Doctrine of Exhaustion of Administrative Remedies as an Offensive Tool

by David E. Kreutzer and Meghan L. Morrissey

The Doctrine of Exhaustion of Administrative Remedies requires those in dispute with the government to exhaust any internal agency remedies prior to litigating the issue in district court. Although usually used by governments to dismiss prematurely brought claims, it also can be used by enforcement attorneys to preclude a defense where the defendant should have administratively appealed the decision the government seeks to enforce.

The Doctrine of Exhaustion of Administrative Remedies (Doctrine) mandates that "courts will not review or grant relief in regard to any aspect of administrative proceedings until the agency has taken final action."[1] This rule resembles the rule against interlocutory appeals in federal court and requires that parties exhaust their administrative remedies before seeking judicial review.[2] The Doctrine applies only to private litigants.[3]

In Colorado, courts strictly adhere to the Doctrine, which serves as a threshold to judicial review.[4] Some statutes specifically identify the procedures a party must complete to comply with the Doctrine. In addition to participating in an administrative hearing, the parties also may be required by statute to pursue administrative remedies of reconsideration.[5] If a statute does not list the administrative procedures a party is required to follow before challenging the action in court, the party may rely on the general provisions of the Colorado Administrative Procedure Act.[6]

The Doctrine is prudential and jurisdictional in Colorado. Colorado Rule of Civil Procedure (Rule) 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction, and it is the plaintiff's burden to prove jurisdiction.[7] In Colorado, if a party

> fails to exhaust available administrative remedies or to establish that an exception to the exhaustion requirement excuses the failure to do so, "the district court may lack subject-matter jurisdiction over the action."[8]

Most exhaustion cases arise against plaintiffs, but if failure to exhaust leads to a jurisdictional defect, it would apply to any party.[9]

This article discusses various aspects of the Doctrine. It describes the underlying goals of the Doctrine, as well as its use by government lawyers, including a short explanation of the traditional defensive use, and a more detailed exploration of use of the Doctrine by a government plaintiff.

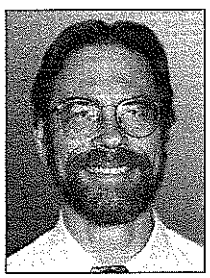
Purposes of the Doctrine

The Doctrine allows agencies with expertise in a particular subject matter to develop the necessary factual record on which the agency and subsequent reviewing courts can base their decisions. It promotes efficiency in the administrative process by preventing the interruption and fragmentation of the process. Allowing the administrative agency to correct its own errors in the first instance preserves the autonomy of the agency and reduces the friction between the branches of government.[10] Exhaustion protects against premature interference by the courts and piecemeal litigation.[11] The Doctrine "conserves judicial resources by insuring that courts intervene only if the administrative process fails to provide adequate remedies,"[12] and applies "with special force when 'frequent and deliberate flouting of administrative processes' could weaken an agency's effectiveness by encouraging disregard of its procedures."[13]

Exceptions to the Doctrine

The statutory exception to the Doctrine is stated in CRS § 24-4-106(8). It mandates that, for a district court to intervene before the agency's action becomes final, the agency's authority or jurisdiction must be clearly exceeded, and the party seeking to enjoin the proceedings must show that the agency action will cause irreparable injury.[14]

There also are common law exceptions to the Doctrine. For example, exhaustion is unnecessary when: (1) it is "clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested";[15] (2) the agency lacks the authority or capacity to determine the matters in controversy; or (3) resorting to administrative channels would cause undue delay.



About the Authors

David E. Kreutzer is a First Assistant Attorney General with the Colorado Office of the Attorney General, Hazardous and Solid Waste and CERCLA Litigation Unit, Natural Resources and Environment Section—david.kreutzer@state.co.us. Meghan L. Morrissey is an Associate with the law firm of Klauzer & Tremaine, LLC in Steamboat Springs—megmorrissey@hotmail.com.

