IN THE SUPREME COURT OF TEXAS

444444444444
NO. 00-0292
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SUBARU OF AMERICA, INC., PETITIONER

v.

DAVID MCDAVID NISSAN, INC. D/B/A DAVID MCDAVID SUBARU, RESPONDENT

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ON PETITION FOR REVIEW FROM THE

COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS
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Argued on February 14, 2001

JUSTICE BAKER delivered the opinion of the Court.

This case involves the interrelation between a trial court's original jurisdiction and the Texas Motor Vehicle Board's original jurisdiction under the Texas Motor Vehicle Commission Code.[1] The court of appeals held that the Board has exclusive jurisdiction over the claims in this dispute, and, because the Code abrogates a party's common-law claims, it unconstitutionally denies a citizen's access to the courts. 10 S.W.3d 56, 67-68. We disagree. The Legislature did not grant the Board exclusive jurisdiction. Rather, the Board's jurisdiction over issues within the Code's subject matter is concurrent with the trial court's

[1] Unless otherwise indicated, "the Board" refers to the Texas Motor Vehicle Board and "the Code" refers to the Texas Motor Vehicle Commission Code. *See* TEX. REV. CIV. STAT. art. 4413(36).

jurisdiction and thus the primary jurisdiction doctrine is relevant. The policies underlying that doctrine support abating the trial court proceeding in this case until the Board has the opportunity to decide the issues over which it has primary jurisdiction. Therefore, we reverse the court of appeals' judgment and remand this case to the trial court for further proceedings.

I. BACKGROUND

David McDavid Nissan owned two Houston car dealerships along the Gulf Freeway. Its Oldsmobile dealership was located inside Loop 610 at 6800 Gulf Freeway; eight miles further south stood its Subaru dealership, outside Loop 610 at 11200 Gulf Freeway. In 1991, McDavid discussed its desire to switch the two dealerships' locations with Subaru's regional vice-president, John Gage. Although McDavid alleges that Gage orally consented to the relocation, McDavid did not submit a written request to relocate. Instead, relying on Gage's alleged oral assurances, it renovated the more-southern location, moved the Oldsmobile dealership there, and prepared to move the Subaru dealership inside the Loop.

On November 6, 1991, Gage sent McDavid a letter stating that Subaru had just learned that McDavid planned to relocate its Subaru dealership and that Subaru would not consent to the move. The letter stated that Subaru would not allow any Subaru franchise to move inside Loop 610. Concerned about its deteriorating relationship with Subaru, McDavid closed its Houston Subaru dealership as well as its Plano and Irving Subaru dealerships. Following the Code's procedure for voluntary-termination benefits, Subaru repurchased certain assets from the dealership and paid McDavid accordingly. The next year, Subaru allowed another dealership to relocate inside the Loop—on the lot adjoining McDavid's proposed site. McDavid then sued Subaru for refusing to allow McDavid to relocate. McDavid alleged Subaru violated the Code provision making unlawful a manufacturer's unreasonably denying a dealership-relocation application. TEX. REV. CIV. STAT. art. 4413(36), § 5.02(15). McDavid also claimed Subaru violated the Texas Deceptive Trade Practices Act and breached its written dealership agreement, its oral agreement,

and its duty of good faith and fair dealing.

Between January 1996 and March 1996, Subaru filed three summary-judgment motions, seeking to dismiss all McDavid's claims. Subaru asserted McDavid did not raise its claims before the Board and, consequently, could not now bring these claims in court. Subaru further claimed McDavid had elected its remedy by terminating the dealership and accepting voluntary termination benefits. Subaru also raised various other grounds for summarily dismissing McDavid's breach of contract, DTPA, and bad-faith claims.

Before the trial court ruled on these motions, McDavid filed a supplemental petition asserting that Subaru was "equitably estopped" from denying its oral agreement with McDavid. McDavid also responded to Subaru's summary-judgment motion. Without stating the grounds, the trial court granted a partial summary judgment, specifically excepting only McDavid's promissory-estoppel claim. Subaru filed another summary-judgment motion, claiming the accord and satisfaction doctrine barred all McDavid's claims and that McDavid did not exhaust its administrative remedies. Subaru further asserted that promissory estoppel is not a cause of action. McDavid argued in response that an exhaustion of remedies requirement would violate its constitutional right to a jury trial and open courts. The trial court granted Subaru's summary-judgment motion.

The court of appeals reversed the trial court's judgment in part. The court affirmed the trial court's dismissal of McDavid's DTPA claim and its "Code claim" for breach of written agreement because these claims fall within the Board's exclusive jurisdiction. 10 S.W.3d at 69, 72. But the court of appeals remanded McDavid's claims for breach of oral contract, promissory estoppel, and breach of the duty of good faith and fair dealing. It concluded that the Code abrogated McDavid's common-law claims for breach of contract and promissory estoppel and, consequently, violated the Texas Constitution's open courts provision. 10 S.W.3d at 68. It then concluded that, though McDavid's bad-faith claim was statutorily created, the Code did not require McDavid to first present this claim to the Board. 10 S.W.3d at 69-70.

