end the inquiry, and a demurrer to a motion or petition for declaratory judgment will be sustained when the motion or petition otherwise fails to show a right to relief. *See* County of Chesterfield v. Town & Country Apartments & Townhouses, 214 Va. 587, 588, 203 S.E.2d 117, 118 (1974) (holding that a declaratory judgment was not proper despite the existence of an actual controversy where the petition failed to allege compliance with a statute requiring any demand on the county be first submitted to the board of supervisors); First Nat'l Trust & Sav. Bank v. Raphael, 201 Va. 718, 723, 113 S.E.2d 683, 688 (1960) (dismissing the petition for declaratory judgment despite the existence of an actual controversy where the court determined, on the merits, that the petition did not state a case entitling the plaintiff to the relief sought). *Cf. infra* section III.D.1.

68. *Chick*, 157 Va. at 63–64, 160 S.E. at 215.

69. *Id.* at 64, 160 S.E. at 215.

70. *Id.*

71. *Id.* at 64–65, 160 S.E. at 215.

> courts to deprive the court of jurisdiction to enter a declaratory judgment wherein the entire rights of the parties can be determined and settled once and for all.[72]

The above language is dicta; there is no reason to believe that the case did not present an actual controversy or that a declaratory judgment would prevent a "multitude of suits." The test of applicability, however, was subsequently used often to test the scope of the Act.

The actual controversy requirement can be defined only through an analysis of the courts' determinations of whether a particular set of facts meet the requirement.[73] In *D.D. Jones Transfer & Warehouse Co. v. Commonwealth*, the court was confronted with a set of contentions that did not constitute an actual controversy.[74] In that case, a public service corporation applied for a certificate of public convenience and necessity, which would authorize it to act as a common carrier of property by motor vehicle between certain cities.[75] The court held that the State Corporation Commission did not abuse its discretion in failing to render a declaratory judgment construing the statute authorizing the granting of such certificates and found that the "petitioner was unwilling to introduce evidence for fear that the evidence, if produced, might show that it had no case under any possible construction of the statute."[76] In other words, the public service corporation failed to allege facts establishing an actual controversy. Attempting to illustrate the notion of actual controversy, the court opined:

> It was not intended that the statute should be invoked in every case where a controversy was possible. One contemplating a future divorce should not be permitted to invoke it to ascertain what corrobo-

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72. *Id.* at 66–67, 160 S.E. at 216.

73. *See, e.g.*, Hagan v. Dungannon Lumber Co., 145 Va. 568, 134 S.E. 570 (1926) (holding that plaintiff failed to allege an actual controversy when the bill simply alleged that the plaintiff owned a large amount of valuable property, was largely indebted to defendant creditors, and was unwilling or incompetent to manage its own business); Tony Guiffre Distrib. Co. v. Va. Alcoholic Beverage Control Comm'n, 5 Va. Cir. 243 (Cir. Ct. 1985) (Alexandria City) (holding that the petition seeking a declaration that a statute did not prohibit wholesalers of alcoholic beverages from providing routine business entertainment to retail licensees concerned an actual controversy, where the Commission stated its position that such entertainment was prohibited).

74. D.D. Jones Transfer & Warehouse Co. v. Commonwealth, 174 Va. 184, 5 S.E.2d 628 (1939); *see also* Treacy v. Smithfield Foods, Inc., 256 Va. 97, 105, 500 S.E.2d 503, 507 (1998) (holding that a declaratory judgment action could not be maintained in a cross-bill because the actual controversy involved a non-party and not the cross-bill defendant).

75. *D.D. Jones Transfer & Warehouse Co.*, 174 Va. at 186–87, 5 S.E.2d at 628.

76. *Id.* at 192, 5 S.E.2d at 631.

> ration of his evidence was necessary. That question would be incidental to and should be decided in due course when the cause came on to be heard, just as unnumbered statutes must be construed in orderly procedure in unnumbered cases.[77]

The court was unwilling to construe the statute when the controversy between the parties, as to its interpretation, was not actual but only possible. The court would not determine an issue that may be in controversy between the parties without adjudicating the whole controversy.

In *Lynchburg Traffic Bureau v. Norfolk & Western Railway*, the court similarly did not find an actual controversy sufficient to invoke the court's jurisdiction to enter a declaratory judgment.[78] The Lynchburg Traffic Bureau petitioned the State Corporation Commission to enter a judgment declaring the legal rate on bulk ground limestone moving in carload lots between two Virginia cities.[79] The petition for declaratory judgment did "not further identify the petitioner or indicate what its interest is in the question, or in what way or on what ground it has a right to institute or maintain the petition."[80] On appeal, the Supreme Court of Virginia held that the petition was subject to dismissal for failure to present an actual controversy.[81]

Fairfax County Park Authority v. Brundage provides a good example of facts satisfying the requirement of actual controversy.[82] The dispute was between the Park Authority and the Wisconsin Alumni Research Foundation over valuable property devised to the Park Authority.[83] The property was devised in fee simple upon the condition that the property be used exclusively as a nature preserve and alternatively to the Research Foundation if any public authority took part of the property for any inconsistent use.[84] After the testator's death, the executor of the estate entered into an agreement with the Park Authority setting forth the conditions of the will.[85] The agreement provided that no road

77. *Id.* at 194, 5 S.E.2d at 632.

78. Lynchburg Traffic Bureau v. Norfolk & W. Ry. Co., 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966).

79. *Id.*

80. *Id.*

81. *Id.*

82. Fairfax County Park Auth. v. Brundage, 208 Va. 622, 159 S.E.2d 831 (1968).

83. *Id.* at 622–23, 159 S.E.2d at 832.

84. *Id.* at 623, 159 S.E.2d at 832.

