Civil Procedure

Session 22 - © National Paralegal College

Civil Procedure: LGL-507

CLASS TWENTY-TWO

CHAPTER 14: 14.9 – 14.15

ISSUE PRECLUSION – COLLATERAL ESTOPPEL

* **Text in this outline was derived from the class text, which is**
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COLLATERAL ESTOPPEL—ISSUE PRECLUSION

* § 14.9 General Principles Underlying Collateral Estoppel
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* D. INTERSYSTEM PROBLEMS OF FORMER ADJUDICATION
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Former Adjudication – Issue Preclusion (Collateral Estoppel)

- Collateral estoppel precludes relitigation of an issue that was actually litigated and necessary to the final decision in a previous case.
- Cannot be used against someone who was not a party to the previous action.
- Two types:
  - **Defensive** nonmutual collateral estoppel
  - **Offensive** nonmutual collateral estoppel

§ 14.9 General Principles Underlying Collateral Estoppel

* *Note: Collateral Estoppel = Issue Preclusion*

* Issue preclusion operates to simplify dispute resolution by treating the original court's determination on specific issues as binding; any subsequent litigation between the parties, even on different claims, will be limited to only those issues being presented for the first time. (652)

Issue Preclusion/Collateral Estoppel: Even if determination was incorrect

* Collateral estoppel operates without regard to whether the first determination of a particular issue was correct. The court does not concern itself with the rightness of the findings. Its only inquiry is whether a particular issue is one that clearly was decided in a prior proceeding and whether the issue was necessary to the determination of that proceeding. (652)

Interlocutory Orders can be collateral estoppel issues

* Interlocutory orders that include findings on specific issues may be given collateral-estoppel effect, even when their lack of finality prohibits their use for res-judicata purposes. (652-653)

Final can mean: no need to hear it again.

* " 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." (653)

Preliminary Injunctions

In a similar vein, a preliminary injunction may have collateral-estoppel effect if it is based on a determination that constitutes an insuperable obstacle to success on the merits.

Miller Brewing Co.

* This was the situation in *Miller Brewing Company v. Jos. Schlitz Brewing Company*. On an appeal from a preliminary-injunction order in the first suit, the court held as a matter of law that the brand name “Lite” could not have trademark protection. This determination was held to be final and conclusive in a second action. (653)

Motion to Suppress a Confession: Not binding on a jury

* A ruling on a motion to suppress a confession on the ground that it was involuntary was only provisional under state law, because the issue of voluntariness ultimately had to be left to the jury in the criminal trial, that ruling was held not binding on a civil jury in an action for damages alleging mistreatment by the police officer. (653)

Procedure for Raising the Defense

* Finally, the procedure for raising the defense of collateral estoppel is the same as for res judicata. Collateral estoppel is an affirmative defense that must be pleaded or it will be waived. It may be raised in a responsive pleading, but more commonly it is included in a motion for summary judgment or for partial summary judgment.

The Point is Raise it Early!

* The key is that the defense must be raised early in the litigation so that, if it is upheld, judicial economy will be fostered by eliminating that issue from the dispute. (655)

§ 14.10 The Scope of Collateral Estoppel—Defining an 'Issue'

* Just as res judicata requires that the cause of action to be precluded be identical to the one already litigated, collateral estoppel demands identity of issues. Consequently, for collateral estoppel, the problem of defining the scope of a single issue takes a place analogous to determining the scope of a cause of action for res judicata.

‘Issue’ is Not a Historical Term of Art

* Unlike “cause of action,” however, the term “issue” is not encrusted with historical associations. Whether issues in two actions are the same typically depends upon straightforward considerations such as factual identity, legal standards, and the burden of proof imposed on the parties in each law (655)

Issues of Law vs Issues of Fact

* Thus, the premise that issues of law require different treatment presents some of the most difficult problems in delineating the scope of collateral estoppel.
* The danger in allowing collateral estoppel to apply freely to issues of law is that the doctrine might cause inequities among litigants when the law has changed and estoppel is asserted for findings based on the earlier law.

Discarded rules of law?

* Discarded rules of law might apply between particular parties whenever an issue recurs between them that was the subject of a previous lawsuit (660)
* The principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. (660)

Restriction to particular rulings for particular events

* The idea was to restrict collateral estoppel to particular rulings about particular events. (661) The following criteria for application of collateral estoppel therefore evolved.

