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A MODERN PROPOSAL FOR UNIFORMITY

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In litigation before a trial court of general jurisdiction, the plaintiff has based his claim, in part, on the alleged violation of a regulatory statute. Defendant moves for dismissal, contending that the claim should have been brought before a regulatory agency. Defendant argues that resolution of the question requires agency expertise, the exercise of administrative discretion in unsettled areas of the law, and policy issues entrusted to a non-judicial branch of government. The plaintiff, in response, denies these allegations. Noting that the statute does not grant exclusive jurisdiction to the agency, plaintiff argues that the administrative law issue is but part of a broader legal question properly before the court, and correctly observes that the agency cannot grant the full judicial relief demanded in the complaint. Plaintiff attacks the defendant's tactics as dilatory.

William Haseltine, a student at Whittier College School of Law, has discovered, not surprisingly, that conscientious courts have failed to agree on consistent criteria for answering the thorny question, "Who should decide the case?" In the following article he demonstrates the need for predictability, and suggests a possible, tentative approach to the problem.

1. INTRODUCTION

Although the scope and diversity of legal issues and problems facing a modern administrative law practitioner are as varied and complex as are the number of viable theories which may appear before a court of law or an administrative tribunal, few can be said to be more frustrating than the basic problem of determining where, when and whom to join in an action for relief.

This problem is especially visible when the claims of one's client rest upon various causes of action which may be based in whole or in part upon common or statutory law, upon administrative remedies, or upon an indistinguishable mixture of both.

The doctrine of primary jurisdiction,[1] which has recently been accepted by most state and federal courts in varying degrees, has presented problems of a logistical, rather than strictly legal, nature to administrative law practitioners. These problems can be widely varying in nature; however, a common nucleus can be found in that the shortcomings of a system in which procedural certainty cannot be found will almost universally result in an adverse affect on the interests of the claimant seeking some sort of relief.

The most obvious of the problems faced by a claimant who finds himself caught in the dilemma of a primary jurisdiction problem is that of the exigency of his claim. Although our legal and administrative tribunals are not known particularly for their speed and efficiency, one can clearly see that requiring a claimant to proceed into one tribunal, then be referred to another tribunal, only to be required to return to the original tribunal for final adjudication or enforcement of a prior tribunal's determination can severely tax the patience, time, and resources of a claimant. Almost all claims presented in courts seek some determination of monetary matters in some form; therefore, delays caused by jurisdictional problems can be very costly. Furthermore, what may initially appear to be a relatively simple court case may require significantly greater costs and attorneys' fees when referred from one tribunal to another.

As will be seen throughout the following discussion, almost all courts adhere to some application of the doctrine in their dealings with administrative law issues. The problem for a practitioner in state courts today arise from the erratic application of the doctrine.

There are many factors which may cause a court to refer a decision to an agency. These factors, as discussed below, are applied solely at a court's discretion, and many times a reviewing court will substitute its own discretionary opinion for that of the trial court. Further, the very factors upon which a court may rest its decision to invoke the doctrine may be similar to those which are ignored by other courts. Although complete uniformity throughout the states may appear to be an unrealistic goal, it is clear that claimants and administrative law counsel would greatly benefit from some limitations on the use of primary jurisdiction, and more uniform application once the procedure is used.

This desired consistency is obviated when state courts are forced to deal with claims which overlap issues involving federal agencies. A lack of uniformity can give rise to significant forum shopping, and may result in unfair results for many claimants.

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[1] The origins of the doctrine can be traced to the case of Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426 (1907), wherein a shipper sued in a state court to recover allegedly unreasonable charges collected on a freight rate. The Supreme Court held that the authority to determine whether the rate was in fact unreasonable had been expressly delegated by Congress to the Interstate Commerce Commission.

