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Administrative Res Judicata in Ohio: A Suggestion for the Future

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ADMINISTRATIVE RES JUDICATA IN OHIO: A SUGGESTION FOR THE FUTURE

I. INTRODUCTION

It has been said that "[t]he law of res judicata, much more than most other segments of law, has rhyme, reason and rhythm - something in common with good poetry."[1]

This note will focus on the law of res judicata[2] as applied by the state courts of Ohio regarding decisions handed down by Ohio's administrative agencies. While there exists a body of law on the federal level pertaining to administrative res judicata,[3] which appears to be well settled,[4] the Ohio Supreme Court has not yet ruled on whether the decision of an administrative body will have res judicata effect in a subsequent action in an

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[1] 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 21.8, at 78 (2d ed. 1983).

[2] The preclusive effects of former adjudication are discussed in varying and, at times seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of 'res judicata' (citations omitted). Res judicata is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.' Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided (citation omitted). This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar (citation omitted).

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984).

[3] Administrative res judicata refers to the concept of applying res judicata principles to decisions of administrative agencies. *See generally* 4 K. DAVIS, *supra* note 1, at 47.

[4] In United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966) (discussed more fully *infra*) the Court recognized administrative res judicata. The Court in recent years has expanded this doctrine. However, it has not decided what effect should be given to the decision of a state administrative agency in a subsequent case in state court. University of Tenn. v. Elliott, 478 U.S. 788 (1986) (federal courts must apply res judicata to state administrative agency decisions in the same manner as the state would).

Ohio state court.[5] This note will suggest that Ohio courts should reject administrative res judicata where its effect would be to bind the state courts by a decision rendered by a state administrative agency.

The discussion will begin with an introduction to the concepts of res judicata and collateral estoppel, the main components of the doctrine of res judicata.[6] This will allow for a better understanding of the principles which underlie the use of res judicata in our courts. Included in this discussion is a comparison of res judicata between federal courts and Ohio courts. In illustrating the differences between the two systems, it will become clear that to assume Ohio will simply follow the federal courts may be premature.[7]

The next step will be to look at how Ohio's appellate courts have dealt with the issue. Particular emphasis in this area will be given to *Pullar v. Upjohn Health Care Services, Inc.*[8] and *Distelzweig v. Hawkes Hospital of Mt. Carmel.*[9] These two decisions provide a marked contrast in the Ohio appellate courts comprehension and application of administrative res judicata. This section is offered to show the difficulty the courts have had in applying this doctrine.

The procedural and philosophical aspects of administrative adjudication and state court adjudication will be discussed with an in-depth look at the similarities and differences between the two systems. By examining such factors[10] as the underlying policies of the tribunal, standards used to make decisions, general purpose of existence, the role of stare decisis in decisions, and the incentive to litigate, it will be suggested that administrative tribunals and courts of law do not have sufficient similarities between them to allow the latter to give res judicata effect to decisions of the former.

II. HISTORICAL VIEW OF RES JUDICATA AND COLLATERAL ESTOPPEL

The precise origin of res judicata and collateral estoppel in Anglo-American law is very difficult to determine.[11] At the time of the first

[5] The Ohio Supreme Court has recognized administrative res judicata only where both adjudicating bodies are administrative agencies. *See* Set Products, Inc. v. Bainbridge Township Bd. of Zoning Appeals, 31 Ohio St. 3d 260, 510 N.E.2d 373 (1987); Office of Consumers' Counsel v. Public Utilities Comm'n of Ohio, 16 Ohio St. 3d 9, 475 N.E.2d 782 (1985); Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St. 2d 133, 403 N.E.2d 996 (1980).

[6] W. FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL TOOLS FOR PLAINTIFFS AND DEFENDANTS 21 (1988).

[7] *Cf.* F. COOPER, 2 STATE ADMINISTRATIVE LAW 527 (1965), stating "there appears no reason to doubt that the state courts would follow the federal courts in showing an inclination to accept administrative determinations of a factual or textual nature . . . ."

[8] 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984).

[9] 34 Ohio App. 3d 277, 518 N.E.2d 43 (1986).

[10] When applying res judicata to administrative agency decisions, consideration must be given to the constitutional ramifications of such action. The constitutional issues are beyond the scope of this article. For an in-depth study of the impact of the Constitution on res judicata, *see* Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33 (1964).

[11] A. VESTAL, RES JUDICATA/PRECLUSION 17 (1969). It is clear that by the beginning of the twelfth century res judicata was part of the law of England. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 44 (1941).

reported cases using these doctrines, the English courts employed many different sources to determine the law which would control any given situation.[12] A number of these sources are believed to be major factors in the development of the modern concepts of preclusion.[13]

Germanic law and tradition were among the controlling influences upon the court at this time.[14] It is believed the concept of collateral estoppel was derived from these influences.[15] The Germanic principle did not concern itself with the judgment qua judgment but instead relied upon some aspect of the record proceedings anterior to judgment as its operative basis.[16]

The operation of the preclusion in this manner became known as estoppel by record because of the emphasis which was placed on the record. This emphasis was created by a "notion of inviolableness of the record"[17] which excluded any attempt to contradict its contents. Estoppel by record, it has been argued, preceded the introduction of the concept of res judicata in English law.[18]

While common law courts did not cite the Roman law with any frequency in the early centuries,[19] the Roman principles had some effect on the law being used in England.[20] Under Roman law, an earlier adjudication was conclusive in a second suit which involved the same main issue and legal basis, but when a judgment was rendered in a personal matter it had no effect on subsequent litigation dealing with different subject matter.[21] This Roman principle has developed into what are now known as the concepts of merger and bar.[22]

Today's perception of collateral estoppel and res judicata as belonging to the general concept of res judicata is the result of an abolishment of both pleading differences, and the requirement that record proof establish the estoppel.[23] Because the basis of the preclusion was the statements of the party, and not the judgment of the court, as in res judicata, the action was termed an estoppel.[24]

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[12] A. VESTAL, *supra* note 11, at 17.

[13] In addition to German and Roman law, the law merchant, the canon courts and canonical law are believed to have had an impact on the English courts' view of res judicata. *Id.* at 16-17.

[14] *Id.* at 17.

[15] W. FREEDMAN, *supra* note 6, at 7. *See generally* Millar, *supra* note 11.

[16] The "Germanic prototype, did not depend at all upon the fact of judgment, . . . in a proper case a man might be estopped by the proceedings in a former suit whether this had gone to judgment or not." Millar, *supra* note 11, at 53-54.

[17] *Id.* at 45.

[18] *Id.*

[19] A. VESTAL, *supra* note 11, at 19.

[20] *Id.* at 19-20.

[21] *Developments in the Law - Res Judicata*, 65 HARV. L. REV. 818, 820 (1952) [hereinafter *Developments*]. *See also* Millar, *supra* note 11, at 52.

[22] Perschbacher, *Rethinking Collateral Estoppel: Limiting The Preclusive Effect Of Administrative Determinations In Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983). *See Developments*, *supra* note 21, at 820.

[23] *See Developments*, *supra* note 21, at 821. The Roman and Germanic doctrines despite their interrelationship were considered to be separate and distinct in judicial and academic discussion. This led to much confusion in terminology. *Id.*

[24] *Id.* at 820. The statements of the party were contained in the record which is where the term "estoppel by record" originated. *See* Millar, *supra* note 18 and accompanying text.

These concepts were recognized by the American courts in the *Cromwell v. County of Sac* decision.[25] In that nineteenth century case, the United States Supreme Court laid the foundation for the American application of these two doctrines.[26]

III. RATIONALE FOR RES JUDICATA

The application of the doctrines of res judicata and collateral estoppel is "central to the purpose for which civil courts have been established."[27] The purpose is one of allowing courts to conclusively resolve disputes within their jurisdiction.[28]

By applying preclusion principles, the parties in an adversarial proceeding[29] are protected from the expense and vexation caused by multiple lawsuits.[30] If parties were allowed indefinite continuation of disputes, issues or claims, burdens would be cast on society.[31] Time and energy which could be put to better use would be wasted. In addition, the disputatious would be rewarded by a system which places the transactions of the day on uncertain premises.[32] Res judicata and collateral estoppel principles are designed to further the purpose noted above by finalizing court judgments and increasing respect for and reliance on judicial decisions.[33]

While res judicata principles have been justified on the grounds of judicial economy, this does not appear to be a strong reason for applying collateral estoppel. In most instances, collateral estoppel does not save as much time or money as res judicata because only the number of issues and not the size of the court docket are reduced.[34]

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[25] 94 U.S. 351 (1876).

[26] Perschbacher, *supra* note 22, at 429.

[27] U.S. v. Montana, 440 U.S. 147, 153 (1979).

[28] *Id.* at 153.

[29] *See* S. LANDSMAN, *infra* note 168 and accompanying text.

[30] *Montana*, 440 U.S. at 153-54.