85. *Id.*

would be constructed on the property other than the State Highway Commissioner's proposed widening of Kirby Road, which runs along the northern boundary of the property.[86] The Park Authority sought a judgment declaring that the agreement with the executor was in compliance with the will, and the Research Foundation sought a declaration that the proposed uses of the property would violate the conditions in the will.[87] The court held that the action for a declaratory judgment presented an actual controversy and was "an issue that was ripe for decision even though the proposed taking had not been effected."[88]

Blodinger v. Broker's Title, Inc. further tested the outer bounds of the scope of the Act.[89] In that case, a group of attorneys brought suit against a title insurance company seeking a declaratory judgment that the defendant was engaged in the unauthorized practice of law.[90] The company asserted that no actual controversy existed between the parties and argued that while there was a disagreement as to whether it was engaged in the unauthorized practice of law, "no rights or obligations of the attorneys have been infringed entitling them to a declaration of this fact."[91] The court, however, found that the attorneys had a "vested interest" in the determination because "[t]hey feared participation in closings with Broker's Title would subject them to possible disciplinary action."[92] Yet, "they worried, as has turned out to be the case, their continued refusal to deal with the company would lead to possible antitrust liability."[93] Therefore, "[t]he attorneys were not seeking an answer to a hypothetical question" but sought resolution of an actual controversy—"a determination of the legality of the company's activities [that] was essential if the attorneys were to avoid the possibility of both disciplinary action and a law suit."[94]

The determination of whether the complaint, petition, or motion for declaratory judgment alleges an actual controversy is a preliminary inquiry, separate and distinct from the court's deci-

86. *Id.*
87. *Id.*
88. *Id.* at 623 n.2, 159 S.E.2d at 832 n.2.
89. Blodinger v. Broker's Title, Inc., 224 Va. 201, 294 S.E.2d 876 (1982).
90. *Id.* at 203, 294 S.E.2d at 877.
91. *Id.* at 203–04, 294 S.E.2d at 877.
92. *Id.* at 204, 294 S.E.2d at 877.
93. *Id.*
94. *Id.*, 294 S.E.2d at 877–78.

sion on the merits. In *Yukon Pocahontas Coal Co. v. Ratliff*, the Supreme Court of Virginia set forth the semantics of a determination of actual controversy.[95] The plaintiffs alleged that as part of their mining operations they held mining rights consisting of privileges and easements in certain land conveyed by deed, also claiming that the defendants were developing on the surface of a portion of that land.[96] Plaintiffs alleged that it was necessary for their mining operation to have exclusive use of the surface of the land and sought a declaration of the extent of their rights under the deed.[97] The court held that the bill presented an actual controversy because it alleged a denial of implied and express rights granted in the deed.[98] The court elaborated on the procedure for determining whether the plaintiffs alleged facts sufficient to maintain an action for declaratory judgment:

> We are here concerned with the *right* to the interpretation, rather than the *interpretation* of the deed. The test of the *right* to an interpretation is the existence of an "actual controversy[.]" The *interpretation* is the solution of the controversy. It follows as the result of the controversy. Whether or not there is a controversy is a question of fact, and may be shown by the pleadings or by the evidence.[99]

Yukon illustrates the sound rationale behind the two-step declaratory judgment adjudication; the finding of an actual controversy must remain separate and distinct from a decision on the merits.[100]

C. *The Justiciable Interest Requirement*

The court has often held that a plaintiff must have a justiciable interest in the subject matter of the litigation. While the court of-

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95. Yukon Pocahontas Coal Co. v. Ratliff, 175 Va. 366, 8 S.E.2d 303 (1940).

96. *Id.* at 369–71, 8 S.E.2d at 305.

97. *Id.* at 371–72, 8 S.E.2d at 305–06.

98. *Id.* at 372, 8 S.E.2d at 306.

99. *Id.* at 368, 8 S.E.2d at 304.

100. *See also* Portsmouth Rest. Ass'n v. Hotel & Rest. Employees Alliance, 183 Va. 757, 763, 33 S.E.2d 218, 221 (1945) (upholding the *Yukon* two-step procedure and holding that "[t]he fact that the contract between the parties expired . . . may affect the merits of the controversy, but does not lessen the alleged fact of an existing controversy"); Graves v. Ciraden, Inc., 65 Va. Cir. 127, 129 (Cir. Ct. 2004) (Fairfax County) (quoting *Yukon* and holding that the complaint alleged an actual controversy and finding that the defendant's arguments, that there was no controversy between the parties because neither party breached the agreements at issue and neither party asserted or denied a specific right, were arguments to the merits).

ten presents the requirement as distinct from the requirement of actual controversy, it generally does not analyze the requirements separately. In *Lynchburg Traffic Bureau*, after identifying the Act's test of applicability as the "determination of the existence of an actual controversy," the court continued: "Moreover, it is well settled that 'in order to entitle any person to maintain an action in court it must be shown that he has a justiciable interest in the subject matter in litigation; either in his own right or in a representative capacity.'"[101] The plaintiff's petition for a declaratory judgment, however, was subject to dismissal for lack of a justiciable interest on the same grounds it was subject to dismissal for lack of an actual controversy; the petition did not indicate the plaintiff's interest or on what ground it had a right to maintain the petition.[102]

Even when the court correctly determines that a plaintiff lacks a justiciable interest, making a declaratory judgment action improper, analysis of the requirement as a separate entity is unnecessary. In *City of Fairfax v. Shanklin*, the court opined that "[t]he controversy must be one that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment."[103] The plaintiff sought a judgment to declare invalid a city zoning ordinance, which conferred authority on the board of zoning appeals to issue special use permits for construction of apartments in the city.[104] The plaintiff stipulated that "[n]o specific case regarding apartment usage within the city is involved in this cause."[105] The plaintiff was merely a resident and taxpayer of the city.[106] The court found that the plaintiff's case was "a wholesale, broadside assault upon the city's zoning ordinance, bereft of a single real complaint of injury, or threatened injury."[107] The plaintiff was left to depend "upon future or speculative facts, that is to say, that a special use permit might, someday, be granted by the board which might aggrieve the plaintiff."[108] Therefore, "the motion for declaratory

101. Lynchburg Traffic Bureau v. Norfolk & W. Ry. Co., 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966).

102. *Id.*

103. City of Fairfax v. Shanklin, 205 Va. 227, 229, 135 S.E.2d 773, 775 (1964).

104. *Id.* at 228–29, 135 S.E.2d at 775.

105. *Id.* at 230, 135 S.E.2d at 776.