McDavid petitioned this Court for review. We granted McDavid's petition to determine the Board's jurisdiction over McDavid's claims. We conclude that the Board does not have exclusive jurisdiction over any issues in this dispute. However, the Board does have primary jurisdiction to make certain findings under the Code forming the basis of McDavid's claims. Accordingly, we hold that the trial court proceeding should be abated pending the Board's resolving those issues over which it has primary jurisdiction.

II. APPLICABLE LAW

Primary jurisdiction and exclusive jurisdiction are distinct, yet often misinterpreted, doctrines. *See Lopez v. Public Util. Comm'n*, 816 S.W.2d 776, 782 (Tex. App.—Austin 1991, writ denied); *D&S Invs., Inc. v. Mouer*, 521 S.W.2d 118, 120 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). Under the exclusive jurisdiction doctrine, the Legislature grants an administrative agency the *sole* authority to make an initial determination in a dispute. *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000). Conversely, the judicially-created primary jurisdiction doctrine operates to allocate power between courts and agencies when *both* have authority to make initial determinations in a dispute. *Foree v. Crown Cent. Petroleum Corp.*, 431 S.W.2d 312, 316 (Tex. 1968); *see also* Travis, *Primary Jurisdiction: A General Theory and Its Application to the Securities Exchange Act*, 63 CAL. L. REV. 926, 927 (1975). Thus, despite similar terminology, exclusive jurisdiction is jurisdictional while primary jurisdiction is prudential. *See Shell Pipeline Corp. v. Coastal States Trading, Inc.*, 788 S.W.2d 837, 842 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

A. JURISDICTION: THE DISTRICT COURT'S AND THE BOARD'S

Our district courts are courts of general jurisdiction. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). Our Constitution provides that a district court's jurisdiction "consists of exclusive,

appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body." TEX. CONST. art. V, § 8. By statute, district courts have "the jurisdiction provided by Article V, Section 8, of the Texas Constitution," TEX. GOV'T CODE § 24.007, and "may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by other courts of law or equity." TEX. GOV'T CODE § 24.008. Courts of general jurisdiction presumably have subject-matter jurisdiction unless a contrary showing is made. *Dubai Petroleum Co.*, 12 S.W.3d at 75. Thus, we presume all claims fall within the district court's jurisdiction unless the Legislature has mandated that a party present them elsewhere. *Dubai Petroleum Co.*, 12 S.W.3d at 75.

On the other hand, there is no presumption that administrative agencies are authorized to resolve disputes. Rather, they may exercise only those powers the law, in clear and express statutory language, confers upon them. *Key W. Life Ins. Co. v. State Bd. of Ins.*, 350 S.W.2d 839, 848 (Tex. 1961); *Railroad Comm'n v. Rowan Oil Co.*, 259 S.W.2d 173, 176 (Tex. 1953). Courts will not imply additional authority to agencies, nor may agencies create for themselves any excess powers. *See Key W. Life Ins. Co.*, 350 S.W.2d at 848; *Rowan Oil Co.*, 259 S.W.2d at 176.

The Legislature prescribed the Board's powers in Section 3.01 of the Code:

> (a) The board has the general and original power and jurisdiction to regulate all aspects of the distribution, sale, and leasing of motor vehicles and to do all things, whether specifically designated in this Act or implied herein, or necessary or convenient to the exercise of this power and jurisdiction, including the original jurisdiction to determine questions of its own jurisdiction. In addition to the other duties placed on the board by this Act, the board shall enforce and administer the terms of Chapter 503, Transportation Code.
>
> (b) Unless otherwise specifically provided by Texas law not in conflict with the terms of this Act, all aspects of the distribution and sale of motor vehicles shall be governed exclusively by the provisions of this Act.

TEX. REV. CIV. STAT. art. 4413(36), § 3.01(a), (b). This provision forms the heart of this dispute: how

much power did the Legislature intend to grant the Board to resolve disputes between motor vehicle dealers and manufacturers?

B. EXCLUSIVE JURISDICTION

The Legislature may grant an administrative agency the sole authority to make the initial determination in a dispute, thereby granting the agency exclusive jurisdiction over certain issues or the entire dispute. *See Cash Am. Int'l Inc.*, 35 S.W.3d at 15; *see also* Humphrey, *Comment: Antitrust Jurisdiction and Remedies in an Electric Utility Price Squeeze*, 52 U. CHI. L. REV. 1090, 1107 n.73 (1985) (noting that exclusive jurisdiction applies "when a pervasive regulatory scheme indicates that Congress intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed"). Thus, whether an agency has exclusive jurisdiction depends on statutory interpretation. *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 447 (Tex. 1996). If an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review of the agency's action. *Cash Am. Int'l Inc.*, 35 S.W.3d at 15. When exhaustion is required, courts have only limited review of the administrative action. *Cash Am. Int'l Inc.*, 35 S.W.3d at 15.

C. PRIMARY JURISDICTION

If an administrative agency does not have exclusive jurisdiction over a particular issue or dispute, then the agency and the courts may have concurrent jurisdiction. If so, the primary jurisdiction doctrine may require the agency to hear the dispute or make specific findings first.

