**Nov. 26: Review of Exceptions to Issue Preclusion; Privity; Mutuality; Introduction to Choice of Law**

Exceptions to issue preclusion:

* Some are about the procedures in the first lawsuit being different or problematic
	+ You couldn’t get appellate review in the first suit
	+ Court of first suit had lower quality procedures
	+ Burden of proof has shifted to adversary, or bound party had a higher burden of proof at first suit than he does now
* “Pure” issues of law don’t have issue preclusive effect
	+ Issue is one of law and two actions involve claims that are substantially unrelated (there is no factual overlap, just the legal overlap of the issue of law)
	+ Example: could relitigate the legal question of whether a municipality has sovereign immunity (this is a legal status and is not dependent on the facts of the claim)
		- You still have stare decisis: the non-precluded party can argue that there is already precedent on the legal issue, and that the decision should stand.
		- Issue preclusion is stronger than stare decisis; precedent can be overturned, but preclusion is set in stone.
		- It’s not very expensive to relitigate pure issues of law
			* Don’t have to summon a jury, conduct extensive discovery, call witnesses
	+ If pure issues of law had issue preclusive effect, incorrect determinations of the law would be permanent for the precluded party
		- Serious problems of inequity would arise: poor plaintiff precluded from relitigating after *Brown* decision would live in his own separate-but-equal world.
	+ The *Brown* example pertains to exception #5 from the Restatement of Judgments: “clear and convincing need for a new determination of the issue (a) because of the potential adverse impact o the determination on the public interest or the interests of persons now involved in the first suit.”
		- Not allowing this would create pockets of inequity where parties couldn’t relitigate after the law changed
		- Effect on third parties is important
* Why were *Moser* and the widget case different?
	+ Moser has a reliance interest; needs to be able to count on his pension.
	+ Businesses in competition with each other don’t have the same interest.
		- And we need business to be able to compete on equal legal terms

**Privity**: even if someone wasn’t an actual party in the previous suit, they can nonetheless be bound by the determination depending on their relationship with a party.

* + Privity applies to CLAIM and ISSUE preclusion
	+ Examples: guardian/ward; executor/decedent; trustee/beneficiary
		- Ward is precluded by guardian’s earlier suit on the ward’s behalf.
	+ If decedent sues and loses before he dies, estate can’t re-sue on the same issue after the decedent dies.
* Privity applies to successors in interest (applies to property, contracts)
	+ Property: litigation associated with the property follows the property, does not just remain with the original owner.
	+ If you assign your interest in a contract to someone else, that person will be bound by prior litigation on the contract.
* One who controls litigation is issue/claim precluded as one in privity if there is a good overlap of interest
	+ There is a solid overlap between the personal interest of the majority shareholder as an individual and the interest of the majority shareholder as a representative of the corporation (both economic interests re: the same money).
	+ The same overlap does not exist between the interests of a mother as a guardian suing on behalf of her child (though mother controls litigation in the same way that the majority shareholder did), so guardian is NOT issue precluded when subsequently suing in her own interest
		- When representing her child, the guardian is representing only the child’s interests, not her own. If we issue precluded the mother, she would have a huge conflict of interest when representing her child. She might have to choose between her interests and those of her child when making arguments during litigation.
	+ Insurance company assumes defense of the action on behalf of the insured. Because they control litigation, the insurer is issue precluded in later litigation re: the same issue(s).
		- * If the insurer were impleaded by the D corporation, they would be a party and also precluded.

**The Story of Mr. X and the Dam**:

* P sues D to put up a dam
* X’s property will be flooded when the dam goes up.
* P wins
* X was aware of P’s litigation but did not intervene.
* X then sues D to have the dam removed.
* Is X precluded?
	+ YES: if X were able to sue D and won, D would have two contradictory judgments telling him to do opposite things.
	+ Because X was actually aware of lawsuit and didn’t intervene (usual requirement is ACTUAL KNOWLEDGE), he has lost his right to sue.
		- Note: X is completely precluded from bringing suit, not just prevented from using nonmutual issue preclusion as an offensive litigation tactic (this will be further explained below, after *Parklane*).