Some of the possible remedies for these problems which are discussed below include a strict, uniform limitation (possibly through amendment to the Model State Administrative Procedure Act[2]) on the availability of primary jurisdiction to circumstances which involve the requirement of a determination of a highly technical issue over which an agency has express statutory jurisdiction. There would be no need to invoke the doctrine when the agency has previously made its position clear on the same or significantly similar subject matter. The court should not refer a matter to an agency unless the central, essential thrust of the case, rather than a mere collateral issue, meets the above requirements. Finally, a court should not utilize primary jurisdiction unless the agency can afford a full and final relief for the claimant. This is often impossible for an administrative tribunal, although some or all of the above elements exist necessitating the opinion of the agency. In such a case, perhaps the trial court should request an amicus brief from the agency, setting forth its opinions and recommendations regarding the administrative issue.

II. THE DOCTRINE OF PRIMARY JURISDICTION

The doctrine of primary jurisdiction, simply stated, requires that when a court is confronted with a case in which one or more issues are raised which involve matters generally committed to an agency's expertise, then the case should be dismissed or retained on the docket pending an agency determination of the questions therein.[3] Subsequent to this agency determination, if the court has retained the case, the court will then decide any remaining issues which are left unresolved by the agency. Obviously, the problems of primary jurisdiction do not arise if the entire matter rests upon common or statutory law and can be decided by a court without the aid of an agency's opinion.

The purpose of the doctrine of primary jurisdiction is to promote uniformity in matters wherein Congress or state legislatures have delegated authority to agencies, and to promote a proper relationship between courts and agencies.[4] Another stated purpose for the utilization of the doctrine is that of "coordinating" the workings of the agency and the court.[5] However, as seen below, this goal is not always reached by the court's application of the doctrine, and it is possible that other means may be more readily available to attain this desired efficient agency/court interaction.

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2 Model State Administrative Procedure Act, 14 U.L.A. 35 (1980).

3 See, e.g., K. Davis, Administrative Law Treatise, Ch. 19 (1958); L. Jaffe, Judicial Control of Administrative Action, Ch. 4 (1965).

4 United States v. Western Pacific Railroad Company, 352 U.S. 59 (1956). This purpose becomes somewhat anomalous in view of the fact that the erratic application of the doctrine by the courts has given rise to little uniformity of result, even though particular questions may be answered consistently by an agency.

5 Nader v. Allegheny Airlines, 426 U.S. 290 (1976).

It has been said that the courts should not try to decide on an ad hoc basis those matters which are predominantly within the specialized knowledge of an agency.[6] This is true even if the ultimate legal decision is of necessity deeply entangled within such matters of agency expertise.[7]

There is no fixed formula for the application of the doctrine, and it is from this fact that the greatest uncertainties arise for practitioners. Counsel may firmly believe that his clients' claims rest wholly or predominantly upon legal issues, with an administrative issue merely collaterally involved. It will be seen below, however, that even in such a case, the court may invoke the doctrine of primary jurisdiction. Further, the application of the doctrine has varied widely among the various states, and it is because of this fact that some reasonable, practicable alternative should be established which can find uniform application throughout the many state courts.

It should be noted at this point that the doctrine of primary jurisdiction is one created by the courts. As experience has dictated, judicially created doctrines vary as widely in their application as do the opinions and theories of the judges who apply them. Since primary jurisdiction problems arise in a variety of contexts, as discussed below, it is not surprising that the applications of the doctrine throughout the states has been somewhat less than uniform or predictable. This problem provides one basis for the advocation herein of a strict, uniform limitation on the availability of primary jurisdiction to state courts.

III. PRIMARY JURISDICTION AND THE STATE COURTS

The following discussion of state court opinions which deal with the doctrine of primary jurisdiction is designed to give the reader some basic illustrations of common areas of differing opinions in its application. The discussion focuses on certain topics of controversy among the courts, and briefly analyzes the different approaches taken. The case study herein is not intended to be exhaustive; however, the examples, when viewed within the context of the inherent vagaries of the doctrine as judicially applied, can be instructive as to the possible reforms which can be incorporated into a more uniform usage.