The primary jurisdiction doctrine guides a court in deciding whether it should route the threshold decision about certain issues to an administrative agency. *See Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 91 (Tex. App.—Fort Worth 2000, pet. denied); *see also* Travis, 63 CAL. L. REV. at 926. No fixed formula exists for applying the doctrine. *See United States v. Western Pac. R.R. Co.*,

352 U.S. 59, 64 (1956). The doctrine encourages courts to ask whether the policies underlying the primary jurisdiction doctrine justify the court's deference to the agency's expertise and responsibility to develop regulatory policy. *Cash Am. Int'l Inc.*, 35 S.W.3d at 18. Two main policies underlie the primary jurisdiction doctrine: (1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules, and regulations, whereas courts and juries may reach different results under similar fact situations. *See Gregg v. Delhi-Taylor Oil Corp.*, 344 S.W.2d 411, 413 (Tex. 1961); *see also Western Pac. R.R. Co.*, 352 U.S. at 64.

Accordingly, courts should defer to an agency when adjudicating a claim requires resolving issues within that agency's special competence. *Cash Am. Int'l Inc.*, 35 S.W.3d at 18. This deference ensures that administrative agencies decide, at least initially, questions that require "the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact." *Cash Am. Int'l Inc.*, 35 S.W.3d at 18 (citing *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753, 755 (Tex. Civ. App.—Waco 1950, writ ref'd)). Courts should also defer to an agency when uniform ruling is essential to carry out the regulatory scheme's purposes. *Cash Am. Int'l Inc.*, 35 S.W.3d at 18; *Kavanaugh v. Underwriters Life Ins. Co.*, 231 S.W.2d 753, 755 (Tex. Civ. App.—Waco 1950, writ ref'd).

D. Standard of Review

Whether an administrative agency has exclusive jurisdiction over a claim is a question of law and our review is de novo. *El Paso Natural Gas Co. v. Minco Oil & Gas*, 8 S.W.3d 309, 312 (Tex. 1999) (questions of law are reviewed de novo); *International Union United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 813 S.W.2d 558, 566 (Tex. App.—Dallas 1991, writ denied) (exclusive jurisdiction is question of law). When conducting a de novo review, the reviewing court

exercises its own judgment and redetermines each legal issue. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998). The reviewing court accords the original tribunal's decision no deference. *Quick*, 7 S.W.3d at 116; *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996).

However, this Court has never expressly decided the standard of review that applies when a trial court denies or grants a motion for dismissal or abatement based on the primary jurisdiction doctrine. Most, but not all, Texas courts of appeals have applied an abuse-of-discretion standard. *See State Bar v. McGee*, 972 S.W.2d 770, 773 (Tex. App.—Corpus Christi 1998, no writ) ("Because the doctrine of primary jurisdiction is prudential rather than jurisdictional, the appropriate standard of review is to ascertain whether the trial court abused its discretion in assuming jurisdiction.") (citing *Shell Pipeline Corp.*, 788 S.W.2d at 842); *Simmons v. Danco, Inc.*, 563 S.W.2d 376, 379 (Tex. App.—Dallas 1978, writ ref'd n.r.e.) (holding the trial court abused its discretion in interfering with an agency's primary jurisdiction). *But see Legend Airlines, Inc.*, 23 S.W.3d at 91 (concluding that whether an agency has primary jurisdiction is a question of law).

Federal courts are similarly split about whether the reviewing standard should be de novo or abuse of discretion. *Compare National Communications Ass'n, Inc. v. American Tel. and Tel. Co.*, 46 F.3d 220, 222 (2d Cir. 1995) ("Although sometimes framed in terms of whether the district court abused its discretion, the standard of review is essentially *de novo*." (citations omitted)), *and Pace v. Honolulu Disposal Serv.*, 227 F.3d 1150, 1155 (9th Cir. 2000) ("We review jurisdictional challenges invoking the primary jurisdiction doctrine de novo."), *with Wagner & Brown v. ANR Pipeline Co.*, 837 F.2d 199, 200 (5th Cir. 1988) ("The district court did not abuse its discretion by deferring to the primary jurisdiction of the [FERC] for a determination of whether such take-or-pay issues affected the maximum lawful price of natural gas."). *See also Access Telecomm. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) ("Without deciding the standard-of-review question, which is best left to be resolved in a case in which it is contested, we accept the parties' invitation to review the primary jurisdiction issue de novo.").

Despite this disagreement, implicit in *Cash America* was an understanding that primary jurisdiction questions are questions of law. *See Cash Am. Int'l Inc.*, 35 S.W.3d at 19 (affirming the court of appeals' judgment reversing the trial court's granting of a plea to the jurisdiction). The inquiry's quasi-jurisdictional nature warrants this result, as does the statutory construction necessary to resolve primary jurisdiction issues. Both jurisdictional and statutory-construction matters are generally questions of law. *See, e.g.*, *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000) (recognizing matters of statutory construction are legal questions); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998) (recognizing ripeness, as an element of subject-matter jurisdiction, is legal question). As such, they are subject to de novo review. Accordingly, we review the primary jurisdiction questions in this case de novo, with no deference to the trial court's decision. *See Quick*, 7 S.W.3d at 116; *Heal*, 917 S.W.2d at 9.

