

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

INSURANCE INSTITUTE OF MICHIGAN,
HASTINGS MUTUAL INSURANCE
COMPANY, FARM BUREAU GENERAL
INSURANCE COMPANY OF MICHIGAN,
FRANKENMUTH CASUALTY INSURANCE,
WALTER STAFFORD, JR., and MICHAEL
FLOHR,

Plaintiffs-Appellants,

and

MICHIGAN INSURANCE COALITION and
CITIZENS INSURANCE COMPANY OF
AMERICA,

Intervening Plaintiffs-Appellants,

v

COMMISSIONER, FINANCIAL &
INSURANCE SERVICES, DEPARTMENT OF
LABOR AND ECONOMIC GROWTH,

Defendant-Appellee.

Supreme Court No. 137407

Court of Appeals No. 262385

Barry County Circuit Court No. 05-156-CZ

**This appeal involves a ruling that a
provision of the Constitution, a statute,
rule or regulation, or other State
governmental action is invalid.**

***AMICUS CURIAE* MICHIGAN ASSOCIATION OF REALTORS®' BRIEF
IN SUPPORT OF THE POSITION OF
PLAINTIFFS-APPELLANTS INSURANCE INSTITUTE OF MICHIGAN, *et al.***

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STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae Michigan Association of REALTORS® accepts and adopts the Statement of Basis of Jurisdiction contained in the brief filed by Plaintiffs-Appellants Insurance Institute of Michigan, Hastings Mutual Insurance Company, Farm Bureau General Insurance Company of Michigan, Frankenmuth Casualty Insurance, Walter Stafford, Jr., and Michael Flohr (hereafter, collectively "Plaintiffs") on appeal in Docket No. 137407.

STATEMENT OF QUESTIONS INVOLVED

Amicus Curiae Michigan Association of REALTORS® does not address all of the questions presented in the briefs on appeal in Docket No. 137407 filed by Plaintiffs and by Defendant-Appellee Commissioner, Financial & Insurance Services, Department of Energy, Labor and Economic Growth (hereafter "OFIS"), but only the following question:

- I. "[W]HETHER UNDER SECTION 64 OF THE ADMINISTRATIVE PROCEDURES ACT, MCL 24.264, THE PLAINTIFFS WERE PERMITTED TO BRING AN ORIGINAL DECLARATORY JUDGMENT ACTION IN THE CIRCUIT COURT WITHOUT HAVING FIRST REQUESTED A DECLARATORY RULING FROM [OFIS]. . . ."

The trial court permitted Plaintiffs to bring an original action for declaratory judgment.

The majority of the Court of Appeals determined the case was properly filed as an original action, but did not agree on whether a declaratory ruling from OFIS was first required.

Plaintiffs answered that they were permitted to bring an original declaratory judgment action without having first requested a declaratory ruling from OFIS.

Amicus Curiae Michigan Association of REALTORS® answers that Plaintiffs were permitted to bring an original declaratory judgment action without having first requested a declaratory ruling from OFIS.

I. STATEMENT OF FACTS

Amicus Curiae Michigan Association of REALTORS® (the "Association") accepts and adopts the Statement of Material Facts and Proceedings in the Plaintiffs' Brief on Appeal in Docket No. 137407.

II. INTRODUCTION AND STATEMENT OF INTEREST

The Association is Michigan's leading organization of real estate professionals and largest non-profit trade association comprising over 48 local boards and a membership of 24,000 brokers and salespersons licensed under Article 25 of the Michigan Occupational Code, MCL 339.2501 *et seq.* Each day the Association's members are involved in hundreds of real estate transactions. Because real estate sales, in particular single-family home sales and ownership, historically have been key segments of the Michigan economy, the Association has consistently advocated public policy and legal outcomes that foster predictability and reasonableness in transactions that touch and concern the value of home ownership.

This case is of vital concern to the Association for two primary reasons. First, the rules at issue in this case will directly impact the affordability of homes to members of the public in Michigan. If the rules promulgated by OFIS are implemented, the cost of homeowners' insurance for creditworthy buyers will undoubtedly increase. Presumably, the Association does not have to present any data for the proposition that the single-family real estate market in Michigan is presently in a dismal state. Any increase in the cost of purchasing and maintaining a single-family residence in Michigan at this time would only further delay economic recovery.

