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Chapter 10: Administrative Law: The Use of the Declaratory Judgment to Secure Judicial Review of Administrative Action

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CHAPTER 10

Administrative Law: The Use of the Declaratory Judgment to Secure Judicial Review of Administrative Action

§10.1. **Introduction.** In 1945, the declaratory judgment statute, General Laws, Chapter 231A, was enacted. While the act provided a remedy that was useful in all areas of litigation, it proved particularly useful in securing judicial review of administrative action. Prior to the enactment of the statute, the practitioner had to resort to the extraordinary writs whenever no specific statutory remedy was provided.[1] These writs were exceedingly technical and intricate, placing heavy emphasis on procedural form; failure to select the correct writ frequently resulted in dismissal of the petition.[2] The declaratory judgment statute eliminated the need to resort to the extraordinary writs by establishing only two prerequisites for securing relief under Chapter 231A: (1) an actual controversy must be present;[3] and (2) all necessary parties must be joined.[4] These requirements represent minimal requisites for maintaining any action.[5] As a result, the declaratory judgment won widespread acceptance as the primary remedy to secure judicial review of administrative action.

The State Administrative Procedure Act, General Laws, Chapter 30A, enacted in 1955, slightly altered the reliance upon declaratory judgments to secure review of administrative action.[6] The Act contained two sections dealing with judicial review.[7] Chapter 30A, Section 14 provided for review of final agency decisions in adjudicatory

§10.1. [1] These extraordinary writs were widely employed since, in Massachusetts, there were few statutory provisions setting forth particular methods of review. For an excellent discussion of extraordinary writs and the problems involved, see Brown, The Use of Extraordinary Legal and Equitable Remedies to Review Executive and Administrative Action in Massachusetts, 21 B.U.L. Rev. 632, 22 B.U.L. Rev. 55 (1941-1942).

[2] Brown, note 1 *supra,* 22 B.U.L. Rev. at 91.

[3] G.L., c. 231A, §1.

[4] Id. §8.

[5] See Borchard, Declaratory Judgments 25-26, 29, 256 (2d ed. 1941).

[6] As is indicated in the 1962 Massachusetts Attorney General's Annual Report 43-64, the problem of determining what agencies are subject to the State Administrative Procedure Act is extremely complex. This chapter is not concerned solely with administrative bodies subject to the Act but also with agencies of purely local jurisdiction.

[7] G.L., c. 30A, §§7, 14.

proceedings by merely filing a petition for review, and thus eliminated the need to resort to the declaratory judgment remedy in these cases. On the other hand, Chapter 30A, Section 7, specifically retained the declaratory judgment as the method of reviewing agency regulations. Regulations and final adjudicatory decisions were the only agency actions for which the State Administrative Procedure Act specified a method of review.[8] As to the method of reviewing other agency actions, such as advisory opinions, the Act remained silent. The courts, however, did not construe the State Administrative Procedure Act as precluding review of these other actions but, instead, allowed review of such actions through petitions for declaratory relief.[9]

Although the declaratory judgment is today the primary method of securing judicial review of administrative actions other than final adjudicatory decisions, the courts have encountered problems in determining when a particular agency action is ripe for review under Chapter 231A. Specifically, problems have arisen as to: (1) whether an actual controversy exists; (2) whether petitioner should be required to exhaust his administrative remedies; and (3) whether a decree would terminate the controversy. The purpose of this chapter is to examine the Supreme Judicial Court's resolution of these questions with a view towards determining the trends of the recent Massachusetts cases.

§10.2. Actual controversy. In one of the earliest cases arising under the declaratory judgment statute,[1] the Supreme Judicial Court attempted to define the requirement that an actual controversy must have arisen and have been specifically set forth in the pleadings:

> We think a pleading is sufficient if it sets forth a real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation.[2]

[8] Regulation is defined broadly to include "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect. . . ." G.L., c. 30A, §1(5). The definition specifically excludes advisory rulings and decisions reached in adjudicatory proceedings. Id. §§1(5)(a), (e). Adjudicatory proceeding is defined as a proceeding before an agency in which a specifically named person's legal rights, duties, or privileges are required by constitutional right or statutory provision to be determined after an agency hearing. Id. §1 (1). Since G.L., c. 30A, §14 provides for review of "final" decisions, it would appear to preclude use of the section to review interlocutory or intermediate decisions.

[9] See Westland Housing Corp. v. Commissioner of Insurance, 1967 Mass. Adv. Sh. 655, 660-663, 225 N.E.2d 782, 787-788. See Metropolitan Dist. Police Relief Ass'n, Inc. v. Commissioner of Insurance, 347 Mass. 686, 200 N.E.2d 245 (1964).

§10.2. [1] School Committee of Cambridge v. Superintendent of Schools of Cambridge, 320 Mass. 516, 70 N.E.2d 298 (1946).

[2] Id. at 518, 70 N.E.2d at 300.