III. ANALYSIS

A. EXCLUSIVE JURISDICTION

The first issue we decide is whether the Legislature has granted the Board exclusive jurisdiction over McDavid's claims. Relying on two courts of appeals cases, Subaru argues that, under the Code's plain language, the Board has the power and jurisdiction to regulate all aspects of new motor vehicle sale and distribution and that the Board's jurisdiction in this arena is exclusive. *See Dupriest Auto., Inc. v. American Honda Motor Co.*, 980 S.W.2d 521, 524 (Tex. App.—Amarillo 1998), *pet. denied*, 10 S.W.3d 673 (Tex. 2000) (per curiam); *Navistar Int'l Transp. Corp. v. Crim Truck & Tractor Co.*, 791 S.W.2d 241, 245 (Tex. App.—Texarkana 1990), *aff'd on other grounds*, 823 S.W.2d 591 (Tex. 1992). We do not find either case persuasive. *Navistar International* merely concludes without explanation that the current version of the Code "provides that its remedies are exclusive and that common law rights are generally preempted." 791 S.W.2d at 245. This statement is unsupported dicta. The next sentence proves as much: "The statute in existence at the time this suit was brought had no such restriction."

Navistar Int'l Transp. Corp., 791 S.W.2d at 245. Thus, the court of appeals was summarily interpreting a new version of a statute not necessary to its decision. *Dupriest Automotive* follows this dicta to hold that "the original and exclusive jurisdiction over [the party's claims] is vested in the Commission, not in the district court." 980 S.W.2d at 524. Closely analyzing the Code proves otherwise.

Generally, a statute's plain meaning expresses the Legislature's intent for an agency to have exclusive jurisdiction. *Continental Coffee Prods. Co.*, 937 S.W.2d at 447. However, if the statute's wording does not clearly show the Legislature's intent to confer exclusive jurisdiction, we may apply general statutory construction rules to resolve the issue. *Wichita County v. Hart*, 917 S.W.2d 779, 783 (Tex. 1996). We may also examine the standard of judicial review and the legislative scheme's purpose before we determine exclusive jurisdiction. *Wichita County*, 917 S.W.2d at 783.

We recently applied these rules in *Cash America*. 35 S.W.3d at 16. A customer pledged a ring as security for a loan from Cash America. While in Cash America's possession, the ring was stolen. The Texas Pawnshop Act requires a pawnbroker to replace lost or damaged pledged goods with like-kind merchandise. The customer, however, refused Cash America's offer to replace the ring and sued Cash America instead. We declined to hold that the Pawnshop Act granted the Consumer Credit Commission exclusive jurisdiction. *Cash Am. Int'l Inc.*, 35 S.W.3d at 18. We noted that because the Act's sole remedy was like-kind replacement, granting the Consumer Credit Commission exclusive jurisdiction would abrogate the party's common-law claims. *Cash Am. Int'l Inc.*, 35 S.W.3d at 16-17. A review of the Act's language and purposes indicated that this was not the Legislature's intent. *Cash Am. Int'l Inc.*, 35 S.W.3d at 16-17. Another indication that the Legislature did not intend the statutory remedy to be exclusive was the scope of judicial review, limited to substantial evidence review under the Administrative Procedure Act. *Cash Am. Int'l Inc.*, 35 S.W.3d at 17. Such review would not allow a reviewing court to determine whether the injured party was made whole. *Cash Am. Int'l Inc.*, 35 S.W.3d at 17.

Likewise, here we simply cannot say the Code's plain language confers exclusive jurisdiction on

the Board to resolve all McDavid's claims. The Code states that "[t]he board has the general and original power and jurisdiction to regulate all aspects of the distribution, sale, and leasing of motor vehicles." TEX. REV. CIV. STAT. art. 4413(36), § 3.01(a). This jurisdictional grant does not use the word "exclusive." Had the Legislature meant to grant the Board exclusive jurisdiction, it could have said so. *See Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (applying the general statutory-construction rule that every word or phrase excluded from a statute must be presumed to have been excluded for a purpose); *see also, e.g.*, TEX. NAT. RES. CODE § 131.022 (granting the commission "exclusive jurisdiction for establishing reclamation requirements for mining operations in this state"); TEX. UTIL. CODE § 32.001 (granting the commission "exclusive original jurisdiction over the rates, operations, and services of an electric utility" in certain areas); TEX. UTIL. CODE § 52.002 (granting the commission "exclusive original jurisdiction over the business and property of a telecommunications utility in this state").

Moreover, other Code provisions expressly grant the Board exclusive jurisdiction over certain matters. For example, the Board has exclusive jurisdiction to determine whether a dealer is unlawfully displaying its roadside business sign. TEX. REV. CIV. STAT. art. 4413(36), § 5.01(4) ("[T]he Board has exclusive jurisdiction to determine whether a sign or signs are in compliance with [the Code]."); *see also* TEX. REV. CIV. STAT. art. 4413(36), § 6.07(e)(5) (expressly requiring "exhaust[ion of] the administrative remedies" before a consumer can bring a DTPA action against a manufacturer for breaching its warranty-performance obligations).

