IN THE SUPREME COURT OF TEXAS

NO. 04-0931

SALEH W. IGAL, PETITIONER

v.

BRIGHTSTAR INFORMATION TECHNOLOGY GROUP, INC. AND BRBA, INC., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued January 25, 2006

JUSTICE BRISTER filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, and JUSTICE MEDINA joined.

The Texas Legislature passed the Payday Law to give unpaid workers a quick alternative to lengthy civil litigation. But today the Court holds they lose everything if they pursue that alternative a little too late, even though years remain to file suit in court. This is not about biting apples twice; this is about a man's wages, a claim that like many others can be filed a second time if the first disposition was not on the merits. By holding Payday claims dismissed for tardiness cannot be refiled in court, the Court converts a law giving extra options to workers into a trap where they may

forfeit all their rights. Because I agree with the state agency entrusted with these claims that this could not possibly be what the Legislature intended, I respectfully dissent.

I agree the Payday Law's 180-day filing requirement is mandatory but not jurisdictional. But I disagree that an order dismissing a Payday claim as untimely precludes a subsequent suit. Res judicata attaches only to a judgment on the merits.[1] There are at least five reasons why the Texas Workforce Commission's order here is not one.

First, the Commission itself says so. In its amicus brief supporting Igal's right to file suit in court, the Commission says "res judicata does not apply . . . because TWC's order was not a judgment on the merits but a procedural dismissal for untimeliness." How can the Court hold the Commission intended a merits dismissal when the Commission itself stipulates that it did not? There is no reason to doubt the Commission's word; the Commission "dismissed" Igal's claim, using a term employed throughout the Texas Rules of Civil Procedure,[2] and American law generally,[3] for dispositions *without* a hearing on the merits. The Commission may have only two options for

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[1] *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).

[2] *See, e.g.*, TEX. R. CIV. P. 39(b) (addressing whether suit should be "dismissed" for indispensable party); *id.* 42(e) (requiring court approval for "settlement, dismissal, or compromise" of class action); *id.* 89 (allowing court to which venue is transferred to "dismiss" case if filing fee not paid); *id.* 143 (allowing claim to be "dismissed" if security for costs not paid); *id.* 151 (allowing suit to be "dismissed" if deceased plaintiff's representatives do not appear); *id.* 161 (allowing "dismissal" of unserved defendants); *id.* 162, 163 (allowing plaintiff to "dismiss" suit before close of evidence); *id.* 165a (allowing cases to be "dismissed" for want of prosecution); *id.* 215.2(b)(5) (allowing order "dismissing" suit as discovery sanction); *id.* 330(d) (allowing court to "dismiss" case if called for trial twice but not tried); *id.* 736(10) (requiring home-loan foreclosure action to be "dismissed" if owner files action contesting foreclosure).

[3] *See* BLACK'S LAW DICTIONARY 502 (8th ed. 2004) (defining "dismissal" as "Termination of an action or claim without further hearing, esp. before the trial of the issues involved").

preliminary determinations (to dismiss or to order payment),[4] but *after* a hearing it can issue any written order it likes.[5]

Second, the order itself shows that Igal's contract rights were considered only for the purpose of deciding whether his claim was untimely. Igal's contract apparently guaranteed him extended payments if terminated without cause, but nothing if terminated by notice of nonrenewal. Because the extended payments would have been due within 180 days of Igal's Payday filing, the Commission had to decide whether he was terminated for cause or nonrenewal — not as a finding on the merits but simply to decide whether his claim was timely filed.

Third, to presume the Commission made a ruling on the merits, we must presume it made a clear error. While an untimely claim did not deprive the Commission of jurisdiction, it did prevent the Commission from reaching the merits if anyone complained (which Brightstar did). There is no good reason to encourage administrative agencies to address the merits of barred claims, especially when those claims are not yet barred in court. We should not presume the Commission committed an error by reaching the merits when it could not.

Fourth, Brightstar insisted throughout the Commission proceedings that Igal's claim was untimely. Brightstar could have waived this complaint (as it was not jurisdictional), and agreed to have the Commission decide the case on the merits. But it did not — it insisted Igal's claim should

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[4] *See* Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 1014 (amended 2005) (current version at TEX. LAB. CODE § 61.052).

[5] *See* Act of May 12, 1993, 73d Leg., R.S., ch. 269, § 1, 1993 Tex. Gen. Laws 1015 (amended 2005) ("After a hearing, the commission shall enter a written order for the payment of wages that the commission determines to be due or for the payment of any penalty the commission assesses.").

be dismissed because he filed late. Having obtained success on that ground, Brightstar should not be allowed to change its position when the claim was refiled in court.

