Lect 31

Issue preclusion

If in an earlier case an issue was
- actually litigated and decided
- litigated fairly and fully
- and essential to the decision
then the earlier determination of the issue precludes relitigation of the same issue by someone who was a party or in privity with a party in the earlier litigation

* notice do not always need to have a final judgment

- can have an issue decided before the final judgment (e.g. a jurisdictional fact)

P sues D for interest on note
- D alleges fraud in execution of note and release of obligation to pay interest
- P wins

- P then sues for principal
- D brings up fraud in execution of note
- Is D issue precluded?

Yes – both were necessary for judgment

- P sues D for interest on note
- D alleges fraud in execution of note and release of obligation to pay interest
- D wins on both grounds
- P then sues for principal
- D brings up fraud in execution of note
- Is P issue precluded?

Alternative determinations – neither is necessary because each is sufficient

First Restatement - both preclusive

* problem – could be that one wasn’t taken seriously by the finder of fact

Halperen – (2d Cir 1970) neither preclusive

* problem – this discourages one to introduce multiple grounds for a judgment in one’s favor– plus one clearly was taken seriously by the finder of fact

2d Rest –

neither unless there has been an appellate court determination

- but this discourages appeals

* some courts systems will allow preclusive effect if the issue was treated as seriously by the finder of fact - careful process of decision

P sues D for interest on note
- D alleges fraud in execution of note and release of obligation to pay interest
- D wins on both grounds
- P then sues for subsequent interest
- D alleges fraud in execution of note and release of obligation to pay interest
- Is P issue precluded? Yes

- this is different, each finding in the first would also be sufficient in the second

* P and D contract for D to deliver coal to P monthly
* D breaches
* P sues D in California
	+ D argues that the contract is invalid, D loses on issue
* D breaches again
* P sues D in Nevada
	+ D argues that the contract is invalid, P does not mention issue precl.
	+ D wins on issue
* D breaches again
* P sues D in California
* Which determination has issue preclusive effect?
* last in time

Why use last in time rule?

* in our example it would encourage D to argue issue preclusion

P and D contract for D to deliver coal to P monthly
- D breaches
- P sues D in California
- D argues that the contract is invalid, D loses on issue
- D breaches again
- P sues D in Nevada
- D argues that the contract is invalid
- P brings up issue preclusion, but the Nevada courts fail to give the Ca. determination FF&C
- the USSCt does not take cert.
- D wins on issue
- D breaches again
- P sues D in California
- Which determination has issue preclusive effect?

Here harder but still the later judgment has preclusive effect. Cal. ct must respect Nevada determination of issue

P sues D for $100,000 in negligence in state court in Cal.
The source of PJ is $50,000 of assets D has in Cal.
D makes a limited appearance and loses (he is found negligent).
P then sues D for the remaining $50,000 in state court in NY, where there is in personam PJ over D.
Is D issue precluded from relitigating his negligence?

courts are conflicted (though the issue does not come up much now)

* on the one hand efficiency, consistency, finality suggest issue preclusion
* on the other hand, if there is issue preclusion, it is as if the first suit was not a limited appearance after all – the entirely of the liability is, in effect, litigated, because there will be nothing left to litigate in the next suit

EXCEPTIONS TO ISSUE PRECLUSION

Restatement (Second) of Judgments §28

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

EG

- In Illinois, the plaintiff suing for negligence has burden of production and persuasion concerning his own lack of contributory negligence.
- P sues D for negligence and loses on ground that he could not satisfy these burdens concerning his own lack of negligence.
- Subsequently X (another person in the accident) sues P for negligence.
- Can X issue preclude P from relitigating his negligence in the accident?

- no – burden has shifted to his opponent

* + imagine D is acquitted of criminal charge in connection with resisting arrest
	+ gov’t sues civilly for damages to officer
	+ issue precluded?
		- NO
		- burden was greater on gov’t in first suit (had to show beyond a reasonable doubt)

what about other way around??

can criminal conviction for murder be used to issue preclude D in civil action for wrongful death?

YES

P sues D to recover for property damage in small claims ct with a jurisdiction maximum of $500 and which operates informally without pleadings, counsel, or rules of evidence. There is no right of appeal. D is found negligent. In a subsequent action by D against P for $10,000 for personal injuries arising out of the same accident, is D issue precluded concerning his own negligence?

No -

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them;

and

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action;

How about this one:

- P sues D for negligence
- P was also negligent
- It is held that P is barred due to contributory negligence (comparative fault is rejected)
- P and D get into another accident
- P sues D for negligence
- P was also negligent
- Is P precluded to relitigate whether P is barred by contributory negligence or comparative fault applies?

- no – one reason is he could not have anticipate new suit in which the issue arose

(5) There is a clear and convincing need for a new determination of the issue **...(b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action,** or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

also...

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated

What’s bad about issue preclusion concerning pure issues of law?

* future cases in which issue would arise are unforeseeable
* inequity is too great (precluded party is stuck with one version of the law in perpetuity while others are free to relitigate the issue)
* not that costly to relitigate pure issues of law (relitigating issues of fact is more costly)
* and there is always stare decisis (precedent) to rely on even if there is no issue preclusion concerning pure issues of law

 African-Americans as a class sue to have a park desegregated. It is before *Brown* and they lose. After Brown, they sue to have the park desegregated again. Issue precluded?

No -

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action

Business A sues gov’t. It determined that the widgets it imports do not have to have an import duty. Subsequently the government sues business B where it is determined that the same type of widgets do have an import duty. Subsequently the gov't sues A to make it pay an import duty going forward. Is the government issue precluded?

No – otherwise A will be able run B out of business -

(2) The issue is one of law and... (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws;

* Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law.
* US v Moser

sued US in Ct Claims for extra pension benefits

- issue was whether he served in Civil War when he was a naval cadet

- judgment in his favor

- in another action another cadet (Jasper) lost by reference to another statute

- Moser sued US for later benefits and twice got issue preclusion

Fourth action

* gov’t seeks to relitigate

Ct Claims held for Moser on basis of issue preclusion

appeal

- SCt affirmed

- pure questions of law have no issue preclusive effect, but this is not a pure issue of law

- it is a mixed question of law and fact

Why was this a mixed question?

 - bound to his particular rights – whether he served in Civil War

- why important to have issue precl concerning mixed questions?

- many questions are mixed so value of issue precl would be severely limited otherwise

But why isn’t this the inequitable administration of the laws, like the widget example?

* Moser doesn’t drive Jasper out of business
* there is some inequity (Moser gets more money than Jasper on same facts) but that is always true if issue preclusion
* plus Moser has strong reliance interests on what his benefits are – he is retired

**Privity**

with respect to both claim and issue preclusion, both a party and his privies can be bound

What is a privy?

- example, Little v Blue Goose

 - executor of estate is in privity w/ decedent

 - party sues, loses, dies, executor cannot sue on same claim

 - or if wins, executor cannot sue concerning same transaction

other examples:

Parent acting as guardian sues, child subsequently bound

- Privity is basically conclusory – means that there will be preclusion even though the parties are not, strictly speaking, the same

 - trustee is in privity with beneficiary of trust when suing in capacity as trustee