A. Technical Issues and Common Law Remedies

There are certain areas, typically involving what most state courts believe to be questions of a highly technical nature, wherein the doctrine of primary jurisdiction is invoked with some uniformity. This uniformity can vary, however, depending upon whether the "technical" issue is deemed to be central to the case or merely collateral.

One area in which this practice is common is that of questions involving rules of public utilities commissions. Other areas involve licensing, tax cases, suits involving interpretation of collective bargaining agreements, and

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6 Far East Conference v. United States, 342 U.S. 570 (1956).

7 Id.; see also United States v. Western Pacific Railroad Company, supra.

zoning cases.[8] It is clear that the court's determination of whether an issue is "technical" enough to require referral to an agency is of necessity based on an entirely subjective determination. Perhaps the courts should have stricter standards by which to make this type of decision than the broad policies which the doctrine of primary jurisdiction supplies. It should be noted that Congress and state legislatures have in a sense forced the application of primary jurisdiction on the courts, since many agency statutes are quite vague in their specification of agency authority.

Even when a court has determined that it possesses the requisite knowledge to competently decide a claim, it may be overturned on appeal for the very reason that the appellate court may not believe the trial court should decide such matters. In one Virginia case,[9] the plaintiff sued for damages resulting from an alleged overcharge by the defendant. Although the trial court had access to rates published by the Federal Maritime Commission and the case had a relatively uncomplicated factual basis, the Supreme Court of Virginia overruled the findings of the trial court, stating that the classification of the cargo would rest solely within the discretion of the Commission.

Similarly, the Supreme Court of South Dakota overturned the decision of a trail court involving a determination that the telephone company had the right of access to construct an underground line beneath defendant's railroad.[10] Although the issues involved both the right of access and the safety of the installation procedure, the court held that the presence of the latter issue required referral of the entire matter of the Public Utilities Commission under the doctrine of primary jurisdiction.

Contrast these cases with the following Mississippi case,[11] wherein the plaintiff railroad sued for a debt on an open account. The Supreme Court therein held that the central issue involved a contractual dispute, and that the question involving the rates set up by the Interstate Commerce Commission was of such a non-technical nature that it could easily be decided by the court. The same result has been reached in Ohio,[12] where the electric utility

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8 Frank E. Cooper, State Administrative Law, Vol. II (1965), pp. 566-8.

9 Seatrain Lines Inc. v. Gloria Manufacturing Corporation, 279 S.E.2d 166 (Va. 1981).

10 Northwestern Bell Telephone Company v. Chicago and North Western Transportation Company, 245 N.W.2d 639 (S.D. 1976).

11 Illinois Central Railraod Company v. M.T. Reed Construction Company, 51 So.2d 573 (Miss. 1951).

12 Cleveland Electric Illuminating Company v. City of Cleveland, 50 Ohio App.2d 275, 363 N.E.2d 759 (1976).

sued the City of Cleveland to recover moneys due for the sale of electric power. Again, the court there held that the central issue involved a contractual dispute, and that no particular agency expertise was needed to resolve it.

The irregularities of decisions by state courts in the context of "technical" questions is further illustrated by the following pair of cases. A shareholder's action against an insurance corporation and its directors in Texas alleged various common law and statutory wrongs, and sought declaratory and injunctive relief, as well as money damages.[13] The appellate court sustained the dismissal of the suit on the ground that insurance companies in Texas are regulated by the Board of Insurance Commissioners; therefore, plaintiff's remedy would be before that administrative tribunal. This ruling seems to have effectively precluded plaintiff's common law remedies since powers of the Board do not include the ability to grant the relief sought by plaintiff.

A shareholder action in Illinois brought a different result.[14] In this case, plaintiff was allowed to sue for the usurping of an alleged corporate opportunity, even though the power to regulate savings and loan associations like the defendant rested exclusively with the Federal Home Loan Bank Board. The court correctly noted (as the Texas court failed to do) that a proceeding before the Board could provide no effective remedy for the plaintiff, even though it had apparent authority to decide the dispute.