A court also may determine that exhaustion is unnecessary when the matter raises questions of law rather than issues that are committed to agency discretion and expertise.[16] Additionally, if the named member of a class properly exhausts its administrative remedies, this fulfillment of the Doctrine is imputed to unnamed class members.[17] Finally, the agency may waive the Doctrine as it applies to individual parties and the matter may be directly heard before a court.[18]

Offensive Use of Exhaustion

The most common application of the Doctrine by government attorneys is as a defensive tool to bar a party from instituting a claim in district court against an administrative agency if the party has failed to exhaust the required administrative remedies.[19] This article focuses on the less common application of the Doctrine by government attorneys—its offensive use. This occurs where an agency brings a claim against a party in court who in turn asserts a defense that was not raised through the administrative review process.

In Colorado, an administrative agency may offensively use the Doctrine to support its claim that the defendant's nonconstitutional defenses are barred.[20] A government attorney will find great value in the offensive use of the Doctrine when bringing suit against a party who has failed to comply with and challenge an order against it within the proscribed time period using the proper administrative procedures.

First Published Colorado Case: CDPHE v. Bethell

In *Colorado Department of Public Health and Environment v. Bethell*,[21] the court of appeals held that the Doctrine applies to claims and defenses. This was the first published Colorado case to hold that:

> allowing a defendant to assert a defense which could have been, but was not, raised in the underlying administrative proceeding would constitute an impermissible collateral attack on the administrative order.[22]

The facts. Phillip Bethel, doing business as Elk Springs Recycling and Recovery, owned and operated an oil and gas drilling brine waste disposal site that was subject to Colorado Department of Public Health and Environment's (CDPHE) solid waste disposal regulations.[23] A year after notifying Bethel that he was out of compliance with its regulations, CDPHE served Bethell with a compliance order, asserting he had not provided the required financial assurance for closure and post-closure care of solid waste disposal sites.[24] Bethell neither provided the required financial assurance nor appealed the order to an administrative law judge as required by CDPHE regulations.[25]

The lawsuit. CDPHE brought suit in district court to seek compliance with the order and penalties against Bethell. CDPHE argued in its motion for summary judgment that Bethell was barred from bringing any nonconstitutional defenses because he failed to exhaust the required administrative remedies.[26] Bethell neither filed a notice of appeal nor specifically requested an informal conference as CDPHE's regulations required for contesting the order.[27] The district court agreed and granted summary judgment in favor of CDPHE and assessed a $7,793 penalty against Bethell.[28] On appeal, Bethell argued that the Doctrine did not bar his defenses, because trial courts regularly hear pre-enforcement challenges to administrative regulations and review final agency actions.[29]

The decision. The court of appeals determined that Bethell's argument was invalid because Bethell did not bring a pre-enforcement action that challenged CDPHE regulations; rather, CDPHE issued Bethel a compliance order before he challenged the regulations.[30] The court found that the administrative record would reflect the agency's expertise and would have facilitated judicial review of Bethell's nonconstitutional defenses; therefore, it disallowed Bethel from asserting any unraised defenses in district court.[31]

Applying the Offensive Use Doctrine

In ruling that the Doctrine applies offensively against parties who fail to comply with or challenge an order, the *Bethell* court adopted the holdings of *Department of Air Force v. Federal Labor Relations Authority*;[32] *Yellow Cab Company v. Williams*;[33] and *City of Lubbock v. Corbin*.[34] These and other cases clarifying the offensive use of the Doctrine are briefly discussed below.

➢ In *Department of Air Force v. Federal Labor Relations Authority*, the Court of Appeals for the Sixth Circuit found that the Doctrine applied when the defendant offered a defense under 5 U.S.C. § 7116(a)(1), (6), and (8) of the Federal Service Labor-Management Relations Statute, which the defendant had not raised through the required administrative procedures.[35] The court held:

> [Because] an [arbitration] award becomes final and must be implemented if the parties fail to file an exception within the required period, the necessary implication is that a party can no longer challenge the award by any means. . . . [T]o preserve defenses against an arbitration award under the Act, a party must file exceptions to the award. . . . Failure to do so is considered a failure to exhaust available administrative remedies, thereby precluding collateral attack on an award in a subsequent proceeding.[36]

➢ In *Yellow Cab Company of Bloomington, Inc. v. Williams*, the Indiana Court of Appeals held that *res judicata* applies even if there has been no actual trial:

