LOSING THE RACE NEVER RUN: HOW *IGAL V. BRIGHTSTAR INFORMATION TECHNOLOGY GROUP, INC.* IMPACTS ADMINISTRATIVE AGENCY ORDERS IN TEXAS

Lauren Braddy*

I. INTRODUCTION

The Texas Supreme Court recently compared the interplay between administrative agencies and constitutional courts as a horse race in which an individual with a claim viable in both, in effect, picks his horse and thereby determines which claim to attempt.[1] However, in certain cases, it is not a horse the claimant is selecting, but rather an entirely different track.[2] That very situation appeared in *Igal v. Brightstar Information Technology Group, Inc.*.[3] Mr. Igal had two alternate and distinct claims, or "tracks," available to him.[4] He chose the administrative track.[5] However, when he arrived at the race, he was told his registration was untimely.[6] When he then attempted to take his horse to the track across the road to run the judicial course, he was told that he would not be permitted to run his horse on that track either—an incorrect attempt to enter the administrative race was enough to guarantee that he would never get to run his horse and see if

* J.D., Baylor University School of Law, *cum laude*; B.A., English and Communication, Texas A & M University, 2006. This Note was made possible only through the patience, knowledge, and guidance of Professor Ron Beal. His sincere love of Texas administrative law has rubbed off on many Baylor students, including this author.

[1] Igal v. Brightstar Info. Tech. Group, Inc., 250 S.W.3d 78, 92 (Tex. 2008) ("In Texas parlance, the claimant selects which horse to ride. Once the horse crosses the finish line, a claimant cannot switch horses and run the same race again . . . .").

[2] *See id.*

[3] *See id.* at 81.

[4] *Id.* at 91.

[5] *Id.* at 81.

[6] *See id.* Under the Payday Act, a plaintiff was required to bring his claim within 180 days after the date the wages claimed became due for payment. *See* Tex. Lab. Code Ann. § 61.051(c) (Vernon Supp. 2009) ("A wage claim must be filed not later than the 180th day after the date the wages claimed became due for payment."). Mr. Igal waited eighteen months to bring his claim. *Igal*, 250 S.W.3d at 81. The Texas Workforce Commission found his claim untimely and dismissed it with prejudice. *Id.*

he had a champion.[7]

Igal is fundamentally an employment contract dispute.[8] Saleh Igal, the plaintiff, began working for BRBA, Inc., (BRBA) in 1989.[9] Mr. Igal executed an employment contract with BRBA in 1998.[10] Prior to the final execution of the agreement, Brightstar Information Technologies Group, Inc., acquired BRBA and assumed BRBA's obligations under the agreement.[11] In 2000, Mr. Igal claimed that Brightstar terminated his employment without cause, thereby entitling him to a post-termination salary.[12] At this point, Mr. Igal had two options: (1) pursue a breach of contract claim in an Article V court or (2) pursue an administrative claim through the Texas Workforce Commission (TWC).[13]

Mr. Igal chose the agency track by submitting his claim to the TWC.[14] On July 17, 2001, eighteen months after the alleged breach, Mr. Igal filed a wage claim with the TWC.[15] The wage claim was dismissed because it was not filed within the 180-day statute of limitations.[16] After the TWC appeals tribunal denied Mr. Igal's appeal, he proceeded to file a new lawsuit in district court.[17] The court dismissed the claim on a motion for summary judgment.[18] The court of appeals affirmed the trial court by holding that "res judicata barred Igal's breach of contract claims."[19]

How res judicata applies to agency orders and its far-reaching implications for the state of agency law in Texas is the touchstone of this Comment. Part II provides a broad overview of the administrative agency background and function in Texas. Part III addresses concerns dealing with

[7] *See Igal*, 250 S.W.3d at 81.

[8] *See id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Tex. Lab. Code Ann. § 61.051(a) (Vernon Supp. 2009) (making the filing of a wage claim with the TWC discretionary by providing that "[a]n employee who is not paid wages as prescribed by this chapter may file a wage claim with the commission"); S. Props., Inc. v. Carpenter, 300 S.W. 963, 964 (Tex. Civ. App.—Dallas 1927, no writ).

[14] *Igal*, 250 S.W.3d at 81.

[15] *Id.*

[16] *Id.*; *see* Tex. Lab. Code Ann. § 61.051(c).

[17] *Igal*, 250 S.W.3d at 81.

[18] *Id.*

[19] *Id.*

the rights that Mr. Igal had under the common law and takes a look at the steps, if any, the legislature took to change those rights. Part IV discusses the principles of res judicata and collateral estoppel, and how they should apply to agency orders. Finally, Part V focuses on the unintentional abolition of primary jurisdiction under the current holding.