§ 14.11 Requirements for the Application of Collateral Estoppel

* Consent judgments or judgments entered as a result of a settlement typically cannot be used as the basis for issue preclusion. Conversely, summary judgments or judgments entered on a directed-verdict motion may be given collateral-estoppel effect. Although the litigation terminated before a full trial was completed, the judgment was not a product of the parties' consent and is a final decision on the merits. (664)

Bad practice or strategy can't be fixed later

* The problem is not one of a failure of proof; an issue may be fully litigated even though the ultimate decision is that the party with the burden of proof failed to adduce sufficient evidence to establish that issue at trial. Rather, the question that arises is whether an issue suggested in the pleadings actually was in contest during trial or, even if litigated at the trial, whether the judgment that was entered necessarily embraced that issue. (665)

Issues Necessary for the Judgment

* Issues that were necessary for the judgment presumably will have been given the complete attention of the parties, as well as the court or fact-finder. Finally, findings not necessary to a lawsuit's result seldom are reviewable by an appellate court, especially when they are decided in favor of the prevailing party.

Appellate Review Factor

* Although availability of appellate review is not an absolute prerequisite for applying collateral estoppel, the absence of review of nonessential findings lends further weight to the arguments against their collateral-estoppel effect. (666-667)

Avoiding Relitigation

* Party A's chance to avoid relitigation and a possible conflicting result, depends on whether claim preclusion may be invoked on the ground that party B omitted her personal-injury claim in the first action, **and cannot raise it now.** (667)

Alternative Grounds for A Judgment

* Alternative grounds for a particular judgment may be given full preclusive effect. The courts will not attempt to discern which ground was the necessary one when either would support the judgment. In this situation, it is presumed that the court fully considered all the issues raised and the losing party had full incentive to obtain appellate review. (667)

§ 14.12 Exceptions to the Application of Collateral Estoppel

* Even when an issue has been fully litigated in a lawsuit, and its determination was necessary to the outcome of the trial, there still are a few instances in which collateral estoppel will not be applied.

Exceptions: For Other Substantive Policies

* Stated generally, exceptions to the normal application of collateral estoppel will be made when other substantive policies are deemed to outweigh the policies of judicial economy and avoidance of inconsistent results that are fostered by issue preclusion. The number of substantive policies deemed significant enough to override collateral estoppel necessarily is limited (667)

Exceptions: Antitrust

* One of the most notable examples of a substantive policy exception to collateral estoppel involves antitrust litigation. (668)
* The exclusive-federal jurisdiction over antitrust matters was designed to promote the uniform administration of the antitrust laws and that that could be accomplished only "by an untrammeled jurisdiction of the federal courts."

Need for Uniform Federal Law

* Thus, the decision to assert exclusive-federal jurisdiction was linked to a congressional desire for uniform statutory interpretation that arguably could be satisfied only by allowing relitigation of any antitrust issue decided by a state court. (668)

Business Arrangements, however, might be subject

* Findings on the underlying facts concerning the parties' business arrangements could be given collateral-estoppel effect. (668)
* Many courts have rejected any notion that exclusive federal jurisdiction, alone, poses a barrier to the use of collateral estoppel. The impact of that conclusion is most important because several states have adopted state antitrust and securities laws that are virtually identical with the federal schemes. (669)

Federally Protected Civil Rights

* It was argued that, although the federal courts were not given exclusive jurisdiction to determine actions brought under the various civil-rights statutes, there was reason to believe that Congress created a federal remedy because the state courts were not able to protect adequately the rights of the persons involved. (670)

Supreme Court Disagreed

* The Supreme Court has put these contentions to rest. In *Allen v. McCurry*, it ruled that collateral estoppel could be used in a Section 1983 suit raising Fourth Amendment search-and-seizure issues that were determined against the federal plaintiff in a state criminal trial. The Court found nothing in the statute's legislative history that suggested that Congress intended to create an exception to the normal preclusion rules.