**MUTUALITY**

Old Rule: mutuality used to be required for issue preclusion (still the rule in GA and OH – at least was last time Green checked)

* Under the doctrine of mutuality, you could only get the benefit of issue preclusion only if you would’ve been bound had the suit gone the other way.
	+ This would come up if someone who wasn’t a party or in privity with a party tried to issue preclude someone.
* Even mutuality states recognize that nonmutual issue preclusion is necessary in the following exception that arises with indemnification relationships:
	+ P sues employee for battery as a result of a scuffle when the employee tried to stop P from shoplifting
	+ Employee wins
	+ P then sues employer via respondeat superior
	+ What happens if employer cannot take advantage of nonmutual issue preclusion, making it possible for P to win against the employer?
* Employee and employer aren’t in privity, so normally, P could’ve sued both of them on the same issue.
	+ We can’t bar the employer from his right of contribution from the employee, but we also can’t subject the employee to two judgments to the same plaintiff for the same event (either the employee or employer would get a raw deal).
* Another example: you sue an insurance company first via direct action (where allowed) for the wrongdoing of the insured. Insurance company wins, and then you sue the insured If insured can’t use issue preclusion, then insured could lose and will now pursue indemnification from the insurer, which is a raw deal for the company.

*Bernhard v. Bank of America* (Cal. 1942)

* Decedent gave Cook some money to move from one bank to another. Cook defeated Bernhard’s suit by arguing that this money was a gift from the decedent, and not intended to go towards the estate.
* First suit: Bernhard (beneficiary of estate, suing in her own capacity)🡪Cook
	+ (Bernhard lost)
* Second suit: Bernhard (suing on behalf of estate as the administratrix)🡪Bank
* Why is Bernhard in privity with herself between the two suits?
	+ Bernhard’s interest is the same in both cases.
		- Suit 1: I want MY money
		- Suit 2: the decedent wanted the money to go to the beneficiaries (which include me)
* The party using issue preclusion (the Bank) was not a party or in privity with a party in the earlier suit (so, the use of issue preclusion is nonmutual, as the Bank itself wouldn’t have been bound by issue preclusion, had Suit 1 gone the other way).
* Assume that Bank could not use issue preclusion and Bernhard won the second suit.
	+ This would have forced the Bank to give Cook’s money to Bernhard, and Cook could’ve sued to get his money out of the Bank.
	+ Bank ends up paying out twice on the same claim (once to Cook, and once to Bernhard).
* This is an exception to the mutuality requirement that would be accepted even in mutuality state.
	+ This should remind you of *Int’l Shoe*: where a court wants to change a rule, they pick a case where the old rule would’ve applied (in *Int’l Shoe*, PJ arguably would’ve been okay, even under *Pennoyer*).
* Was the first suit against Cook *in rem*, and thus binding on the whole world?
	+ Remember, *in rem* actions require notice to satisfy *Mullane*.
	+ However, this wasn’t an *in rem* action about who owns the property (the money from the decedent).
	+ What if the object of the suit were an antique clock that the Bank was holding in a vault? *In rem* action now?
		- This would be an example of where you would have an **interpleader**: Looks like a quiet title action, must have notice, parties with interests are required to show up, and final and binding determination is issued.
* Traynor: says issue preclusion applies if three things are true – this isn’t the rule in ANY jurisdiction
	+ (1) Was the issue decided in the prior suit identical to the one now presented?
	+ (2) Was there a final judgment on the merits?
		- You don’t actually need a final judgment for issue preclusion; an issue can be fully litigated and decided while other issues in the suit are still ongoing.
	+ Was the party against whom the plea is asserted­­­­ a party or in privity with a party in the earlier suit

If your two suits take place in different states, remember that the RELEVANT PRECLUSION LAW IS THE LAW OF THE FIRST LAWSUIT

* You’ll want to check if your state allows only defensive issue preclusion before filing a second suit – or if it is a mutuality state like OH or GA

Two scenarios where nonmutual issue preclusion works: **defensive** and **offensive**.

