**Civil Procedure Notes 11/16/17**

**Claim preclusion v. Issue preclusion**

**Claim preclusion**

- When P sues D and it comes to a **final valid judgment on the merits**

- claim preclusion bars P from subsequently bringing suit on actions that P did bring or *should have brought* in the earlier suit

- also, claim preclusion bars D from subsequently bringing suit to undo the judgment on the basis of defenses that D brought or *should have brought* in the earlier suit

**- All actions within the scope of the claim will be barred.**

- separate from the compulsory counterclaim rule

**Issue preclusion**

- if a party fully and fairly litigated an issue in an earlier case he can (with certain exceptions) be barred from relitigating the same issue in subsequent proceedings

**Requirements for claim preclusion**

- must be a final judgment

- judgment must be valid

- judgment must be on the merits

**River Park, Inc. v. City of Highland Park**

- Interjurisdictional claim preclusion problem

Federal claim preclusion law would apply in state court (constitutional obligation) when there is a federal court judgment, and the claim is brought again in state court.

**Evidence v. Transactional Test**

**Evidence Test**

- Whether the evidence needed to sustain second suit would have sustained the first, or if the same facts were essential to maintain both actions

**Transactional Test**

- Whether the claim arises out of the “same group of operative facts” or arise out of the same underlying transaction or occurrence.

Rest. (2d) of Judgments  
§ 24. Dimensions Of “Claim” For Purposes Of Merger Or Bar—General Rule Concerning “Splitting”  
(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.  
(2) What factual grouping constitutes a “transaction”, and what groupings constitute a “series”, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Ex. 1: P sues D Railroad alleging that the conductor was negligent in starting the car while P was disembarking and that as a result P broke his arm.

After judgment for P, P brings a new action against D alleging that after disembarking from the car he fell into a trench negligently left by D beside the road and broke his leg.

*Answer: Claim precluded; arises out of same transaction/ group of operative facts.*

Ex. 2: B owes A $500 on an obligation that matured on February 1

A visits B on June 1 and requests payment, whereupon B commits an unprovoked assault upon A; A sues B on the debt and recovers

May A maintain a second action against B based on the assault?

*Answer: Separate transactions under the Transaction Test. There is not an obligation to sue the D for all wrongs against you; they must’ve been part of the same “transaction” to be precluded.*

Ex 3: D buys goods at P store on credit during January, February and March

In April P sues D for the debt incurred in January if

May P later sues for the debt incurred on February or March?

*Answer: If there’s a running account, you have the duty to sue for the entirety of the account; falls under the same transaction using test; claim precluded.*

*There might not be claim preclusion in this case if at the time the action was brought in April the February and March debts were not in arrears – this is an example where the scope of a transaction takes into account business understanding or usage*

**Judgment on the Merits**

The following are not on the merits

- Lack of jurisdiction (SM/PJ)

- Improper venue

- failure to join a necessary party

- When P agrees to a voluntary dismissal

The following presumptively is on the merits in Federal Court unless the court dismisses without prejudice- failure to state a claim (problematic)

**Statute of Limitations – dismissals on statute a limitation grounds are difficult**

Ex. 1: P sues D for negligence under California law in Virginia state court 2.5 years after the cause of action arose – is the dismissal on the merits? *Old view, still used in some states*

Va 2 yr procedural  Ca 3 yr substantive

* Because this was a dismissal on procedural grounds it was not on the merits, allowing the plaintiff to sue in another jurisdiction with a longer statute limitations

Va 3 yr procedural  Ca 2 yr substantive

* Because this dismissal was on the basis of substantive law, it was on the merits, prohibiting the plaintiff from suing in any other jurisdiction

*Now: Modern tendency to treat a dismissal on statute of limitations grounds (even a procedural one) as having preclusive effect.*

But there is a good deal of ambiguity out there about what a jurisdiction’s courts mean when they say that a dismissal on statute of limitations grounds has preclusive effect

* Do they mean it has preclusive effect within their jurisdiction or that has preclusive effect in all jurisdictions?
* The fact is, a jurisdiction’s courts will never have occasion to actually say whether the dismissal has preclusive effect in other jurisdictions

Ex. 2: P sues D for negligence in connection with a Va accident in Va state court 2.5 years after the cause of action arose.

The action is dismissed under Va’s 2 yr procedural limitations period for negligence

Before 3 yrs had passed since the accident, P then sues D for battery in Va state court, because immediately after the accident D hit P.

The Va procedural statute of limitations for battery is 3 yrs

result?

*Va Court may say:* *Our dismissal has preclusive effect, P is barred – but this may just mean you can’t sue again in Virginia, not saying claim can’t be brought elsewhere.*

*Is it preclusive in other jurisdictions? We don’t really know. State courts won’t answer.*

*Green thinks that the tendency to treat a dismissal on SoL grounds as preclusive in other jurisdictions might be the result of confusing preclusive effect within a jurisdiction with interjurisdictional preclusive effect*

- Other examples of dismissals that don’t have preclusive effect: prematurity of the action, or failure to satisfy a precondition to suit - does not bar another action by P.

- Summary judgment and directed verdict do have preclusive effect

- Is dismissal on Twiqbal ground on the merits?

Prof. Green: “The idea behind the Twiqbal is to stop you from getting to an expensive discovery period. Seems wrong to not let it be brought at a later time if you can then satisfy the requirements for Twiqbal or sue in a jurisdiction that doesn’t have those requirements.”