106. *Id.*

107. *Id.*

108. *Id.* at 231, 135 S.E.2d at 776.

judgment, upon its face, merely sought an advisory opinion, or a decision upon a moot question, or an answer to a speculative inquiry."[109] In other words, the plaintiff failed to allege an actual controversy.

Determining, as a separate requirement, whether the plaintiff has a justiciable interest in the litigation may only lead to confusion. In *Brinkley v. Blevins*, the court couched the requirement of justiciable interest in terms of whether the plaintiff had a "real interest in the subject matter in controversy."[110] In *Brinkley*, the petitioning creditors sought a judgment declaring a deed from the defendant debtor to his wife void on the grounds "that the deed was voluntary and made with the intent to defraud and defeat them in the collection of their debts."[111] The same creditors previously sued the defendant debtor and his wife to set aside the deed on the very same grounds, and judgment was entered against the creditors "on the merits."[112] Rather than dismissing the declaratory judgment action on the obvious basis of *res adjudicata*, the court held that the creditors did not state a case for a declaratory judgment because the creditors "not only fail to allege and prove that they have an interest in the subject matter of the litigation, but the record conclusively shows that they have no interest whatever."[113] The court determined that the *general* creditors had no interest because the statute provided that an unrecorded deed was void only to *lien* creditors.[114] Therefore, the creditors could not maintain a declaratory judgment "even though the court should declare the deed void."[115]

The court in *Blevins* confused the issue by deciding the case on the merits and then retroactively holding that the plaintiffs did

109. *Id.*; *see also* Garnett v. Medicorp Props., Inc., 62 Va. Cir. 450, 451 (Cir. Ct. 2003) (Spotsylvania County) (holding that the plaintiff could not seek a declaratory judgment determining a reasonable time for the completion of a contract because such an adjudication would be based on "speculative future circumstances" that may occur during the contract performance) (citing City of Fairfax v. Shanklin, 205 Va. 227, 229–30, 135 S.E.2d 773, 775–76 (1964)); FSG Capital Corp. v. Bristol Assocs., 22 Va. Cir. 231, 231–32 (Cir. Ct. 1990) (Fairfax County) (holding that a declaratory judgment was inappropriate because the plaintiff sought an advisory opinion that a note represented a binding obligation on the defendant when there was already an actual anticipatory breach).

110. Brinkley v. Blevins, 157 Va. 41, 45, 160 S.E. 23, 24 (1931).

111. *Id.* at 43, 160 S.E. at 23.

112. *Id.* at 42, 44, 160 S.E. at 23–24.

113. *Id.* at 45, 160 S.E. at 24.

114. *Id.*

115. *Id.*

not have an interest sufficient to entitle them to a declaratory action. The creditors clearly had a property right in the indebtedness of the defendant. The creditors presented an actual controversy by alleging that the defendant's fraudulent conveyance injured that interest.[116] Therefore, it was not that the plaintiffs lacked an interest sufficient to maintain a suit for declaratory judgment, it was, rather, that they could not ultimately prevail on the merits under the court's interpretation of the statute. The court's holding is even more puzzling in light of the fact that it could have dismissed the action on the grounds of *res adjudicata*.[117] The determination of whether the plaintiff has an interest in the subject matter of the litigation is better left as part, although an important part, of the preliminary determination of whether he has alleged an actual controversy.[118]

Despite the fact that the justiciable interest requirement adds little to the analysis, the requirement continues to be applied in zoning and other land use cases.[119] In *Board of Supervisors v. Southland Corp.*, the plaintiff sought a judgment declaring invalid a zoning ordinance that required a special exception from the board of supervisors to operate a "quick-service food store."[120] The plaintiff was in the business of obtaining suitable sites and devel-

116. *Id.* at 43, 160 S.E. at 23.

117. *See id.* at 45, 160 S.E. at 24.

118. *Brinkley* is not the only case where the defendant's argument on the merits of the case was disguised as an argument that the plaintiff lacked a justiciable interest sufficient for declaratory judgment. *See, e.g.*, Basheer/Edgemoore-Millwood, LLC v. Sizdahkhani, 62 Va. Cir. 28, 29 (Cir. Ct. 2003) (Fairfax County) (holding that the plaintiffs had a justiciable interest in the controversy in the face of defendant's argument that plaintiff lacked such an interest "because the portion of the easement that Plaintiff [sought] to have vacated [could] only be extinguished by Fairfax County, the property owner under the deed of subdivision."). The problem in *Brinkley* also occurs in the application of the actual controversy test. *See supra* notes 95–100 and accompanying text.

119. *See* Hoffman Family, L.L.C. v. Mill Two Assocs. P'ship, 259 Va. 685, 693–94, 529 S.E.2d 318, 323–24 (2000) (holding that a declaratory judgment action could be maintained by a conveyor of property with restrictive covenants against the conveyee when the conveyee had not received final approval for development, but took substantial steps in making specific plans); Bd. of Supervisors v. Fralin & Waldron, Inc., 222 Va. 218, 224, 278 S.E.2d 859, 862 (1981) (holding that a developer had a justiciable interest in bringing a declaratory judgment action when he owned a contractual right to purchase the subject property and filed a development plan for the community); Broad Run Vill., L.C. v. Loudoun County Bd. of Supervisors, 59 Va. Cir. 96, 97 (Cir. Ct. 2002) (Loudoun County) (holding that the plaintiffs met the justiciable interest requirement necessary for declaratory relief when plaintiffs alleged they owned property subject to unreasonable, arbitrary, and capricious restrictions on its development).

120. Bd. of Supervisors v. Southland Corp., 224 Va. 514, 518, 297 S.E.2d 718, 719–20 (1982).

oping them as 7-Eleven stores, and, therefore, had an "actual, present right to construct and operate quick-service food stores" in the county.[121] The court distinguished *Shanklin* on the basis that the plaintiff in the present case had "a justiciable interest in the subject matter which was ripe for judicial determination, rather than one which was merely hypothetical or abstract."[122] The justiciable interest test is prominent in land use cases because the issue of whether an actual controversy is alleged turns on the nature and extent of the plaintiffs' interest in the land subject to state regulation.