[31] RESTATEMENT (SECOND) OF JUDGMENTS, introduction at 11 (1982). Res judicata had been described as, "the quintessence of the law itself: A convention designed to compensate for man's incomplete knowledge and strong tendency to quarrel." *Id.*

[32] *Id.* at 11-12.

[33] Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 49 (1897). In Southern Pacific, Justice Harlan speaking of the goals sought in applying res judicata stated:

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order: for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Id. at 49.

[34] *See* Perschbacher, *supra* note 22, at 445-48.

IV. MECHANICS OF RES JUDICATA

The principle of res judicata used by courts consists of three separate elements: collateral estoppel,[35] merger,[36] and bar.[37]

The classic definition of collateral estoppel was provided by the U.S. Supreme Court in 1877:

> Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . . . Only upon such matters is the judgment conclusive in another action.[38]

In applying collateral estoppel, the federal courts have taken into account such factors as (1) full and fair opportunity to be heard;[39] (2) validity and finality of the prior judgment;[40] (3) changes in circumstance between the time of the first and second action;[41] (4) substantive or procedural law of the forum;[42] (5) full faith and credit;[43] (6) difficulty in obtaining evidence[44]; (7) identity of issues;[45] and (8) identity of parties.[46]

Until 1971,[47] the federal courts required mutuality of parties before collateral estoppel could preclude litigation of an issue. In 1971, the U.S. Supreme Court[48] rejected this long standing requirement saying "it is apparent that the uncritical acceptance of the principal of mutuality . . . is today out of place."[49] Today, the federal courts will look at the facts

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[35] For a general discussion of collateral estoppel see RESTATEMENT (SECOND) OF JUDGMENTS § 27 and comments (1982).

[36] *Id.* at § 18.

[37] *See id.* at § 19.

[38] Cromwell v. County of Sac, 94 U.S. 351, 353 (1877).

[39] *See* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964).

[40] *See* Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929) (finality is established when rights and interests established by the first judgment would be destroyed by litigation of the second action).

[41] *See* W. FREEDMAN, *supra* note 6, at 22.

[42] *Id.*

[43] 28 U.S.C. § 1738.

[44] Cromwell v. County of Sac, 94 U.S. 351, 356 (1877).

[45] *See, e.g.*, Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725 (1969) (there must be identity of issues for collateral estoppel).

[46] *Cf.* Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 324 (1971).

[47] The doctrine of mutuality of parties was being eroded by the state courts prior to this time. In the leading case of Bernhard v. Bank of Am. Nat'l Trust and Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), the California Supreme Court unanimously rejected the requirement of mutuality. The court focused, instead, on whether the issue decided in the prior adjudication was identical with the one presented in the action in question, whether there was a final judgment on the merits and whether the party against whom the plea is asserted is a party or in privity with a party to the earlier adjudication. *Id.* at 813, 122 F.2d at 895. The impact of Bernhard on state and federal courts, over the years, has been tremendous. Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 324 (1971).

[48] Blonder-Tongue Laboratories, 402 U.S. 313 (1971).

[49] *Id.* at 350.

and circumstances of each case to determine whether mutuality is required.[50]

Merger and bar, which together form the concept of res judicata or claim preclusion, preclude the litigation of a claim if a final judgment has been rendered previously by a court of competent jurisdiction on the same cause of action between the same parties.[51] When applying claim preclusion, the court will look at factors similar to those used when applying collateral estoppel.[52]

Ohio has recognized the concept of res judicata[53] as involving the doctrines of res judicata and collateral estoppel. While Ohio relies on the Restatement[54] and *Cromwell v. County of Sac*[55] to fashion definitions of these concepts which appear to be almost identical to the federal model,[56] the application of these principles with respect to mutuality is not the same.

In *Goodson v. McDonough Power Equipment Inc.*,[57] the Ohio Supreme Court expressed its view that "Ohio has continued the requirement of mutuality for the application of collateral estoppel, as a general principle, even though recognizing the view of other states."[58] In doing so, Ohio explicitly rejects the arguments of the federal courts and other states that by not requiring mutuality there will be a reduction in the amount of litigation.[59]

V. OHIO CASE LAW

In the 1980 decision, *Superior's Brand Meats, Inc. v. Lindley*,[60] the Ohio Supreme Court addressed, for the first time, the issue of whether the

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[50] *See* United States v. United Airlines, Inc., 216 F. Supp. 709, 726 (D. Nev. 1962), stating, "[t]he rule of non-mutuality is not a general one but a limited one to be determined from the facts and circumstances in each case whether or not it should be applied."

[51] Under the doctrine of merger when a plaintiff recovers a final and valid judgment, the original claim is extinguished and the judgment is substituted for it. In this situation if the plaintiff attempts to assert the same claim the defendant can use the prior judgment as a defense, or a bar against the plaintiff bringing the action. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19 (1982).

[52] For a list and comprehensive discussion of the factors the court will consider, see W. FREEDMAN, *supra* note 6, at 11-30.

[53] Goodson v. McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983). See Trautwein v. Sorgenfrei, 58 Ohio St. 2d 493, 391 N.E.2d 326 (1979); Whitehead v. General Tel. Co., 20 Ohio St. 2d 108, 254 N.E.2d 10 (1969); Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943).

[54] *Whitehead*, 20 Ohio St. 2d at 112, 254 N.E.2d at 13.

[55] *Id.*

[56] *Compare* Norwood v. McDonald, 142 Ohio St. 299, 306, 52 N.E. 67, 71 (1943) (an existing judgment is conclusive of rights, questions and facts in issue, and that a fact which was in issue in a former action may not be questioned in a future action) *with* Montana v. United States, 440 U.S. 147, 153 (1979) (a final judgment bars subsequent claims on the same cause of action and once an issue has been determined that determination is final).

[57] 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983).

[58] *Id.* at 198, 443 N.E.2d at 984.

[59] *Id.* at 198, 443 N.E.2d at 983.

[60] 62 Ohio St. 2d 133, 403 N.E.2d 996 (1980).

doctrine of collateral estoppel applies to decisions rendered by administrative bodies.[61] In *Superior's Brand Meats*, the Board of Tax Appeals affirmed the Tax Commissioner's order assessing Superior taxes and penalties. A portion of the assessment was for the components of a cold storage building. Subsequently, Superior filed an application for a tax refund. In its application, Superior stated that the components of the cold storage building were exempt from the tax. Upon denial of this application, Superior again appealed to the Board of Tax Appeals. Upon this appeal the Commissioner raised the defense of collateral estoppel. He argued that the issue was resolved previously when the Board first affirmed the order of the Commissioner assessing the taxes. The court in affirming this use of collateral estoppel stated:

> We recognize the need for flexibility in applying the doctrine of collateral estoppel to the administrative decision-making process; however, because of the need for finality, we hold that ordinarily where an administrative proceeding is of a judicial nature and where the parties have had an adequate opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.[62]

It should be kept in mind, however, that in *Superior Brand Meats*, as well as the other two cases in which the Ohio Supreme Court has addressed this issue,[63] both adjudicatory bodies were administrative in nature.

While the Ohio Supreme Court has not addressed the issue of whether a finding by a state administrative agency should be given res judicata affect in a subsequent action in state court, Ohio's appellate courts have had occasion to address the issue.[64]

In *Pullar v. Upjohn Health Care Services, Inc.*,[65] the Cuyahoga County Court of Appeals found that collateral estoppel does apply to prevent the litigation in state court of an issue previously determined by an admin-

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[61] The court stated, "[t]his court must decide whether the doctrine of collateral estoppel can be applied to decisions rendered by administrative bodies. This is a question this court has not faced squarely in the past." *Id.* at 135, 403 N.E.2d at 999.

[62] *Id.* at 135, 403 N.E.2d at 999.

[63] Set Prods., Inc. v. Bainbridge Township Bd. of Zoning Appeals, 31 Ohio St. 3d 260, 510 N.E.2d 373 (1987) (both actions were before the zoning board). Office of Consumers' Counsel v. Public Utilities Comm'n of Ohio, 16 Ohio St. 3d 9, 475 N.E.2d 782 (1985) (where the Public Utilities Commission of Ohio had determined that an electric company had correctly calculated its rates a subsequent action before the same commission relating to those rates is barred).

[64] *See* Luka v. Sherwin-Williams Co., No. 54627 (Ohio Ct. App. Cuyahoga County Nov. 10, 1988) (1988 WESTLAW 121059); Walters v. City of Brecksville, No. 53660 (Ohio Ct. App. Cuyahoga County Apr. 21, 1988) (1988 WESTLAW 38111); Dean v. Miami Valley Hospital, Inc., CA 1039 (Ohio Ct. App. Montgomery County Feb. 22, 1988) (LEXIS, Ohio Library); Wilson v. Hatter, No. CA 85-04-014, (Ohio Ct. App. Warren County June 23, 1986); Distelzweig v. Hawkes Hospital of Mount Carmel, 34 Ohio App. 3d 277, 518 N.E.2d 43 (Franklin County 1986); Pullar v. Upjohn Health Care Serv., Inc., 21 Ohio App. 3d 288, 488 N.E.2d 486 (Cuyahoga County 1984).