These cases, and many others, illustrate how various courts' opinions differ on exactly what constitutes an issue of sufficient technicality to require referral to an agency. Although ignored by many courts, it should be a highly determinative factor whether the agency question is central to the issues confronting the court,[15] or whether it is merely tangential.[16] Further, a court should be required to consider such factors as whether the issue involves a determination of the fairness of a rate, or merely its enforcement.[17] This can be especially obvious in a case wherein the authority

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[13] Kavanaugh v. Underwriters Life Insurance Company, 231 S.W.2d 753 (Tex. Civ. App. 1950).

[14] Valiquet v. First Federal Savings and Loan Association of Chicago, 87 Ill. App. 3d 195, 408 N.E.2d 921 (1979).

[15] See, e.g., Northeast Airlines, Inc. v. Weiss, 113 So.2d 884 (Fla. App. 1958), cert. denied 116 So. 2d 772 (Fla. 1959).

[16] See, e.g., Swede v. City of Clifton, 22 N.J. 303, 125 A.2d 865 (1956); Gregg v. Delhi-Taylor Oil Corporation, 162 Tex.26, 344 S.W.2d 411 (1961).

[17] See, e.g., Central Hudson Gas and Electric Corporation v. Napoletano, 227 App. Div. 441, 101 N.Y.S.2d 57 (1950); State ex rel. Evansville City Coach Lines v. Rawlings, 229 Ind. 552, 99 N.E.2d 597 (1951).

upon which plaintiff seeks to enforce a rate is a prior decision of the agency itself.[18]

B. Application vs. Interpretation of an Agency Rule

A common variation among state courts in the application of primary jurisdiction rests upon some preliminary decision of the court of whether the issue involved deals with the application or enforcement of a rule which an agency has promulgated; or in the alternative, if it requires some substantive determination of the content of the rule. Although this can appear to be a clear distinction, there is no apparent pattern nor any clear standards utilized by the various state courts in their decisions. As can be seen through the following brief discussion of some state and federal cases, a general rule regarding this application of primary jurisdiction would be helpful in predicting the outcome of a case or the value of the claim of one's client.

The Second Circuit has clearly stated its position on this matter; there can be no utilization of the doctrine of primary jurisdiction when the issues before the court merely require enforcement, rather than interpretation, of the rule of an administrative body.[19] This seems to be a good rule so far as it goes, but it often may become necessary to interpret a rule prior to its enforcement. The court would not be deterred from deciding such an issue even in view of its extreme complexity.[20]

In a New York case,[21] the Court of Appeals found that the Interstate Commerce Act does not abrogate the common law duties of a shipper or carrier. However, since a rule promulgated by the Interstate Commerce Commission was asserted as a defense to such an action, the Court decided in an apparent attempt to avoid a conflict with the I.C.C. that there must be a determination of the reasonableness of the rule, and that this task must be left initially with the I.C.C., rather than in the courts. It seems highly unlikely that the Commission would be able to provide an adequate remedy for the plaintiff, however, if his recovery rests upon a determination by the I.C.C. that its own rule is unfair or unreasonable.

The Supreme Court of Iowa appears to have decided that no common law remedy may be given by a court when an administrative agency has approved the conduct of the defendant.[22] No inquiry was possible into the merits of the rule or the purposes therefor in a suit for damages against an airline.

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[18] State ex rel. Taylor v. Nangle, 360 Mo.122, 227 S.W.2d 655 (1950).

[19] Civil Aeronautics Board v. Modern Air Transport, 179 F.2d 622 (C.A.N.Y. 1950).

[20] Id., at 624.

[21] Hewitt v. New York, N.H. & H.R. Co., 284 N.Y. 117, 29 N.E.2d 641 (1940).

[22] Ravreby v. United Airlines, Inc., 293 N.W.2d 260 (Iowa 1980).