II. BACKGROUND

A. The History of Texas Administrative Agencies

Agencies have existed in some form in Texas since the end of the nineteenth century.[20] In February of 1876,[21] Texas voters approved an amendment to Article X, Section 2 of the Texas Constitution that "empowered the Legislature to enact statutes creating regulatory agencies."[22] The Texas Legislature was not slow to put the amendment to work, and on April 3, 1891, "[a]n Act to establish a Railroad Commission for the State of Texas," passed—and with it, the first Texas agency was born.[23] Since then, Texas has embraced the concept of the agency as a regulatory body and now recognizes approximately 200 agencies.[24]

Today, much of Texas' regulation is handled through administrative agencies, and questions concerning how the agencies' decisions impact life outside of the agency itself are of utmost importance.[25] The enabling legislation that creates the agency sets out what powers an agency can wield to impact life outside the agency.[26] The general rule is that

[20] R.R. COMM'N OF TEX., AN OVERVIEW OF RAILROAD COMMISSION RECORDS AT THE TEXAS STATE ARCHIVES, http://www.lib.utexas.edu/taro/tslac/20078/20078-P.html.

[21] Tex. S.J. Res. 16, 21st Leg., R.S., 1889 Tex. Gen. Laws 171; TEX. LEGISLATIVE COUNCIL, FACTS AT A GLANCE: AMENDMENTS TO THE TEXAS CONSTITUTION SINCE 1876, 81 (Apr. 2008), *available at* www.tlc.state.tx.us/pubsconamend/constamend1876.pdf.

[22] R.R. COMM'N OF TEX., *supra* note 20.

[23] Act of Apr. 3, 1891, 22d Leg., R.S., ch. 51, § 1, 1891 Tex. Gen. Laws 55, 55; JOHN E. POWERS, AGENCY ADJUDICATIONS 1–2 (1990); *see* R.R. COMM'N OF TEX., *supra* note 20.

[24] LYNDON B. JOHNSON SCH. OF PUB. AFFAIRS, UNIV. OF TEX., GUIDE TO TEXAS STATE AGENCIES 302–04 (11th ed. 2001); POWERS, *supra* note 23, at 5.

[25] *See* POWERS, *supra* note 23, at 1–2.

[26] Larsen v. Santa Fe Indep. Sch. Dist., 296 S.W.3d 118, 123 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("Administrative bodies may exercise only those powers the law confers upon them in clear and express language. Courts will not imply the existence of additional authority for administrative bodies, nor may these bodies create for themselves any excess powers." (citation omitted)).

"[a]dministrative agencies lack . . . inherent constitutional power to effect the rights, duties, and obligations of Texas citizens."[27] However, anyone who has dealt with an administrative agency knows the pervasive power the agencies can wield over individuals and businesses in the state.[28]

Agencies are unique governmental bodies because in one agency the powers of the executive, legislative, and judicial branch are merged.[29] Agencies are able to act pursuant to the inherent power of the legislature to regulate persons, places, and things in order to protect the general welfare as required by the legislature's police power.[30] Though created via the legislature, agencies are an arm of the executive branch because they are placed under the control of the governor.[31] Furthermore, agencies are usually vested with the power to draft rules, adjudicate disputes, and enforce decisions that arise under their regulatory scheme.[32] The end result is an agency created by the legislature, wielding executive power, with the ability to make "quasi-judicial" determinations as to individual rights. Thinking of agencies as the judge, jury, and executioner of Texas does not place you far off the mark.[33]

B. The Executive Agency and the Transformation of Its "Quasi-Judicial" Role

Though the role of "judge, jury, and executioner" sounds extreme, it is helpful to keep in mind that an agency only has power over the limited

[27] 1 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 1.2, at 1-3 (2009); Tex. Natural Res. Conservation Comm'n v. Lakeshore Util. Co., 164 S.W.3d 368, 377 (Tex. 2005).

[28] *See* BEAL, *supra* note 27, § 1.2, at 1-3 to -4.

[29] *See id.* at 1-6 to -7.

[30] *See id.* at 1-3 to -4.

[31] *See* Tex. Const. art. IV, § 12(a) (giving the governor power of appointment over State offices).

[32] Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 635 (Tex. 1996) ("[T]he power to determine controverted rights to property by means of binding judgment is vested in the judicial branch. Nevertheless, this principle does not bar administrative agencies of the executive branch of government from working in tandem with the judicial branch to administer justice under appropriate circumstances." (citation omitted)).