[65] 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984).

istrative agency. In *Pullar*, the appellant, upon being discharged from her place of employment, instituted an action against appellees charging them with discharge in violation of a state age discrimination statute,[66] as well as breach of contract and wrongful discharge.[67] Appellant, in addition, filed for unemployment compensation in connection with this loss of employment. The referee of the Unemployment Compensation Board of Review found that there was just cause for appellant's discharge. The referee found that the discharge was the result of appellant's failure to follow a written order given by her employer.[68] The trial court held that the denial of unemployment benefits, on the grounds that the discharge was for just cause, precluded appellant from raising a claim as a result of her discharge.[69] The court of appeals affirmed, holding "it has already been established in a prior administrative hearing that the appellant's discharge was based on her refusal to follow orders. Therefore, it follows that her discharge could not be based on her age."[70] In addition, it held that because of the decision of the referee "she cannot now claim an action for wrongful discharge."[71]

In *Pullar*, the appellant argued that findings under such a relaxed and abbreviated procedure as that used in the context of an unemployment compensation hearing should not be given res judicata effect.[72] She also argued that a referee's determination in such a proceeding may be based on evidence which would be inadmissible in a court of law and as such she would be denied her day in court.[73] The *Pullar* court rejected these arguments based on the fact that appellant was provided with the rules needed to appeal her claim and did in fact appeal to the board of review.[74] In addition, the *Pullar* court explicitly accepted the holding of the U.S. Supreme Court[75] which acceptance was based on the interest in finality of litigation.[76] The breach of contract action was held by the court to be barred by the Statute of Frauds.[77]

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[66] OHIO REV. CODE ANN. § 4101.17 (A) (Baldwin 1983) provides in part: "[n]o employer shall . . . discharge without just cause any employee between the ages of forty and seventy . . . ."

[67] It was claimed that the discharge was the result of the appellant communicating to doctors malfunctions in the pacemakers she was selling. 21 Ohio App. 3d at 288, 488 N.E.2d at 487.

[68] *Id.* at 289, 488 N.E.2d at 488.

[69] *Id.* at 289, 488 N.E.2d at 488.

[70] *Id.* at 291, 488 N.E.2d at 489.

[71] *Id.* at 295, 488 N.E.2d at 494.

[72] *Id.* at 293, 488 N.E.2d at 492. For a discussion of the procedures used at an unemployment compensation hearing see generally, 54 O. JUR. 2d *Unemployment Compensation*.

[73] 21 Ohio App. 3d at 293, 486 N.E.2d at 492.

[74] *Id.* at 294, 486 N.E.2d 492. The *Pullar* court, in rejecting the argument that as a result of using evidence which would be inadmissible in court the plaintiff is being denied an opportunity to be heard, relied on Gear v. Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981) (to apply administrative res judicata the litigants in the administrative adjudication must have been notified, heard, introduced evidence and afforded an opportunity to seek court review).

[75] 21 Ohio App. 3d at 292, 486 N.E.2d at 490. The court accepted the holding of United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) (discussed *infra*.).

[76] *Pullar*, 21 Ohio App. 3d at 292, 486 N.E.2d at 290 (quoting Superior's Brand Meats, Inc. v. Lindley, 62 Ohio St. 2d 133 at 135, 403 N.E.2d 996, 999 (1980)).

[77] Ohio's Statute of Frauds is provided in OHIO REV. CODE ANN. § 1335.05 (Baldwin 1982).

A case which illustrates the uncertainty of the law of administrative res judicata in Ohio was decided in 1986 by the Franklin County Court of Appeals in *Distelzweig v. Hawkes Hospital of Mount Carmel.*[78] In *Distelzweig*, plaintiff was employed as a nurse by defendant, Hawkes Hospital, under the terms of an employment contract. During the term of the contract, plaintiff was discharged for refusing to wear a nursing cap. Plaintiff subsequently applied for and was initially awarded unemployment compensation benefits. These benefits, however, were denied based on the Unemployment Compensation Board of Review's finding that she was discharged from her employment for just cause within the meaning of the Ohio Unemployment Compensation law.[79]

In addition to the claim for unemployment benefits, plaintiff brought action against defendant for breach of a written employment contract for a specified duration.[80] In defense of this action, the employer asserted that an employer may discharge an employee for just cause without incurring liability in Ohio despite a written employment contract.[81] Thus, defendants argued, since the Unemployment Compensation Board of Review previously found that the discharge was for just cause, plaintiff should be collaterally estopped from bringing the breach of contract ac-

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[78] 34 Ohio App. 3d 277, 518 N.E.2d 43 (1986). *See also* Walters v. City of Brecksville, No. 53660 (Ohio Ct. App. Cuyahoga County Apr. 21, 1988) (1988 WESTLAW 38111). In *Walters*, the court was faced with a situation which was somewhat different than that in *Pullar* or *Distelzweig*. The difference lies in the fact that in *Walters* the decision of the administrative agency was appealed to the common pleas court. In *Pullar* and *Distelzweig*, there was no such appeal of the agency's decision. This is significant because under normal applications of res judicata the decision of the reviewing court would preclude subsequent litigation of the same claim in another court.

In *Walters*, the court, which was the same one that decided *Pullar*, was faced with the issue of whether the trial court's affirmation of an administrative agency's decision is res judicata in a subsequent civil action. The plaintiff, Mr. Walters, was discharged from his employment as a fireman. He then filed a claim appealing his discharge with the Civil Service Commission. The Commission dismissed his appeal; the dismissal was affirmed by the court of common pleas. Mr. Walters then commenced civil action against his employer, the city of Brecksville, and an official thereof. The complaint asserted seven causes of action: breach of contract, breach of covenant of good faith and fair dealing, age discrimination, violation of public policy, violation of federal civil rights, intentional infliction of emotional injury and promissory estoppel. The trial court dismissed this action. The trial court concluded that because the common pleas court affirmed the Civil Service Commission decision, the plaintiff was precluded from bringing this action.

On appeal, the court rejected the claim of res judicata. The court in *Walters* held that the Civil Service Commission was not empowered to look into the underlying reason for the discharge, they could only examine whether the discharge was procedurally correct. Perhaps more significantly, the court placed great weight on the fact that the plaintiff could not have received the same remedy in his administrative action as he was asking for in the civil action. It is interesting to note that in *Pullar* the remedy sought in the civil action was not the same as that which was available in the administrative action.

[79] 34 Ohio App. 3d at 277, 518 N.E.2d at 44.

[80] *Id.*, 518 N.E.2d at 44. The contract was for the period of one year, during which time the plaintiff was to work as a part-time nursing instructor.

[81] *Id.*, 518 N.E.2d at 44. *See, e.g.*, Dayton Rubber Mfg. Co. v. Brown, 116 Ohio St. 373, 156 N.E. 136 (1927).

tion.[82] While the trial court accepted this contention in granting summary judgment for defendant, the appellate court did not.

The court in *Distelzweig* refused to apply collateral estoppel to the decision made by the Unemployment Board of Review because the issues were not identical. The court held that a finding that plaintiff was discharged for just cause under the Ohio unemployment compensation law is not the same as a finding that she was discharged for just cause as that term applies to the law governing a written employment contract.[83] The court found that:

> While there will be an overlap of factual questions as well as similarities in the presentation of evidence and testimony, the doctrine of collateral estoppel does not apply to a mere overlap of issues. To apply the doctrine of collateral estoppel in such a situation would be to deny plaintiff her right to due process as well as her right to a jury trial.[84]

In addition, the *Distelzweig* court placed importance on the fact that it was not foreseeable to plaintiff that as a result of the board's determination of just cause she would be precluded from litigating her breach of contract action.[85]

The *Distelzweig* court did not explicitly reject *Pullar v. Upjohn*[86] but rather distinguished it on the ground that the plaintiff in *Pullar* was barred from litigating the subsequent action in state court because the oral contract, at issue in that case, did not comply with the Statute of Frauds.[87]

While the court in *Distelzweig* did not, on its face, reject the decision in *Pullar*, at least one Ohio court[88] has found these two decisions to be irreconcilable in their application of administrative res judicata.

In *Dean v. Miami Valley Hospital, Inc.*, the Montgomery County Court of Appeals chose the approach used by the *Distelzweig* court while explicitly rejecting the decision of the *Pullar* court.[89] In *Dean*, the court was faced with the issue of whether a determination by the Unemployment Board of Review, that an employee was not terminated for just cause, precludes the litigation of the issue in a subsequent breach of contract

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[82] The claim of the defendant is that "the just cause issue decided by the board is the exact issue which would be determinative as to the resolution of plaintiff's action for breach of contract." *Distelzweig*, 34 Ohio App. 3d at 278, 518 N.E.2d at 44.