Another decision by the United States Supreme Court has indicated that mere enforcement or application of a prior agency ruling may not be an available remedy for a plaintiff in a federal district court.[23] However, it is unclear whether the Court was invoking the doctrine of primary jurisdiction or that of exhaustion of remedies in this case.

The United States Supreme Court advocated the practice of lower courts' interpretation of agency rules in the Pyramid case, however.[24] A specific rule of the Interstate Commerce Commission was at issue in that case, and the determination of whether plaintiffs came under its application was left up to the District Court.[25]

Some courts, on the other hand, have rejected altogether the practice of referral to agencies to determine the application or the substance of a rule.[26] Although this view is clearly a minority, its practicality should not be overlooked by those seeking a solution to the problems presented by primary jurisdiction. Surely a court of law, which is required constantly to interpret intricate statutes, is well equipped to discern the meaning of an agency rule or regulation. This concept is closely related to the "technical" question issue, discussed above. If a court cannot sufficiently interpret a rule or regulation due to its technical nature, then perhaps referral to an agency would indeed be required.

C. Constitutional Questions and the Inability of an Agency to Grant Relief

There exist a relatively small number of cases within the purview of primary jurisdiction which seem to apply an element of the doctrine with some uniformity. The courts in these cases have significantly refused to refer to various agencies' questions which involve some type of constitutional question. Although this would appear to be an easy decision for a court to make, many courts, as noted below, have refused to acknowledge the Constitutional claims of a plaintiff when accompanied by closely related administrative claims. Again, it appears that the courts should look to the central issues in the cases in determining whether to deny immediate judicial relief or to delay such relief pending some agency determination. There can be no doubt as to the lack of agency authority to determine constitutional rights of claimants.

This concept is illustrated by the decision of a Maryland court,[27] wherein the state sued to recover unpaid taxes from appellant. The court stated that, generally, one must appear before the State Comptroller to contest

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23 United States Navigation Company v. Cunard Steamship Company, 284 U.S. 474 (1932).

24 Pyramid Motor Freight Corporation v. Murray Ispass, 330 U.S. 695 (1947).

25 Id., at 706.

26 See, e.g., Main Realty Co. v. Blackstone Valley Gas & Electric Co., 59 R.I.29, 193 A.879 (1937).

27 Miller Bros. Co. v. State, 201 Md. 535, 95 A.2d 286 (1953).

a tax assessment, and that courts do not wish to bypass administrative agencies. However, the central issue of this case involved the constitutionality of the tax; therefore, it was proper for the court to decide such issues without the aid of the Comptroller.

A claimant may also sue an agency in a court of law and allege a violation of his due process rights through an inordinate delay of adjudication by an agency. A Massachusetts court held that while a court may not decide the agency issue itself, it may make a determination of whether the delays of the agency caused a violation of the claimant's constitutional rights.[28] However, it seems that the court must actually reach the merits of the claim before the determination can be made.

Most courts appear to be reluctant to refer a case to an agency unless it appears that the agency will be able to give the specific relief sought by the plaintiff. In a Connecticut case,[29] the plaintiff sought declaratory and injunctive relief from a mobile home park rental agreement. The court sustained defendant's demurrer, stating that these remedies could be granted by the Real Estate Commission.

Conversely, a Washington court determined that the Federal Maritime Commission should not be consulted in another case.[30] Although the F.M.C. had authority to determine the meaning of an exculpatory clause in the subject contract, they could not grant the relief sought by the plaintiffs. Further, the court stated that the exculpatory clause could have no effect under Washington Law; therefore, it's meaning was irrelevant.