Subaru points to section 3.01(b), which states that "[u]nless otherwise specifically provided by Texas law not in conflict with the terms of this Act, all aspects of the distribution and sale of motor vehicles shall be governed exclusively by the provisions of this Act." TEX. REV. CIV. STAT. art. 4413(36), § 3.01(b). This section, along with section 3.01(a), fall under a heading entitled "Jurisdiction." Accordingly, Subaru argues that this provision gives the Board exclusive jurisdiction. We disagree.

This provision does not alter our analysis. Rather, "exclusively" in this context simply requires

parties selling and distributing motor vehicles to look to the Code for rules and regulations governing sales and distribution. It deals only with governing law; by its plain language, its purpose is to clarify that the Code may trump other laws affecting new motor vehicle sales and distributions that may be inconsistent with the Code.

The Code's limited judicial review procedures also indicate the Legislature's intent not to grant the Board exclusive jurisdiction to resolve all issues and disputes related to motor vehicle sale and distribution. *See Cash Am. Int'l Inc.*, 35 S.W.3d at 17 (considering limited scope of judicial review as an indication that the Legislature did not intend the statutory remedy to be exclusive); *Wichita County*, 917 S.W.2d at 783 (examining the judicial review of administrative opinions when determining whether a provision should be considered jurisdictional). The Code's "Judicial Review" provision states:

> Any party to a proceeding before the board that is affected by a final order, rule, decision, or other final action of the board is entitled to judicial review of any such final board action, under the substantial evidence rule, in a District Court of Travis County, Texas, or in the Court of Appeals for the Third Court of Appeals District, and to the extent not inconsistent herewith, pursuant to Chapter 2001, Government Code.

TEX. REV. CIV. STAT. art. 4413(36), § 7.01(a); *see also Gene Hamon Ford, Inc. v. David McDavid Nissan, Inc.*, 997 S.W.2d 298, 300 (Tex. App.—Austin 1999, pet. denied) ("The Board's order is reviewed under the substantial evidence standard of review.").

The Code also limits judicial review of Board findings related to alleged DTPA violations:

> [A] person who has sustained actual damages as a result of a violation [under the Code] may maintain [a DTPA] action . . . and shall be entitled to all procedures and remedies provided for therein. In any action brought under this section, and in the interest of judicial economy and efficiency, a judgment rendered pursuant to this section shall pay due deference to the findings of fact and conclusions of law of the Commission contained in a final order which forms the basis of the action.

TEX. REV. CIV. STAT. art. 4413(36), § 6.06(a).

When courts have only limited review of an agency's decision, a party's remedies are necessarily limited to those available under the applicable statute. For example, here, if the Board determines that a party has violated the Code, the Board may levy a penalty payable to the Board, issue cease and desist

orders, issue injunctions, or institute a law suit. TEX. REV. CIV. STAT. art. 4413(36), §§ 6.01-.03. But the Board does not have the authority to award damages. *See Kawasaki Motors Corp. v. Texas Motor Vehicle Comm'n*, 855 S.W.2d 792, 798 (Tex. App.—Austin 1993, no writ). Without a damages award, the Board may not be able to make an injured party whole. And, under its limited review, a court cannot remedy this shortcoming. Thus, as we concluded in *Cash America*, holding that the Board has exclusive jurisdiction over all issues related to motor vehicles—and thereby requiring a party to exhaust its administrative remedies—would abrogate a party's common-law claims and render the Code's remedies exclusive. Such a result is inconsistent with the Code's other provisions. *See, e.g.*, TEX. REV. CIV. STAT. art. 4413(36), § 6.06(a) (allowing a party who has sustained actual damages to pursue a DTPA claim in court); TEX. REV. CIV. STAT. art. 4413(36), § 6.06(e) (making the statutory duty of good faith and fair dealing "actionable in tort").

Finally, the Code's purposes likewise demonstrate the Legislature's intent not to grant the Board exclusive jurisdiction. The Legislature's express purpose in enacting the Code was "to insure a sound system of distributing and selling motor vehicles," "to provide for compliance with manufacturer's warranties," and "to prevent frauds, unfair practices, discriminations, impositions, and other abuses of our citizens." TEX. REV. CIV. STAT. art. 4413(36), § 1.02. These purposes focus on promoting safety and fair business dealings within the automotive industry and deterring parties from wrongdoing. As a result, the Code's remedies focus on stopping the harm and punishing the wrongdoer—not on making the injured party whole. The courts fulfill that need. Accordingly, limiting an injured party's remedies at common law does not further the Code's purposes. Rather, allowing a party common-law remedies complements the regulatory scheme.

The Code's plain language, purposes, and scheme convince us that the Legislature did not confer exclusive jurisdiction on the Board over all issues or disputes related to motor vehicle sale and distribution. Rather, the Board has exclusive jurisdiction over only those issues expressly identified in the Code. Because

the parties do not raise any expressly exclusive issues, we hold that the Board does not have exclusive jurisdiction over McDavid's claims.