* But Twombly and Iqbal both stated that their dismissal was with prejudice
* Still, we don’t know what the presumptive rule is – that is, how we should treat a dismissal on Twiqbal grounds when the court does not say whether it is or is without prejudice

If caught up in this situation, FIGHT TO MAKE SURE IT IS NOT DISMISSED WITH PREJUDICE.

(Prof Green’s view: Both failure to state a claim and Twiqbal should usually not be on the merits)

**Non-party claim (and issue) preclusion**

- privity e.g.

- guardian/ward

- trustee/beneficiary

- executor/ decedent

* Examples where someone who was not a party to earlier litigation is precluded in subsequent litigation

Ex. 1: P as guardian of X sues D for negligence in an accident in which X and D were involved

P loses (D not negligent)

X, upon obtaining maturity, then sues D for negligence in connection with the same accident

Precluded?

*Answer:* *Yes, this is binding because P is acting for X as the guardian on the first lawsuit.*

* *X is claim precluded*

Ex. 2: P sues D to determine whether P has an easement to D’s property

P wins

D sells the property to X

X finds P on his property and sues P in ejectment

P defends on the ground of the easement

Is X claim/issue precluded?

*Answer: Yes, because X is a SUCESSOR OF INTEREST, and is bound by the previous litigation of D with regards to the property.*

Ex. 3: P sues close corporation

Majority shareholder controls litigation

Corporation loses

In litigation between P and majority shareholder concerning same transaction, can shareholder be precluded?

*Answer: Yes, the subtle idea between the close relationship of the corporation and shareholder, essentially alter-egos of each other – and majority shareholder controlled litigation - privity; claim/issue preclusion applies.*

Ex. 4: P as guardian of X sues D for negligence in an accident in which P, X and D were involved

X loses (D not negligent)

P then sues D in individual capacity for negligence

Precluded? NO

*Answer: General rule, just because there’s one transaction doesn’t mean that all parties have to sue together. There has to be a relationship of privity in order to bind the parties. In this example, P is not precluded because there are different harms to P and X, and P was suing as the guardian for X, and would not be barred from suing on his own. P could have joined his claim with X’s claim, but he did not have to. There is no issue or claim preclusion.*

*\* There is no privity relationship between parents/children, husbands/wives.*

**Virtual Representation**

- There is this desire to expand the scope of privity – virtual representation is an example

**Taylor v. Sturgell**

- P filed suit in D.C. federal district court to obtain plans for a particular plane’s engine via the Freedom of Information Act.

- His friend, Herrick, filed a similar suit in Wyoming federal court seeking the same information; the case was dismissed on the merits for the D under trade secret protection.

- P’s case was granted summary judgment to the D, finding that P’s case was claim precluded because P was “virtually represented” by Herrick.

* - Court of appeals affirmed. Supreme Court Reversed.
* Those jurisdictions that accept virtual representation require

an identity of interest

Plus a weighing of the following factors

1) close relationship to party in prior litigation

2) participation in prior litigation

3) apparent acquiescence in preclusive effect of prior litigation

4) deliberate maneuvering to avoid preclusive effect of the judgment

5) adequate representation in prior litigation

6) public rather than private law issue

SCt rejected because –

- due process concerns – virtual representation creates a De Facto class action without the due process protections in an actual class action

- also litigating the scope of virtual representation can be so substantial that it will swamp the benefits of having preclusion

Green:

There is a type of nonparty preclusion that is not mentioned in the book but that we discussed earlier

Ex. 1: Water from river flowing from D’s property down to P’s is flooding P’s property

P sues D to get D to build a dam

P wins

X, who knew about the suit but did not intervene, sues D to get D to take down the dam because water backing up from the dam is going on X’s property

*This is a situation where some state courts would say X is precluded (whether it is characterized as claim or issue preclusion) because they knew about the previous lawsuit, and were a necessary party. That would be sufficient to establish this new category of preclusion with respect to those who could have intervened at the previous lawsuit.*

Notice how limited this is – the nonparty precluded must’ve been a necessary party in the earlier lawsuit and have been aware of the litigation but failed to intervene

* Even then this is on the cutting edge of preclusion law

**Exceptions to Claim Preclusion**

From the 2nd RSoJ

1. The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein
2. The court in the first action has expressly reserved the plaintiff's right to maintain the second action
3. The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

P brings a state antitrust action against D in state court

Judgment for P

P then brings a federal antitrust action concerning the same transaction in federal court – precluded?

*Answer: Not precluded; P can bring the federal antitrust claim only in federal court (SMJ).*

P brings a quasi in rem action against D for $2000 in unpaid lawyer’s fees in Oregon state court.

The value of the property is $1000

Oregon allows limited appearances and D makes such an appearance.

Judgment for P for $1000

P then brings an in personam action against D in D’s domicile (Ca) for the remaining $1000

precluded?

*Answer: Not precluded; P could not bring the extra $1,000 in Oregon state ct because there was a PJ requirement that was not met; the remaining $1,000 claim could not have been brought before.*

1. The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim

Ex. 1: African-Americans as a class sue city for racially segregating school

this is pre-*Brown* and the plaintiffs lose

*Brown* is decided

*Ps are not claim precluded to sue again.*

*\* However, changes in the law will generally not allow you to get out of claim preclusion.*