However, a Wisconsin court felt compelled to refer a case to the Board of City Service Commissioners in a wrongful termination suit.[31] Although there existed in the action some matters which could be determined by the Board, the suit also included claims of damages for violation of Constitutional rights and defamation. The court felt obligated to defer litigation of these claims pending an agency adjudication despite the total lack of authority of the agency to resolve these claims. It is in this type of case that the primary jurisdiction doctrine can cause a severe delay or denial of recovery to the plaintiff who has had substantial rights invaded by defendants, yet is forced to pursue an administrative remedy which cannot really provide him the relief sought. It should be inquired of the courts whether they are in fact either deferring their own Constitutional duty of resolving cases to an administrative tribunal or if they are relying upon an agency decision of what amounts to the substantive Constitutional rights of a claimant in their subsequent review of the agency action.

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[28] Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission, 372 Mass. 495, 362 N.E.2d 897 (1977).

[29] Connecticut Mobile Home Association, Inc. v. Jensen's, Inc., 178 Conn. 586, 424 A.2d 285 (1979).

[30] S.S. Kresge Company v. Port of Longview, 18 Wash. App. 805, 573 P.2d 1336 (1977).

[31] Castelaz v. City of Milwaukee, 94 Wis.2d 513, 289 N.W.2d 259 (1980).

D. Mixed Questions of Administrative and Common or Statutory Law

One of the most perplexing problems a court may find itself confronted with in determining whether to invoke primary jurisdiction arises when the case presents questions of law which seem indiscernable from what appear to be pure agency questions. It is in this context that the courts may truly be justified in referring the case to an agency for prior determination. However, as will be seen below, this remedy may be unnecessary in a great majority of cases.

Although an agency may be best suited to determine a certain issue, formal referral by the court may not be necessary. For example, perhaps the agency has issued a prior statement or decision which disposes of the issue. Another possible alternative available to a court would be to merely invite the agency to submit an amicus brief outlining its position on the matter. This is especially true if the agency question is tangential to the central question involved in the case. Except in rare circumstances where a court is specifically bound by law to rely upon an agency determination prior to the issuance of its decision, a court should decide the issues involved if there is any clear agency policy upon which they may base their decision. However, as outlined above, many courts will refer a case to an agency upon the mere appearance of what they may deem to be a "technical" question designed for agency expertise, regardless of whether it involves the central issues in the case.

Courts have handled the problem of cases involving mixed legal and administrative issues in many different ways. Some courts may simply decide that they will determine all of the issues and ignore the possible jurisdiction of an agency.[32] Another approach is similar in result, though more moderate in tactic. This involves the willingness of a court to decide an issue of considerable complexity because it has all the undisputed facts before it and knows the general opinion of the agency with regard to such matters.[33]

Some courts have adhered to the strict doctrine of primary jurisdiction which, when combined with the doctrine of exhaustion of remedies, requires a plaintiff to adjudicate his administrative claims first, then bring an action in court to adjudicate his related constitutional claims, even though both sets of claims could have been heard by the court initially.[34] This view, however, is clearly not uniformly held in theory or in application,[35] nor is it to be preferred in seeking a workable solution to the problem.

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[32] See, e.g., Straube v. Bowling Green Gas Co., 360 Mo. 132, 227 S.W.2d 666 (1950).

[33] See, e.g., State v. Associated Metals & Minerals Corporation, 616 S.W.2d 305 (Tex. Civ. App. 1981).

[34] See, e.g., Evans v. Stanton, 419 N.E.2d 253 (1981).

[35] See, e.g., Kahl v. Consolidated Gas, Electric Light & Power Co. of Baltimore, 191 Md. 249, 60 A.2d 754 (1948).

E. What Deference Should Courts Give to Administrative Tribunals?

As can be seen generally from the preceding examples, state courts seem to give great deference to the authority of agencies which are established by Congress or state legislatures. There are, however, varying degrees of this deference given throughout the states, with no real discernable basis for the lack of uniformity. Consider the following cases which speak of the deference given to the various agencies' authority in terms which range from automatic to very little or none in some circumstances.

A Pennsylvania court determined that any possible action by the plaintiff to enforce a ruling of the Public Service Commission must be brought before the P.S.C.[36] This was true even though it was clear from the facts that the rule had been violated by the defendants, and the court could have granted an injunction.