B. PRIMARY JURISDICTION

Our holding that the Board does not have exclusive jurisdiction over McDavid's claims does not mean that the Board has no role in resolving this dispute. The Board may have primary jurisdiction over certain issues. The primary jurisdiction doctrine arises only when a plaintiff seeks a remedy in court, but an issue or a claim also falls under a regulatory scheme's subject matter. Consequently, the doctrine presumes concurrent jurisdiction over an issue exists between the courts and the particular agency. *See Cash Am. Int'l Inc.*, 35 S.W.3d at 18; Travis, 63 CAL. L. REV. at 926. Because all claims presumably fall within the district court's jurisdiction, *Dubai Petroleum Co.*, 12 S.W.3d at 75, and because we conclude that the Board does not have exclusive jurisdiction in this case, the district court and the agency in this case may share general jurisdiction over issues within the Code's subject matter. The primary jurisdiction doctrine thus becomes relevant.

Subaru argues that failure to apply the primary jurisdiction doctrine in this case, thereby allowing a party to circumvent the Board's authority, would result in a lack of uniform rulings related to dealership relocations. Subaru also maintains that resolving dealership relocation issues requires the Board's special expertise.

In response, McDavid argues that the primary jurisdiction doctrine does not apply in this case because (a) it seeks to recover common-law damages and thus its claims are inherently judicial; or, alternatively, (b) the Board is powerless to grant common-law damages and has no authority to make incidental findings essential to granting common law relief. *See Foree*, 431 S.W.2d at 316. Our examination of the Code's overall scheme proves otherwise. Under the primary jurisdiction doctrine, McDavid must present certain issues to the Board before proceeding in district court. In reaching our

conclusion, we examine each claim separately to determine whether the primary jurisdiction doctrine applies.

1. DTPA Claims

The primary jurisdiction doctrine requires that the trial court defer to the Board with regard to McDavid's DTPA claims. The Code expressly comments on the DTPA:

> [I]n addition to the other remedies provided by this subchapter, . . . a franchised dealer who has sustained actual damages as a result of [an unlawful denial of relocation] or a [DTPA laundry list] violation . . . may maintain an action [under the DTPA] and shall be entitled to all procedures and remedies provided for therein. In any action brought under this section, and in the interest of judicial economy and efficiency, a judgment rendered pursuant to this section shall pay due deference to the findings of fact and conclusions of law of the Commission contained in a final order which forms the basis of the action.

TEX. REV. CIV. STAT. art. 4413(36), § 6.06(a).

The Legislature, in providing that a trial court "shall pay due deference to the findings of fact and conclusions of law of the Commission," envisioned the Board would make any necessary findings about alleged Code violations forming the basis of a plaintiff's DTPA claim. Accordingly, McDavid's DTPA claims do not fall within the *Foree* mandate that the doctrine does not apply if the agency is powerless to grant the relief sought and has no authority to make incidental findings which are essential to granting relief. *Foree*, 431 S.W.2d at 316. While the Board does not have the power to award monetary damages, *Kawasaki Motors Corp.*, 855 S.W.2d at 798, the Code envisions the Board making findings about whether the parties' conduct was lawful under the Code. *See Lake Country Estates, Inc. v. Toman*, 624 S.W.2d 677, 681 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (holding *Foree* does not apply when agency has no authority to award damages but can make incidental findings essential to granting relief).

Furthermore, the policies underlying the primary jurisdiction doctrine demonstrate why the trial court should defer to the Board so the Board can make any Code-violation findings that form the basis of McDavid's DTPA claims. There is a pragmatic need for decisional uniformity and agency expertise about whether a party violated a Code provision. For example, McDavid asserts a DTPA claim under section

17.46(b)(12), which makes it unlawful to represent that "an agreement confers or involves rights, remedies, or obligations . . . *prohibited by law*." TEX. BUS. & COM. CODE § 17.46(12) (emphasis added). McDavid further alleges Subaru violated Code section 5.02(15), which requires, among other things, that a manufacturer's denial of a written relocation request be reasonable. *See* TEX. REV. CIV. STAT. art. 4413(36), § 5.02(15).

In this context, the Code does not define reasonableness. This is important because it does define unreasonableness in other contexts. For example, the Code defines when it is unreasonable for a manufacturer to deny a potential dealership transfer. TEX. REV. CIV. STAT. art. 4413(36), § 5.01B(4)(C). The Code also gives the Board guidance on determining whether a manufacturer unreasonably denied a dealer's request to expand product lines. TEX. REV. CIV. STAT. art. 4413(36), § 5.02(25). However, the Code simply does not articulate when a relocation request is unreasonably denied. With no guidance from the Code, a court could benefit from the Board's special expertise and knowledge about industry practice and public needs related to the automobile industry to decide if a relocation denial was unreasonable and thus violated the Code.

Similarly, a court's interference may disrupt the uniformity and integrity of the Code's regulatory scheme. The Board adjudicates disputes with knowledge of its own prior decisions. Over time, dealers and manufacturers can adjust their behavior based on the agency's predictability. The Legislature has determined that regulating dealers and manufacturers falls under the Board's primary responsibility; contrary trial court and jury decisions could tread on this obligation. Accordingly, we conclude that the Board has primary jurisdiction to make any Code-violation findings, including whether Subaru unlawfully denied McDavid's relocation request, that form the basis of McDavid's DTPA claims.