D. *The Traditional Discretionary Limitations*

1. Whether There is an Adequate Remedy at Law

In *American National Bank & Trust Co. of Danville v. Kushner*, the court opined that to maintain a suit for declaratory judgment, "[s]omething more than an actual controversy is necessary. In common cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted."[123] The court has the ability to dismiss on these grounds because "[w]hether or not jurisdiction

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121. *Id.* at 520, 297 S.E.2d at 721.

122. *Id.* at 520–21, 297 S.E.2d at 721 (internal quotations omitted); *see also* Logie v. Town of Front Royal, 58 Va. Cir. 527, 531-32 (Cir. Ct. 2002) (Warren County) (holding that plaintiff landlords had a justiciable interest in seeking a declaration that a statute was invalid although plaintiff was not "directly and immediately affected" by the statute, but was engaged in the rental of property in the county generally).

123. Am. Nat'l Bank & Trust Co. of Danville v. Kushner, 162 Va. 378, 386, 174 S.E. 777, 780 (1934) (internal quotations omitted); *see also* Berry v. Hartford Cas. Co., 5 Va. Cir. 481, 482 (Cir. Ct. 1977) (Richmond City) (holding that declaratory judgment was improper where plaintiff motorist asked the court for advice regarding the best order to sue various insurance companies and opining that an "adequate remedy at law does not necessarily mean a perfect remedy"); Hardware Dealers Mut. Fire Ins. Co. v. Ins. Co. of N. Am., 13 Va. Cir. 421, 423 (Cir. Ct. 1969) (Richmond City) (holding that a declaratory judgment was inappropriate "where a multiple choice of remedies is available and where there is a complete and adequate remedy at law"). Additionally, coercive or injunctive relief and a declaratory judgment can be determined in one action. Winborne v. Doyle, 190 Va. 867, 871–72, 59 S.E.2d 90, 93 (1950); *see also* VA. CODE ANN. § 8.01-186 (Repl. Vol. 2000 & Cum. Supp. 2006) ("Further relief based on a declaratory judgment order or decree may be granted whenever necessary or proper."); Dean v. Paolicelli, 194 Va. 219, 239, 72 S.E.2d 506, 518 (1952) ("In a proper case under [the Declaratory Judgments Act], such consequential, other, and additional relief as is justified by the pleadings, and by the private or public rights and interest involved, may be awarded."). Clearly, the court may determine the rights of the parties in a declaratory judgment action and then enforce those rights in a subsequent action. *Doyle*, 190 Va. at 872–73, 59 S.E.2d at 93.

shall be taken is within the sound discretion of the trial court."[124] While the court's language appears to be dicta, it has formed the foundation of a major basis for dismissal of a declaratory judgment suit.[125] In *Fairfield Development Corp. v. City of Virginia Beach*, the plaintiffs filed petitions for declaratory judgment to recover fees paid "as a condition precedent to the recording of a final subdivision plat."[126] The fees were paid pursuant to an ordinance that the plaintiffs alleged was unconstitutional and invalid.[127] Holding that the plaintiffs' "remedy was by motion for judgment and not by petition for declaratory judgment," the court found that "[i]n essence [the plaintiffs] were seeking a money judgment for a sum certain."[128] Because "[t]he court had nothing to determine that would guide the parties in their future conduct in relation to each other," the plaintiffs had an adequate remedy at law.[129]

In *Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, the court held that the plaintiff was without an adequate remedy at law.[130] In *Hop-In Food Stores*, the plaintiff, the new lessee and current occupant of certain premises, brought suit for declaratory judgment against a former lessee to determine which party had the right to occupy the premises.[131] The lessor notified the lessee that his

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124. *Kushner*, 162 Va. at 386, 174 S.E. at 780.

125. Earlier, the Court addressed a challenge to a declaratory judgment action based on the existence of an adequate remedy at law in *Chick v. MacBain*, 157 Va. 60, 66–67, 160 S.E. 214, 216 (1931). *See supra* text accompanying note 72.

126. Fairfield Dev. Corp. v. City of Virginia Beach, 211 Va. 715, 715–16, 180 S.E.2d 533, 533–34 (1971).

127. *Id.* at 716, 180 S.E.2d at 534.

128. *Id.* at 717, 180 S.E.2d at 534–35.

129. *Id.*, 180 S.E.2d at 535; *see also* Andrews v. Universal Moulded Prods. Corp., 189 Va. 527, 529–30, 53 S.E.2d 837, 838 (1949) (determining that the matter could be decided in a contempt proceeding and that the declaratory judgment proceeding "served no further purpose and was properly dismissed"); Kontzias v. CVS, Inc., 44 Va. Cir. 161, 162–63 (Cir. Ct. 1997) (Fairfax County) (holding that the plaintiff could not maintain an action for declaratory judgment because the plaintiff had an adequate remedy at law; the plaintiff could sue for breach of contract and seek specific performance or monetary damages).

130. Hop-In Food Stores, Inc. v. Serv-N-Save, Inc., 237 Va. 206, 210, 375 S.E.2d 753, 756 (1989); *see also* Bd. of Supervisors v. Garrett, 1 Va. Cir. 379, 380–81 (Cir. Ct. 1983) (Richmond City) (dismissing action for declaratory judgment that the Commonwealth was responsible for direct payment of attorney fees or liable for reimbursement of fees when plaintiff had a prior opportunity to assert its rights to direct payment and an adequate remedy at law for the recovery of a sum certain); Kassir v. City of Norfolk, 16 Va. Cir. 485, 488 (Cir. Ct. 1980) (Norfolk City) (holding that the plaintiffs' claim of possible property damage from the state's widening of a street adjacent to their property were without a remedy at law, but could assert their rights in the form of a declaratory judgment).

131. *Hop-In Food Stores*, 237 Va. at 208, 375 S.E.2d at 754–55.

lease was terminated and removed the lessee's equipment from the premises; the new lessee then installed its own equipment.[132] The former lessee threatened to prosecute the current lessee's employees and customers for criminal trespass, but filed an action for common-law trespass only against the lessor.[133] Meanwhile, the new lessee was subject to "potential liability for continuing damages" and could not be "compelled simply to wait until [the former lessee] decided to prosecute its employees and customers for trespass."[134] The new lessee could not assert the possessory remedies at law (unlawful detainer, ejectment, and trespass) against the former lessee who already lost possession of the premises.[135] The court held that the new lessee, who was not a party to the trespass suit, was without an adequate remedy at law and, therefore, could maintain an action for declaratory judgment against the former lessee.[136] The requirement that the plaintiff be without an adequate remedy at law evolved into the modern test of whether rights have accrued and matured and wrongs have been suffered.