This definition sets forth three rather vague tests, each of which must be met, in order to have an actual controversy: (1) whether one party has asserted and another party denied a legal relation, status, or right; (2) whether both parties have a definite interest in the subject matter; and (3) whether the problem is almost certain to lead to litigation unless declaratory relief is granted. Further definition of each of these tests can be obtained only by examining what the courts have done in specific cases.

Since a petition for judicial review of administrative action is a denial, by the petitioner, of a claimed agency assertion, the issue posed by the first test becomes whether the agency action can be considered an assertion of the agency. By definition, an agency makes an assertion whenever it states an opinion to the public or to the party requesting it, as in issuing a regulation or advisory ruling.[3] The question, thus, may be narrowed still further to whether such actions as statements made by agency employees to the agency as part of the investigatory process are assertions of the agency.

In *Frontier Research Inc. v. Commissioner of Public Safety*,[4] a fire occurred in petitioner's chemical manufacturing plant. An assistant chemist, employed by the Department of Public Safety, investigated the fire and filed two conflicting reports. If the first report were adopted by the agency, the manufacturer would be required to obtain a license from the local board of selectmen and a permit from the town fire chief in order to continue operations. If the second report were adopted, the manufacturer would only need the selectmen's license. The agency, however, could adopt a regulation the effect of which would require the manufacturer to secure a permit from the local fire chief. The manufacturer filed a petition for declaratory relief, alleging that the reports had caused it uncertainty with respect to its rights and duties in regard to the licensing and permit provisions. The bill sought a declaration that petitioner was not required to obtain either a license or a permit to continue operations and that the respondent could not in the future adopt a regulation which would force petitioner to obtain a permit.

In answer to an allegation by the respondent that petitioner was barred from relief for failure to pursue certain administrative remedies, the Supreme Judicial Court found that there had been no official communication of the reports to the petitioner. It further found: "No official departmental action on the basis of either report has been shown to have been taken or proposed."[5] The Court, therefore, concluded that the mere existence of the reports was not sufficient to require the petitioner to resort to the administrative remedies. It granted relief, however, because of the "uncertainties (a) caused by the

[3] See, e.g., Metropolitan Dist. Police Relief Ass'n, Inc. v. Commissioner of Insurance, 347 Mass. 686, 200 N.E.2d 245 (1964).

[4] 1967 Mass. Adv. Sh. 137, 222 N.E.2d 854.

[5] Id. at 139, 222 N.E.2d at 855.

reports and their effect upon Frontier's business and (b) concerning the action appropriate for Frontier to take. . . ."[6]

The Court, in granting declaratory relief, either found that the report of the assistant chemist was an assertion of the agency, or dispensed with the assertion requirement, the first test proposed in its definition of an actual controversy. This appears to be the first case which allows review of an employee's investigatory report.

There are strong reasons why review of an investigatory report to an agency should not be allowed. During the course of any administrative investigation, reports will be submitted by the employees of the agency which may be both favorable and unfavorable to the parties involved. These reports are not meant to be an assertion of the agency's position but to aid the agency in reaching a position. To grant review merely because a report adverse to petitioner has been submitted, allows the courts to "short-circuit" the administrative process by making the decision which initially is within the jurisdiction and expertise of the agency.

There is, however, reason to expect that the *Frontier* case will have limited application. The local selectmen and fire chief, acting independently of the agency, had asserted that the petitioner must obtain a license and a permit from them in order to continue operations. This fact does not appear to have been specifically set forth in the pleadings and, moreover, these individuals were not parties to the litigation. Had these circumstances been specifically pleaded and these parties included in the bill, the Court would have had before it an assertion which would have satisfied the first test set forth in the definition of actual controversy. The Court's decision might, then, be justified on two bases. First, had the Court remanded the case to the lower court and required that the local selectmen and fire chief be joined, the parties would have been faced with increased expenditures of time and money and yet would probably not have litigated the matter more fully. Second, possible injury to the petitioner could be avoided by settling the issues as they were presented. While *Frontier* illustrates that a flexible application of rules to meet a situation before a court is desirable, the case creates great uncertainty as to whether an assertion by the agency will be required in the future.

The second test in determining the existence of an actual controversy is whether the parties have a definite interest in the subject matter. By requiring a definite interest, the Court assures that the parties will be motivated to litigate fully the actual issues, and that judicial time will not be squandered resolving abstract questions. In light of these purposes, it is clear that the administrative body has such a definite interest in the validity of its action which is challenged. It is much less clear whether any given petitioner has such an interest. The resolution of this problem should always be made with regard to the purposes of this test.

[6] Id. at 139, 222 N.E.2d at 856.

There is some question in Massachusetts whether a petitioner who seeks to challenge an administrative action solely because it has injured him economically by increasing his competition is considered to have a definite interest. When an agency grants a license to a party to establish a business, it can increase the competition not only of those parties subject to its regulation but also of those parties not subject to its regulation. Thus, regardless of whether a party is subject to the regulation of the agency, he may be affected by the increase in competition. The question becomes whether the mere fact that the party is affected by the increase in competition will give him the requisite interest to review the agency action by declaratory relief.