A Court of Appeal in California has stated that the issue of whether an agency has been granted statutory authority to adjudicate a case must be first decided by the agency itself.[37] This court was willing to allow the seemingly exclusive judicial authority to interpret statutes to fall into the hands of the agency created by the statute. One may question a policy whereby an agency can determine its own authority. If this is not the case, and the powers of the agency must ultimately be decided by the court, then there is no apparent reason to refer the matter to the agency for their opinion as to the extent of power granted by the statute.[38]

Other cases seem to indicate a lesser degree of deference to the authority of administrative agencies, however. A California court has held that the mere possession by an agency of a continuing supervisory or investigatory power does not necessarily require that all related proceedings must first be heard by that agency prior to full adjudication in a court of law.[39]

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36 Fogelsville & Trexlertown Electric Co. v. Pennsylvania Power & Light Co., 271 Penn. 237, 114 A.822 (1921).

37 Woodard v. Broadway Federal Savings & Loan Ass'n of Los Angeles, 111 Cal. App.2d 218, 244 P.2d 467 (1952).

38 For other examples of cases wherein courts seem to afford great deference to administrative agencies, see, e.g., State Department of General Services v. Willis, 344 So.2d 580 (Fla. App. 1977); Minor v. Cochise County, 125 Ariz. 170, 608 P.2d 309 (1980); Humphrey Feed & Grain, Inc. v. Union Pacific Railroad Company, 199 Neb. 189, 257 N.W.2d 391 (1977).

39 Mueller v. MacBan, 62 Cal. App.3d 258 at 280, 132 Cal. Rptr. 222 at 233 (1980).

Similarly, a Washington court has determined that it will not refer matters to an administrative tribunal unless it has some special competence over the subject matter, and is able to provide the relief sought.[40]

On the other hand, some courts have expressed the view that when an agency question appears in the litigation, referral to that tribunal should be almost automatic, with little or no determination of other relevant factors involved.[41] This view is certainly not universally held, and it appears that many courts would rather decide the issues themselves than have to refer to some administrative tribunal for their opinion.[42] Certainly, a part of the reason for this viewpoint lies in the high probability of the eventual necessity of the case returning to the court for its ultimate disposition.

To summarize, it appears that courts vary widely in their interpretation and application of the doctrine of primary jurisdiction. Some factors which are heavily relied upon by some courts seem to be generally ignored by others. There is no consistent pattern of precedent running through the many decisions as outlined above. Although the doctrine has a general purpose and a general definition, these generalities are precisely the points wherein the discrepancies in application arise, frustrating efforts of counsel to secure relief for their clients. Certainly, administrative law practitioners are aware and avail themselves and their clients of administrative remedies when the need for these arise. However, it is in the context of the cases in which the administrative tribunal is ineffective in providing the proper relief, or those where the courts are unwilling to grant the proper relief that the major problems lie.

IV. REFORMATION OF THE DOCTRINE OF PRIMARY JURISDICTION

In formulating a workable reformation of the doctrine of primary jurisdiction, one must first consider the means by which a plan may be carried out. The application of the doctrine is constantly being revised and modified through its current usage in the courts. Many of the goals set forth herein are now urged by various courts to some degree, but it appears that in the final analysis, the discretion of the reviewing court will be determinative. Since w e have seen above that there is little agreement on a uniform application

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40 In re Real Estate Brokerage Antitrust Litigation, 95 Wash.2d 297, 622 P.2d 1185 (1980).

41 See, e.g., Lemhi Telephone Company v. Mountain States Telephone and Telegraph Company, 98 Idaho 692, 571 P.2d 753 (1977); Steward v. Allstate Insurance Company, 92 Ill. App.3d 637, 415 N.E.2d 1206 (1980).