> [I]f the parties had a full legal opportunity to be heard on their respective claims but there is no actual hearing because a party misses a statute of limitations or . . . for a failure to comply with the statutory prerequisites—it is just as much a bar to further litigation as a judgment on the merits."[37]

The court held that a defendant cannot collaterally attack an order in the courts where the defendant failed to appeal the order as provided by the statute.[38] The court focused on the fact that the legislature had granted authority to a tribunal to determine cases of a specific class.[39] In granting the agency the jurisdiction to hear these cases, the court found the defendant cannot collaterally attack the order in court if the defendant ignores the agency's jurisdiction.[40] In applying the *Yellow Cab* rule, the U.S. District Court for the Southern District of Indiana held that "a dismissal based on a litigant's failure to comply with the rules amounts to a dismissal with prejudice on the merits." When a case is dismissed on the merits based on a procedural error and without a hearing, the dismissal amounts to a ruling that has the effect of precluding the claims from being litigated in the future.[41]

- In *City of Lubbock v. Corbin*, the Texas Court of Appeals held:

> [W]hen the law has vested a special board, commission or tribunal with authority to hear and determine matters arising in the course of its duties, its decisions on those matters are conclusive, and like the judgments of courts, cannot be collaterally attacked in another proceeding.[42]

- In *State v. Triax Oil and Gas, Inc.*,[43] the Texas Court of Appeals further clarified the offensive use of the Doctrine. The court stated:

> [U]nless the order is directly attacked by the aggrieved party in an action brought for that purpose, the substance of the order is not subject to subsequent attack [and e]ven valid defenses to the substance of an enforcement order are not permitted if the final order is not appealed.[44]

- The Supreme Court of California has also recognized the offensive use of the Doctrine. In *Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Board*,[45] the Court held "[t]he exhaustion requirement applies to defenses as well as to claims for affirmative relief." The Court recognized in *Styne v. Stevens*[46] that the offensive use of the Doctrine has been applied in California in many circumstances.

- In *McGee v. United States*,[47] the U.S. Supreme Court allowed barring a defense in a criminal matter where the defendant failed to exhaust his administrative remedies. There, the Court concluded that:

> The result of applying the Doctrine in a criminal context is no doubt a substantial detriment to the defendant whose claims are barred. Still this unhappy result may be justified in particular circumstances by considerations relating to the integrity of the [administrative] process and the limited role of the courts in deciding [administrative issues]. . . . [T]he task for the courts, in deciding the applicability of the exhaustion doctrine to . . . a particular case, is to ask "whether allowing all similarly situated [regulated entities] to bypass (the administrative avenue in question) would seriously impair the [agency's] ability to perform its functions.[48]

The U.S. Supreme Court has been reluctant to penalize a criminal defendant for failing to exhaust administrative remedies when criminal sanctions are at issue, because the consequences and due process implications are severe.[49] However, the Court applied the Doctrine to the criminal defendant in *McGee v. U.S.* and held that McGee had lost his defense because "the interest in full airing of the facts within the administrative system is prominent."[50]

Issues Not Heard by the Administrative Agency

When a party follows the procedure specified by the administrative review statute and appeals the agency's decision to an administrative reviewing body, a question arises as to whether the respondent may raise issues on review that were not raised with specific particularity before the administrative agency. As a general rule, courts will not hear matters that lower adjudicative bodies did not have the opportunity to consider.

This rule applies to claims and defenses. If there is a *de novo* review by an administrative agency, it is likely the agency will allow the parties to raise issues that were not raised in the original administrative hearing, because the agency review board will not be limited to the record.[51] Practitioners must pay close attention to the wording of the statute that authorizes review of the original administrative action for standard of review and hierarchy of reviewing bodies.

This rule does not apply to matters that would fall under the exceptions to the Doctrine. To preserve these issues for appeal, the practitioner may consider raising issues with enough specificity so as to put the agency on notice of the objections before the administrative agency.

Conclusion

When arguing an issue involving the Doctrine, questions can be framed in terms of whether in its ruling the court will be promoting the underlying goals of the Doctrine. In using the Doctrine offensively, the attorney for the government may want to consider arguing that the factual record has not been developed through the administrative litigation process and that the respondent, through procedural finagling, should not be permitted to usurp the agency's authority in determining matters within its jurisdictional province. Emphasizing the factual nature of the inquiry and statutory requirements of the Doctrine may require the practitioner to consider the policies of administrative autonomy and separation of powers.