In *Nantucket Boat Inc. v. Woods Hole, Martha's Vineyard and Nantucket S.S. Auth'y*,[7] the petitioner had furnished water transportation between Hyannis and Nantucket since 1946. Early in the 1960's, the respondent authority agreed to grant a license to a competitor of the petitioner to operate between these same two points. Arguing that he had standing to challenge because he would be economically injured by the competition, the petitioner sought a declaration that the license was invalidly granted. The petitioner himself was not subject to the regulation by the agency and was not required to obtain a license which was necessary only for boats above a certain tonnage.[8] The Court refused relief, stating: "Apart from special circumstances . . . , one injured by [business] competition has no standing to maintain a proceeding . . ."[9] attacking the agency's action.

It is difficult to see what purpose this rule serves. The petitioner in *Nantucket Boat* was in danger of incurring economic loss because of the increased competition created by the agency's action. Economic loss presents concrete, as opposed to abstract, issues and strongly suggests that the party will fully litigate the issues. The economic interest in being free from illegally created competition thus fulfills the purposes of the second test, and there appears no good reason why such a person should not be held to have a definite interest in the subject matter.

The premise of the *Nantucket Boat* rule may be founded on earlier statements by the Court that unless one of the purposes of the statutory scheme is to protect the individual's competitive status, the petitioner has no private right to be protected from impairment of his competitive position, and that, absent such a private right, the petitioner has no definite interest.[10] The statutory purposes would be relevant to the substantive issues raised by a complaint, but it is difficult to see what relevance they bear to the procedural aspects of the

7 345 Mass. 551, 188 N.E.2d 476 (1963).

8 Acts of 1960, c. 701, §5.

9 345 Mass. at 554, 188 N.E.2d at 478. The issues of standing and actual controversy are closely related. See South Shore Nat'l Bank v. Board of Bank Incorporation, 351 Mass. 363, 368, 220 N.E.2d 899, 901 (1966).

10 E.g., Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 429-432, 86 N.E.2d 920, 922-923 (1949).

case. In requiring that the petitioner allege more than a distinct injury caused by illegal agency action in order to meet the definite interest test, the Court is contravening the legislative dictate that the Declaratory Judgment Act be liberally interpreted[11] and is setting up a technical rule that achieves no valid objective.

The rule in *Nantucket Boat* is qualified by the phrase "apart from special circumstances." The Court found such circumstances in the recent case of *South Shore National Bank v. Board of Bank Incorporation*.[12] The petitioner alleged that it had standing because its application to the Federal Comptroller of the Currency for permission to establish a branch office in Cohasset had been adversely affected by the Board's decision to allow another bank to establish a branch office in the same area. In granting declaratory relief, the Court held that the special circumstances present in this case justified a departure from the *Nantucket Boat* rule. The Court reasoned that petitioner was part of an industry in which competition is regulated and that:

> When considering changes in branch office location . . . , the board must take into account the effect such moves will have on competition between banks, under the broad requirement that the "*public convenience*" be served. Certainly a bank whose competitive position is endangered by the board's approval of a change in location of a branch of a competing bank has a sufficient interest in the board's action to bring this suit.[13]

It might be argued that *South Shore* is an entirely consistent application of the premise underlying the *Nantucket Boat* rule. Competition between banks is regulated, in part, to prevent banks which could not meet unrestricted competition from failing and causing a loss of public funds. To achieve this objective, a bank's competitive position must, to some extent, be protected. On this basis, *South Shore* could be read as holding that the petitioner had a definite interest because protection of a bank's competitive position was a statutory purpose.

In *South Shore*, however, the Court did not deal with the issue solely in terms of statutory purpose. It appeared, in addition, to reason that petitioner's ability to compete would be limited by the fact that it was subject to agency regulation and that, therefore, the petitioner's interest in the agency's action was definite enough to allow it to protect itself against an increase in competition due to illegal agency action. Apparently, the mere fact that the petitioner was subject to agency regulation would be sufficient to give him the necessary interest to seek review. There would, thus, be no need to look to whether the statutory purpose was to protect his competitive position. *South Shore*, as thus construed, would not be in conflict with *Nantucket Boat* because the petitioner in the latter case was not subject

[11] G.L., c. 231A, §9.
[12] 351 Mass. 363, 220 N.E.2d 899.
[13] Id. at 367-368, 220 N.E.2d at 902.

to regulation. Since in many cases, however, the individual challenging the agency will be subject to agency regulation, *South Shore* can be construed as greatly expanding the *Nantucket Boat* rule.