Second, the Association is regulated primarily through the Michigan Department of Energy, Labor and Economic Growth. The Association, along with all other citizens of Michigan who provide services in regulated industries in Michigan, is subject to the rule-making process of the executive branch. Any impediment to the ability to legitimately participate in the rule-making process and judicially challenge rules of questionable legal validity is strongly opposed by the Association.

III. STANDARD OF REVIEW

The Association agrees with the Standard of Review as set forth in Plaintiffs' Brief on Appeal in Docket No. 137407.

IV. ARGUMENT

The historical background which led up to the instant appeal is not an uncommon one for regulated businesses. An agency of the executive branch announces its intention to adopt a rule which the regulated industry perceives to be both unwise and unlawful. The rule-making process runs its course pursuant to the provisions of Michigan's Administrative Procedures Act. MCL 24.201, *et seq.* ("APA"). Ultimately, if opposition to the proposed rule fails and the rule is promulgated by the agency, members of the regulated industry generally do not have the wherewithal to initiate a legal action challenging the rule. Instead, they look to the collective strength of their industry's trade association. This is, of course, what occurred in the instant case. The issue the Association wishes to address is whether there is a requirement that a declaratory ruling be obtained from the agency that promulgated the rule under Section 63

of the APA, MCL 24.263 ("Section 63") prior to commencing an action for declaratory judgment under Section 64 of the APA, MCL 24.264 ("Section 64").

A. The language of Section 63 precludes its application to a challenge to the validity of a rule

The express language of Section 63 precludes a finding that a declaratory ruling from the administrative agency itself must be sought prior to challenging the validity of a rule pursuant to Section 64. Section 63 plainly states:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. An agency shall prescribe by rule the form for such a request and procedure for its submission.

As required by Section 63, OFIS has prescribed by rule the form for a request for a declaratory ruling and the procedure for its submission. The rule prescribed by OFIS requires an interested person to "state all facts known to the applicant which are or may be relevant to a determination of the applicability of a rule . . ." 1985 AACRS, R 500.1041. (Emphasis added.) Simply put, there is no "actual state of facts" involved in a regulated industry's challenge to the validity of a rule itself.

This statutory interpretation was expressly recognized by the Michigan Court of Appeals in *Mich Ass'n of Home Builders v Director of Dep't of Labor and Economic Growth*, 276 Mich App 467; 741 NW2d 531 (2007) (vacated in part on other grounds, see *Mich Ass'n of Home Builders v Director of Dep't of Labor and Economic Growth*, 481 Mich 496; 750 NW2d 593 (2008)). The plaintiff in that case had filed a complaint challenging DLEG's authority to make certain changes to the Michigan Uniform Energy Code. DLEG had asked the trial court

to summarily dismiss the plaintiff's claim on the basis that the plaintiff was required under Sections 63 and 64 of the APA to exhaust its administrative remedies before seeking judicial relief. The trial court denied DLEG's motion and the Court of Appeals affirmed that decision, holding:

A plain reading of [Section 63] requires that an interested person have 'an actual state of facts' to bring before the agency for its consideration. Here, plaintiff did not have an 'actual state of facts' to bring before the DLEG. Therefore, plaintiff could not seek a declaratory ruling before seeking judicial relief.

Mich Ass'n of Home Builders, supra 276 Mich App at 480.

Further, the fact that Section 63 does not contemplate a challenge to the validity of a rule promulgated by a regulated industry is demonstrated by the limited scope stated in Section 63. This section provides in pertinent part:

A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling.

Section 63, by its own terms, limits the effectiveness of any declaratory ruling under that section to only the interested person obtaining the declaratory ruling. Obviously, in implementing Section 63, the Legislature did not intend that declaratory rulings be sought by an interested person with respect to the validity of a rule promulgated by the agency.

B. Section 64 does not require an administrative ruling where none is available

The limitations on declaratory rulings imposed by Section 63 have great consequences for the declaratory judgment provisions of Section 64. The parties may seek

declaratory relief from administrative action in the circuit court under Section 64 as long as certain requirements are met:

Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action shall be filed in the circuit court of the county where the plaintiff resides or has his principal place of business in this state or in the circuit court for Ingham county. The agency shall be made a party to the action. **An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously.** This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. (Emphasis added)

If a plaintiff cannot seek a declaratory ruling under Section 63 because the potential request does not fall within the limit or scope of that section, then this Section 64 limitation does not apply. Only if a plaintiff could have sought a Section 63 declaratory ruling, but did not, would it be prohibited from filing a declaratory judgment action in the circuit court.