* Some states accept only defensive and not the other
* Federal courts accept both (with limits)

**Defensive** nonmutual issue preclusion

* Why is issue preclusion nonmutual here? The party asserting issue preclusion wasn’t a party or in privity in the earlier suit. Why defensive? Because the party asserting issue preclusive is a defendant.
	+ Two subtypes of defensive nonmutual issue preclusion:
1. Precluded party was a plaintiff in first suit
* Ex. 1: A sues B for infringement of his patent and loses (invalid patent).
* A then sues C for infringement of the same patent. C argues patent is invalid.
	+ A is just trying to get a different determination of the issue by suing C on the same issue he lost to B on. A doesn’t get to circumvent a valid determination of the issue like that.
	+ A was responsible for the issue being litigated in the first place. When A is plaintiff again, he deserves to be issue precluded because he is just being difficult.
	+ C should be able to use nonmutual issue preclusion as a ***defense*** against A’s action. In the earlier action against B, A (as plaintiff) chose the forum and chose to bring suit in the first place.
* Second subtype: Precluded party was a (2) defendant in first suit
* Ex. 2: A sues B for negligence and wins (B is found negligent).
* B then sues C for negligence in connection with the same accident. C offers the ***defense*** of B’s contributory negligence, precluding B from defending himself against the assertion of contributory negligence because Suit #1 declared him negligent.
	+ Precluded party is B, a defendant in the earlier action, who did not choose to litigate the action or choose the forum. Most states would still hold him precluded.

2. **Offensive** nonmutual issue preclusion:

* Two subtypes
	+ 1) Precluded party was a plaintiff in first action
* Ex. 1: A sues B for negligence. A is found contributorily negligent.
* C then sues A for negligence in connection with same accident.
	+ Precluded party, A, chose to bring up the action in the first place and chose the forum.

Subtype 2) Precluded party was a defendant in first action

* Ex. 2: A sues B for negligence. B is found negligent.
* C sues B for negligence in connection with the same action and precludes him from litigating his negligence again.
	+ What if B had won against both A & C? If there were no limits on offensive nonmutual issue preclusion, D could come along, win against B, and everyone else involved in the accident could jump on the bandwagon and preclude B from relitigating his negligence and win their own judgments.
* IMPORTANT: even if you allow nonmutual issue preclusion in your jurisdiction, the bound person will always have to be a party in the earlier suit or in privity with a party from the earlier suit. Can’t preclude some random guy who had nothing to do with Suit #1.

*Parklane Hosiery Co. v. Shore* (U.S. 1979)

* This is an example of the federal approach (at least with respect to FQ actions) and of the modern approach (except some backwards states).
* Suit #1 (class action): Shareholders derivative 🡪Parklane
* Suit #2: SEC (wants injunctive relief)🡪Parklane Hosiery
	+ Finding that Parklane made material misrepresentations in disclosure documents associated with a merger.
	+ Decided first, so shareholders wanted to use it to preclude Parklane in 1st suit
	+ SEC’s action was an action in equity decided by a judge (no 7th Amendment jury trial right)
	+ Doesn’t Parklane have a right to jury trial on issue in second suit, since this is an action in law?
		- Court went back to took at issue preclusion at the time of the enactment of the 7th Amendment and decided right to jury trial was not violated
	+ Party taking advantage of issue preclusion wasn’t a party or in privity in the SEC suit (Suit #2), AND issue preclusion was used offensively here. Problematic?
		- Here, since the shareholders could not have intervened (easily or otherwise) because Suit #2 was brought by the SEC, requested injunctive relief, and the shareholder’s suit was brought before the SEC suit. Thus, shareholders CAN use offensive nonmutual issue preclusion.
* Issue preclusion usually to encourage efficiency
	+ But, offensive nonmutual issue preclusion could increase litigation by discouraging parties from joining as co-plaintiffs. Plaintiff has every incentive to adopt a “wait and see” attitude. So, we adopted the requirement below:
		- The party who is taking advantage of offensive nonmutual issue preclusion as a plaintiff in a new suit **cannot have easily intervened in the first suit**.