A reconsideration of the *Nantucket Boat* rule would be preferable from both the petitioner's and the public's viewpoint. The administrative agency today has attained a position of enormous influence and power in constructing governmental policy affecting the daily lives of every citizen. One of the strongest restraints against abuse of this power and influence is the ability of the citizen to challenge administrative action judicially. Yet, at the same time that the administrative body has increased its position in the governmental structure, it has necessarily moved away from the general cognizance of the public. Today the individual citizen is not likely to be aware of the particular actions of an agency, let alone be willing to assume the expenditure of time and money to challenge them. Holding that an individual whose competitive position is endangered has a definite interest in the subject matter not only will service the legitimate interest of the complaining party but will also protect the public interest against illegal and unauthorized agency action.

This approach finds support in the federal case of *FCC v. Sanders Bros. Radio Station*.[14] There petitioner had been operating a radio station and the FCC granted permission to another party to broadcast in the same area. Sanders appealed the grant of the permit under a statute which permitted appeal by an aggrieved person, alleging he had standing because of the economic injury due to increased competition. The United States Supreme Court held that the FCC had to consider competition only as it might affect the public interest and that Sanders had no private right to be free from competition. Yet it held that the petitioner had standing to sue because a competitor who was financially injured would be the one most likely to challenge the agency and thereby to protect the public against illegal or unauthorized agency actions.[15] Although the Supreme Judicial Court has cited the *Sanders* case with approval in earlier cases,[16] the *Sanders* doctrine has not yet been specifically adopted. Had it been applied in *Nantucket Boat,* the petitioner would have been held to have a definite interest in the subject matter. *South Shore,* however, may represent a step in the *Sanders* direction.

The third and final standard proposed by the Court in determining whether an actual controversy exists is whether the problem is almost certain to lead to litigation unless declaratory relief is granted. Although most litigation cannot be brought until an injury occurs, under Chapter 231A, Section 1, declaratory relief can be granted before an injury actually occurs. Thus by requiring that litigation be imminent, the Court essentially is requiring that the injury be imminent.

[14] 309 U.S. 470 (1940).

[15] Id. at 477.

[16] A. B. and C. Motor Transportation Co., Inc. v. Department of Public Utilities, 327 Mass. 550, 552, 100 N.E.2d 560, 561 (1951).

In *Kelley v. Board of Registration in Optometry*,[17] the Attorney General, in response to a request from the defendant Board, rendered an advisory opinion that the fitting of contact lenses by opticians constituted the unauthorized practice of optometry and was therefore unlawful. The petitioners, opticians, brought suit against the Board for a declaration that opticians could lawfully fit contact lenses. In refusing declaratory relief, the Supreme Judicial Court noted that although it is proper to seek relief against a party who can regulate the petitioners' activities, such was not the case here; the Board had no power to regulate the activities of opticians. This finding provided sufficient basis for refusing relief. Since the Board could not enforce the advisory opinion of the Attorney General, it could not harm the petitioners and, therefore, as between these two parties, the petitioner could not contend that there was an imminent threat of injury.

The Court went on to say, however: "That the Attorney General has rendered an opinion does not, of itself, raise the matter to the dignity of a justiciable controversy. There are currently in force statutes which provide substantial penalties for the illegal practice of optometry."[18] Finally, the Court noted, "there is no evidence that the Attorney General has acted upon the opinion."[19] This dictum seems to indicate that even had the opticians sought relief against the Attorney General, instead of the Board, the Court still would have refused relief because, although the Attorney General had asserted that the petitioners' practice was unlawful, he had not yet taken any steps to enforce that assertion. It should be noted that this dictum would sub silentio overrule prior precedent in Massachusetts. Massachusetts has granted review of advisory opinions even where there was no indication that the party issuing the opinion had started to act upon it or had even threatened to act upon it.[20]

It is submitted that these precedents should continue to be adhered to in the future. To require a party to wait until there is enforcement, or threatened enforcement of the asserted opinion would place him in an unnecessarily precarious position in contravention of the stated policy of Chapter 231A, which is "to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status, and other legal relations. . . ."[21] If the petitioner is required to wait until enforcement, he is placed in the position of either continuing the status quo and risking fines and criminal penalties or of complying with the opinion and undergoing great financial loss. It is exactly this situation which the liberal, remedial function of Chapter 231A is intended to eliminate.

The Supreme Judicial Court attempted to bypass the above argu-

17 351 Mass. 187, 218 N.E.2d 130 (1966).
18 Id. at 192, 218 N.E.2d at 133.
19 Id.
20 E.g., Metropolitan Dist. Police Relief Assn., Inc. v. Commissioner of Insurance, 347 Mass. 686, 200 N.E.2d 245 (1964).
21 G.L., c. 231A, §9.

ment by pointing out that there have been statutes in force providing substantial penalties for the unauthorized practice of optometry. The rationale would be that the Attorney General's opinion merely restated the law and did not increase the likelihood of a confrontation. This argument assumes that the law had been clear before the advisory opinion. If in fact it was not, then the ruling of the Attorney General would substantially increase the likelihood that the petitioners would be prosecuted under the statute.