Fair Procedures Can Be Upheld without Relitigation

* As long as fair procedures were used in the state trial courts, there was no justification for allowing relitigation of the federal issues (670)
* The key question in these cases was whether there was some legislative purpose or policy underlying the particular remedial scheme that suggested that interpretations of that law should be solely within the competence of the federal courts. (670)

Government As a Party

* The final exception to collateral estoppel that should be noted arises in litigation in which the government is a party. The government is not in the same position as most private litigants because it is likely to be involved in nationwide litigation involving identical legal issues. (671)

Nonparties Cannot Use Collateral Estoppel Offensively

* Supreme Court has ruled that nonparties cannot use collateral estoppel offensively to preclude the relitigation of issues decided against the government in other cases. (672)
* When the same party is involved and the facts are virtually identical, judicial economy concerns predominate. (672)

C. WHO CAN BE BOUND

* **§ 14.13 General Principles Governing Who Is Bound**
* Only persons who were parties or who are in privity with persons who were parties in the first action may be bound. Given the preceding rules, the ability to bind a nonparty to a judgment typically is tied to a determination that the nonparty is in privity with a party. (673)

But…what is ‘privity’?

* It has been suggested that privity is merely a conclusory label applied by the courts when they determine that there is a sufficient identity of interest between a party and nonparty to allow a judgment to bind both (673-674)

Situations of Privity: Later-Acquired Interest

* The historic and most common situation in which privity is found is when a person acquires an interest in the subject matter of the suit after it was filed or decided. Successors in interest, whether they obtain their interests by assignment, by inheritance, or by law are bound along with their predecessors by res judicata and collateral estoppel. (674)

Privity: Legally Appointed Representatives

* A second well-defined privity relationship arises when legally appointed representative parties, such as trustees and executors, are involved; those individuals are deemed in privity with those whom they represent. Since parties litigating in a representative capacity have no interests of their own, but either sue or are sued on behalf of the beneficiaries, any judgment that is entered will bind not only them, but the individuals whom they serve. (674)

Privity: Insurers and their Insureds

* As the real party in interest in the first suit, the insured had the ability to combine the personal-injury and property-damage claims and should have done so. The insurance company stands in the shoes of its insured. Since the latter would be barred, so is the former. (675)

Derivative Liability as Privity

* The second important context in which complex and sometimes seemingly inconsistent rules of privity have been developed involves derivative liability growing out of such relationships as employer and employee, principal and agent, guarantor and debtor, etc. An injured party may sue to collect damages from the individual who caused the harm or the person who is derivatively liable. The question is when, if at all, the plaintiff can sue each of them in successive actions. (675-676)

§ 14.14 The Doctrine of Mutuality

* However, identical issues can be presented in separate actions involving different parties and it may be clearly established that those issues were actually and necessarily litigated and determined in the first proceeding, thereby meeting the basic requirements for issue preclusion. What prevents the use of collateral estoppel in those circumstances is the doctrine of mutuality. (676)

Who can't assert shouldn't be subject to assertions

* Since someone who was a party to the first proceeding could not assert any judgment that was entered against a nonparty because that person had no opportunity to present evidence or argument at the first trial, the nonparty likewise should not be able to use the judgment against the party. Thus, mutuality operates in favor of prior parties because it affords them the opportunity to litigate a second time in the hope that a different determination will be reached. (677)

Abandonment of Mutuality?

* Following Justice Traynor's lead in *Bernhard v. Bank of America*, many jurisdictions have abandoned mutuality. They have noted that a person should not be able to continue to try an issue, particularly when there is no reason to suspect that the result will be different. As long as the issue or issues are identical in both suits and a full opportunity was present in the first action to litigate those issues, a nonparty may assert collateral estoppel against someone who was the losing party there. (677)

Typical Situations of Abandonment of Mutuality

* The most common situation in which mutuality has been abandoned is when the party against whom estoppel is asserted was in an offensive posture in the first suit (a plaintiff) and when the person who is asserting estoppel is doing so defensively in the second action. This was the situation in the *Bernhard* case itself. In this context there is little disposition to allow a losing claimant to continue litigating the same issues simply by switching adversaries in the hope that a different result will occur. (678)

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Former Adjudication – Issue Preclusion (Collateral Estoppel)

- Defensive nonmutual collateral estoppel
- Collateral estoppel can be used defensively "as a shield" by one who was not a party to the first action against someone who was a party.
  - Barney is driving a car that is involved in a collision with Fred, who is, within the scope of his employment, driving a truck owned by his employer, Mr. Slate.
  - Barney sues Fred and loses.
  - Barney then attempts to sue Mr. Slate for the same accident.
  - Mr. Slate will win as well based on the result of Barney's failed lawsuit against Fred.