Section 63 and 64 must be read "in tandem." The proper interplay of those two sections supports the Plaintiffs' right to seek relief from the Court without first asking for an administrative declaratory ruling under Section 63. Don LeDuc's Michigan Administrative Law treatise explains how Sections 63 and 64, read together, limit Section 64's exhaustion requirement to challenges to a rule's application, not its underlying validity:

... Section 63 empowers an agency to issue a declaratory ruling only as to the applicability of a rule, not as to its validity. The reason for this is obvious, an agency is unlikely to find its own

rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine a validity of a rule. Section 64 thus specifically empowers a court to hear an action for declaratory judgment as to either the validity or applicability of a rule. **The exhaustion requirement of Section 64 (requiring resort first to the submission of a declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual state of facts. Section 63 does not authorize an agency to issue a ruling on the validity of rules, so there is nothing to exhaust.**

LeDuc, Michigan Administrative Law, (2d ed; 2009 Supp) §8:13, p 576-577; See also, *Id.*, §8:12, p 575 (“The only imposition in Section 64 is that the request for a declaratory ruling is a condition precedent to an action for declaratory judgment that challenges the applicability of a rule . . .”). It is only when a party has a question about the application of a statute, rule or order to the that individual party’s actual factual situation, that the party must first seek a declaratory ruling under Section 63.

LeDuc further explains:

(6) *If the question relates to the applicability of a rule promulgated by a state agency, a person must first present a request for declaratory ruling to the state agency.*

(7) *If the person seeks to challenge the validity of a rule or otherwise resolve a legal controversy prior to compliance with the rule, a statute, or prior order issues by a state agency, a declaratory judgment may be sought pursuant to MCR 2.605*

LeDuc, *supra*, §8:21, p 591.

Thus, Plaintiffs did not have to pursue a declaratory ruling under Section 63 from OFIS prior to commencing its action for declaratory judgment in the circuit court. The Plaintiffs’ challenge to the OFIS’ rules specifically attacks their validity. The Plaintiffs did not ask how the

proposed rules apply to a given type of insurance policy or a given insured or any other specific set of facts. There could be no disagreement that the rules as promulgated by OFIS would apply to all similarly situated insurance companies in Michigan. Further, there was no need for the Plaintiffs to ask OFIS to opine on the validity of its own rules; OFIS plainly believes its rules are valid. Instead, the Plaintiffs proceeded with a declaratory judgment action in circuit court, subject to the customary declaratory judgment limitations of MCR 2.605.

C. A declaratory judgment under Section 64 is not precluded by any exclusive remedy imposed by the Legislature

It should be noted that when the Legislature wishes to impose an exclusive remedy, it knows how to do so. In *Huron Valley Schools v Secretary of State*, 266 Mich 638; 702 NW2d 862 (2005) a challenge was made to the Secretary of State's application of the Michigan Campaign Finance Act. The Michigan Campaign Finance Act provides in pertinent part:

There is no private right of action, either in law or equity, pursuant to this Act. The remedies provided in this Act are the exclusive means by which this Act may be enforced and by which any harm resulting from a violation of this Act may be redressed.

MCL 169.215(16); *Huron Valley* at 646. A declaratory judgment action cannot be maintained to resolve disputes where "the legislature has expressed an intent to make an administrative tribunal's jurisdiction exclusive." *Id.* at 646. There is no similar law conferring exclusive jurisdiction in the instant case. Section 64 certainly cannot be construed as imposing such a limitation.

V. CONCLUSION

As stated in LeDuc's Administrative Law Treatise Sections 63 and 64 of the APA do not give OFIS (or any agency, for that matter) exclusive jurisdiction over declaratory rulings. Exclusivity applies only when a party challenges the applicability of a rule and not when as in the instant case, a party challenges the validity of the rule itself. LeDuc, *supra*, §8:13 and §8:21.

As noted above, it is presumed that an agency of the executive branch never promulgates a rule with the belief that the rule is invalid. Exhaustion of administrative remedies, as referred to in Section 64, is not required where the pursuit of such a remedy would be futile. *Turner v Lansing Township*, 108 Mich App 103, 108-110; 310 NW2d 287 (1981). When Section 63 and 64 are correctly read "in tandem" it is obvious that the exhaustion requirement of Section 64 does not apply to challenges to the validity of a rule.

Respectfully submitted,

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