2. Whether Administrative Remedies are Exhausted

In a series of land use cases, the court scrutinized the requirement that the plaintiff must exhaust any available administrative remedy in order to maintain a declaratory judgment action. In *Board of Supervisors v. Rowe*, the plaintiff landowners challenged the constitutionality of a zoning ordinance that rezoned the subject property.[137] In their motion for declaratory judgment, the plaintiffs alleged that the ordinance was "unreasonable" and unconstitutional "in its entirety . . . without regard to any particular property."[138] Defendants argued that the plaintiffs failed to exhaust their administrative remedies, including the right to apply to the zoning administrator for a variance and to appeal to the board of zoning appeals.[139] The court held that "when the relief sought constitutes a challenge to the constitutionality of a

132. *Id.*, 375 S.E.2d at 754.
133. *Id.* at 208–09, 375 S.E.2d at 754–55.
134. *Id.* at 210, 375 S.E.2d at 755.
135. *Id.*, 375 S.E.2d at 756.
136. *Id.* at 211, 375 S.E.2d at 756.
137. Bd. of Supervisors v. Rowe, 216 Va. 128, 131, 216 S.E.2d 199, 204 (1975).
138. *Id.* at 133, 133 n.4, 216 S.E.2d at 205, 205 n.4.
139. *Id.* at 132–33, 216 S.E.2d at 204–05.

zoning ordinance in its entirety, only a variance providing total exemption would vindicate the rights asserted."[140] Such a variance was not possible under a statute providing that "all variances shall be in harmony with the intended spirit and purpose of the ordinance."[141] Consequently, "there was no administrative remedy equal to the relief sought," and the plaintiffs were entitled to have their declaratory judgment action heard on the merits.[142] Shortly after *Rowe*, the court again addressed the requirement of exhaustion of administrative remedies in the context of a challenge to the constitutionality of a zoning ordinance. In *Gayton Triangle Land Co. v. Board of Supervisors*, the court held that where "a landowner claims the zoning ordinance is invalid as applied to his specific property, he must exhaust adequate and available administrative remedies before proceeding by declaratory judgment to make a direct judicial attack on the applied constitutionality of the ordinance."[143]

In *Mosher Steel-Virginia v. Teig*, the court faced a challenge to a declaratory judgment based on the failure to exhaust administrative remedies outside the context of land use.[144] There, the plaintiff, a steel plant operator, challenged the validity of a warrant for inspection of its plant that was issued to the defendant in an *ex parte* proceeding.[145] The plant manager earlier refused to permit an inspection and asserted that the warrant was illegal.[146] The defendant demurred to the plaintiff's bill for declaratory judgment on the grounds that the plaintiff had an adequate remedy "through review of any citation issued as a result of the inspection."[147] The plaintiff could only exhaust his administrative remedies by allowing the inspection to proceed, mooting any chal-

140. *Id.* at 133, 216 S.E.2d at 205 (footnote call number omitted).

141. *Id.*

142. *Id.*

143. Gayton Triangle Land Co. v. Bd. of Supervisors, 216 Va. 764, 766, 222 S.E.2d 570, 572 (1976); *see also* Cupp v. Bd. of Supervisors, 227 Va. 580, 591–92, 318 S.E.2d 407, 412–13 (1984) (finding that the plaintiffs in a declaratory judgment action asked the Board of Supervisors to dismiss their application in order to exhaust administrative remedies).

144. Mosher Steel-Va. v. Teig, 229 Va. 95, 97, 327 S.E.2d 87, 89 (1985); *see also* Latney v. Lukhard, 9 Va. Cir. 30, 31 (Cir. Ct. 1986) (Richmond City) (holding that an action for declaratory judgment was proper to determine whether the Department of Social Services adopted reasonable standards of need when the Administrative Process Act did not "condition plaintiff's access to court under the circumstances").

145. *Mosher Steel-Va.*, 229 Va. at 97–98, 327 S.E.2d at 89–90.

146. *Id.* at 98, 327 S.E.2d at 90.

147. *Id.* at 99, 327 S.E.2d at 90.

lenge to the constitutionality of the search.[148] Therefore, the court held that because there was no administrative remedy equal to the relief sought, the declaratory judgment proceeding was proper.[149]

3. Whether Agency Rules Have the Force of Law

The Supreme Court of Virginia has held that "there is no actual controversy" when the plaintiff challenges an agency action that does not have the force of law.[150] In *Virginia Historic Landmarks Commission v. Board of Supervisors*, the plaintiffs, landowners and the Board of Supervisors, filed a petition for judicial review of the Historic Landmark Commission's resolution to adopt the Green Springs Historic District as a registered landmark.[151] The court found that "at most the resolution of the Commission does no more than encourage the county to adopt rules and regulations which the Commission might recommend."[152] The resolution did not compel the Board of Supervisors to enact any regulation or "to give the resolution any weight in its consideration of zoning, rezoning, or other matters affecting the land in the district."[153] The court was unwilling to speculate that regulations would be adopted pursuant to the resolution in a manner that would abridge the property rights of the landowners.[154] The court held that the resolution "did not give rise to a justiciable or actual controversy" under the Act.[155]

148. *Id.* at 100, 327 S.E.2d at 91.

149. *Id.* at 100–01, 327 S.E.2d at 91–92.

150. Commonwealth *ex rel.* Art Comm'n v. Silvette, 215 Va. 596, 598, 212 S.E.2d 261, 262–63 (1975) (holding that the plaintiff, by declaratory judgment action, could not challenge an Art Commission rule when the rule was permissive and not mandatory and lacked the force of law).

151. Va. Historic Landmarks Comm'n v. Bd. of Supervisors, 217 Va. 468, 468–69, 230 S.E.2d 449, 449 (1976).

152. *Id.* at 474, 230 S.E.2d at 453.