Fifth, judgments based on limitations are usually considered rulings on the merits because a late claim can never be refiled any earlier (barring time travel[6]). But an important exception applies here because there are two different limitations periods. As the First Restatement of Judgments stated in a comment:

> Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. *He is not, however, precluded* from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State.[7]

The Second Restatement of Conflict of Laws now makes the same point:

> Thus, the plaintiff's suit may be dismissed in state X on the ground that it is barred by the X statute of limitations. This judgment will preclude the plaintiff from thereafter maintaining an action to enforce the claim in state X. This judgment, however, binds the parties only with respect to the issue that was decided. It will preclude the plaintiff from maintaining an action to enforce the claim in another state only if the courts of the other state would apply the X statute of limitations . . . .[8]

The First, Second, Fifth, Seventh, and Tenth federal circuit courts all agree that while dismissals based on limitations are usually preclusive, they are not preclusive when a case is filed

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[6] Stephen W. Hawking, *Chronology Protection Conjecture*, 46 PHYSICAL REV. D. 603 (1992) (arguing in his "chronology protection conjecture" that the laws of physics are such as to prevent time travel on all but sub-microscopic scales).

[7] RESTATEMENT (FIRST) OF JUDGMENTS § 49 cmt. a (emphasis added)).

[8] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 110 cmt. b (1988).

in two different systems that apply two different limitations periods.[9] In such cases, as Wright and Miller state: "[i]f the second forum would decide independently to apply a longer period of limitations . . . the traditional rule has been that it is free to proceed with the second action."[10] While dismissal of an untimely claim may be preclusive if based on the substantive law governing the claim (Texas contract law's four years), it is not preclusive if based on a shorter period designed as a procedural protection for the first forum (the Commission's 180 days):

> Dismissal based on the limitations period established by the law that governs the claim is a judgment on the merits that precludes application of a different limitations period by another court. Dismissal based on application of the forum's own shorter period for purposes of protecting the forum *is not a judgment on the merits and does not preclude an action on the same claim in a court that would apply a longer limitations period*.[11]

This Court has never adopted these well-settled and long-standing principles, but we certainly have not rejected them either. In the past, Texas law has not provided two limitations periods for a single claim; now that it sometimes does when there is an administrative alternative to the courts, we should explain why we reject the traditional rules followed by everyone else.

Igal can hardly be faulted for not appealing the Commission's decision. As his claim was untimely, an appeal would have been futile. Even if he could have convinced an appellate court to

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[9] *Reinke v. Boden*, 45 F.3d 166, 173 (7th Cir. 1995); *Henson v. Columbus Bank*, 651 F.2d 320, 325 (5th Cir. 1981); *Jimenez v. Toledo*, 576 F.2d 402, 404 (1st Cir. 1978); *Sack v. Low*, 478 F.2d 360, 363 (2d Cir. 1973); *Titus v. Wells Fargo Bank & Union Trust*, 134 F.2d 223, 224 (5th Cir. 1943); *Stokke v. S. Pac. Co.*, 169 F.2d 42, 43 (10th Cir. 1948); *United States v. Lyman*, 125 F.2d 67, 70 (1st Cir. 1942); *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 541 (2d Cir. 1933).

[10] 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4441 (2d ed. 2002).

[11] *Id.* (emphasis added).

reverse the part of the Commission's decision discussing the merits (which I doubt since it was necessary to decide timeliness), he would still have lost due to the late filing. The Payday process is supposed to be quick and cheap; requiring an appeal for this late claim would have simply made it longer and more expensive.

I would not hold that every unsuccessful Payday claimant can start over with the same claim in court. Claimants should not be permitted to litigate the same issue twice.[12] But the only issue Igal has litigated so far is whether he filed his Payday claim within 180 days; he does not need to litigate that issue again here as it is irrelevant to whether he filed his breach of contract claim within four years.[13]

The Legislature has chosen to give Texans asserting Payday claims two different ways to proceed. That being the case, this Court has no business saying that if they try one too late, then they get none at all. The Commission properly dismissed Igal's Payday claim as late, but that does not preclude his common law claim which was filed on time. Because the Court holds otherwise, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: December 7, 2007

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[12] *Cf. Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004) (holding sovereign immunity dismissal should be with prejudice "because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been finally determined").

[13] TEX. CIV. PRAC. & REM. CODE § 16.004(a)(3); *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 312 (Tex. 2006) (per curiam).