The dictum in *Kelley* does not appear to have been applied as yet. Some doubt on this question is raised by *McCaffrey v. School Committee of Haverhill.*[22] There the petitioners were teachers who had formed an educational association at which they worked outside of their regular school work hours. They sought declaratory relief, alleging that the respondents had ordered them to discontinue work with the outside association, that they believed the respondents would expel them from the school system if they did not cease such work, that the respondents had "suspended" them, and that the respondents had refused the petitioners counsel and the hearing to which they were entitled under General Laws, Chapter 71, Section 42.

The decision denying relief, as well as the allegations of the complaint, are unclear. The Court conceivably could have found that the allegations failed to allege that any disciplinary action had been taken or threatened and denied relief on that ground. Thus the case would represent an application of the *Kelley* dictum. The more reasonable interpretation of the case is that the Court construed the allegations dealing with the respondents' action to mean that if the petitioners did not cease their outside work, the respondents would be forced to investigate the matter more thoroughly to see if disciplinary action was called for. Since the respondents had not asserted that the petitioners would be subject to disciplinary action and since the respondents had not yet decided to take any action, the petitioners were not in any imminent danger of injury. The *McCaffrey* case would thus be distinguishable from the *Kelley* dictum. In *Kelley,* the Attorney General had asserted the petitioners' conduct was unlawful and subject to disciplinary action, whereas in *McCaffrey,* respondents had not decided whether the petitioners' conduct was wrongful or subject to disciplinary action.

These cases dealing with what constitutes an actual controversy illustrate that the current Court, instead of limiting itself to a rigid application of technical rules, has taken a flexible approach to reach what it considers the most desirable result in each case. For example, in *Frontier,* the Court ignored the assertion requirement in order to remove the uncertainties raised by the assistant chemist's reports. And although the general rule is that the interest in preserving one's competitive position is not a definite interest, the Court is willing, as in *South Shore,* to recognize special circumstances which will justify

22 1967 Mass. Adv. Sh. 825, 226 N.E.2d 232.

a departure from this rule. These cases further indicate that the Court has been primarily concerned with whether a decree will eliminate uncertainties and prevent potential injury. In focusing on petitioner's interests, however, the Court has not given due weight to the effective functioning of the administrative process. Thus, in *Frontier*, the Court granted relief against an agency although the agency was still in the process of investigation. Although the current Court has adopted a liberal approach to determining the existence of an actual controversy, there is dictum in *Kelley* which would add the unnecessary requirement of a threat of enforcement before review of an advisory opinion would be granted. The *Kelley* dictum, however, has yet to be adopted.

The remainder of this chapter will be concerned with the Court's approach to two arguments frequently raised by the agencies to prevent court review of their action: (1) the petitioner has failed to exhaust his administrative remedies; and (2) a decree would not terminate the controversy.

§10.3. **Exhaustion of administrative remedies.** The doctrine of exhaustion requires the complaining party to pursue all adequate and available administrative remedies before seeking judicial relief.[1] The purpose of the doctrine is to preserve an orderly timetable between the administrative body and the court and to give the agency full opportunity to consider the issues before it.[2]

The exhaustion rule is not specifically mentioned in the Declaratory Judgment Act. As is obvious from the Court's treatment of the rule, however, the rule falls within Section 3 of the statute, which provides that the Court may in its discretion refuse declaratory relief for sufficient reasons.

In *St. Luke's Hospital v. Labor Relations Commission*[3] a trade union filed a petition with the Commission seeking certification as the bargaining agency of certain non-professional employees of the hospital. A hearing was held on the petition, at which the hospital appeared and moved to dismiss on the ground that the Commission had no jurisdiction to entertain the petition. Before the Commission had decided the jurisdictional question, the hospital brought an action for a declaratory decree seeking to have the Commission adjudged without jurisdiction. Although the Court noted, "the general rule that one must first exhaust his remedies before an administrative board . . . before he may invoke judicial interference with the action of the board,"[4] and that "the instances are rare where circumstances will require such interference,"[5] the Court was willing to grant relief because both parties had requested a declaration on the substantive issue. Since the Court was willing to dispense with exhaustion, the

§10.3. [1] Jaffe, Judicial Control of Administrative Action 424 (1965).
[2] Id. at 424-426.
[3] 320 Mass. 467, 70 N.E.2d 10 (1946).
[4] Id. at 469, 70 N.E.2d at 12.
[5] Id. at 470, 70 N.E.2d at 12.

Court must have considered its application to be discretionary under Chapter 231A, Section 3.