153. *Id.*

154. *Id.*

155. *Id.* at 476, 230 S.E.2d at 454 (citing *Silvette*, 215 Va. at 598, 212 S.E.2d at 262–63).

E. *The Modern Discretionary Limitations*

1. Whether Rights Have Accrued and Matured and Wrongs Suffered

If the asserted claims and rights have accrued and matured and the alleged wrongs have been suffered by the time the declaratory judgment action is filed, the court will dismiss the action.[156] In *Liberty Mutual Insurance Co. v. Bishop*, there was a pending wrongful death action against Bishop Jr. arising out of an automobile accident.[157] The dealer delivered the vehicle involved in the accident, a new vehicle, to the Bishops, but the cash settlement did not occur until after the accident.[158] Bishop had two automobile policies from Hartford Accident and Indemnity Co. and Virginia Farm Bureau covering the vehicle, and the dealership had a policy on the vehicle from Liberty Mutual.[159] Liberty Mutual denied liability and refused to defend Bishop Jr. while Hartford and Virginia Farm Bureau defended the action instead.[160] Hartford and Virginia Farm Bureau settled the case.[161] The two companies then filed suit against Liberty Mutual for a declaratory judgment.[162] The court dismissed the suit, finding:

> What Hartford and Virginia Farm Bureau seek here is the recovery of a money judgment, a sum certain, from Liberty Mutual, upon the theory that they have defended, settled and paid under their policies a claim which should have been defended, settled and paid by Liberty Mutual under its policy.[163]

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156. Liberty Mut. Ins. Co. v. Bishop, 211 Va. 414, 421–22, 177 S.E.2d 519, 524 (1970).

157. *Id.* at 416–17, 177 S.E.2d at 521.

158. *Id.* at 415–16, 177 S.E.2d at 520.

159. *Id.* at 416, 177 S.E.2d at 520.

160. *Id.* at 417, 177 S.E.2d at 521.

161. *Id.*

162. *Id.*; *cf.* Asplundh Tree Expert Co. v. Pac. Employer's Ins. Co., 269 Va. 399, 407, 411, 611 S.E.2d 531, 535, 537 (2005) (holding that the employer's insurer could bring a declaratory judgment action against the employer for a declaration that the policy did not provide coverage for liability to the employee although the insurer already contributed to settlement of the injured party's claim; distinguishing *Bishop* because settlement of the underlying claim did not occur prior to the filing of the declaratory judgment action).

163. *Bishop*, 211 Va. at 421, 177 S.E.2d at 524; Prudential Prop. & Cas. Ins. Co. v. Jeffers, 7 Va. Cir. 107, 109 (Cir. Ct. 1982) (Richmond City) (dismissing an action for declaratory judgment, although, there was no "[*Bishop*] situation because there [was] no final decision reached as to the [underlying] claim," because the plaintiff only sought an advisory opinion—"[n]othing [the defendant] has or has not done in this case has put

Holding that the "various claims and rights asserted had all accrued and matured, and that the wrongs had been suffered," the court provided the rationale for the rule:

> The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature. In other words, the intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests. This is with a view rather to avoid litigation than in aid of it.[164]

Furthermore, "the power to make a declaratory judgment is a discretionary one and must be exercised with care and caution" and "will not as a rule be exercised where some other mode of proceeding is provided."[165] It is important to note that the court expressly held open the possibility for a declaratory judgment "'between two insurance companies as to their obligations under the terms of their respective policies.'"[166]

In a recent case, *USAA Casualty Insurance Co. v. Randolph*, the court had an opportunity to apply *Bishop*.[167] A co-worker accidentally shot Randolph at the end of the work shift in the em-

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[plaintiff] in the situation it finds itself").

164. *Bishop*, 211 Va. at 421, 177 S.E.2d at 524.

165. *Id.*; *see also* Linke v. Gov't Employees Ins. Co., No. 128767, 1994 Va. Cir. LEXIS 902, at *6 (Cir. Ct. May 5, 1994) (Fairfax County) ("If plaintiff prevailed on her breach of contract and bad faith claims she would be entitled to any and all damages she may have suffered. The declaratory judgment, under these circumstances provides no additional remedy and is indeed superfluous.").

166. *Bishop*, 211 Va. at 418, 177 S.E.2d at 522 (quoting Criterion Ins. Co. v. Grange Mut. Cas. Co., 210 Va. 446, 449, 171 S.E.2d 669, 671 (1970)); *cf.* Atkinson v. Penske Logistics, L.L.C., 61 Va. Cir. 223, 234 (Cir. Ct. 2003) (Norfolk City) (holding that the case presented no justiciable controversy between the two insurance companies regarding their obligations under the terms of their respective policies because there was no claim under the policies).

167. USAA Cas. Ins. Co. v. Randolph, 255 Va. 342, 497 S.E.2d 744 (1998); *see also* Humane Soc'y of Loudoun County, Inc. v. deButts, No. 11790, 1989 WL 646184, at *2 (Va. Cir. Ct. Feb. 16, 1989) (Loudoun County) (holding that the plaintiffs' claims and rights had accrued and matured; finding that plaintiffs requested only "relief ordinarily available in such common actions or suits as, for example, to set aside a conveyance, to impose a constructive trust, for an accounting, for the tort of fraud or for breach of fiduciary duty"); *cf.* Gigante v. Target, Inc., 52 Va. Cir. 141, 144 (Cir. Ct. 2000) (Richmond City) (holding that if the plaintiffs prove entitlement to future commissions, an action for breach of contract would not fully compensate them; "[o]nly a declaration of [p]laintiffs' rights under the contract can protect the parties from the costs of future litigation of a controversy which may properly be decided in this action").

ployee parking lot. The co-worker was transferring the rifle from his personal car to a company owned car when it discharged.[168] Randolph brought a suit for declaratory judgment against multiple insurance companies to determine whether his injury was within the scope of his employment for workers' compensation purposes.[169] The court held that "[l]ike *Bishop*, the present case involves claims and rights that had accrued and matured when the bill of complaint was filed. Thus, declaratory judgment did not lie because other remedies were available to Randolph, namely, a claim for workers' compensation benefits or an action at law."[170] *Randolph* illustrates that the test of whether claims and rights have accrued and matured is a modern version of the requirement that there be no adequate remedy at law.[171]

In *Blodinger v. Broker's Title, Inc.*, the defendants cited *Bishop* in a declaratory judgment suit, asserting "that if a controversy exists it has matured past the point where [a] declaratory judgment would lie."[172] In *Blodinger*, the plaintiff attorneys sought a declaratory judgment as to whether the defendant title company was engaged in the unauthorized practice of law such that the plaintiffs could not be subject to antitrust liability for their boycott of the defendant.[173] The title company argued that "it was damaged the moment the attorneys started their boycott" and that "once damages accrue the proper remedy is an action at law."[174] The court held that unlike *Bishop*, "this case involves an alleged continuing harm and mounting damages."[175] The attorneys could not be forced to continue their boycott and subject

168. *Randolph*, 255 Va. at 344, 497 S.E.2d at 745.

