

3-15-1987

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### Recommended Citation

David J. Agatstein, *The Doctrine of Collateral Estoppel Should Not Apply to Administrative Hearings*, 7 J. Nat'l Ass'n Admin. L. Judges. (1987)  
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# THE DOCTRINE OF COLLATERAL ESTOPPEL SHOULD NOT APPLY TO ADMINISTRATIVE HEARINGS

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D. J. Agatstein

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[The following argument was presented to the 1986 Annual Meeting of the NAALJ, and is reprinted here at the direction of the President of the Association. The usually high editorial standards of the Journal have been waived in order to permit its inclusion. The author wishes to thank Honorable Paul Wyler for much of the material used in this presentation.]

May it please the Court!

I stand before you today as advocate for the position that collateral estoppel should not apply to administrative hearings. I take this position at the request of our esteemed President, Judge Margaret Giovaniello. Whether I am, in fact, devil's advocate in this matter is very much open to speculation.

When I speak of collateral estoppel, I am in fact talking about two separate doctrines. The first is fact preclusion, by which I mean this:

When an issue of fact is necessarily decided by one adjudicative tribunal, a party to that proceeding is precluded from urging any other tribunal to make any different factual findings. Stated somewhat differently, the facts necessarily found by one tribunal are binding upon the parties when the same issues of fact arise before another tribunal.

By issue preclusion, I refer to mixed questions of law and fact. For example, the question of whether a person

was fired for misconduct, or acted in good faith, or had good or just or probable cause for his actions combine a general legal standard with the circumstances of a particular case. When such an issue is decided by one tribunal, the doctrine of collateral estoppel would preclude any other tribunal from making any inconsistent determination.

There are, of course, other definitions. One is given by Prof. Hank Perritt in a publication close to my heart, the Journal of the National Association of Administrative Law Judges. 1/

Before launching into my argument, I would make a few further observations.

First is that collateral estoppel is usually distinguished from res judicata. Res judicata is generally defined as precluding the same parties from relitigating the identical claim. Simply stated, you can't sue the same person twice on the same cause of action.

Secondly, collateral estoppel can apply to any combination of tribunals--administrative, arbitration, civil and criminal. The rules vary in each case.

Third, with respect to collateral estoppel, there may be different considerations if the first tribunal finds a fact, or fails to find a fact, or finds that an alleged fact has not been proven.

Next, there may be a difference if the first tribunal actually resolves an issue, or merely could have resolved the issue.

It is sometimes said that res judicata applies to all claims that were or might have been litigated before the first tribunal, whereas collateral estoppel only applies to claims that were actually litigated. 2/

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1/ Perritt, Preclusive Effect of Administrative Decisions in Wrongful Dismissal Suits. 5 J.N.A.A.L.J. 33 (Spring 1985).

2/ Raff, Collateral Estoppel and Unemployment Insurance Decisions, March 7, 1986 (unpublished). Rovin, The Collateral Estoppel Effect of Administrative Law Decisions

Finally, there may be a distinction based upon whether a hearing was actually conducted, or whether there was merely the opportunity for a hearing. In other words, there is some dispute over the collateral effect of default judgments. 3/

However, our present discussion is limited to the common situation in which an administrative hearing is conducted first, and thereafter, the same facts or issues arise in litigation before a civil court.

I will be speaking principally, but not exclusively, about benefit cases.

I contend that collateral estoppel should not apply in such cases.

I will attempt to prove that application of the doctrine to administrative hearings will not serve the best interests of the parties or the public. I will show that the doctrine conflicts with basic principles of our constitutional system of fairness and justice. Finally, and perhaps incidentally, I will show that abolition of the doctrine will enhance the prestige and legitimate power of Administrative Law Judges, make their jobs easier, and enable them to better fulfill their judicial function.

It is axiomatic that administrative tribunals should provide parties with a prompt hearing in which the litigants' substantive rights may be determined quickly. The panoply of procedural remedies and evidentiary rules which protect litigants in the courts of common law are intentionally omitted from administrative trials. Speed and simplicity are the hallmarks, perhaps the raison d'etre, of administrative proceedings.