2. Breach of the Duty of Good Faith and Fair Dealing

The primary jurisdiction doctrine also requires that the Board first decide alleged Code violations, if any, that form the basis of McDavid's bad-faith claims. A common-law duty of good faith and fair

dealing does not exist in all contractual relationships. *See Great Am. Ins. Co. v. North Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 418 (Tex. 1995). Rather, the duty arises only when a contract creates or governs a special relationship between the parties. *See Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). We have declined to extend this common-law duty to all franchise agreements, holding that a franchisor does not exert control over its franchisee's business comparable to the control an insurer exerts over its insured's claim. *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595-96 (Tex. 1992). However, after this decision, the Legislature expressly provided a statutory duty of good faith and fair dealing among parties to a car dealership franchise agreement. TEX. REV. CIV. STAT. art. 4413(36), § 6.06(e) ("Each party to a franchise agreement owes a duty of good faith and fair dealing to the other party."). And, the Legislature made this duty "actionable in tort." TEX. REV. CIV. STAT. art. 4413(36), § 6.06(e).

The court of appeals concluded that, under this statutory provision, McDavid's bad-faith claim did not fall within the Board's primary jurisdiction. It reasoned:

> Unlike the cause of action "pursuant to" the DTPA set forth in subsection (a) to section 6.06, the [L]egislature did not specify that a cause of action for breach of the duty of good faith and fair dealing created by subsection (e) is predicated on [Board] findings of a Code violation. Because the [L]egislature did not specify that a claimant must obtain a [Board] finding that the Code was violated before it could pursue its [bad-faith claim], and because the Code expressly states that this claim is actionable in tort, we conclude McDavid was not required to present this claim to the [Board] before pursuing it in court.

10 S.W.3d at 69-70.

We disagree. The language in section 6.06(a) requiring initial Board findings expressly applies to that entire section labeled "Application of Other Law." *See* TEX. REV. CIV. STAT. art. 4413(36), § 6.06(a) ("*In any action brought under this section* . . . a judgment rendered pursuant to this section shall pay due deference to the findings of fact and conclusions of law of the Commission contained in a final order which forms the basis of that action." (emphasis added)). A breach of the duty of good faith and fair dealing claim is an "action brought under this section." Thus, the Legislature envisioned the Board would make any

necessary findings about alleged Code violations forming the basis of any action in section 6.06, including DTPA claims, as established in subsection (a), and bad-faith claims, as established in subsection (e).

Accordingly, the same analysis applies to McDavid's bad-faith claim as applies to its DTPA claims; the Board has primary jurisdiction to make any Code-violation findings that form the basis of McDavid's bad-faith claim. Thus, to the extent McDavid's bad-faith claim is predicated upon Code violations, the Board should initially determine whether those violations occurred. But, to the extent McDavid's bad-faith claim is not predicated upon Code violations, the trial court need not defer to the Board.

3. Breach of Oral Contract and Promissory-Estoppel Claim

The primary jurisdiction doctrine does not, however, necessarily preclude the district court's deciding whether Subaru breached an oral contract with McDavid. Nor does it preclude the court's deciding whether Subaru is estopped from denying such an agreement exists.

The only Code provision that McDavid alleges Subaru violated is section 5.02(15). This provision applies only to written relocation agreements. TEX. REV. CIV. STAT. art. 4413(36), § 5.02(15) (making unlawful a manufacturer's denial "of a written application to relocate" except by the Code's express terms). Consequently, we agree with the court of appeals that this section does not delegate to the Board the authority to resolve a dispute between a manufacturer and a dealer about an alleged oral agreement to relocate a franchise. Likewise, because the promissory-estoppel doctrine presumes no contract exists, *Wheeler v. White*, 398 S.W.2d 93, 96-97 (Tex. 1965), McDavid's claim that Subaru is now estopped from denying the existence of an agreement with McDavid also does not fall within the Code's province. Therefore, the primary jurisdiction doctrine does not apply, and the trial court need not defer to the Board.

However, in its pleadings, McDavid seeks "actual damages, including, but not limited to (a) all expenses incurred and damages suffered relating to McDavid's detrimental reliance on Subaru's agreement to relocate and misrepresentations; and (b) the loss of value of the Subaru franchise." If McDavid intends

to pursue lost profits as well as reliance damages, as it has pleaded, his request for monetary damages is predicated, in part, on the belief that the Board would have allowed its relocation and denied any related third-party protests. If so, the Board should be given the opportunity to decide if it would have allowed the relocation even if a third-party protested. *See* TEX. REV. CIV. STAT. art. 4413(36), § 4.06(d) (allowing a franchised dealer of the same line-make and in the same county or within a fifteen-mile radius as the proposed site to protest an application to establish or relocate a dealership.); TEX. REV. CIV. STAT. art. 4413(36), § 4.02(c) (stating that a franchise dealer's license must authorize the establishment of a separate display and sales location).

Accordingly, we conclude that the Board does not have primary jurisdiction over McDavid's breach of contract and promissory estoppel claim. However, we caution the trial court that, to the extent McDavid seeks lost profits, the Board's primary jurisdiction may be invoked, in which event the trial court should be guided by this opinion.

IV. CONSTITUTIONAL CLAIMS

McDavid argues that if the Board has exclusive or primary jurisdiction over its claims, then section 3.01(b), which grants that jurisdiction, violates the Texas Constitution's open courts provision. The court of appeals agreed, holding the section unconstitutional because it abrogates common-law claims without reasonably substituting another remedy. 10 S.W.3d at 68.