[33] *See* POWERS, *supra* note 23, at 5. Agencies act as mini-states that wield power over the subject matter the legislature granted them power to control. Of course, this power is limited by the legislature itself, as well as the judicial system. *See* Larsen v. Santa Fe Indep. Sch. Dist., 296 S.W.3d 118, 124–26 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

subject matter the legislature has seen fit to grace it with.[34] Trouble arises when the legislature vests the agency with the authority to determine issues of law and fact arising under the legislative scheme, but the legislature does not abrogate the common-law causes of action pertaining to those same issues of law and fact.[35] In 1921, the Texas Supreme Court held that it was unconstitutional for the legislature to modify a citizen's previously adopted common-law rights.[36] Just twenty years later, the court gave the agencies further authority to adjust even the correlative rights held by an individual.[37] In *Corzelius v. Harrell*, the court determined that it was possible to adjust an individual's correlative rights via administrative hearing.[38] The agency's ability to adjust an individual's correlative rights evidenced yet another shift of power in which the legislature further imbued the agency with the ability to decide actions that were once left to the courts alone.[39] The Texas Legislature gives administrative agencies the ability to act in instances once controlled by the common law in one of two ways: the agency may share the ability to act on the common-law cause of action with the judicial system or the legislature may completely abrogate the common-law cause of action, which makes the administrative agency the sole outlet for relief.[40]

The ability of the legislature to abridge or abrogate a common-law cause

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[34] *See Larsen*, 296 S.W.3d at 123.

[35] This occurs when the courts, via the common law, and the administrative agency are left with the authority to determine one dispute. An example of this situation arises in *Igal*. Mr. Igal had a choice of remedies in his common-law breach of contract cause of action and his statutory worker's compensation claim. Igal v. Brightstar Info. Tech. Group, Inc., 250 S.W.3d 78, 91 (Tex. 2008).

[36] Bd. of Water Eng'rs v. McKnight, 111 Tex. 82, 92–93, 229 S.W. 301, 304 (1921) ("It would be hard to state a more patent attempt by the Legislature to confer judicial power on a nonjudicial tribunal than for the Legislature to enact that such tribunal shall be authorized to determine cases pending in court between litigants, involving property, as well as such future controversies as but for the act would have to be adjudicated by the courts.").

[37] Corzelius v. Harrell, 143 Tex. 509, 513, 186 S.W.2d 961, 964 (1945). Correlative rights are different from common-law rights in that they are an inherent aspect, or inherent part of something, as differentiated from common-law rights, which are really more properly referred to as claims. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 33–35 (1913).

[38] *See Corzelius*, 143 Tex. at 519, 186 S.W.2d at 967 (defining "quasi-judicial" as the power to: (1) issue and cause process to be served by its own officers; (2) enter orders which are final unless set aside on appeal; and (3) enforce its judgment which would clearly affect valuable property rights).

[39] *See id.*

[40] *See* BEAL, *supra* note 27, § 5.5, at 5-22 to -25.

of action is checked by the Open Courts provision of the Texas Constitution.[41] The Open Courts provision guarantees that people with common-law causes of action will not be denied access to the courts.[42] Though this seems to directly contradict the holding that the legislature may abridge or modify the common law, the Texas Supreme Court has found that the Open Courts provision prohibits the abrogation or modification of a common-law right only where there is no showing that the "legislative basis for the statute outweighs the denial of the constitutionally guaranteed right of redress."[43] However, while recognizing that it is possible for the legislature to modify or abrogate the common law, actions to do so must clearly be shown as the intent of the legislature.[44] Unless and until the legislature abrogates the common law by granting an agency exclusive jurisdiction, both the agency and the constitutional courts maintain concurrent jurisdiction over the claim.[45]

III. MR. IGAL RETAINED HIS COMMON-LAW CAUSE OF ACTION

Article V, Section 8 of the Texas Constitution provides that a district court's "jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction" is conferred by the constitution or "other law on some other court, tribunal, or administrative body."[46] In other words, in order to defeat the district court's right to hear a cause of action within its jurisdiction, a showing of exclusive jurisdiction is

[41] Tex. Const. art. I, § 13; *see* Edwards Aquifer Auth. v. Day, 274 S.W.3d 742, 758 (Tex. App.—San Antonio 2008, pet. granted).

[42] Tex. Const. art. I, § 13.

[43] BEAL, *supra* note 27, § 5.3.2, at 5-14 to -15; Shah v. Moss, 67 S.W.3d 836, 842 (Tex. 2001) ("A statute that unreasonably or arbitrarily abridges a person's right to obtain redress for injuries another person's harmful act causes is an unconstitutional due-course-of law violation."); Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985) (stating that there is only a violation of the Open Courts provision when legislative acts cut off a person's right to sue before there is a reasonable opportunity for them to discover the wrong and bring suit).