Let us look at the element of speed. It would be fatuous to espouse any system which did not give paramount importance to the immediate determination of welfare claims, unemployment claims, social security claims, workers

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in Subsequent Court Actions, IV Labor & Employment Law News, No. 3, p. 11 (1985); see also, People v. Sims, 32 Cal. 3d 468 (1982).

3/ See, e.g., Re Garland 401 F. Supp. 608, 610 (1975).

compensation claims, license revocation cases, parole hearings, and similar matters. Indeed, the U.S. Supreme Court has mandated promptness in many of these cases. 4/

However, there is a price for speedy adjudication. By definition, parties do not have a great deal of time to investigate their cases, to interview witnesses, to gather evidence or to prepare for a hearing. In the interests of speed, parties are generally denied the right, available to litigants in the civil court, to engage in pre-trial discovery, to obtain bills of particulars, to request interrogatories, and to take the pre-trial oral depositions of opposing parties. 5/ Even the right to subpoena witnesses, which exists in most administrative agencies, is rendered illusory by the absence of the contempt power necessary to enforce the subpoenas. As a result, parties are generally not well prepared to present all of the facts to an administrative tribunal.

Secondly, the parties to an administrative hearing often do not have the resources to present a proper case. How realistic is it to suggest that a poor person, or an unemployed person, or a disabled person, can properly investigate and present a case? Most do not even have lawyers (fewer than 2% of Unemployment Insurance claimants have attorneys, according to one study). 6/ Indeed, the administrative system is designed to permit parties to try their cases without the very substantial cost of legal counsel.

By contrast, in civil litigation, particularly tort cases, an attorney may represent the party on a contingency fee basis. In contingency cases, the attorney advances the cost of investigation and discovery, defers his fee until the outcome of the case, and receives no fee unless he

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4/ E.g., California Dep't. of Human Resources Development v. Java, 402 U.S. 121 (1971).

5/ See Sherwood, Evolution of Administrative Collateral Stoppel, California Lawyer, June 1986, p. 33.

6/ Report by the New York State Assembly Standing Committee on Labor (Frank J. Barbaro, Chairman) "Due Process in the Unemployment Insurance System in New York State", 1981 (hereinafter, "Barbaro Report").

is successful. In administrative benefit cases, the size of the attorney's fee, and his resulting availability to represent his client, are limited, either by statute, as in New York, 7/ or by practical consideration of the amount in issue.

Indeed, the amount in issue is a separate factor which limits the scope of administrative hearings. Certainly, when an unemployed or disabled worker is pitted against his former employer, the latter usually has greater resources with which to fight the case. The vigor of the employer's opposition is checked, however, by the relatively low cost of paying unemployment insurance contributions or workers' compensation premiums. The employer may even want the employee to collect, out of humanitarian considerations.

Where, however, the issue in the administrative proceeding is going to determine a later civil action arising from the same facts--for example, a personal injury action arising from the operation of the employer's truck--the employer will be prompted to oppose the benefit claim, and to exert its weight to deny benefits to a relatively helpless employee. 8/

The amount of money involved in benefit cases is also a factor to be considered by government officials charged with apportioning limited resources. I think everyone would agree that the amount of money the government spends to conduct benefit hearings should not exceed the amount the government pays in benefits. More judges cost more money. It follows that administrative hearings must be, in effect, summary proceedings. It is not a disparagement of Administrative Law Judges to observe, as did one of my colleagues in testimony before a legislative committee,

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7/ N.Y. Labor Law § 538 (McKinney 1986).

8/ Letter from Richard T. Williams, Esq., to Honorable Paul Wyler dated May 6, 1986, re CA Assembly Bill 3950 (unpublished). In a case decided after presentation of this paper, a New York Court distinguished Ryan, infra, fn. 15, and refused to apply collateral estoppel, on the grounds, inter alia, that the party against whom the doctrine was invoked had not initiated the administrative proceeding. Dusovic v. N.J. Bus Operations, Inc., 508 N.Y.S. 2d 26 (App. Div. 2nd Dep't., 1986).

that benefit cases provide parties with all of the due process that can fit in 20 minutes. 9/

And so we have, both by necessity and design, administrative hearings which are brief in duration, held on short notice, and conducted in an informal manner, without extensive preparation or costly representation. The benefit to society of conducting hearings in this manner is demonstrated by widespread public acceptance of administrative hearings, and their endurance for half a century. However, we must recognize that the price we pay for this system consists of tolerating hearings which, when compared to plenary trials conducted before court and jury, can only be described as less than thorough.