[83] *Id.* at 279, 518 N.E.2d at 46.

[84] *Id.*

[85] *Id.*

[86] 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984).

[87] The court in *Distelzweig* states, "[t]he *Pullar* case is inapplicable because the plaintiff in *Pullar* was not collaterally estopped from litigating the breach of contract action but was barred from litigating the action because the oral contract did not comply with the Statute of Frauds." *Distelzweig*, 34 Ohio App. 3d at 279, 518 N.E.2d at 45. While it is true that the plaintiff in *Pullar* failed to comply with the Statute of Frauds, based on the statement of the *Pullar* court, that, "appellant is estopped from relitigating the issue of the cause of her discharge because the findings of the referee . . . concluded that the appellant was discharged for [just cause]," *Pullar*, 21 Ohio App. 3d at 295, 488 N.E.2d at 494, it is questionable whether *Distelzweig*'s basis for distinction is completely accurate.

[88] Dean v. Miami Valley Hosp., Inc., No. CA 10391 (Ohio Ct. App. Montgomery County Feb. 22, 1988) (LEXIS, Ohio library).

[89] *Id.* at 18.

action. This is essentially the same issue that was determined in *Pullar*[90] and *Distelzweig*.[91]

The court in *Dean* held that the agency's decision does not preclude the breach of contract action. The court, in so holding, accepted the *Distelzweig* court's belief that the standard to be used to determine "just cause" in the administrative hearing is not the same as that used in an action for breach of contract.[92] The court, in *Dean*, looked at the policy implications of allowing the agency's decision res judicata effect. The court stated that if res judicata were allowed in such a situation "[a]n employer could not afford to allow an application for benefits to go uncontested."[93] In addition, the court found that legislative intent could not have been to allow the administrative agency to decide contract issues.[94]

VI. SUPREME COURT

In the 1940 case of *Sunshine Anthracite Coal Co. v. Adkins*[95] the United States Supreme Court, for the first time, allowed the decision of an administrative agency to have preclusive effect in a subsequent judicial action. Prior to this time, the Court was unwilling to apply res judicata to an administrative agency's determinations. The Court previously recognized decisions rendered by administrative bodies as decisions of the executive department and as such, immune from the application of the doctrine of res judicata.[96] The Court's rationale for not accepting administrative res judicata during this era was predicated on a concern for the way in which the agencies arrived at decisions. The Court felt that these decisions were rendered in a summary way so as to obtain the objectives of the administrative body.[97] In addition, the Court expressed concern over the lack of ability of an administrative body to compel the attendance of witnesses.[98]

The full acceptance by the Supreme Court[99] of the concept of administrative res judicata can be traced to the Court's decision in *United States v. Utah Construction & Mining Co.*[100] The dispute in *Utah Construction* arose out of a construction contract entered into between Utah Construction, as contractor, and the United States, for the construction of a facility for the Atomic Energy Commission. The contract provided for an extension of time or an equitable adjustment of the contract price in the event of government orders permitting changes in the work or if materially different conditions were encountered by the contractor. Under the terms of the contract, any disputes which arose were to be decided by the contracting officers whose decision was to be final and conclusive. The con-

[90] *Pullar*, 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984).

[91] *Distelzweig*, 34 Ohio App. 3d 277, 518 N.E.2d 43 (1986). Unlike *Pullar* and *Distelzweig*, however, the employee in *Dean* is the party who wants res judicata principles to apply.

[92] *Dean*, No. CA 10391, at 11.

[93] *Id.* at 15.

[94] *Id.* at 16. The *Dean* court found the Unemployment Board's function is to determine whether benefits should be granted.

[95] 310 U.S. 381 (1940).

[96] Pearson v. Williams, 202 U.S. 281, 285 (1906).

[97] *Id.*

[98] *Id.*

[99] United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966).

[100] Pershbacher, *supra* note 22, at 433.

tracting officer's decision could then be appealed to the Advisory Board of Contract Appeals. If unsatisfied with the decision of the Board, a breach of contract action could be brought in either the Court of Claims or the District Court. By statutory mandate,[101] the finality with which these courts were to accord the fact finding of the Board was limited to a review of the record made at the time of the appeal.[102] The Board's decision was to be struck down only if it was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence."[103] In no event, however, was the court to make a de novo determination of the facts.[104]

The contractor in *Utah Construction*, filed claims with the contracting officer pursuant to the changed conditions portion of the contract.[105] The Board, upon appeal, found as to the first claim, that the changed conditions did not occur as a result of the cause alleged and as to the second claim, that no changed conditions occurred within the meaning of the contract. The contractor subsequently brought action for breach of contract in the Court of Claims.[106] The Court of Claims held that they had power to conduct a de novo review of the breach of contract claim because the dispute clause of the contract limited the authority of the Board to a dispute over the rights given by the contract, not to a dispute over a violation of the contract.[107]

The Supreme Court, on appeal, reversed the decision of the Court of Claims as to its failure to give finality to the factual findings of the Board. The Court based its decision on the terms of the contract.[108] Although the facts of the case had little to do with res judicata,[109] the Court stated that:

> Occasionally, courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.[110]

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[101] Wunderlich Act, 41 U.S.C. §§ 321-22 (1964 ed.).

[102] *Utah Constr. & Mining Co.*, 384 U.S. at 400.

[103] *Id.* at 399 (quoting Wunderlich Act, 41 U.S.C. §§ 321-22 (1964)).

[104] The Court found in United States v. Bianchi & Co., 373 U.S. 709 (1963), that where an administrative decision is challenged in a breach of contract action, Congress did not intend a de novo determination of the facts to be made by the courts. *Id.*

[105] A "Pier Drilling" claim was filed which asked for an adjustment of the contract price and an extension of time. Also, a "Shield Window" claim asserted the existence of changed conditions and asked for additional compensation and time. *Utah Constr. & Mining Co.*, 384 U.S. at 400-01.

[106] The Court of Claims action was for breach of contract by reason of the government's unreasonable delay. The recovery sought was delay damages. *Id.* at 401.

[107] *Id.* at 401.

[108] The disputes clause of the contract limited the Board's authority to "disputes concerning questions of fact arising under this contract." *Id.* at 401.

[109] For an in-depth analysis of Utah Construction & Mining Co., see Morris, *infra* note 114, at 208.

[110] Utah Construction & Mining Co., 384 U.S. at 421-22.

Legal commentators have argued that the Court's statement relying on res judicata is at best an alternative holding and in fact may simply be dicta.[111] However, lower federal courts[112] and state courts, including Ohio,[113] have relied on this language to apply res judicata to decisions of administrative agencies.

More recently, in *University of Tenn. v. Elliott*,[114] the Supreme Court had an opportunity to expand the scope of the holding in *Utah Construction*. The issue presented in *Elliott* was whether the decision of a state administrative law judge, that respondent was not discharged as a result of racially motivated prejudice, precludes action in federal court based on a violation of various civil rights laws.[115]

In *Elliott*, respondent was discharged for misconduct at work and inadequate work performance. Respondent requested and received a hearing under state law.[116] The adjudication was conducted by an administrative assistant to the vice president of the department in which respondent had worked. After listening to evidence in an extensive hearing,[117] the administrative assistant, who was acting as an administrative law judge, held that some of the charges made against respondent were proven and that they were not racially motivated. On appeal to the vice president, the initial findings were affirmed. Prior to the hearing with the administrative assistant, respondent filed an action in federal court to claim violations of certain civil rights statutes. This action was not heard until the completion of respondent's administrative appeal, at which time the district court granted petitioner's motion for summary judgment on the grounds that the decision by the administrative law judge should be given preclusive effect in a subsequent action in federal court based on civil rights statutes.[118] The district court reasoned that the civil rights statutes were not designed to provide a plaintiff with a means of re-litigating that which the plaintiff had previously litigated.[119]

After the Court of Appeals reversed,[120] the Supreme Court issued a rule of preclusion which could apply to every action brought in federal court. The Court expanded *Utah Construction* beyond the res judicata effects of federal administrative agency decisions on subsequent court actions. The

[111] Pershbacher, *supra* note 22, at 434.

[112] *Id.*

[113] Pullar v. Upjohn Health Care Serv., Inc., 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984).

[114] 238 U.S. 288 (1986). For an intensive study of the Court's decision in *Elliott* see Morris, *How Many Bites Are Enough? The Supreme Court's Decision in University of Tennessee v. Elliott*, 55 TENN. L. REV. 205 (1988).

[115] The action was brought under Title VII of the Civil Rights Act of 1964 42 U.S.C. §§ 2000e - 2000e-17 (1982), as well as 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988. *See* University of Tenn. v. Elliott, 478 U.S. 788, 790 n.1 (1986).

[116] University of Tenn. v. Elliott, 478 U.S. 788, 790 (1986). The hearing was allowed pursuant to TENN. CODE ANN. § 4-5-101 (1985). University of Tenn. v. Elliott, 478 U.S. at 791 n.1 (1986).