[44] *See* Blue Cross Blue Shield of Tex. v. Duenez, 201 S.W.3d 674, 675–76 (Tex. 2006) (recognizing that the agency had exclusive jurisdiction to determine the dispute).

[45] *See* Employees Ret. Sys. of Tex. v. Duenez, 288 S.W.3d 905, 908 (Tex. 2009); Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 220 (Tex. 2002); Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 15 (Tex. 2000); Larsen v. Santa Fe Indep. Sch. Dist., 296 S.W.3d 118, 123 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

[46] Tex. Const. art. V, § 8.

required.[47] Otherwise, unless expressly specified by the legislature, the common-law cause of action continues to exist separately and distinctly from the claim to be brought in the agency.[48] The analysis determining the status of Mr. Igal's common-law cause of action is paramount because the classification of the action, or actions, available exposes the lay of the land as to who had the authority to act and when the authority arose.[49]

A. Statutory Construction to Determine the Status of the Common Law

The purpose of construing the meaning of a statute is to determine the legislative intent.[50] Legislative intent is determined by considering the statute's language, history, purposes, and the consequences of alternate constructions.[51] When a statute deprives a person of a common-law right, it "will not be extended beyond its plain meaning or applied to cases not

[47] *Id.*; *Subaru of Am., Inc.*, 84 S.W.3d at 223 (finding that the legislature's use of the word "exclusive" is necessarily indicative of its intent to confer exclusive jurisdiction on an agency); *cf.* Thomas v. Long, 207 S.W.3d 334, 340 (Tex. 2006) ("[A]dministrative bodies only have the powers conferred on them by clear and express statutory language or implied powers that are reasonably necessary to carry out the Legislature's intent. . . . Determining whether [an agency] has exclusive jurisdiction requires examination and construction of the relevant statutory scheme.").

[48] Apollo Enters., Inc. v. ScripNet, Inc., 301 S.W.3d 848 (Tex. App.—Austin 2009, no pet.) ("[B]ecause 'abrogating common-law claims is disfavored' . . . we are not to construe a statute creating an administrative remedy to deprive a person of an established common-law remedy unless the statute 'clearly or plainly' reflects the legislature's intent to supplant the common-law remedy with the statutory one." (quoting Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 15–17 (Tex. 2000))); Travis Cent. Appraisal Dist. v. Norman, 274 S.W.3d 902, 909–10 (Tex. App.—Austin 2008, pet. granted) ("Where the legislature has not expressed an intent to grant an agency [exclusive jurisdiction], there is no jurisdictional issue barring a court from adjudicating the dispute."); Igal v. Brightstar Info. Tech. Group, Inc., 250 S.W.3d 78, 88 (Tex. 2008) ("Typically, a statutory remedy is cumulative of the common law remedy, unless the statute denies the right to the common law remedy."); *see Larsen*, 296 S.W.3d at 123 (noting that unless the legislature has clearly granted exclusive jurisdiction to an agency, the individual is not required to exhaust his administrative remedies before bringing his claim in court).

[49] *See Subaru of Am., Inc.*, 84 S.W.3d at 220–21 (noting that the prudential doctrine of primary jurisdiction may require a court to defer to an administrative agency in hearing a common-law cause of action, and the jurisdictional characteristics of exclusive jurisdiction may remove the court's ability to hear a cause of action all together).

[50] *See* Union Bankers Ins. Co. v. Shelton, 889 S.W.2d 278, 280 (Tex. 1994).

[51] *See id.*

clearly within its purview."[52] "Abrogating common-law claims 'is disfavored and requires a clear repugnance between the common law and statutory causes of action.'"[53]

There was no dispute that "[t]he Payday Act is not an employee's sole and exclusive remedy for a claim based on past wages but is rather an alternative remedy that is cumulative of the common law."[54] Furthermore, even the statute itself makes the distinction that "[a]n employee . . . may file a wage claim," which thereby renders action under the Payday Act discretionary.[55] In deciding *Igal*, the Texas Supreme Court stated that "[t]he Legislature intended the Payday Law to provide employees with a vehicle for relief when a traditional lawsuit proved too arduous."[56] The court found that the legislature did not intend to make the Payday Act an employee's exclusive remedy for a claim based on past wages, but rather created an alternative remedy that is cumulative of the common law—basically, "Payday Law actions do not abrogate common law claims against employers . . . ."[57]

B. What It Means to Have Two Separate and Distinct Claims

Because Mr. Igal had the option to pursue either a common-law breach of contract claim or an administrative claim, his action could have properly been asserted in either forum.[58] When both the Article V courts and the TWC have jurisdiction to hear a claim,[59] concurrent original jurisdiction

[52] Satterfield v. Satterfield, 448 S.W.2d 456, 459 (Tex. 1969).