169. *Id.* at 345, 497 S.E.2d at 745.

170. *Id.* at 347, 497 S.E.2d at 747.

171. *See supra* text accompanying notes 123–36; *see also* Stitches of Va., Inc. v. Greenbrier Mall Venture, 13 Va. Cir. 392, 392–93 (Cir. Ct. 1988) (Chesapeake City) (holding that where the petition sought a judgment as to whether certain demands for rent were accurate determinations of the sums due, the petitioner had an adequate remedy at law, the parties' rights and obligations had matured, and damages had already accrued).

172. Blodinger v. Broker's Title, Inc., 224 Va. 201, 204, 294 S.E.2d 876, 878 (1982); *see also* Kincheloe v. Spotsylvania County, 13 Va. Cir. 133, 135 (Cir. Ct. 1988) (Spotsylvania County) ("The fact that the plaintiffs are able to request specific performance of the repurchase provisions of the deed evidences the inappropriateness of a declaratory judgment . . . . The claim is fully mature, the wrong has been suffered, and the issue is ripe for adjudication through the customary processes of the court.").

173. *See supra* text accompanying notes 89–94 for the court's analysis of an actual controversy.

174. *Blodinger*, 224 Va. at 204, 294 S.E.2d at 878.

175. *Id.*

themselves to possible growing antitrust liability until the company saw fit to file suit.[176] *Blodinger* illustrates that the modern test is subject to the same exception for continuing damages as is the traditional requirement that there be no adequate remedy at law.[177]

2. Whether Determinative of Issues or for the Construction of Rights

The test of whether a declaratory judgment is determinative of issues rather than for the construction of rights appears to have originated in *Williams v. Southern Bank of Norfolk*.[178] In that case, the Southern Bank of Norfolk financed vehicles Williams and his corporation bought and sold.[179] At one point, the bank learned of events which led it to believe that Williams committed a crime.[180] The bank's attorney informed the Commonwealth's Attorney of these suspicions, and a grand jury indicted Williams on eleven separate charges of larceny related to the financing of the vehicles.[181] After trial for two of the indictments resulted in an acquittal and the remaining charges were dropped, Williams threatened the bank with eleven actions for malicious prosecution and sought large sums in punitive damages.[182] The bank filed a petition for declaratory judgment against Williams alleging that an "actual controversy existed between the parties" as to "whether or not the [b]ank can be held civilly liable for the alleged malicious prosecution of [Williams]."[183]

The court opined that "[w]here a declaratory judgment as to a disputed fact would be determinative of issues, rather than a construction of definite stated rights, status, and other relations, commonly expressed in written instruments, the case is not one for declaratory judgment."[184] The court found that the only controversy was one of "disputed fact, that is, whether [the] [b]ank made a full, correct and honest disclosure of all the material facts

176. *Id.*
177. *See supra* text accompanying notes 130–36.
178. Williams v. S. Bank of Norfolk, 203 Va. 657, 125 S.E.2d 803 (1962).
179. *Id.* at 658, 125 S.E.2d at 804.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 658–59, 125 S.E.2d at 804.
184. *Id.* at 663, 125 S.E.2d at 807.

within its knowledge" so as to be relieved of liability for malicious prosecution.[185] The court held that "[t]he determination of that issue rather than an adjudication of the rights of the parties was the real object of the proceeding."[186] Furthermore, "[t]he fact that multiplicity of actions may be avoided if a declaratory judgment be granted is not always a ground for assuming jurisdiction."[187] Finally, the declaratory judgment would improperly allow the "[b]ank to choose its own forum and position upon the trial of the cause" and would "prevent the trial of each of [Williams'] prospective actions at law on its own merits by a jury."[188]

Using similar logic, the court refused to entertain a suit for declaratory judgment in the case of *Green v. Goodman-Gable-Gould Co.*[189] In *Green*, the plaintiff homeowners hired a public insurance adjuster to help them process their fire loss claim with the insurance company.[190] The contract provided that the insurance adjuster's fee would be ten percent of the gross amount adjusted or otherwise recovered.[191] The homeowners, dissatisfied with the insurance adjuster, requested that the adjuster withdraw.[192] The insurance adjuster filed a motion for judgment for a declaration that it had a ten percent interest in the insurance proceeds and sought damages for breach of contract, *quantum meruit*, and conversion.[193] Prior to trial, the adjuster nonsuited all claims except those seeking a declaratory judgment.[194] The court found that, in the declaratory judgment proceeding, the adjuster "sought to determine whether it had substantially performed its obligations under the contract" and that the adjuster's "actual objective . . . was a determination of that disputed issue rather than an adjudication of the parties' rights."[195] Declaratory judgment was im-

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*, 125 S.E.2d at 808.
189. Green v. Goodman-Gable-Gould Co., 268 Va. 102, 110, 597 S.E.2d 77, 82 (2004); *see also* Richmond v. Trigon Ins. Co., 57 Va. Cir. 276, 277 (Cir. Ct. 2002) (Norfolk City) (holding that declaratory judgment was inappropriate when the action would necessarily require the resolution of a disputed fact and was not specifically designed merely to construe specific rights under the contract).
190. *Green*, 268 Va. at 104, 597 S.E.2d at 78.
191. *Id.*, 597 S.E.2d at 79.
192. *Id.* at 105, 597 S.E.2d at 79.
193. *Id.*
194. *Id.*
195. *Id.* at 108, 597 S.E.2d at 80–81.