The Court's definition of the exhaustion doctrine in the *St. Luke's* dictum quoted above has never been strictly applied by the Court. In *Meenes v. Goldberg*,[6] the petitioner sought a declaratory decree as to the validity of a sewer assessment. The respondent demurred on the ground that the petitioner had adequate administrative remedies by paying the tax under protest and then recovering it in an abatement proceeding. Although the Court recognized that previous cases had required a showing of extraordinary circumstances before judicial intervention would be warranted, it granted declaratory relief. In doing so it stated:

> But the most convincing reason for sustaining the bill is found in G.L. (Ter. Ed.) c. 231A . . . setting up the present procedure for declaratory judgments. Section 9 of this chapter makes it particularly plain that the statute is to be "liberally construed and administered" "to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations." Commonly relief under this chapter should not be denied because of the possibility of some other form of remedy, if the case presented comes within the general scope of the chapter and no special reasons exist against the use of the declaratory process.[7]

Thus, rather than require that the petitioner show extraordinary circumstances which would justify judicial intervention, a presumption in favor of the use of declaratory relief was proposed, and the respondent had imposed upon him the responsibility of showing special reasons why exhaustion should be required.

In a later case, *Madden v. State Tax Commission*,[8] the Commissioner issued an advisory opinion that the petitioner was subject to the state income tax on the conversion of his stock in the merger of two corporations. There were 725 other shareholders similarly situated. The petitioner sought a declaration that the conversion was not subject to the tax. The Commission demurred on the ground that the petitioner had not yet exhausted his administrative remedies. In granting declaratory relief, the Court allowed the petitioner to bypass his administrative remedies, stating that it was influenced in the case by the novelty of the questions and the large number of persons interested.[9] This result is consistent with the liberal interpretation of Chapter 231A as proposed by Section 9, and with the discretionary power granted by Section 3. The Court, however, warned that a petitioner would normally be required to exhaust his administrative remedies.[10]

[6] 331 Mass. 688, 122 N.E.2d 356 (1954).
[7] Id. at 691, 122 N.E.2d at 359.
[8] 333 Mass. 734, 133 N.E.2d 252 (1956).
[9] Id. at 740, 133 N.E.2d at 256.
[10] Id.

Madden represents a withdrawal from the position adopted in *Meenes*. Although the Court in *Madden* recognized that exhaustion is not an inflexible requirement, it appeared to create a presumption in favor of the doctrine and to require the petitioner to carry the burden of showing special circumstances that would justify judicial intervention. This position prevailed in *Squantum Gardens, Inc. v. Assessors of Quincy*.[11] The question presented there was whether a party who leased lands from the United States was required to pay a municipal property tax. The Court granted declaratory relief without requiring exhaustion on the ground that "important and novel questions are raised about a municipality's power . . . to tax real estate leased by the United States to a private corporation."[12] In the same paragraph, however, the Court stated that generally the petitioner would be required to exhaust his administrative remedies unless special circumstances were present.[13]

The latter two cases indicate that the doctrine of exhaustion no longer presents a serious obstacle to obtaining judicial review. Although the Court requires the petitioner to show "special circumstances," justifying an exception to the rule, these circumstances include the novelty of the question and the number of people interested in the resolution of the controversy.

In the *Madden* case, the fact that 725 people would have to fill out tax forms and that the agency would have to process them all gave the Court good reason to intervene because it could decide the question in one proceeding without necessitating an enormous expenditure of time and money. Thus, the number of persons involved is perhaps a justifiable reason for not requiring exhaustion, providing, as it does, more efficient administration of justice. Nevertheless, the Court is also willing to recognize the novelty of the issues as a special circumstance. Since many cases reaching the litigation stage present novel questions, the exception will be frequently available. But there appears to be no justifiable reason for disregarding the exhaustion requirement merely because of the novelty of the issue raised. To dispense with the requirement of exhaustion merely because a novel question is presented will detract from the efficient administration of justice, as it will require the courts to decide many cases which would be more efficiently handled by the agencies in the first instance.

This is not to say that the doctrine of exhaustion is no longer viable. In *Winch v. Registrar of Motor Vehicles*,[14] the respondent assessed three points against the petitioner for being at fault in an automobile accident causing minor injuries. The petitioner sought a declaration that assessment of points was unconstitutional. The Court found that the petitioner had failed to establish that there was any penalty imposed for acquiring three points or that if there was a penalty, that

11 335 Mass. 440, 140 N.E.2d 482 (1957).
12 Id. at 443, 140 N.E.2d at 485.
13 Id.
14 334 Mass. 271, 135 N.E.2d 17 (1956).

it was anything more than a warning.[15] Declaratory relief was refused on the ground that the petitioner should be required to exhaust his right to administrative appeal, since it was not apparent that there was danger of any serious harm.[16] Thus, it appears that if the injury suffered is relatively minor and there is no danger of further injury, the Court will require exhaustion.

Since the presumption in favor of requiring exhaustion remains and also since the application of exhaustion is discretionary, where the lower court applies the doctrine, the Supreme Judicial Court will find it difficult to reverse for abuse of discretion. There is no evidence, however, that lower courts will be any more rigorous in requiring exhaustion than the Supreme Judicial Court has been.