[53] Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 16 (Tex. 2000) (quoting Holmans v. Transource Polymers, Inc., 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied)); Coppedge v. Colonial Sav. & Loan Ass'n, 721 S.W.2d 933, 938 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) ("Repeal of the common-law action and remedy by implication is disfavored and requires a clear repugnance between the common-law and statutory causes of action.").

[54] Igal v. Brightstar Info. Tech. Group, Inc., 205 S.W.3d 78, 88 (Tex. 2008) (agreeing with the court of appeals' determination that the statutory remedy is an "'alternative remedy that is cumulative of the common-law'").

[55] Tex. Lab. Code Ann. § 61.051(a) (Vernon Supp. 2009).

[56] *Igal*, 250 S.W.3d at 87 (citing Holmans v. Transource Polymers, Inc., 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied)).

[57] *Id.* at 88.

[58] *See id.* at 87 (noting that the TWC provides relief when a "traditional lawsuit prove[s] too arduous").

[59] This author does not argue, as the petitioner did at the Texas Supreme Court, that the agency lacked jurisdiction to hear the dispute because it was outside the statute of limitations. *Id.* at 82–86 (discussing the TWC's jurisdiction over the dispute).

exists.[60] However, it is important to keep the claims distinct, for they can never be considered the same claim, in that the agency will never be able to render judgment on a common-law claim.[61] Furthermore, the district court could never originally hear the statutory cause of action.[62] In other words, while the horse may be the same, the track itself is inherently different.

IV. COLLATERAL ESTOPPEL, NOT RES JUDICATA, IS THE APPROPRIATE STANDARD TO APPLY TO *IGAL*

To fully appreciate the irony presented in *Igal*, revisiting the facts that led to the present quagmire is helpful. As discussed above, Mr. Igal had two available and viable causes of action on which to stake his legal claim: He could proceed with his common-law breach of contract action in a district court or bring a statutory action under the TWC.[63] While the common-law action had a four-year statute of limitations,[64] the TWC claim required filing within 180 days.[65] Mr. Igal chose—in error—the statutory action.[66] By the time he filed, eighteen months had already passed.[67] His claim was barred from the moment he filed it with the agency.[68] After receiving an agency order to that effect, Mr. Igal brought his common-law breach of contract action in district court.[69] The court granted summary judgment for the defendants, Brightstar, on res judicata grounds.[70] However, as discussed further, such a finding was incorrect when

[60] *See In re* Sw. Bell Tel. Co., 226 S.W.3d 400, 403 (Tex. 2007) (discussing when primary jurisdiction is properly exercised where both the agency and the court have subject matter jurisdiction over a dispute).

[61] *See* Dolenz v. Sw. Bell Tel. Co., 730 S.W.2d 44, 44–45 (Tex. App.—Houston [14th Dist.] 1987, no writ) ("[T]he nature and extent of [the agency's] powers must be found within the constitutional and statutory provisions, which are applicable to the agency.").

[62] The wage claim under the Payday Act must first be brought in the administrative agency, and the remedies provided by statute must first be exhausted before the district court has jurisdiction to hear the statutory claim. *See Igal*, 250 S.W.3d at 88 (noting that the Labor Code did not provide Mr. Igal with the option of seeking a remedy in court).

[63] *See id.* at 88.

[64] Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a) (Vernon 2002).

[65] Tex. Lab. Code Ann. § 61.051(c) (Vernon Supp. 2009).

[66] *Igal*, 250 S.W.3d at 81.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

considering the principles of the res judicata doctrine itself.[71]

A. The History of Res Judicata as an Umbrella Term Describing the Conclusive Effect of Judgments

Res judicata has existed in some form in American jurisprudence since the inception of the Republic.[72] It is a doctrine that essentially ensures that the parties do not get more than their day in court.[73] "The doctrine of res judicata deals generally with the conclusive effects of judgments, encompassing the separate judicial doctrines of merger, bar and collateral estoppel."[74] Res judicata may be asserted to preclude relitigation of a claim when a previous adjudicative body has entered a final judgment on the claim.[75] However, it is very important in determining the "breadth of the estoppel worked by a prior judgment" to make a sharp distinction between "the doctrine of res judicata as a plea of bar [or merger] (claim preclusion), and as a plea of collateral estoppel (issue preclusion) . . . ."[76]

1. Res Judicata as Claim Preclusion

The doctrines of res judicata and collateral estoppel are two distinct doctrines that create very different results.[77] The doctrine of res judicata, or claim preclusion, "prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit."[78] Basically, that means that once judgment has been entered on one suit, a party cannot

[71] *See infra* Part IV.B.

[72] *See* Graves & Barnewall v. Boston Marine Ins. Co., 6 U.S. (2 Cranch) 419, 432 (1805) (recognizing that the claims had been adjudicated).