DISTINGUISH *PARKLANE* FROM THE STORY OF X AND THE DAM

* We have been talking about preclusion in connection with people who could’ve intervened and didn’t.
* The *Parklane* example is the following:
	+ P🡪D for negligence, P wins. X knew about the suit (maybe he was part of the same accident) but refused to intervene. X wanted to stand back and see how the P🡪D suit turned out before trying it himself. After P’s success, X sues D for negligence in connection with the same accident. X cannot **issue preclude** D because he should’ve intervened and didn’t.
		- X can’t take advantage of the earlier determination because he should’ve intervened
* X’s dam scenario: X is issue precluded here (it’s not a question of whether he can use issue preclusion as a sword against D)
	+ X was a necessary party here because D will be whipsawed if we have duplicative litigation.
	+ Here, it’s completely over for X, he **can’t sue at all**.
	+ This is an exception to the *almost iron rule* that people who weren’t parties or in privity with parties can’t be precluded.

The *Parklane* exception: people who aren’t parties or in privity in the earlier suit don’t get to use issue preclusion offensively ***except in specific cases where they couldn’t have easily intervened.***

Other considerations when determining whether to allow offensive nonmetal issue preclusion

if first suit was for nominal damages, D might not have fought it the way he should have, especially if his vulnerability to future suits wasn’t foreseeable.

* D didn’t realize at the time that he needed to win the suit because he would be precluded from his defenses in future suits.
* Also if inconsistent determinations in previous lawsuits on issue, offensive issue preclusion should not be allowed
	+ Eg A sues D Airlines, D held not negligent in accident
	+ B sues D Airlines, D held not negligent in same accident
	+ C sues D Airlines, D held negligent in same accident
	+ D sues D Airlines, seeks to use C’s suit against D to issue preclude D to relitigate its negligence. Will not be allowed

**CHOICE OF LAW**

* One sovereign’s law in another sovereign’s court.
	+ This arises a lot in diversity suits and supplemental jurisdiction (state created the law, but a federal court (different sovereign) is adjudicating it).
* Which law do you choose?
	+ Wife (PA) is driving husband (PA) when she gets into an accident in OH.
	+ Husband sues wife for negligence/recklessness in VA state court (rude).
	+ Under VA and OH state law, husbands can’t sue wives for negligence (and possibly not recklessness, either).
	+ Under PA law, they can.
	+ Which law should VA state court use?
		- This is a substantive question, not really a procedural one (so VA doesn’t get to use its own law).
		- The wrongdoing AND the harm occurred in OH.
			* Sometimes, the wrongdoing and the harm will occur in different states.
	+ **Old-fashioned approach** (followed by VA): **the law of the place of the harm** (*lex loci delicti*)
		- So, in this case, VA ct would use OH law.
	+ But, wife and husband are domiciled in PA. What interest does OH have in the state of the marital relationship? None.
	+ Modern approach: choose the law of the state with the greatest interest
		- Married couple domiciliaries of PA, so PA has the greatest interest in the state of the relationship.
* How should the VA court answer question of whether OH law allows husbands to sue their wives for recklessness?
	+ VA courts don’t make OH law, but they need to figure out what OH law is on this matter.
		- At least in the OH system, the question could be passed up the OH appellate system until the OH Supreme Court figures it out. This can’t happen in VA cts
	+ VA will decide the case based on how VA thinks the OH Supreme Court would have decided the case.
* Process of certification: state or federal court can ask another state’s supreme court to answer a specific question.
	+ Some states don’t allow this, as it is a very time-consuming process.
* VA court’s decision on how the OH Supreme Court would rule isn’t binding on ANYONE, not even lower VA courts, and especially not OH courts.
	+ VA court’s decision is just a prediction.