Notes

1. *Envirotest Sys., Corp. v. Colo. Dep't of Revenue*, 109 P.3d 142, 144 (Colo. 2005).

2. CRS §§ 24-4-101 to -108.

3. 73 C.J.S. *Public Administrative Law and Procedure* § 83 (2007).

4. *Colo. Dep't of Pub. Health and Env't v. Bethell*, 60 P.3d 779, 784 (Colo.App. 2002), *citing Denver-Laramie-Walden Truck Line, Inc. v. Denver-Fort Collins Freight Serv., Inc.*, 399 P.2d 242, 243 (Colo. 1965). *See also State v. Golden's Concrete Co.*, 962 P.2d 919, 923 (Colo. 1998).

5. *See Janssen v. Denver Serv. Career Bd.*, 998 P.2d 9, 11-12 (Colo. App.) (requiring respondent to request reopening or reconsideration of decision by Career Board). *But see Darby v. Cisneros*, 509 U.S. 137, 144-45 (1993) (holding that under the Administrative Procedure Act, 5 U.S.C. § 704, a respondent need not ask for reopening or internal appeal before turning to a district court, unless the agency has adopted regulations that require an internal appeal).

6. CRS §§ 24-4-101 to -108 ("[f]inal agency actions under this and any other law shall be subject to judicial review as provided in this section").

7. *Egle v. City and County of Denver*, 93 P.3d 609, 611 (Colo.App. 2004), *citing Trinity Broad. of Denver v. City of Westminster*, 848 P.2d 916 (Colo. 1993) and *Bazemore v. Colo. State Lottery Div.*, 64 P.3d 876 (Colo. App. 2002).

8. *Id.* at 612, *quoting City and County of Denver v. United Air Lines, Inc.*, 8 P.3d 1206, 1212 (Colo. 1993).

9. *Clasby v. Klapper*, 636 P.2d 682, 683-84 (Colo. 1981).

10. *Egle, supra* note 7 at 612, *citing United Air Lines, Inc., supra* note 8 at 1212-13. *See also Leedom v. Kyne*, 358 U.S. 184, 187-88 (1958).

11. *Bethell, supra* note 4 at 784.

12. *Id.*

13. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), *quoting McKart v. United States*, 395 U.S. 185, 195 (1969).

14. CRS § 24-4-106(8). *See also Envirotest Sys., supra* note 1 at 143-44, (noting that:

> [on] a showing of irreparable injury, any court of competent jurisdiction may enjoin at anytime the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly defined beyond the constitutional or statutory jurisdiction or authority of the agency).

15. *Egle, supra* note 7 at 612, *quoting Golden's Concrete Co., supra* note 4 at 919. *See also McCarthy, supra* note 13 at 145.

16. *Golden's Concrete Co., supra* note 4 at 923.

17. *Id.* at 924 (noting that "the class action exception to administrative review does not permit named class members to avoid the exhaustion requirements").

18. *See First Christian Assembly of God, Montbello v. City and County of Denver*, 122 P.3d 1089, 1094 (Colo.App. 2005).

19. *See, e.g., Crow v. Penrose-St. Francis Healthcare Sys.*, 169 P.3d 158 (Colo. 2008) (holding that "[b]ecause the Hospital's governing board has not rendered a final decision in his matter, Crow [a physician] has not exhausted his available administrative remedies, and his case is not ripe for judicial review").

20. *Bethell, supra* note 4 at 785 (holding that because administrative agencies lack jurisdiction to decide constitutional claims, including the constitutionality of its statutes or regulations, a defendant is not required to exhaust administrative remedies before raising a facial unconstitutionality challenge before a court).

21. *Id.* at 784.

22. *Id.* at 784-85.

23. *Id.* at 783.

24. *Id.*

25. *Id. See also* Colorado Department of Public Health and Environment Reg. No. 1.0.3(A)(1)-(2), 6 CCR § 1007-2 (making all compliance orders effective on receipt, unless provided for otherwise in the order, and allowing the respondent to file a notice of appeal within thirty calendar days of the effective date).

26. *Bethell, supra* note 4 at 783.