[73] *See* Puga v. Donna Fruit Co., 634 S.W.2d 677, 679 (Tex. 1982) (noting that a final judgment may be used to prevent the relitigation of the same issue between the same parties).

[74] *Id.*

[75] *Id.*

[76] *Id.*; *see also* Barr v. Resolution Trust Corp., 837 S.W.2d 627, 628 (Tex. 1992) (recognizing that res judicata is a "generic term for a group of related concepts" and that res judicata can act as a bar or merger to any given claim; as a bar, it prevents the claim from being litigated, while a merger finds that the claim was already litigated and decided).

[77] *Compare* State v. Getman, 255 S.W.3d 381, 384 (Tex. App.—Austin 2008, no pet.) (discussing the determination courts must make before barring relitigation of specific issues), *with* Tex. State Bd. of Dental Exam'rs v. Brown, 281 S.W.3d 692, 707 (Tex. App.—Corpus Christi 2009, pet. filed) (listing the elements required for res judicata to bar a claim).

[78] *Barr*, 837 S.W.2d at 628.

attempt a second suit to litigate matters that could have been litigated in the first suit.[79] "The bar of a claim by res judicata requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action."[80]

2. Collateral Estoppel

"The collateral estoppel rule 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'"[81] Collateral estoppel avoids the splitting of a cause of action and therefore prevents a party from taking a double bite at the apple or the re-running of a race that the Texas Supreme Court was so concerned about in *Igal*; however, the claimant is still afforded his time around the track.[82] Essentially, a party can bring his claim—if the claim is not barred or merged by application of res judicata—but will be estopped from re-litigating the issues that make up that claim, if such issues have been previously decided.[83] "To determine whether collateral estoppel bars a subsequent prosecution or . . . relitigation of certain facts at a subsequent prosecution, courts must determine (1) exactly what facts were necessarily decided in the first proceeding, and (2) whether those necessarily decided facts constitute essential elements of the offense in the second trial."[84] While still preventing duplicative litigation in an attempt to undermine a prior judgment or decision, collateral estoppel is a more narrowly applied theory.[85]

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[79] Gracia v. RC Cola-7-Up Bottling Co., 667 S.W.2d 517, 519 (Tex. 1984).

[80] *Brown*, 281 S.W.3d at 707 (citing *Ex parte* Myers, 68 S.W.3d 229, 232 (Tex. App.—Texarkana 2002, no pet.)).

[81] *Getman*, 255 S.W.3d at 384 (Tex. App.—Austin 2008, no pet.) (quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970)).

[82] *See* Igal v. Brightstar Info. Tech. Group, Inc., 250 S.W.3d 78, 92 (Tex. 2008) ("In Texas parlance, the claimant selects which horse to ride. Once the horse crosses the finish line, a claimant cannot switch horses and run the same race again, hoping for a different outcome.").

[83] *See Getman*, 255 S.W.3d at 384.

[84] *Id.* (citing *Ex parte* Taylor, 101 S.W.3d 434, 440 (Tex. Crim. App. 2002)).

[85] *Compare Brown*, 281 S.W.3d at 707 (discussing the requirements to bar a claim through res judicata), *with Getman*, 255 S.W.3d at 384 (listing the elements of collateral estoppel).

B. Applying Res Judicata and Collateral Estoppel to Igal

Igal is significant for Texas jurisprudence in two very important aspects: (1) it was the first time the Texas Supreme Court officially applied the doctrine of res judicata to agency orders[86] and (2) the court misapplied the doctrine by applying the wrong theory of res judicata to the case. As the court had previously stated, "Much of the difficulty associated with the doctrine of res judicata is due to the confusion of several related theories."[87]

This is easily discerned by applying the different standards of res judicata and collateral estoppel to the case. In Mr. Igal's case, the final judgment was based on the expired statute of limitations.[88] Furthermore, the Texas Supreme Court found that "[i]n deciding wage claims under Section 61, TWC acts in a judicial capacity" and "[r]es judicata . . . will generally apply to final TWC orders."[89] The requirement that the subsequent litigation involve the parties, or those in privity, to the previous litigation is easily met in this action because Mr. Igal was clearly seeking recovery from Brightstar in both instances.[90] However, *Igal* cannot meet the third requirement that states that the "second action [was] based on the same claims that were raised or could have been raised in the first action."[91]

To determine when a claim could have been litigated, the Texas Supreme Court adopted a transactional approach so that "[a] subsequent suit will be barred if it arises out of the same subject matter of a previous suit . . . ."[92] In this case, it is clear that the liability arises out of the same subject matter as a previous suit.[93] However, there is no way the agency could have had subject matter jurisdiction over Mr. Igal's common-law breach of contract claim.[94] To hold otherwise violates the express

[86] *See Igal*, 250 S.W.3d at 86.