We disagree. Texas' open courts provision prohibits the Legislature from abrogating well-established, common-law causes of action unless the reason for doing so outweighs a litigant's constitutional right of redress. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993). The only common-law claim McDavid pursues is its breach-of-contract claim. And, while we recognize the Board's primary jurisdiction to make certain findings under the Code relating to certain alleged damages arising from that claim if McDavid were to pursue lost profits, the trial court will ultimately decide if

McDavid has established this claim. Thus, section 3.01(b) does not abrogate McDavid's common-law rights or remedies. Accordingly, we reject McDavid's constitutional challenge.

V. ABATEMENT

Our inquiry does not end with our defining the parameters of the Board's jurisdiction over McDavid's claims. We must next decide whether the trial court should abate the suit pending the Board's resolving any Code-violation issues or dismiss it for lack of jurisdiction.

The primary jurisdiction doctrine does not affect a court's subject-matter jurisdiction. The doctrine is prudential in nature, not jurisdictional. It assists courts to determine whether the court or the agency should make the *initial* decision on an issue over which the court and the agency share *concurrent* jurisdiction. The doctrine presupposes that the issue arose in the context of a matter within the court's jurisdiction. If the doctrine requires a court's deferring to an agency, the court should suspend the lawsuit, postponing its judgment until the agency has an opportunity to act on the matter committed to its decision-making authority—be it an entire issue or some essential aspect of an issue. *See Central Power & Light Co. v. Public Util. Comm'n*, 17 S.W.3d 780, 787 (Tex. App.—Austin 2000, pet. denied); *Roberts Express, Inc. v. Expert Transp., Inc.*, 842 S.W.2d 766, 771 (Tex. App.—Dallas 1992, no writ). The court retains jurisdiction over the dispute; it simply errs if it renders final judgment before the agency has the opportunity to resolve the issues within its primary jurisdiction. *See TCI Cablevision, Inc. v. Owens*, 8 S.W.3d 837, 849 (Tex. App.—Beaumont 2000, pet. dism'd by agr.); *see also* 2 Davis & Pierce, ADMINISTRATIVE LAW TREATISE 271 (3d ed. 1994).

Relying on *Kavanaugh*, 231 S.W.2d at 755-56, several lower courts have held the primary jurisdiction doctrine jurisdictional, requiring a trial court to dismiss a claim for lack of jurisdiction when an agency had primary jurisdiction over an issue. *See, e.g., Lloyd A. Fry Roofing Co. v. State*, 516 S.W.2d 430, 432 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.). Quoting from a federal administrative-law

treatise, the *Kavanaugh* court stated:

> Administrative questions, which are ordinarily questions of fact, matters which call for the technical knowledge of an administrative agency, must first be determined by the agency before judicial relief can be sought. This primary jurisdiction is exclusive. *A court does not have jurisdiction to determine administrative questions, or to adjudicate controversies involving them until they have been determined by the appropriate administrative agency*. This is the primary jurisdiction doctrine. Where the court has no jurisdiction under the doctrine it may not acquire it by consent of the parties.

Kavanaugh, 231 S.W.2d at 755 (emphasis added).

However, later in the opinion, the court controverts this jurisdictional language: "Questions of primary jurisdiction arise *only when* the statutory arrangements are such that administrative and judicial jurisdiction are *concurrent* for the initial decision of some questions." *Kavanaugh*, 231 S.W.2d at 756 (emphasis added) (citing Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Personal Jurisdiction*, 28 TEX. L. REV. 376, 400, 402 (1950)). This statement about the doctrine is correct. The doctrine assumes both the agency and the court have original jurisdiction. Their jurisdictions are concurrent as opposed to exclusive. If an agency and court share jurisdiction, courts simply defer to the agency for policy reasons; whereas, if an agency's jurisdiction is exclusive, courts defer as a matter of subject-matter jurisdiction. In the former, abatement is appropriate; in the latter, dismissal is mandatory. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963) (noting that under the primary jurisdiction doctrine, "[c]ourt jurisdiction is not thereby ousted, but only postponed").

The Board and the court share original jurisdiction over certain issues in this dispute. However, the Board has primary jurisdiction over certain issues related to McDavid's claims. Accordingly, the trial court should abate its proceeding pending the Board's resolving the issues over which it has primary jurisdiction.

VI. CONCLUSION

The Legislature granted the Board power to regulate new motor vehicle sale and distribution. But,

in doing so, it did not grant the Board exclusive jurisdiction over all claims and issues within the Code's subject matter. The Board, however, plays an important role in resolving disputes between manufacturers and dealers. Specifically, in this case, the Board has primary jurisdiction over those alleged Code violations that form the basis of McDavid's DTPA and bad-faith claims. Additionally, the Board may have primary jurisdiction to determine whether it would have permitted McDavid's relocation in the face of third-party protests, if McDavid is seeking more than reliance damages. Thus, the trial court should abate its proceedings pending the Board's resolving those issues over which it has primary jurisdiction. Accordingly, we reverse the court of appeals' judgment and remand this cause to the trial court for further proceedings.

James A. Baker, Justice

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