§10.4. Termination of controversy. The other major reason for refusing declaratory relief, within the discretionary power granted in Chapter 231A, Section 3, is that the decree would not terminate the controversy. In *Foster v. City of Everett*,[1] the petitioner, a policeman, sought to retire because of a heart condition and applied for a pension. As one of the requirements for obtaining the pension, he had to prove to a board composed of the mayor and aldermen that the heart condition was a result of his employment. Prior to his employment, the petitioner had submitted to a physical examination which had produced no evidence of the heart condition. Upon application for the pension, the petitioner had submitted to another physical which verified the existence of the condition. In his appearance before the board, the petitioner would be entitled to a presumption that the condition was a result of employment if he met the requirements of General Laws, Chapter 32, Section 94. After the physical examination but before he appeared before the board, the petitioner sought a judicial declaration that he was entitled to the presumption. At the request of both parties the lower court ruled that the petitioner was entitled to the presumption. The respondent appealed, challenging that ruling on the basis that the lower court had no right to make it because such a ruling would not terminate the controversy. Since the question was one of jurisdiction, the Supreme Judicial Court found that it could be raised at any stage of the proceedings.[2]

The Court pointed out that "it would be a perversion of the purposes of the statute if it were used to obtain decisions on subordinate questions in a case. Instead of a dispute resulting in one judicial proceeding it would divide, amoeba-like, and give rise to many."[3] The Court, however, ruled that it was within the lower court's discretion whether to refuse to grant declaratory relief and that it could not say that the lower court had abused its discretion.[4]

[15] Id. at 274, 135 N.E.2d at 18.
[16] Id.

§10.4. [1] 334 Mass. 14, 133 N.E.2d 480 (1956), noted in 1964 Ann. Surv. Mass. Law §21.6.
[2] Id. at 16, 133 N.E.2d at 482.
[3] Id. at 17, 133 N.E.2d at 483.
[4] Id.

Since the question had already been decided before a proper body, there would have been little reason for overturning the decision of the lower court and having the petitioner challenge again if the board did not allow him the presumption. Also, the respondent was not aided in this case by requesting a decision on the matter in the lower court. It is difficult, however, to imagine a case more appropriate for the application of the termination rule. The fact that the Court did not apply termination in this case indicates the wide latitude of discretion the Court will permit.

The most significant departure from the Court's liberal attitude toward granting declaratory relief appears in *Weinstein v. Chief of Police of Fall River*.[5] The petitioner was the treasurer and sole stockholder of a manufacturing business in Fall River. Because of his religious beliefs, the plant was closed on Saturdays. Under General Laws, Chapter 136, Section 9, the chief of police had discretion "upon such terms and conditions as he deems reasonable [to issue permits to work on Sundays where the work] . . . in his judgment could not be performed on any other day without serious suffering, loss, damage, or public inconvenience." The petitioner alleged that his manufacturing business was indistinguishable from those of other firms to which respondent had been granting such permits and yet that respondent refused to grant him a permit. The petitioner also alleged that the sole ground for the respondent's refusal was that he interpreted the statute as excluding the petitioner from obtaining a permit because he closed on Saturday. The bill sought a declaration that the respondent's interpretation was incorrect or that if it was correct, that the statute was unconstitutional. The respondent demurred generally, alleging as one ground that a decree would not terminate the controversy. The lower court sustained the demurrer and entered a final decree dismissing the bill.

The Supreme Judicial Court held that the respondent's demurrer did not admit the general assertion of facts and that "without specific facts the Court cannot determine and terminate the controversy."[6] It was stated:

> The allegation that the sole ground for his [respondent's] refusal is the closing of the corporate plaintiff's place of business on Saturdays is not a substitute for showing that the corporate plaintiff is otherwise entitled to a permit.
>
> . . . A declaration as to the correctness of the ground of refusal attributed to the defendant chief of police would not be decisive of the entire controversy. The plaintiff corporation would not at once become entitled to a permit. The chief of police would still have a discretion to exercise.[7]

[5] 344 Mass. 314, 182 N.E.2d 525 (1962), noted in 1962 Ann. Surv. Mass. Law §14.8.

[6] Id. at 317, 182 N.E.2d at 527.

[7] Id. at 318, 182 N.E.2d at 527.

Although it is true that petitioner had not alleged the specific facts which made his firm indistinguishable from other firms, he had alleged that they were indistinguishable and should have been allowed to prove that allegation at trial. If he were able to prove it, then a decree declaring the respondent's interpretation valid or invalid would have terminated the controversy. If the Court was merely looking for a more specific statement of facts, it should have allowed the petitioner to amend.

A possible explanation for the Court's decision is that the lower court has a wide range of discretion in deciding whether to refuse relief on the ground that a decree would not terminate the controversy. Since the allegations of the petitioner were rather confusing and did not allege the specific facts which made his business indistinguishable from others, the Court could not say, as a matter of law, that the lower court had abused its discretion.[8]

§10.5. Conclusion. This chapter has not attempted to examine all the problems which may arise in using declaratory relief to review administrative action. Rather it has focused on specific problems that have been the subject of discussion in the Supreme Judicial Court to see what resolutions have been adopted and then to see what trend these resolutions forecast for future decisions.