[117] The hearing took place over more than five months, more than 100 witness and 150 exhibits were involved and it generated over 5,000 pages of transcript. University of Tenn. v. Elliott, 478 U.S. 788, 791 n.2 (1986).

[118] Elliott v. University of Tenn., 641 F. Supp. 24 (W.D. Tenn. 1984).

[119] *Id.* at 27.

[120] Elliott v. University of Tenn., 766 F.2d 982 (6th Cir. 1985).

Elliott Court stated that when a state agency is acting in the judicial capacity required by *Utah Construction*, "federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the state's courts."[121] The Court was of the opinion that giving this res judicata effect to an administrative tribunal's decisions would serve the values of federalism,[122] and "act as a nationally unifying force."[123]

While the Court may have expanded its concept of administrative res judicata, it is clear from *Elliott* that they have stopped short of establishing an absolute rule of preclusion to be applied by state courts in regard to decisions handed down by state administrative agencies, opting instead, to rely on the lower state and federal courts' decisions in this regard.[124]

VII. RESTATEMENT

The Restatement (Second) of Judgments takes a position regarding administrative res judicata which is similar to that taken by the United States Supreme Court. The Restatement's view is that, generally, res judicata should be applied to decisions by an administrative tribunal in the exact manner in which the doctrine would be applied to the judgments of a court of law.[125] This approach advocates the application of res judicata without regard to whether the subsequent action is another proceeding in the same or different administrative setting as the initial action or whether it takes place in a judicial tribunal.[126]

The approach taken by the Restatement is not one requiring absolute application of res judicata principles to the whole multitude of decisions handed down by administrative agencies.[127] The Restatement recognizes that statutes, which are applicable in given situations, may contemplate that the decisions of a particular administrative agency are not to be given res judicata effect outside of that agency.[128]

The Restatement additionally provides, as a prerequisite to the application of administrative res judicata, that the initial administrative proceeding entail "the essential elements of adjudication."[129] This

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[121] University of Tenn. v. Elliott, 478 U.S 788, 798 (1986). However, while the Court held that as to the Reconstruction Era Civil Rights Statutes, including 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 (1982), a preclusion rule could be formulated, they refused to allow state administrative proceedings to have preclusive effect on Title VII claims. *Id.* at 788, 795. In so holding with regard to Title VII actions, the Court was following the decision in Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), where it was held that although final state judgments are entitled to full faith and credit in Title VII actions, unreviewed determination by state agencies do not. *Id.* at 470.

[122] University of Tenn. v. Elliott, 478 U.S. 788, 798 (1986).

[123] *Id.* at 799 (quoting Thomas v. Washington Gas Light Co., 448 U.S. 261, 289 (1980)).

[124] *Id.*

[125] RESTATEMENT (SECOND) OF JUDGMENTS § 83(1) (1982).

[126] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 Comment a (1982).

[127] *Id.*

[128] *Id.*

[129] RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1982).

requirement is satisfied under the terms of the Restatement if: (1) adequate notice is provided to all persons who are to be bound by the administrative proceeding;[130] (2) the parties are given the right to present evidence and legal arguments in order to support this position or rebut the evidence and legal arguments presented by the opposing parties;[131] (3) issues of law and fact are formulated so as to apply to specific parties in specific circumstances;[132] and 4) a rule is given by the agency which establishes the point in the process where the decision is final.[133] Moreover, the size and intricacy of the dispute, the opportunity to obtain evidence and frame legal arguments, and the requisite speed with which the matter must be resolved[134] are all factors which must be considered in determining whether a given proceeding contains the elements of adjudication which are essential under the Restatement to the application of res judicata to decisions of administrative agencies. The presence of the aforementioned elements in a proceeding is not prima facie evidence of an adjudication of the type necessary under the Restatement for the application of res judicata. A legal claim to specific relief must also be present.[135]

The Restatement, in applying administrative res judicata, is not concerned with whether the administrative proceedings have an objective which is paramount to the determination of a claim. Its primary concern is whether an issue is expressed and determined in a manner analogous to that which exists in a court of law.[136] The Restatement is additionally concerned with advancing the general policies which underlie the basic concepts of res judicata.[137]

Certain factors are recognized by the Restatement as mitigating against the use of res judicata in situations which would initially appear to warrant the use of the doctrine.[138] One such factor to take cognizance of is the amount in controversy. It may be contrary to our concepts of fairness to preclude the re-litigation of an issue where the amount in controversy in the initial administrative proceeding is considerably smaller than the amount in controversy in the subsequent court action.[139]

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[130] *See id.* § 83(2)(a).

[131] *See id.* § 83(2)(b).

[132] *See id.* § 83(2)(c).

[133] *See id.* § 83(2)(d).

[134] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83(2)(e).

[135] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment b (1982).

[136] "The essential question is whether, within the context of the larger purpose of an administrative proceeding, an issue is formulated as it would be in a court and decided according to procedures similar to those of a court." *Id.*

[137] *Id.* For a discussion of the policies underlying res judicata, see *supra* notes 27-34 and accompanying text.

[138] Courts and commentators have recognized the need to maintain flexibility in applying res judicata. An example of a situation where a court must exercise restraint is where the two actions involve claims which are totally unrelated. The danger also exists that a party, because of preclusion, may feel compelled to over-litigate out of fear of the consequences in a later action. *See* RESTATEMENT (SECOND) OF JUDGMENTS Title E Introductory Note at 249 (1982).

[139] *See infra* notes 242-45 and accompanying text.

There is also a provision in the Restatement which explicitly enumerates exceptions to the application of res judicata.[140]

VIII. POLICY AND PHILOSOPHY

The Unites States Supreme Court and the Restatement (Second) of Judgments both focus heavily on the procedural aspects of adjudication when analyzing whether to give res judicata effect to determinations made by administrative agencies.[141] Under this approach, if the procedures adhered to by the administrative agency are similar to those employed by a court of law, the decision of the agency will be given preclusive effect in the subsequent judicial action.[142] Neither the Supreme Court nor any other legal authority has been able to define exactly what procedures are essential for the application of administrative res judicata.[143] The decisions handed down by the various state and federal courts have been ad hoc, dependant on the facts of the individual case.[144] Lack of a definitive standard of procedure is consistent with the situation encountered when determining whether a litigant has been granted his constitutionally required procedure in a court of law.[145]

Although some procedure is required by an administrative agency acting in a judicial capacity to allow it to resemble a court, this should not be the sole inquiry made in determining whether to recognize administrative res judicata. Other factors which must be examined include purpose of the agency,[146] incentive to litigate,[147] remedies available[148] and the substantive law as the basis of decision.[149] It is when these factors are taken into consideration that the goals underlying res judicata are achieved.[150]

State agencies generally do not have the internal structure or intra-agency procedural consistency of agencies operated by the federal government.[151] The adjudicatory procedures which are followed by federal

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[140] *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 20 (exceptions to claim preclusion), 28 (issue preclusion) and 83(3) (4) (administrative res judicata) (1982).

[141] *See supra* notes 110, 125-35 and accompanying text.

[142] *See* 4 K. DAVIS, *supra* note 1, § 21.3, at 53.

[143] It is common for courts to simply quote the language used by the court in United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966), where the court said that res judicata applies "[w]hen an administrative agency is acting in a judicial capacity . . . ." *Cf.* Stillians v. Iowa, 843 F.2d 276, 281 n.3 (8th Cir. 1988); Yashon v. Hunt, 825 F.2d 1016, 1021 (6th Cir. 1987); Pullar v. Upjohn Health Care Serv. Inc., 21 Ohio App. 3d 288, 488 N.E.2d 486 (1984).

[144] *Cf.* 2 F. COOPER, *infra* note 151, at 503.

[145] *See* Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). The Court in *McElroy* stated, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 895. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (determination of process required in an administrative proceeding requires analysis of interests affected).

[146] *See infra* note 186.

[147] *See infra* notes 242-48 and accompanying text.

[148] *See* A. VESTAL, *supra* note 11, at 62-67.

[149] *See infra* notes 230-44 and accompanying text.

[150] *See* A. VESTAL *supra* note 11 at 14-15. Professor Vestal sets out a list of variables to be taken into account when applying res judicata.