42 See, e.g., Morrison-Knudsen Co. v. State Tax Commission, 242 Iowa 33, 44 N.W.2d 449 (1950); Cotter v. Blue Cross and Blue Shield of Michigan, 94 Mich. App. 129, 288 N.W.2d 594 (1979); Southern Bell Tel. & Tel. Co. v. State ex rel. Transradio Press Service, 53 So.2d 863 (Fla. 1951).

of primary jurisdiction within the courts, perhaps the principles of reform should be assimilated into the Model State Administrative Procedure Act.[43] However, this task should be carefully scrutinized to avoid codifying the same vagueries which now exist through judicial applications.

Since the largest problem arising from unnecessary utilization of primary jurisdiction by the courts occurs when litigants are denied their chance of recovery for claims related to but separate from administrative remedies, there should be an imperative and substantial limitation on the general usage of the doctrine. Courts should always be required to entertain actions for common law, statutory, and constitutional claims.

In the many circumstances wherein the cases involve factual situations including both administrative and other issues, courts should be reluctant to refer the entire matter to an agency for disposition. Initially, a court should determine whether an agency has been granted express and exclusive authority to either decide the rights and obligations of the parties or to control and interpret the subject matter of the dispute. Courts should not balk at their duty to resolve disputes merely because some portion of the relevant issues involve administrative matters.

This policy should not be construed as advocating a practice of usurping the authority of administrative agencies. To the contrary, courts should be more willing to avail themselves of agency expertise in matters wherein this viewpoint is needed. Courts cannot ignore express delegations of authority over certain subject matter by Congress or legislatures to various agencies. A court may find it helpful or necessary in the resolution of a dispute to invite an amicus curiae brief from a particular agency to explain their position on a certain issue over which they have some authority and expertise. This could be done upon the request of any party or on the court's own motion, and would greatly facilitate the interaction of courts and agencies as well as the promulgation of a uniform administrative policy (which is one of the stated purposes of the doctrine of primary jurisdiction). In cases wherein approval of certain conduct by an agency will obviate some aspects of the judicial proceeding (such as in antitrust litigation), a court may be compelled to invite an interim agency approval of actions of the defendant which would then facilitate resolution of the remaining issues before the court. Obviously, this would not be necessary if the entire matter can be settled by an agency, in which case the doctrine of primary jurisdiction should still be invoked.

Strong consideration must be given to the question of whether the administrative issue of the case is the central issue to be decided, or merely a collateral dispute. Although the former situation may give cause to apply the doctrine of primary jurisdiction, such application should be limited by the following consideration.

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[43] Model State Administrative Procedure Act, 14 U.L.A. 35 (1980).

For example, as seen in the case discussion above, a court should not defer the responsibility of enforcing a clear violation of an agency rule or policy. Mere enforcement should be distinguished from a substantive determination or statement of agency policy, however, and a court should respect the authority of an agency in the latter instance. A court should not be permitted to refer a case to an agency under any circumstance which may place a claimant in a position wherein he cannot obtain the specific relief to which he may be entitled. Further, a court should not be able to refer to an agency a case wherein a substantive determination of the constitutional rights of the parties will be involved.

Finally, it is clear that some agency guidance will be needed when the issues confronting the court are of sufficient technicality to require agency expertise and insight. However, a court should look to prior existing agency opinions upon which they may make a determination of the present issues. Further, the use of an amicus brief could be of great assistance in this situation. Only if these alternatives do not sufficiently equip the court to resolve the disputes before it should primary jurisdiction be invoked.

Through the preceding discussion it is clear that primary jurisdiction has been founded upon sound and reasonable objectives. However, it is equally clear that the doctrine has exceeded its original bounds and varied so widely in its application as to undermine the original policies supporting it. Therefore, it appears that the goals of efficient interaction between courts and administrative agencies and uniformity of application of administrative policy can only be obtained through a strict, perhaps codified, limitation of the usage of the doctrine.

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Query: When the case before a State ALJ requires resolution of an issue for which another tribunal has been created, the same problem of "primary jurisdiction" is presented. How should the judge address the problem?