In this regard, it may be said that the Court has adopted a flexible position and a strong attempt has been made by the judiciary to function as a preventive as well as a curative body. One of the strongest factors motivating the Court to grant relief appears to be a desire to prevent injury and resolve legal uncertainty, wherever possible. At times this concern with the danger of injury to the petitioner has led the Court to overlook the proper functioning of the administrative process. This was exemplified in the *Frontier*[1] case where relief was granted against the agency on the basis of an investigatory report. Admittedly, the case arose under unusual circumstances but the holding would allow the courts to assume a function which should clearly be left within administrative control. Although the prevention of injury should remain an important consideration, it must be balanced against the proper functioning of the administrative process. A reading of *Frontier* which would allow the court to interfere in the agency's investigation would greatly impair the agency's ability to fulfill its duty to the public and should not be followed in the future.

This desire to prevent injury has also had its ramifications in determining the type of interest which must be impaired before relief will be granted. In Massachusetts the main controversy as to this particular question has been whether relief should be granted if one's

[8] Another possible explanation of the opinion is that the Court employed the termination rule in order to avoid deciding the difficult and controversial issue raised by the petitioner.

§10.5. [1] Frontier Research Inc. v. Commissioner of Public Safety, 1967 Mass. Adv. Sh. 137, 222 N.E.2d 854.

interest in being free from illegally created competition is interfered with. The Court's position on this question appears to be changing. In *Nantucket Boat*,[2] the Court stated that the mere interest in being free from illegally created competition was not sufficient to maintain the suit. "Special circumstances" were necessary to obviate this rule. In *South Shore*,[3] the Court found the special circumstances, relying on a statutory purpose to protect a bank's competitive position and the fact that the bank was subject to regulation. If the latter circumstance is sufficient, then many individuals whose competitive position is impaired by agency action will be allowed to challenge that action. This would be a step towards adopting the doctrine that any party who can show economic loss arising from increased competition should be able to challenge the agency action which caused it, both to protect his own interest and the public's. The Court's concern with preventing injury may lead it to adopt such a position.

Although the dicta in *Kelley*[4] that a threat of enforcement is necessary to create a controversy indicates a contrary approach, the Court has been willing to grant review of advisory opinions even though the administrative body rendering the opinion has not yet made any threat of enforcement. This, of course, is a logical extension of the preventive role the Court appears to have assumed, and there seems no good reason for retreating from this position.

The Court's desire to avoid injury has also extended itself in the application of the exhaustion doctrine. Whenever the petitioner can show that more than minor injury will result from the agency's action, the Court as in *Squantum Gardens*,[5] seems willing to dispense with the requirement of exhausting administrative remedies and to grant immediate judicial review. Again this is essentially a balancing of the proper functioning of the administrative process against the preventive judicial role. Since the Court has become so concerned with preventing injury, any injury will generally be considered important enough to outweigh the necessity of first resorting to the administrative remedies.

While the doctrine of termination of controversy does not raise any questions peculiar to administrative action, it may be said that the lower court has a wide range of discretion as to whether the decree will or will not terminate the controversy. Thus, the Court in the *Foster*[6] case allowed relief upon an issue to be raised in a future hearing, in effect permitting that hearing to be divided "amoeba-like."

[2] Nantucket Boat Inc. v. Woods Hole, Martha's Vineyard and Nantucket S.S. Auth'y, 354 Mass. 551, 188 N.E.2d 476 (1963).

[3] South Shore Nat'l Bank v. Board of Bank Incorporation, 337 Mass. 615, 151 N.E.2d 70 (1958).

[4] Kelley v. Board of Registration in Optometry, 351 Mass. 187, 218 N.E.2d 130 (1966).

[5] Squantum Gardens, Inc. v. Assessors of Quincy, 335 Mass. 440, 140 N.E.2d 482 (1957).

[6] Foster v. City of Everett, 334 Mass. 14, 133 N.E.2d 480 (1956).

Generally, it may be said that the Court has carefully heeded the admonition of Section 9 of Chapter 231A that the Declaratory Judgment Act be "liberally construed and administered." This has been a significant factor in making the declaratory judgment the most important remedy for securing judicial review of administrative action.[7]

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[7] The utility of adding a prayer for declaratory relief to one's petition for judicial review of administrative action is well illustrated by comparing Natick Trust Co. v. Board of Bank Incorporation, 337 Mass. 615, 151 N.E.2d 70 (1958), with South Shore Nat'l Bank v. Board of Bank Incorporation, 351 Mass. 363, 220 N.E.2d 899. In both cases, the fact situations were nearly identical. In the Natick case the Court held that review was not available either under Section 14 of the State Administrative Procedure Act or as a writ of certiorari. In South Shore, the petitioner sought review by a petition for writ of certiorari and by a petition for declaratory relief. The Court again held that a petition for writ of certiorari did not lie. The Court, however, granted declaratory relief. The two cases seem to provide ample reason for including a petition for declaratory relief whenever seeking judicial review of administrative action.