[87] Barr v. Resolution Trust Corp., 837 S.W.2d 627, 628 (Tex. 1992) (recognizing that res judicata is a "generic term for a group of related concepts").

[88] *Igal*, 250 S.W.3d at 89; *see* Sani v. Powell, 153 S.W.3d 736, 752 (Tex. App.—Dallas 2005, pet. denied) ("'No statute of limitations directly addresses the merits of a claim to which it is interposed as a bar. Instead, limitations rest on a legislative policy judgment that requires the diligent pursuit of one's legal rights at the risk of losing them if they are not timely asserted.'" (quoting City of Murphy v. City of Parker, 932 S.W.2d 479, 481–82 (Tex. 1996))).

[89] *Igal*, 250 S.W.3d at 87.

[90] *Id.* at 81; *see Brown*, 281 S.W.3d at 707.

[91] *Brown*, 281 S.W.3d at 707.

[92] *Barr*, 837 S.W.2d at 631.

[93] *See Igal*, 250 S.W.3d at 81.

[94] *See* Employees Ret. Sys. of Tex. v. Blount, 709 S.W.2d 646, 646–47 (Tex. 1986) (finding

separation of powers principle in the Texas Constitution, which requires that no branch exercise the power of another branch unless expressly permitted.[95] As discussed in Part III, the legislature did not grant the agency the ability to hear the common-law cause of action—it merely provided an alternate remedy.[96] The agency therefore has not been expressly permitted to exercise the powers of another branch of government.[97]

The court baldly stated that an administrative agency "may provide remedies for injuries actionable under the common law," while citing no authority to support the statement.[98] However, a proper statement of the law is that the agency could provide remedies that had previously only been available under the common law.[99] Therefore, because the common-law action is a separate claim that could not have been adjudicated before the agency, there is no way to fulfill the last requirement.

"Traditionally the res judicata problem has been solved by definition. Once a cause of action was defined, then anything that could be squeezed within the confines of the particular definition inevitably acquired certain characteristics and was attended with certain consequences, as day follows night."[100] For the TWC, there is no way to squeeze a common-law claim into an administrative hearing without express legislative action, and no amount of defining can change that.[101]

This is not to say that Mr. Igal's claim could have had a different result had the doctrine of res judicata been correctly applied. Of course, this conclusion considers the reference to res judicata in its broad sense, as a generic term for a group of concepts relating to the "conclusive effects

that "Blount's cause of action is derived from statute, not common law," and is therefore for the agency to determine).

[95] Tex. Const. art. II, § 1; s*ee also* BEAL, *supra* note 27, § 5.3.3, at 5-15 (stating that it is constitutional for the agency to be vested with the ability to adjudicate claims "not known to the common law").

[96] *See supra* Part III.A.

[97] *See Igal*, 250 S.W.3d at 88.

[98] *Id.* at 87.

[99] This is proper because the legislature gave the agency a statutory grant of authority to hear wage dispute claims. Tex. Lab. Code Ann. § 61.051 (Vernon Supp. 2009).

[100] Edward W. Clearly, *Res Judicata Reexamined*, 57 YALE L.J. 339, 339–40 (1948) (footnote omitted).

[101] An abrogation of the common law reached by giving the agency exclusive jurisdiction requires express legislation. *See, e.g.*, Employees Ret. Sys. of Tex. v. Blount, 709 S.W.2d 646, 646–47 (Tex. 1986).

given final judgments."[102] Arguably,[103] the function of collateral estoppel, or issue preclusion, is to prevent the litigation of claims already litigated.[104] If the breach of contract issue were actually litigated at the agency level, and such litigation was necessary to the judgment rendered, then collateral estoppel would prevent the issue from being re-litigated before the court.[105]

Applying the doctrine of res judicata incorrectly has dire implications for several guiding principles of law.[106] In his dissent, Justice Brister stated, "The Legislature has chosen to give Texans asserting Payday claims two different ways to proceed. . . . [T]his Court has no business saying that if they try one too late, then they get none at all."[107] A res judicata bar necessarily implicates the common law,[108] abolishes the doctrine of primary jurisdiction,[109] violates the foundational principle of separation of powers,[110] and does away with a plaintiff's election of remedies.[111] These issues will subsequently be discussed in detail.