27. *Id.*

28. *Id.*

29. *Id.* at 784.

30. *Id.*

31. *Id.*

32. *Dep't of the Air Force v. Fed. Labor Relations Auth.*, 775 F.2d 727, 731 (6th Cir. 1985).

33. *Yellow Cab Co. of Bloomington, Inc. v. Williams*, 583 N.E.2d 774, 777 (Ind.App. 1991).

34. *City of Lubbock v. Corbin*, 942 S.W.2d 14, 22 (Tex.App. 1996).

35. *Dep't of the Air Force, supra* note 32.

36. *Id.* at 735.

37. *Yellow Cab Co. of Bloomington, supra* note 33.

38. *Id.* at 777-78.
39. *Id.*
40. *Id.*
41. *United States v. Clark County, Ind.*, 234 F.Supp.2d 934, 938 (S.D.Ind. 2002).
42. *City of Lubbock, supra* note 34.
43. *State v. Triax Oil & Gas, Inc.*, 966 S.W.2d 123, 126 (Tex.App. 1998).
44. *Id.*
45. *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Employment Relations Bd.*, 112 P.3d 623 (Cal. 2005), *citing Styne v. Stevens*, 26 P.3d 343, 353-54 (Cal. 2001).
46. *Styne, supra* note 45, *citing S. Coast Reg'l Comm'n v. Gordon*, 558 P.2d 867 (Cal. 1977) (holding that a landowner who failed to seek coastal zone building permit cannot raise "vested rights" defense in action for violation of Coastal Zone Conservation Act); *People v. Coit Ranch*, 21 Cal.Rptr. 875 (Cal.App. 1962) (holding that a farmer sued by Director of Agriculture for past-due cantaloupe advertising assessment cannot, for the first time, raise *ultra vires* defense available in administrative proceedings before the director).
47. *McGee v. United States*, 402 U.S. 479, 482-85 (1971) (noting that the defendant failed to exhaust his selective service remedies regarding a draft board's determination that he did not qualify for conscientious objector status.)
48. *Id.* at 483-84, *quoting McKart, supra* note 13 at 185, 197.
49. *See McKart, supra* note 13 at 185, 197 (noting that "[t]he defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order").
50. *McGee, supra* note 47 at 483-90 (distinguishing the case from *McKart, supra* note 13, in which the Court failed to apply the Doctrine of Exhaustion (Doctrine) to a criminal defendant where the case involved legal issues, and noting in *McGee* that the Doctrine was appropriate because McGee's conscientious objector defense turned on factual rather than legal issues).
51. *See Platte Dev. Co. v. State Envtl. Quality Council*, 966 P.2d 972, 975 (Wyo. 1998) (noting that the Doctrine does not apply to issues not raised in lower agency proceedings being reviewed *de novo* by agency review board). ■

QUESTIONS

1. The Doctrine of Exhaustion of Administrative Remedies (Doctrine) is usually used by governments to:
   a. force a landowner to comply with zoning ordinances
   b. have a district court action against it dismissed
   c. prevail in administrative litigation brought by it before administrative law judges
   d. revoke business licenses of under-performing auto dealerships

2. The Doctrine has been applied in:
   a. civil cases
   b. Troubled Asset Relief Program proceedings
   c. administrative proceedings
   d. civil and criminal cases

3. Purposes of the Doctrine include (select all that apply):
   a. preventing the interruption and fragmentation of the administrative process
   b. allowing the administrative agency to correct its own errors
   c. promoting job creation by adding to district court dockets
   d. discouraging disregard of administrative procedures

4. Exceptions to the Doctrine include (select all that apply):
   a. where further administrative review by the agency would be futile because the agency will not provide the relief requested
   b. where inaction by the regulated entity is due to lack of federal stimulus funds
   c. where the agency lacks the authority or capacity to determine the matters in controversy
   d. where resorting to administrative channels would cause undue delay

5. The Doctrine can be used by government attorneys to bar defenses to an agency district court enforcement action where:
   a. the defense is constitutional
   b. the regulated entity lost its appeal of the final agency action
   c. the regulated entity failed to comply with the final agency action or to appeal it administratively
   d. the regulated entity's credit-default portfolio exceeds its cash or equivalent assets

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