[151] 1 F. COOPER, STATE ADMINISTRATIVE LAW 4 (1965).

administrative agencies are statutorily defined[152] and apply to most federal agencies.[153] States may not have a statute which defines the procedures to be used by all of its agencies. Ohio, for instance, has a statute which prescribes procedures which many of its administrative agencies must follow.[154] However, Ohio's statute is not as comprehensive in application as its federal counterpart. In Ohio, for the Administrative Procedure Act (APA) to be applicable, the adjudication must take place before the highest authority of the agency involved.[155] Thus, a large percentage of administrative adjudication in Ohio falls outside the purview of a uniform statute because much of Ohio's administrative adjudication takes place at a lower level of review.[156]

When the Ohio APA does apply in a given situation, the procedures which it entails do have similarity to those used in a court. The statute requires an opportunity for a hearing[157] and notice[158] of the hearing before the decision is rendered. In a court of law, opportunity to be heard and notice of the hearing are benchmarks of a fair trial.[159] The Ohio act also gives the various parties to the adjudication the right to be represented by counsel if they so choose.[160] Additionally, the person who has the responsibility to hear the administrative adjudication is a licensed attorney.[161] Similarly, the litigants in a judicial proceeding conducted in a court of law have a right to be represented by counsel[162] and the trier of fact in such a situation must also be a licensed attorney.[163] In Ohio, in situations where the state's APA does not apply, the procedures which

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[152] 5 U.S.C. § 551 (1982).

[153] *See* 5 U.S.C. § 551(1) (1982). The agencies covered by the federal administrative procedures act include every authority of the United States Government with the exceptions of the Congress, U.S. courts, governments of territorial possessions of the U.S., and the government of the District of Columbia. *Id.*

[154] *See* OHIO REV. CODE ANN. §§ 119.01 - 119.13 (Baldwin 1987). *See generally* Note, *A Survey of Principal Procedural Elements Among State Administrative Procedure Acts*, 22 CLEV. ST. L. REV. 281 (1973); Comment, *Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 354 (1985) [hereinafter *Administrative Adjudications*].

[155] OHIO REV. CODE ANN. § 119.01(d) (Baldwin 1987). Under section 119.01(d) adjudication is defined as a "determination by the highest or ultimate authority of an agency . . . ." *Id.*

[156] A large percentage of administrative adjudications do not get to the highest authority of the agency. Often a referee or an examiner will hear the claim and issue a recommendation to the ultimate authority. *See Administrative Adjudications, supra* note 154, at 361.

[157] *See* OHIO REV. CODE ANN. § 119.06 (Baldwin 1987).

[158] *Id.* at 119.07.

[159] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

[160] OHIO REV. CODE ANN. § 119.13 (Baldwin 1987).

[161] *Id.* at § 119.09.

[162] *See* S. LANDSMAN, *infra* note 168, at 4.

[163] A judge's decisions are a product of the legal experience he has acquired before and after taking the bench. Although there are exceptions, trial judges tend to come from the ranks of people with a great deal of experience as trial lawyers. This is in contrast to many countries which use the inquisitorial system, where judging commences at the outset of the professional's work life. M. FRANKEL, PARTISAN JUSTICE 41-42 (1980). *See* M. ROSENBERG, *The Qualities of Justices - Are They Strainable?*, in SELECTED READINGS JUDICIAL SELECTION AND TENURE 1 (G. Winters ed. 1967).

the administrative adjudication must follow are found in the statutes which create the agency and give it power.[164] Most of Ohio's administrative adjudications are not covered by a uniform statute. As a result of the relatively small size of state administrative agencies, the procedures they follow tend to be much less formal than those which are found in various state and federal APAs.[165]

Ohio's administrative agencies may possess some procedural elements which are associated with adjudication in a court of law. However, the procedures which are used generally do not approach those of an adversary proceeding.[166]

While often criticized,[167] the adversary system of procedure has been a part of the United States court system since the American Revolution.[168] The adversary system is characterized by a fact finder who is neutral and passive.[169] In this system, the parties to the litigation provide all of the information upon which the court will render a decision.[170] In addition, the adversary system requires a highly structured forensic setting. The American court system is not concerned primarily with whether they have found the truth,[171] but is mainly interested in resolving disputes between opposing parties.[172] The adversarial system achieves this goal. If the court system were interested in finding the truth, they could empower the judge to make an inquiry into the facts.[173] By having the judge or jury be neutral and passive, an evenhanded consideration of each case will take place and society at large will have increased trust in the system.[174] Requiring the parties in a judicial proceeding to present all the evidence also serves an important function. It increases the likelihood that the needs of the litigants, and not the tribunal, will be fully appreciated.[175] The case will be tailored toward what the litigants believe the

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[164] *A Survey of the Ohio Administrative Procedures Act* 22 CLEV. ST. L. REV. 320 (1973) [hereinafter *Survey*].

[165] *See* F. COOPER, *supra* note 151.

[166] Administrative adjudication is concerned with the basic concepts of fair play but does not attempt to approach the procedures of an adversarial system. For a study of Ohio's administrative procedures see 2 O. JUR. 3d *Administrative Law* § 78.

[167] The opponents of the adversarial system maintain that it places too high a value on winning. This leads to excessive partisanship which can frustrate the search for truth by advocates ignoring and distorting facts and confusing rather than clarifying an issue. The opponents also argue that this system approaches problems in a piecemeal manner directed to symptoms rather than causes. Additional problems seen by detractors of the adversary system include the high cost and delay, lawyer self-interest, and winner-take-all attitude which prevents any compromise. *The Role of Courts in American Society, Final Report of the Council on the Role of Courts* 92-93 (1984) [hereinafter *Role of Courts*].

[168] S. LANDSMAN, THE ADVERSARIAL SYSTEM: A DESCRIPTION AND DEFENSE 1 (1984).

[169] *Id.* at 2.

[170] *See Role of Courts*, *supra* note 167, at 88. *See also* S. LANDSMAN, *supra* note 168, at 3-4. L. FULLER, *The Adversary System* in TALKS ON AMERICAN LAW 34 (H. Berman ed. 1961).

[171] *See Role of Courts*, *supra* note 167; S. LANDSMAN, *supra* note 168.

[172] *Role of Courts*, *supra* note 167; S. LANDSMAN, *supra* note 168.

[173] This type of inquisitorial system is found in the judicial systems of the socialist states of Eastern Europe. *See* S. LANDSMAN, *supra* note 168 at 3.

[174] *Id.*

[175] *See Role of Courts*, *supra* note 167, at 72; S. LANDSMAN, *supra* note 168, at 4.

issue is, not what the court thinks it is.[176]

Procedural structure is also an essential element in American courts.[177] This structure allows the parties to control the situation. The control which the parties have in a judicial proceeding is the most important factor in characterizing a procedural system.[178] It is this element of party control which distinguishes a judicial proceeding from an administrative adjudication.[179] The elaborate rules of evidence,[180] procedure[181] and ethics[182] serve to diminish the opportunity for the court to engage in a biased investigatory proceeding. Similarly, it helps further the goal of fairness by allowing each litigant an equal opportunity to present his case in the best way possible.[183]

Courts, also, should have a good deal of political independence.[184] Judges should not be politically accountable in such manner as to be susceptible to removal for not sharing the beliefs of other government officials. Prior to any expiration of term of office, removal should occur only for cause or by impeachment.[185]

Administrative agencies do not have the attributes of the adversary system. One of the primary reasons for the augmentation of administrative agencies in the United States was the judgment that the judicial process could not serve the regulatory needs of the nation.[186]

In administrative adjudication, the person hearing the matter is not neutral and passive as is the case in a court proceeding. In fact, many administrative findings are prepared by people who did not even participate in the hearing.[187] The structure of administrative agencies generally entails that the agency itself perform the executive, legislative and judicial functions.[188] It is often essential for an agency to act in each of

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[176] S. LANDSMAN, *supra* note 168, at 4.

[177] *See Role of Courts*, *supra* note 167, at 89.

[178] *Id.*

[179] *See* Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 546 (1978).

[180] *See generally* FED. R. EVID.; OHIO R. EVID. In an administrative hearing, the agency may consider any testimony offered. Only in rare cases will an agency's decision be overturned for receiving evidence that would be inadmissible in a court. 1 F. COOPER, *supra* note 151, at 381.

[181] *See generally* FED. R. CIV. P.; OHIO R. CIV. P. Much of an administrative agency's adjudication is done informally. It has been estimated that ninety percent of all administrative action is accomplished in this manner. 1 K. DAVIS, *supra* note 1, § 1.5, at 14.

[182] *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981).

[183] *See* S. LANDSMAN, *supra* note 168, at 5.

[184] *Role of Courts*, *supra* note 167, at 90.

[185] *Id.*

[186] *See* J. FREEDMAN, CRISIS AND LEGITIMACY 23 (1978). The most dramatic departure agencies have made from judicial norms is in authorizing an agency to combine investigative, prosecuting, and adjudicatory functions. *Id.*

[187] *See* Pershbacher, *supra* note 22, at 453.