Former Adjudication – Issue Preclusion (Collateral Estoppel)

- Offensive nonmutual collateral estoppel
- Collateral estoppel can be used offensively "as a sword" by one who was not a party to the first action against someone who was a party, based on several other considerations:
  - Could the plaintiff have easily joined in the earlier action?
  - Was the defendant in an offensive or defensive position in the earlier action?
  - Courts are concerned that use of offensive collateral estoppel will increase, rather than decrease, the total amount of litigation.

Non-allowance of Offensive Collateral Estoppel

* The rationale for not allowing a nonparty to assert collateral estoppel offensively is twofold. First, there is the concern that abandoning mutuality under those circumstances would encourage people to adopt a wait-and-see attitude after one suit was filed. If that suit were completed successfully, they could take advantage of the judgment by collateral estoppel, but if the suit were unsuccessful, they could claim a due-process right to litigate the issues anew. (679)

A Blonder Shade of Tongue

* The Court had endorsed the abandonment of mutuality in the defensive setting in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*. In that case it ruled that a patent owner could be precluded from relitigating the validity of a patent that had been declared invalid in prior litigation against other alleged infringers.

Fair Where Forced to Fully Defend

* As described by Justice White, in his opinion for the Court, “In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources.” (679-680)

Parklane Hosiery v Shore: Fair, Where Not Unfair

* Not long afterward, in *Parklane Hosiery Company v. Shore*, the Court confronted the question whether a nonparty could assert collateral estoppel offensively against someone who was a defendant in the prior action—the most troublesome situation for the lower courts. In an opinion by Justice Stewart, the Court upheld the use of collateral estoppel, but issued a caveat: "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where * * * the application of offensive estoppel would be unfair to defendant, a trial judge should not allow the use of offensive estoppel." (680)

Parklane Hosiery v. Shore

- 439 U.S. 322 (1979)
- Shore brought a stockholder's class action suit against the Parklane Hosiery Co. in a federal district court, alleging that Parklane and 13 of its officer and directors issued a materially false and misleading proxy statement in connection with a merger.

Parklane Hosiery v. Shore – Facts

- Before this action came to trial, the SEC filed suit against Parklane, alleging that the proxy statement was materially false and misleading in the same respects as those that had been alleged in Respondent's complaint.
- The district court in the SEC case found that the proxy statement was materially false and misleading in the respects alleged and entered a declaratory judgment to that effect.
- The Court of Appeals for the Second Circuit affirmed this judgment.

Parklane Hosiery v. Shore – Facts

- Shore then moved for partial summary judgment against Parklane, asserting that Parklane was collaterally estopped from relitigating the issues that had been resolved against them in the SEC action.
- The district court denied the motion on the ground that such an application of collateral estoppel would deny Parklane its Seventh Amendment constitutional right to a jury trial.
- The Court of Appeals reversed.

Parklane Hosiery v. Shore – Issues

- Whether a party who has had issues of fact adjudicated adversely to it in an **equitable action** may be collaterally estopped from relitigating the same issues before a jury in a subsequent **legal action** brought against it by a new party.

Parklane Hosiery v. Shore – Ruling

- Yes. Parklane was collaterally estopped from relitigating the issue of whether the proxy statement was materially false and misleading.
- Offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does.
- The preferable approach is not to preclude the use offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.

Parklane Hosiery v. Shore – Ruling

* The general rule should be that in cases where a plaintiff could easily have joined in the earlier action, or where, either for the reasons discussed above or for other reasons, the application of collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of collateral estoppel.

Parklane Hosiery v. Shore – Explanation

- How was Seventh Amendment implicated?
  - Action for equitable relief involves a bench trial
  - Action for monetary damages carries with it a constitutional right to a **jury** trial.
- The Seventh Amendment is not violated by a court's assignment of preclusive effect to an earlier equitable **claim if the same issue arises in a second suit involving legal claims.**

Sometimes a Completer Abandonment

* Thus, the Court endorsed the complete abandonment of mutuality in the federal courts. It substituted a discretionary standard by which the trial judge is to assess whether allowing a nonparty to assert issue preclusion in a particular case raises any of the concerns or problems that have encouraged some courts and commentators to reject its use. (680)

Factors Listed in *Parklane*

* Four factors are specifically mentioned in *Parklane* as pertinent to that inquiry….
* First, could the nonparty have joined the prior litigation?
* Second, was the subsequent litigation foreseeable at the time of the first suit so that the defendant had every incentive to defend that action vigorously?