Accordingly, I underscore my first point: because administrative hearings are less searching than jury trials, they should not determine the outcome of jury trials.

The tail should not wag the dog.

Let us turn to the effect of the doctrine of collateral estoppel.

Initially, before the rule becomes known among lay members of the public, the effect will be surprise, and entrapment of the unwary. Parties will go into an administrative hearing intending to litigate the narrow issue before the tribunal and will thereafter learn, to their sorrow, that they have been precluded from presenting or defending another, perhaps more substantial case, in another forum.

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9/ Barbaro Report, supra, fn. 6.

Is it fair, for example, that the decision of an Unemployment Judge should determine:

- A wrongful discharge case
- A Title VII civil rights case
- An OSHA complaint
- A breach of contract action
- An unfair labor practice charge
- A negligence action
- A union fair representation proceeding
- An age discrimination case

or any other of a host of actions?

Even after the rule does become widely known, however, there will be unrepresented parties to administrative hearings who are unaware of its existence and will fall prey to what they can only perceive as an unfair, hyper-technical, legal trap. 10/

I submit that parties who participate in administrative hearings should not be required to anticipate the possibility of future litigation, because such litigation is very rare, and often cannot be foreseen in any event. Even if it can be foreseen, the place to try a civil case is in the civil courts. Parties should be free to use administrative tribunals for the purpose of obtaining an administrative determination, without the threat of other consequences which are difficult or impossible to foresee.

When the rule of collateral estoppel is known to the parties, and further litigation is anticipated, the result is equally bad for the parties and the administrative system. As I have already suggested, parties will be unable to scale their administrative case to the size of the administrative claim, even if they want to do so. The other side will force them to expend resources appropriate to the anticipated civil litigation.

Finally, where both sides do have the resources to try the expected civil case before the administrative

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10/ See "Unemployment Insurance Hearings-A Trap For the Unwary Employer". Littler Labor Report, Vol. 6, No. 4, p. 1 (May 1986).



tribunal, the result is just as bad for the litigants and the tribunal: either the parties will convert the administrative tribunal into a civil courtroom, or, what is worse, a party will withdraw his administrative claim, rather than jeopardizing his chances in the subsequent lawsuit.

This has happened to many of us. It might not work because of the "opportunity to be heard" rule. 11/

A civil trial can take days or weeks. If the parties abuse the administrative process, the Administrative Law Judge may be required to expend a great deal of time which might be devoted to resolving administrative issues.

Moreover, the Administrative Law Judge does not have the resources necessary to properly try civil cases. 12/ The exclusionary rules, for example, have the effect of limiting the scope of the evidence presented in civil cases. Where the civil case is tried in an administrative forum, it can actually take longer than it would in court, because the parties are free to introduce hearsay, and other forms of incompetent evidence.

It is, I submit, highly incongruous to allow hearsay evidence, which is admissible in administrative hearings, to control the outcome of civil trials, where such evidence would not be admissible.

In addition, in some types of administrative proceedings, particularly ratemaking and other forms of business regulation, issues of policy may properly influence the outcome of the proceedings. Such issues would have no place before the civil court.

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11/ Compare Cavanagh, The Collateral Estoppel Effect of California Unemployment Insurance Decisions in Subsequent Civil Litigation. Los Angeles Lawyer, June 1986, p. 65.

12/ A bar association committee implies that ALJ s lack judicial status and, accordingly, are not qualified to render decisions having collateral estoppel effect. See "Unemployment Insurance Decisions and the Doctrine of Collateral Estoppel" 40 Record of the Association of the Bar of the City of New York, 738 (December 1985). The present author expressly repudiates this argument as specious and self-defeating.

Different procedures apply in civil and administrative proceedings which have a direct bearing on the outcome. Burdens of proof, and the rules of evidence, are two obvious examples.

The constitutional doctrine of separation of powers requires that administrative questions be decided by agencies, and that civil cases be tried in the courts. 13/

The fundamental right to trial by jury is lost if collateral estoppel is applied to administrative tribunals. 14/

If we allow administrative hearings to be converted into forums for litigating collateral matters, the entire system of prompt, efficient and inexpensive administrative adjudication will be seriously compromised.

