News from the States

Collateral Estoppel from an Investigation? Ouch!

*By Michael Asimow**

Collateral estoppel (often called "issue preclusion") is well accepted in administrative law. An issue that has been litigated and resolved in one case (administrative or judicial) cannot be relitigated in a subsequent case (administrative or judicial). However, collateral estoppel applies only if the losing party in the first case had a full and fair opportunity to litigate the issue and the issue was actually adjudicated.

The California Supreme Court vastly expanded the scope of collateral estoppel in *Murray v. Alaska Airlines, Inc.*, 114 Cal.Rptr.3d 241 (2010). Murray claimed that he was fired because he had blown the whistle on safety violations. Under a federal statute, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. § 42121(b), Murray had a voluntary administrative remedy: He could request the Secretary of Labor to investigate his claims and if they were sustained he could get damages. The investigation was *ex parte* and all information was furnished by the airline. Unsurprisingly, the investigation concluded that there was no connection between Murray's discharge and his safety complaint. AIR-21 provided that Murray could obtain a full administrative hearing on his claims before an ALJ (followed by judicial review if he lost), but his lawyer decided not to go that route. Instead, the lawyer filed a lawsuit in the California state courts for wrongful termination (a remedy well supported by prior California employment law cases).

In a 4-3 decision, the California Supreme Court held that Murray was blocked by collateral estoppel. The investigation concluded that there was no connection between the complaint and the discharge; he could have litigated this before an ALJ but chose not to. He had an "opportunity" for a full and fair trial on the causation issue, as well as for judicial review of the ALJ decision, remedies that he chose not to pursue. As a result, he could not litigate the issue in the state court. As the dissent pointed out, no California case (and probably no case anywhere) had ever held that collateral estoppel arises from the findings of an ex parte investigation that a party chose not to challenge in administrative litigation. Moreover, since there was no hearing, the causation issue was never adjudicated; yet collateral estoppel applies only to issues that were actually adjudicated.

I believe that the *Murray* decision is perverse and remarkably insensitive to the economics of litigation. Starting now, no employee in his or her right mind will request the voluntary investigation provided for in AIR-21. Yet such investigations are useful and often lead to settlement of the claims; at least, they are a cheap way of developing evidence.

Murray and his lawyer (who were never warned of the consequences of their decision) undoubtedly thought they had nothing to lose by requesting an investigation — it might have a favorable outcome, it might turn up useful evidence, and it would not cost anything. However, following up a negative investigation by an ALJ hearing and federal judicial review is another matter entirely. It is a lengthy process and it is bound to be costly in terms of attorney's fees. If you lose, you will then be precluded from your state law action (which, by the way, includes a jury trial and could produce punitive damages). So Murray and his lawyer made the entirely rational calculation that they would go straight to state court. Probably the attorney had a contingent-fee arrangement and would never have been willing to pursue the administrative remedy in preference to the state law remedy.

The purposes of collateral estoppel are to prevent vexatious relitigation of settled issues, a tactic that is costly to private parties and to the judicial and administrative adjudicatory systems. However, that did not happen in Murray because there was no earlier litigation, only an *ex parte* investigation. Investigatory conclusions should never be subject to collateral estoppel.

*Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA Law School; former Chair, ABA Section of Administrative Law and Regulatory Practice; Advisory Board Chair; and Contributing Editor, *Administrative & Regulatory Law News*.

Florida Legislature Overrides Veto of "Million Dollar Rules" Ratification Requirement

*By Larry Sellers***

During the 2010 Regular Session, the Florida Legislature enacted several significant changes to the Florida Administrative Procedure Act (APA), including the requirement that administrative rules with a "million dollar" impact may not take effect until ratified by the Legislature. Governor Crist vetoed the bill, HB 1565, claiming that it "encroaches upon the principle of separation of powers" and that if the bill became law, "nearly every rule would have to await an act of the Legislature to become effective. This could increase costs to businesses, create more red tape, and potentially harm Florida's economy." On November 16, 2010, the Legislature voted to override the veto and to make the new law effective the following day.

Here is a brief summary of some of the key provisions in HB 1565:

Revises SERC Requirements. Since 2008, agencies have been required to prepare a statement of estimated regulatory costs (SERC) for each proposed rule that will have any impact on small business. HB 1565 limits the requirement to those cases where the proposed rule will have an "adverse" impact on small

** Partner, Holland & Knight LLP, Tallahassee, FL.

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businesses. It also requires a SERC where the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in the state within one year after the implementation of the rule.

Expands Contents of SERC to Include Economic Analysis. HB 1565 expands the required contents of a SERC to include an economic analysis if the proposed rule is likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. The economic analysis is to indicate whether within five years after implementation, the proposed rule directly or indirectly is likely to: (1) have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of $1 million in the aggregate; (2) have an adverse impact on business competiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate; or (3) increase regulatory costs, including any transactional costs, in excess of $1 million in the aggregate.

Prohibits Certain Rules from Taking Effect Until Ratified by the Legislature. If the adverse impacts or regulatory costs of the rule exceed any of the above three criteria, then the rule must be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular session, and the rule may not take effect until it is ratified by the Legislature.

Provides Exception for Adoption of Emergency Rules and Federal Standards. The requirement to prepare an economic analysis — and presumably the requirement for legislative ratification — does not apply to the adoption of emergency rules, i.e., those rules necessitated by an immediate danger to the public health, safety, or welfare that warrants emergency action. These requirements also do not apply to the adoption of federal standards substantively identical to regulations adopted pursuant to federal law in the pursuance of state implementation, operation, or enforcement of federal programs.

Raises Certain Issues. When it voted to override the veto of HB 1565, the Legislature also passed a joint resolution setting the effective date as the following day, November 17, 2010. This then raised the question of whether the new law, including the requirement that certain rules may become effective only if ratified by the Legislature, applies to pending rulemakings. The Joint Administrative Procedures Committee promptly issued a memorandum suggesting that it does, advising that "[p]roposed agency rules that have not been filed for adoption, and proposed rules that have been filed for adoption but are not yet effective, as well as proposed rules noticed on or after the effective date of [HB 1565], appear to be subject to the new legislation."

HB 1565 raises a number of other interesting questions, including whether such rules continue to be subject to legal challenges provided by the Florida APA and what process the Legislature will use to consider whether to ratify rules. Stay tuned to see how Florida answers these questions.

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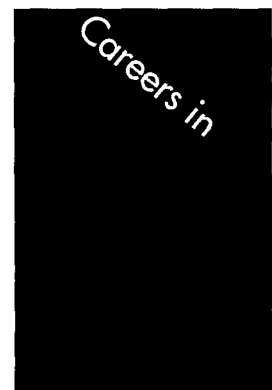

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