Parklane Factors, 2

* Third, is the judgment being relied upon consistent with prior judgments against this defendant so that there need be no fear of the multiple-claimant phenomenon?
* Fourth, are there any procedural opportunities available to the defendant in the second action that did not exist in the first, so that a different result might ensue if the issues are retried? (680)

Parklane Approach Pluses

* Under *Parklane* the court must evaluate on a case-by-case basis whether it is necessary to allow what appears to be duplicative litigation to ensure the reliability and fairness of a judgment; no precise rules can or should be formulated.
* This approach has much to recommend it because it allows the courts to maintain the advantages of collateral estoppel while protecting the parties' interests. The *Parklane* standard is applicable only to the federal courts. (682)

D. INTERSYSTEM PROBLEMS OF FORMER ADJUDICATION

* **§ 14.15 Principles Governing Judgment Recognition Across System Lines**
* When the first action is heard in one judicial system and the second action in another, the decision to accord respect for the judgment in the first suit is controlled by principles of full faith and credit. (682)

State Courts regarding Federal Judgments

* State courts must treat federal judgments as those judgments would be treated by the federal courts themselves. The presence of this compulsion is very important, for without it each judicial system would be free to ignore the judgments coming from other court systems. (682-683)

When to Override Full Faith and Credit?

* When arguments are raised that an exception should be made to avoid giving the normal binding effect to a prior judgment rendered by a court in a different court system, the question is not simply whether as a policy matter the court in its discretion should decide to ignore the judgment, but whether there is some policy that would override constitutional and statutory full-faith-and-credit obligations. Necessarily, exceptions are few in number. (683)

Main area of Intersystem Preclusion Issues

* The main area in intersystem-preclusion cases in which there has been some difficulty is in determining what law should be consulted when deciding whether res judicata or collateral estoppel has been asserted appropriately. The question of governing law is a very important one because, as much of the earlier discussion in this Chapter has illustrated, courts in different jurisdictions often disagree concerning the scope of these two doctrines. (683)

28 USC 1738, Full Faith & Credit

* In all of these circumstances, the language of Section 1738 must be applied literally. Thus, it is necessary to look to the judgment-rendering court's law to determine all binding-effect questions. This is true when a state-court judgment is asserted later in a federal tribunal, as well as when a federal-court judgment subsequently is asserted in a state-court action.

28 USC 1738 (in part)

* "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
* "Such Acts, records and judicial proceedings or copies thereof, so authenticated, **shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession** from which they are taken."

Even After Error

* Even in cases in which the court that rendered the judgment erroneously failed to give preclusive effect to an earlier judgment, the court in which the judgment is being asserted as preclusive is bound to honor it. (684)
* The source of governing law has produced special problems when a judgment is entered by a federal court in one state and questions of preclusion arise in a federal court in another state.

Not Applicable from Federal to Federal

* Full faith and credit no longer controls because the question of judgment recognition pertains only to one judicial system—federal. Thus, federal law should control. As argued persuasively by Professor Degnan, even if the first action was a federal diversity case, the scope of the judgment should be controlled by federal law, not by a reference to the state law where the federal court was sitting.

Restatement: Federal Law Controls, Not *Erie*

* Although there is some conflicting authority, at least in this last situation, the Restatement Second of Judgments also has agreed that the decision regarding the preclusive effect of federal judgments is controlled by federal law rather than by principles derived from the Supreme Court's decision in *Erie Railroad Company v. Tompkins*. (684)

Semtek

* Supreme Court's 2001 decision in *Semtek International Inc. v. Lockheed Martin Corporation*, which held that federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity. (685)
* The Court held that federal common law required a Maryland state court to treat the statute-of-limitations dismissal of a state-law claim by a California diversity court as preclusive if California state law would give the judgment that effect. (685)

LAST CLASS WEDNESDAY!

CLASS 23 Wednesday, March 28	Class Actions
Reading	Friedenthal – Chapter 16.1-16.8
Case/Law/Rule	FRCP 23 *Hansberry v. Lee*, 311 U.S. 32 (1940) *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)
Assignment	None
Exam	None