I will now address the arguments most frequently advanced in support of the application of collateral estoppel.

The first is the possibility that inconsistent results will be reached in different proceedings. To this, I have a simple answer--

So what?

A foolish consistency is the hobgoblin of my worthy opponents on this issue.

I will not belabor the point. I will merely note that, in law, the same word can have different meanings in different contexts. It does not trouble me, for example, that a person may be found to have committed misconduct for purposes of license revocation, but not for the purpose of imposing criminal sanctions. For one thing, different

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13/ But see United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966), which can be read as holding otherwise. The argument must be distinguished from the Full Faith and Credit Clause issue decided in Kremer v. Chemical Construction Co., 456 U.S. 461 (1982).

14/ U.S. Const., Amd. VII. Note that Utah Construction & Mining Co., supra, fn. 13, did not involve a claim triable before a jury.

burdens of proof can result in different decisions in criminal, civil and administrative cases.

It would not shock my conscience if an Administrative Law Judge, deciding that a claimant had not stolen from his employer, allowed Unemployment Insurance benefits, while a civil jury found that the allegation of theft was not defamatory, and rejected the employee's civil action. The fact that an Administrative Law Judge may find that the employee did steal, as in Ryan, 15/ is no reason, in my view, to insist upon collateral estoppel. It is, I think, sufficient to note that different tribunals have different purposes and may, therefore, arrive at different results. 16/

The next argument is that of judicial economy. It is said that collateral estoppel saves time for the parties and the courts.

It is, of course, true that when a judge denies a party his day in court, the court is spared the time of trying the case. The time of the party who brought the civil action is also saved, albeit unwillingly. I submit, however, that this is neither fair nor appropriate. It is less than due process--it is no process at all.

In addition, however, I suggest that application of the doctrine will actually increase litigation. This is because a court cannot apply collateral estoppel unless it makes certain findings. The Ryan court recites the following elements: 17/

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15/ Ryan v. N.Y. Telephone Company, 62 N.Y. 2d 494 (1984). The Administrative Law Judge in Ryan was Hon. Margaret Giovaniello, co-panelist for this presentation.

16/ In New York, by statute, collateral estoppel does not attach to small claims adjudications or motor vehicle hearings (UCCA § 1808; VTL § 155. McKinney 1986). There is even a case which refused to apply the doctrine to a criminal conviction Goldberg v. Barbieri; 53 N.Y. 2d 285 (1981).

17/ Quoted from Raff, supra, fn. 2.

1. Whether the issue is the same as that necessarily decided in the first action.

2. Whether the issue was material to the first action or proceedings and essential to the decision.

3. Whether the party against whom it is asserted had a full and fair opportunity to contest the decision now said to be controlling.

4. Whether the first action offered a full and fair opportunity requires a consideration of the realities of the litigation including the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination such as:

- a) nature of the forum;
- b) importance of the claim in the prior litigation;
- c) incentive and initiative to litigate and actual extent of the litigation;
- d) the competence and expertise of counsel;
- e) the availability of new evidence;
- f) the differences in the applicable law; and
- g) the foreseeability of future litigation.

In short, the very issue of whether to give preclusive effect to the administrative determination will have to be litigated in each and every case.

In sum, I believe that collateral estoppel is not in the best interests of litigants, the public, the government, the courts, or Administrative Law Judges. 18/ I submit that the prestige and status of Administrative Law Judges will be enhanced if their work is not hindered by the

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18/ A decision by the California Supreme Court [People v. Sims, 32 Cal. 3rd 468 (1982)], applying collateral estoppel to a welfare adjudication, has been abrogated by statute.

inevitable delays, protracted hearings, or other factors which will interfere with the performance of their duties. The relatively efficient, single-purpose administrative hearing system should be maintained in its present form. Collateral estoppel should not be applied to administrative hearings.



*Look north down Michigan Avenue, the "Magnificent Mile." This boulevard is lined with exclusive shops, boutiques, restaurants, office buildings, art galleries and hotels, including The Inn of Chicago, where NAALJ will meet October 7-10, 1987, for its annual meeting and seminar. Photo: Ron Schramm/Chicago Convention and Tourism Bureau.*