properly utilized as an "instrument[ ] of procedural fencing" because by nonsuiting the breach of contract claim the adjuster "did not have to prove, by the greater weight of the evidence, a valid contract, a breach of that contract by the [h]omeowners, and damages resulting from the breach."[196]

In *Randolph* the court applied the *Williams* test when the plaintiff sought a determination of whether his injury arose out of and in the course of his employment for purposes of the workers' compensation bar.[197] The court found that "[l]ike *Williams*, the present case is inappropriate for declaratory judgment because the case does not involve a determination of rights, but only involves a disputed issue to be determined in future litigation between the parties."[198] Furthermore, the entry of a declaratory judgment would improperly allow Randolph "to choose a forum for the determination of this issue," as was the case in *Williams*.[199] As *Green* and *Randolph* illustrate, the *Williams* test is an important limitation on the scope of the Act because it prevents plaintiffs from splitting a legal action into its various issues for piecemeal adjudication. Under *Williams*, a plaintiff cannot submit favorable issues for adjudication and exclude less favorable issues from litigation.[200]

196. *Id.* at 107–08, 597 S.E.2d at 80–81.

197. USAA Cas. Ins. Co. v. Randolph, 255 Va. 342, 347–48, 497 S.E.2d 744, 747 (1998); *see supra* text accompanying notes 167–69.

198. *Randolph*, 255 Va. at 347, 497 S.E.2d at 747; *cf.* Reisen v. AETNA Life & Cas. Co., 225 Va. 327, 335–37, 302 S.E.2d 529, 533–34 (1983) (holding that a declaratory judgment was proper, despite a pending tort action, to decide the issue of whether coverage existed when the plaintiff owed a duty to settle with the defendant within policy limits, but only if coverage existed; finding that the "conclusion is not altered by the circumstance that the ultimate issue of fact determining coverage was one of the issues scheduled for adjudication in the tort action" because "in the present case, unlike *Williams*, declaratory judgment as to the disputed fact in issue resulted . . . in delineation and interpretation of definite rights expressed in the insurance contract"); Nottingham v. Caviggiola, 67 Va. Cir. 86, 90 (Cir. Ct. 2005) (Norfolk City) (holding that the plaintiff could ask the court "to interpret various insurance policies so that [the] parties can be guided in their future conduct in relation to each other and avoid the risk of action that would jeopardize their respective interests").

199. *Randolph*, 255 Va. at 347–48, 497 S.E.2d at 747.

200. *See* Williams v. S. Bank of Norfolk, 203 Va. 657, 662–63, 125 S.E.2d 803, 807–08 (1962).

IV. CONCLUSION

The bill *quia timet* allowed a plaintiff, apprehensive of possible or probable future damage, to bring suit against a negligent, culpable, or otherwise liable defendant. However, the scope of the bill *quia timet* was limited by its historical uses and the best Virginia definition of the bill referenced those uses.[201] In Virginia, the bill *quia timet* was used primarily by sureties apprehensive of loss from the failure of creditors to enforce rights against principal debtors and by landowners to remove cloud on title. The Declaratory Judgments Act is rooted in the principle of *quia timet* because the Act authorizes the court to adjudicate the rights of the parties before they are violated. However, the utility of the Act is not limited to its historical uses but rather by the constitutional restriction of actual controversy and the court's sound discretion.

The actual controversy requirement contemplates an actual antagonistic assertion and denial of right by the parties to a declaratory judgment action. The plaintiff cannot seek an advisory opinion or the determination of a hypothetical question; the adverse claims must be based on present rather than future or speculative facts. The parties must have a sufficient interest, known as a justiciable interest or sometimes as a real interest, in the outcome of the litigation. While the court may separately analyze whether the plaintiff has a justiciable interest in the outcome of the litigation and whether the plaintiff alleged an actual controversy, such a separate inquiry is unnecessary and may only lead to confusion. However, in land use cases, the justiciable interest test may be used as a shortcut in the determination of whether the plaintiff alleged an actual controversy. Regardless of whether the court applies the actual controversy test or the more specific justiciable interest requirement, the inquiry must remain a preliminary one, separate and distinct from a decision on the merits. Whether the case presents an actual controversy is a question of fact for the court to determine based on the allegations in the pleadings and evidence.

In their sound discretion, the courts of Virginia have required something more than an actual controversy. Traditionally, the

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201. *See* Randolph v. Kinney, 24 Va. (3 Rand.) 394, 397–98 (1825); *see also supra* text accompanying note 5 for the definition.

courts have required that no adequate remedy at law be available to the plaintiff. Prior to seeking a declaratory judgment, the plaintiff must exhaust all administrative remedies. The court will not grant a declaratory judgment challenging agency rules which do not have the force of law. In addition to these traditional limitations, the courts have fashioned a rule that the plaintiff cannot seek a declaratory judgment with respect to claims and rights that have accrued and matured and wrongs that have been suffered. The rule is a reflection of the purpose of the Declaratory Judgments Act—to guide the parties in their future relation to one another. The rule is similar to the traditional requirement that there be no adequate remedy at law, but the rule more properly focuses on the Act's purpose. Like the traditional constraint, the rule does not apply to cases where the plaintiff alleged continuing harm and mounting damages. Another modern rule is that the court will not entertain an action seeking a declaration determinative of issues rather than for the construction of definite rights, status, or other relationships of the parties. This rule prevents plaintiffs from splitting an action into favorable issues for litigation and excluding less favorable issues. In other words, the rule thwarts improper procedural fencing.

Whether a given case falls within the scope of the Virginia Declaratory Judgments Act is dependent on the flexible concept of actual controversy. While the requirement of actual controversy is a constitutional limitation on the right to bring a suit for declaratory judgment, the courts in their sound discretion have strived to strike a balance between furthering the Act's purpose of making the courts more serviceable to the people and exercising judicial constraint where an adjudication would not touch the rights of the parties, would affect claims and rights that have matured and address wrongs that have been suffered, or would be determinative of issues rather than for the construction of rights.

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