V. THE COURT'S HOLDING ABOLISHED THE PRUDENTIAL DOCTRINE OF PRIMARY JURISDICTION AS IT APPLIES TO ADMINISTRATIVE AGENCIES IN THE STATE OF TEXAS

Primary jurisdiction is the principle that determines whether the district court or the agency will make the initial decision in a matter.[112] The doctrine operates to allocate power between courts and agencies when both have the authority to make the initial determination regarding a dispute or

[102] Barr v. Resolution Trust Corp., 837 S.W.2d 627, 628 (Tex. 1992).

[103] *See Igal*, 250 S.W.2d at 93–96 (Brister, J., dissenting) (stating that the agency's determination of the substantive claim is not on the merits of the contract claim, and therefore, res judicata cannot attach).

[104] *Barr*, 837 S.W.2d at 628.

[105] *See* State v. Getman, 255 S.W.3d 381, 384 (Tex. App.—Austin 2008, no pet.).

[106] *See Igal*, 250 S.W.3d at 93–96 (Brister, J., dissenting) (discussing the court's incorrect application of the doctrine of res judicata and the resulting consequence).

[107] *Id.* at 96.

[108] *See Igal*, 250 S.W.3d at 86–87 (majority opinion).

[109] *See* Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 221 (Tex. 2002).

[110] *See* Tex. Const. art II, § 1.

[111] *See Igal*, 250 S.W.3d at 96 (Brister, J., dissenting).

[112] Primary jurisdiction arises when both the agency and the district court have original subject matter jurisdiction. *In re* Sw. Bell Tel. Co., 226 S.W.3d 400, 403 (Tex. 2007); Tex. Dep't of Human Servs. v. ARA Living Ctrs. of Tex., Inc., 833 S.W.2d 689, 693 (Tex. App.—Austin 1992, writ denied).

issue.[113] It is a prudential doctrine, meaning it was not mandated by statute; the courts adopted the doctrine because they recognized the benefit of having agencies make the initial ruling which determines agency law.[114]

However, the very existence of primary jurisdiction is called into question by the Texas Supreme Court's decision in *Igal*. Previously, primary jurisdiction recognized that when both adjudicatory bodies have the jurisdiction to act, the district court should abate their decision on the action until the agency has made its determination.[115] Following *Igal*, district courts will no longer have the option of abatement until after the agency has had the opportunity to make the initial determination.[116] *Igal* dictates that once the agency adjudicates a claim, the district court no longer has jurisdiction over the claim.[117] Therefore, if an individual now brings an action originally in district court, that court will be forced to either proceed to hear the case on the merits or relinquish the claim in its entirety.[118] There can be no abatement if res judicata attaches to an administrative order.[119]

This result hampers the very purpose of primary jurisdiction. That purpose requires abatement by the court to ensure that the agency is not circumvented in making decisions on topics that have been expressly delegated to it.[120] "Primary jurisdiction applies when (1) an agency is 'staffed with experts trained in handling the complex problems in the agency's purview' and (2) 'great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations.'"[121]

Before *Igal*, courts were permitted to defer to an agency's expertise without losing their subject matter jurisdiction.[122] However, the courts are currently faced with a bitter choice: they may either retain their jurisdiction

[113] *In re Sw. Bell Tel. Co.*, 226 S.W.3d at 403.

[114] *See Subaru of Am., Inc.*, 84 S.W.3d at 220.

[115] *See In re Sw. Bell Tel. Co.*, 226 S.W.3d at 404.

[116] *See Igal*, 250 S.W.3d at 92.

[117] *See id.*

[118] *See id.* By allowing the agency to hear the claim first, the court relinquishes the claim in its entirety because the court will be barred from making any determination on the merits because of res judicata. *See id.*

[119] *See id.*

[120] Subaru of Am., Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 220–21 (Tex. 2002).

[121] Apollo Enters., Inc. v. ScripNet, Inc., 301 S.W.3d 848, 871 (Tex. App.—Austin 2009, no pet.).

[122] *See id.*

and decide a case that would be better served being tried by an agency of experts, or they may give up their jurisdiction entirely and deprive an individual forever of his right to trial by a jury of his peers.[123] After *Igal*, the doctrine of primary jurisdiction is empty. The subversion of primary jurisdiction's purpose is an unintended casualty of a doctrine wrongfully applied.

VI. CONCLUSION

Igal v. Brightstar Information Technology Group, Inc. reached an inequitable holding that resulted in claim preclusion based on an agency hearing where the merits did not form the basis for dismissal. This decision has repercussions that can be felt far beyond Mr. Igal who never got to run his race on the right track. Finding that a common-law cause of action is barred via claim preclusion violates the very principles of res judicata, impermissibly abridges the common law, and abolishes the doctrine of primary jurisdiction. While no one disagrees that a person should not get to run the same horse twice, decisions depriving an individual of the right to race his horse at all cannot remain unchallenged.

[123] *See Igal*, 250 S.W.3d at 92.