[188] *See* FCC v. Pottsville, 309 U.S. 134 (1940). The Court in Pottsville stated that the reason administrative agencies take part in many functions "is to satisfy the requirements of the public interest in relation to the needs of vast regions ... in the employment of facilities for tranportaion, communication and other essential public services." *Id.* at 143.

these areas, so long as there is a mechanism to handle any abuse of discretion.[189]

The presentation of evidence in an administrative proceeding, likewise, does not necessarily follow the model set up in a judicial proceeding.[190] Often there is no reliance on any formal set of evidentiary proceedings.[191] The administrator of an agency may select the relevant information. He may also set objectives and standards to reach those objectives.[192] In Ohio, it is not uncommon for the statute creating the agency to explicitly forbid the use of formal rules for the presentation of evidence.[193] In addition, many of these statutes provide for the agency to perform investigatory functions.[194]

The formality that our court system requires is conspicuously missing from administrative adjudication. The majority of an agency's adjudication is done informally.[195] Administrative proceedings, in making issue determinations, are not structured with the same goals that characterize a formal court proceeding.[196] Unlike a court of law, an administrative agency is not set up for the purpose of resolving disputes among parties.[197] The purpose for which the agency exists is to effectuate policy which the legislature deems important.[198]

To illustrate the extent of procedural and philosophical conditions which exist in Ohio's administrative agencies, it is necessary to examine one of the state's numerous agencies.

Ohio's scheme for providing unemployment benefits was created by the Unemployment Compensation Act.[199] The purpose of this statute is to assist those who are involuntarily unemployed.[200] To implement this ob-

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[189] *See* 1 F. COOPER, *supra* note 151, at 17. There is a difference in attitude between state and federal courts as to the measure of finality to be given to agencies which combine legislative, prosecutory and adjudicatory functions. State courts are much less inclined to allow this finality. *Id.* at 17-18.

[190] *See id.* at 389.

[191] R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 132 (1969).

[192] *Role of Courts*, *supra* note 167, at 99-100.

[193] *See* OHIO REV. CODE ANN. § 4123.10 (Baldwin 1982), which provides in part:

> The industrial commission shall not be bound by the usual common law or statutory rules of evidence . . . but may make an investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of such sections.

See also OHIO REV. CODE ANN. § 4141.28 (Baldwin 1982) which provides that in a fact-finding interview to determine unemployment compensation, "the administrator is not bound by rules of evidence." OHIO REV. CODE ANN. § 4141.28 (B)(1)(b) (Baldwin 1982).

[194] *See* OHIO REV. CODE ANN. §§ 4123.08 (Baldwin 1982) (allowing the industrial commission to administer paths, take testimony, conduct hearings and make investigations); OHIO REV. CODE ANN. 4141.28 (D)(2) (allowing unemployment administrator to investigate all claims made).

[195] *See* R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 116, (1969); *See also*, *supra* note 181 and accompanying text.

[196] *See* Pershbacher, *supra* note 22, at 452. *See also*, *supra* notes 167-185 and accompanying text.

[197] For the structure and operation of administrative agencies see K. DAVIS, ADMINISTRATIVE LAW TREATISE (1978).

[198] *See* M. FORKOSCH, A TREATISE OF ADMINISTRATIVE LAW 204 (1956).

[199] OHIO REV. CODE ANN. §§ 4141.01-4141.99 (Baldwin 1982).

[200] *See* Nowak v. Board of Review, 150 Ohio St. 535, 83 N.E.2d 208, 209 (1948).

jective, the statute provides for the appointment of an administrator to head up the Bureau of Employment Services.[201] The administrator has duties which involve executive, legislative, and judicial functions.[202] The administrator has the power to adopt rules which govern the procedures of the agency.[203] He also has the power to enforce rules which he has promulgated.[204]

In his judicial capacity, the administrator is vested with the power to receive, hear, and decide claims for unemployment benefits.[205] In order for a claimant to collect unemployment benefits, an application must be filed with the bureau. A fact finding interview is then conducted at which time the employer and employee, after receiving at least three days notice, may be present.[206] No formal rules of evidence or procedure are used during this interview. Much of the information which is to be used in the interview is received at the request of the administrator.[207] The administrator or his deputy will then make a decision as to whether the claimant is entitled to benefits.[208] This decision is based on prior decisions handed down by the agency's board of review.[209] In addition, policy ramifications play a large role in the decisions handed down by this agency.[210] In line with the policy of assisting the involuntarily unemployed, the bureau is required to apply a liberal construction to the statute in favor of the claimant.[211]

This example illustrates the essential differences between a judicial hearing and an administrative hearing. This agency, as well as other Ohio agencies, lacks the independence from other branches of government which is an important feature of our judicial system.[212] Additionally, the trier of fact in an administrative agency is not neutral and passive; rather, he initiates a request for certain information and also may conduct a full investigation. The fact that the bureau is predisposed to find in favor of the claimant serves to illustrate that the objectiveness that lays at the

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[201] OHIO REV. CODE ANN. § 4141.02 (Baldwin 1982). There is no statutory requirement as to the qualifications for the position. The governor has authority, subject to consent of the senate, to appoint whomever he sees fit.

[202] *See* OHIO REV. CODE ANN. § 4141.13 (Powers of Administrator). *See also supra* notes 188-94 and accompanying text.

[203] OHIO REV. CODE ANN. § 4141.13 (A) (Baldwin 1982)

[204] *Id.*

[205] *Id.*, at § 4141.13 (J).

[206] *Id.*, at § 4141.28 (B)(1)(b).

[207] The administrator may request any information necessary to the determination of rights to benefits. If this information is not given, the administrator may base his decision on any information which is available. *Id.*, at § 4141.28 (B)(1)(b).

[208] OHIO REV. CODE ANN. at § 4141.28 (c).

[209] *See id.* at § 4141.28 (f). The Board of Review is established to review appeals of the agency's decision. There are no provisions in the statute for publication of the board's decisions or for making the decisions available to the public. *See id.* at § 4141.06.

[210] *But see, supra* note 184 and accompanying text.

[211] Salzi v. Gibson Greeting Cards, Inc., 61 Ohio St. 2d 35, 399 N.E.2d 76 (1980); Vespremi v. Giles, 68 Ohio App. 2d 91, 427 N.E.2d 30 (1980).

[212] *See Role of Courts, supra* note 167, at 90.

foundation of our system of justice is not present in an administrative hearing.

A court, when applying administrative res judicata, must look at the agency's decision while being cognizant of the context in which the decision was rendered.[213] The concern for flexibility, so as to adapt its policy to changing conditions, may provide adequate reason to withhold res judicata effect from an agency's determinations.[214]

IX. STARE DECISIS

In a common law judicial system, the doctrine of stare decisis is an essential element.[215] Under this doctrine, courts will look to prior cases in order to address issues in the instant case.[216] Stare decisis creates stability in the legal system.[217] This stability allows a lawyer to give sound legal advice.[218] If the law in an area is settled, the attorney has a reasonable basis upon which to advise, enabling the client to exercise reasonable reliance.[219]

In most state agencies, there is no predilection to follow precedent.[220] The state administrative tribunals operate under the theory that they are to decide controversies by the application of governmental policy or discretion, not by fixed and settled rules of law.[221] Many state agencies do not write or publish opinions, and when they do, the language used is phrased in a statutory way with no detailed statement of facts or reason for the decision.[222] This process makes it difficult to determine what the case stands for, while making it simple for an agency to move away from a policy enunciated in a previous case.[223]

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[213] *See* Allied Chem. v. Niagra Mohawk Power Corp., 72 N.Y.2d 271, 528 N.E.2d 153 (1988). The New York court, after first looking at the procedural characteristics of the administrative agency, fashioned two additional areas of analysis in applying administrative res judicata. First there must be an examination of the expectations of the parties to determine the fairness of preclusion. Second, the court is to look at the over-all context of the decision "to assess whether according preclusive effect to a particular agency determination is consistent with the agency's scheme of administration. *Id.* at 277, 528 N.E.2d at 155.

[214] *See id.* at 277, 528 N.E.2d at 158.

[215] *See* Judge Re, *Stare Decisis*, Presented at a Seminar for Federal Appellate Judges 2 (May 13-16, 1975). Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 112 (1957) [hereinafter *Doctrine of Precedent*].

[216] *See Doctrine of Precedent*, *supra* note 215, at 112.

[217] *See id.* at 118, *See also*, *The Concept of Legal Certainty: A Preliminary Skirmish*, 4 MOD. L. REV. 183 (1941).

[218] Precedent also allows a lawyer to better frame arguements before the court. He can support his own case by prior decisions in his favor and at the same time weaken his opponents case. *See Doctrine of Precedent*, *supra* note 215, at 122.

[219] *Id.* at 118.

[220] 2 F. COOPER, *supra* note 7, at 531. State courts recognize that administrative agencies have freedom in refusing to follow their own precedents. *But cf. supra* note 209 and accompanying text.

[221] *See* J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 35-36 (1959).

[222] 2 F. COOPER, *supra* note 7, at 532.

[223] *Id.*

With a state administrative agency not feeling compelled to follow previous decisions, the attorney does not have the same ability to offer his client a reasonable basis for advice. While this may be one of the inherent difficulties of administrative adjudication,[224] it becomes more of a problem when the courts give res judicata effect to these decisions. If a lawyer is presented with a client who has an administrative claim and a potential judicial claim, he is faced with a choice of which course of action he should undertake. If the lawyer had a reasonable view of what the administrative tribunal would do, he would have a more solid basis for advising his client as to which course of action should be pursued.[225]

The basis for decisions made by Ohio's administrative agencies, and with state agencies in general, varies depending on the particular agency involved.[226] As was discussed earlier, the Ohio Bureau of Unemployment Compensation is explicitly required to rely on decisions previously handed down by its appellate body.[227] However, other agencies, such as the Bureau of Workers Compensation,[228] may not have any statutory mandate in this area.

In order for a court to give res judicata effect to an issue or a claim, the matter raised in the first proceeding must be identical to that raised in the subsequent action.[229] In recognizing this basic tenet, the Supreme Court,[230] in applying res judicata, has focused on an identity of legal principles as a supplement to requirements of identical issues or claims. The Court has said that when applying res judicata, the subsequent action must include "the same bundle of legal principles that contributed to the rendering of the first judgment."[231]

When an administrative tribunal relies on a prior decision to resolve a case, they generally rely on a decision handed down by the same or another administrative tribunal,[232] not a court of law. Thus, the principles which settle a dispute in an administrative adjudication are not neces-

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[224] *Cf.* K. Davis, *Administrative Findings, Reasons and Stare Decisis*, 38 CALIF. L. REV. 218, 228 (1950).

[225] It may be more important that the law is settled than that it is right. However, there is also a great need for flexibility because a rationale for a rule of law may cease to exist at some time in the future. *See* B. CARDOZO, THE GROWTH OF THE LAW 2-3 (1924); Davis, *Doctrine of Precedent*, *supra* note 215, at 118. *See generally* Kent, Commentaries 443 (1826).

[226] Even within a particular agency it is not easy to determine to what extent stare decisis is present. Some agencies do not have a standard policy as to when they will and will not issue a written opinion. In addition, when the decisions are written there is a conspicuous absence of a statement of rules or policies being applied, thus making it extremely difficult to distinguish decisions that a party is trying to use. 2 F. COOPER, STATE ADMINISTRATIVE LAW 532 (1965).

[227] *See supra* note 209 and accompanying text.

[228] OHIO REV. CODE ANN. §§ 4123.01-4123.59 does not provide for the use of prior decisions in adjudicating a claim for benefits.

[229] Commissioner v. Sunnen, 333 U.S. 591, 598-600 (1948).

[230] *Id.* at 599-600

[231] *Id.* at 601-02.

[232] *See* 2 F. COOPER, *supra* note 226, at 532.

sarily the same legal principles which a court would apply in a given situation. The substantive law and the burden of proof[233] in an administrative action may not reach the level of similarity required to apply res judicata.

The Ohio courts have recognized the problem of similar legal principles being used in different settings.[234] For instance, the Ohio Supreme Court has found that the element of just cause required to justify the discharge of an employee does not have to be of the exact same magnitude as that which is required by the Unemployment Bureau to disqualify a discharged employee from receiving statutorily provided unemployment compensation.[235]

The Court found that in the initial action, the determination of just cause was made in the context of a contract dispute.[236] By contrast, the subsequent action was before the unemployment bureau.[237] The Ohio court determined that the unemployment bureau was not designed to handle contract disputes.[238] The court looked at the policies underlying the formation of the agency and found that because they did not comprehend the adjudication of a contract dispute, the standards for decision did not have to be the same.[239]

With the rationale of this case being based on policy considerations and with the policies behind administrative agencies[240] being different from those of the court system,[241] the Ohio Supreme Court should, in future cases, refuse to apply res judicata to decisions of its state agencies.

X. INCENTIVE TO LITIGATE

In *Goodson v. McDonough Power Equipment, Inc.*,[242] the Ohio Supreme Court laid out a list of factors which a court must look at before they should apply res judicata. Among these factors, the court listed "the

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[233] *Cf.* Ohio State Bar Ass'n v. Weaver, 41 Ohio St. 2d 97, 322 N.E.2d 665 (1975). (in order for doctrine of res judicata to be appliable, the question of proof in the two proceedings must be proven to be the same).

[234] *See* Youghiogheny & Ohio Coal Co. v. Oszust, 23 Ohio St. 3d 39, 491 N.E.2d 298 (1986); Sellers v. Board of Review, 1 Ohio App. 3d 161, 440 N.E.2d 550 (1981) ("just cause" for discharge from Bureau of Motor Vehicles is not equivalent to "just cause" required to deny unemployment benefits).

[235] Youghiogheny & Ohio Coal Co. v. Oszust 23 Ohio St. 3d 39, 491 N.E.2d 298 (1986).

[236] A private arbritrator determined that under the terms of a collective bargaining agreement the employee was discharged for "just cause." *See id.* at 41, 491 N.E.2d at 300.

[237] *Id.* at 41, 491 N.E.2d at 300.

[238] *Id.* at 40-41, 491 N.E.2d at 300.

[239] The agency was formed to provide financial assistance to people out of work through no fault of their own. The arbitrator of the contract, however, is bound to interpret the agreement and has no authority to invoke the state's unemployment compensation laws. *Id.* at 41-42, 491 N.E.2d at 300.

[240] *See supra* notes 141-214 and accompanying text.

[241] *Id.*

[242] 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983).

amount involved in such claim."[243] The amount involved takes on great importance when a court is asked to give preclusive effect to an agency's determination. Where damages sought in a proceeding are small or nominal, a defendant may not have an incentive to litigate.[244] It may be unfair then to preclude him from defending himself in a future action where the remedy sought is a much larger amount.[245]

When viewed in the context of administrative res judicata, the concern over what effect the amount in controversy should have may be greater than it would be if both tribunals were of a judicial nature. In addition to the unfairness, which may be a factor in any res judicata claim, if the courts apply res judicata to an agency's decisions, it may cause the administrative system to slow down due to claimants and defendants feeling compelled to litigate every administrative claim with increased vigor.[246] By forcing parties to litigate their administrative claims in this manner, other problems may occur. For instance, in a situation where an employee is seeking workers compensation or unemployment benefits, the defendant employer may be represented by legal counsel whereas the employee may be forced, for financial reasons, to go unrepresented.[247]

An administrative agency is set up to further policy goals of a government and to do so requires informal operations and expediency.[248] The amounts which are involved are small in comparison with those which are potentially available in a court proceeding. To allow an agency's decision to be res judicata under such circumstances would be contrary to the requirement of fairness which is essential for the application of res judicata.

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[243] The Goodson court stated:

> There are the tangible as well as the intangible, elements which have their meaningful effect upon the result of any cause, the nature of the claim and the claimants, as well as the nature of the defendant; the amount involved in such claim; the manner of the advocacy, often depending upon the amounts involved is such cause; the philosophical elements surrounding the cause; the agreed settlement, if any, in the matter . . . and the unwillingness to appeal a verdict, if such would not be feasible.

Id. at 201, 443 N.E.2d at 986.

[244] *See* Parklane Hosiery Co., v. Shore 439 U.S. 322, 330 (1979) (if defendant is sued for small or nominal damages, he may have little incentive to defend vigorously).

[245] *See Mutuality Is a Requirement for the Use of Collateral Estoppel in Ohio, and in the Absence of Mutuality There May Be No Collateral Estoppel in the Relitigation of Design Issues Relating to Mass Produced Products—Goodson v. McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983).* 52 U. CIN. L. REV. 1083 (1983).

[246] *See, e.g.*, Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1284 (9th Cir. 1986).

[247] *Id.* at 1284.

[248] *See* 2 F. COOPER, *supra* note 151.

XI. CONCLUSION

Res judicata is a legal doctrine designed to give finality to the litigation of claims or issues. When applied by a court to a decision rendered previously by another court, the doctrine works equitably. It allows the parties to structure their legal strategy with full awareness of the consequences. A litigant knows that once a court renders a decision, he will forever be precluded from bringing the action, or litigating the issue again, thus giving him incentive to litigate the matter. When a court applies res judicata to decisions of a prior court, a certain amount of consistency is present. Both adjudicative bodies were established with the same goal in mind—settlement of disputes. In addition, both tribunals in this situation apply the same principles to arrive at a decision.

When a court applies res judicata to a decision rendered by an administrative agency, the situation is entirely different. The ad-hoc basis on which courts have applied administrative res judicata places a potential claimant on tenuous ground. It is difficult to develop a legal strategy if it cannot be determined before-hand what the consequences of a particular choice are. Additionally, administrative agencies and courts are not set up with the same policy objectives, nor do they base their decisions on the same standards.

Ohio courts when asked to apply administrative res judicata have had a difficult time. In the future, Ohio's courts should refuse to give res judicata effect to decisions rendered by the states' administrative agencies. This result takes into consideration the inherent differences between administrative agencies and courts of law.

RANDY J. HART