Civ Pro Notes

Monday 11/20/17

**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* earlier in the suit (that is, actions that are part of the same claim, where – under the federal standard and the standard of most states - a claim consists of a transaction)
* Claim preclusion also bars D from bringing suit to undo the judgment (called defendant preclusion)
	+ This is different from the compulsory counterclaim rule
* Requirements
	+ Final judgment
		- but the defense of claim splitting (also known as prior action pending) will lead to the dismissal without prejudice of a later filed action that is part of the same claim as an earlier filed action, so that the later filed action can be brought with the earlier filed one
	+ Valid
	+ “on the merits”
* Scope of a claim
	+ Most states and the federal standard: transactional standard
	+ Evidence standard: 7 states (be aware of how the evidence test works!)
		- Better described as “Fact test”; will facts from first action answer second action?
	+ Primary rights test: CA, narrowest understanding if
* Interjurisdictional preclusion
	+ Second jurisdiction must give first jurisdiction same preclusive effect (use rendering jurisdiction law, that is the law of the jurisdiction whose courts rendered the judgment)
* Non- party preclusion
	+ Even if there are not overlapping of parties, if there is a privity relationship, claim will be precluded
* Privity
	+ Examples: guardian/ward, trustee/beneficiary, executor/decedent
	+ Successor in interest
	+ Shareholder usually not in privity with corporation!
	+ Spouses not in privity with one another or with their children
* Virtual Representation
	+ Push to create virtual representation to reduce litigation
	+ **Taylor v. Sturgell** was an example where a court rejected the attempt to expand virtual representation
		- Green**:** this was actually an attempted non-party issue preclusion example, rather than nonparty claim preclusion
			* Herrick (the person who filed the first suit) and Taylor (the person who filed the second) had different claims for the materials, but there was an overlap of issues about whether they were covered by FOIA
* Non-intervening necessary party with notice preclusion
	+ necessary party (in particular one who, if not joined, will subject someone who is already a party to inconsistent obligations), not joined, a necessary party knew about lawsuit but did not intervene
		- Good argument that this party should be precluded
		- In a cutting edge expansion of issue preclusion, some states have adopted such an approach
* **Exceptions to Claim Preclusion**
	+ § 26 Exceptions to the General Rule Concerning Splitting
	(1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant
	+ (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein B)expressly reserved
	+ (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action
	+ (c) 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
	+ (d) 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
		- Pre-*Brown* P’s are not precluded, would have an intolerable result

(new material starts here)

* + - Not truethat change of interpretation of law releases from preclusion
		- Hypo: - P sues D (a municipality) for employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964. Judgment for P with injunctive relief, but no compensatory damages, since it was held they are not available under Title VII. P does not join an action for damages under 42 USC 1983 because the Supreme Court has held such actions are not available against municipalities. Subsequently the Supreme Court decides that compensatory damages are available against municipalities under 42 USC 1983. P sues D under 1983 for compensatory damages for the past employment discrimination. Claim precluded?
			* Yes, need some finality that doesn’t just allow new theories to constantly relitigate issues; also no real effect on third parties, as in the Brown example
	+ (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course
		- Ex: temporary vs. permanent nuisance
			* if Temporary allowed to sue up until particular point
			* if Permanent must sue for future damages
		- Hypo: P sues D for mild asbestosis caused by asbestos exposure. P receives damages. Years later, he develops deadly mesothelioma, a cancer caused by asbestos. P sues D for this harm. Claim precluded?
			* Set aside question of whether the later action is barred by the statute of limitations, which is also a possible problem
			* State law is conflicted on this but by and large finality as most important!
			* some states allow an exception using…
			* (F) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.
			* In general, suits for damages that arise later from the same transaction are barred

**Issue Preclusion**

* Precludes relitigation of the same issue by someone who was a party or in privity with a party in the earlier litigation
* Requirements
	+ Actually litigated and decided
	+ Litigated fairly and fully
	+ And essential to the decision
		- Not always necessary that there was a final valid judgment on the merits as long as the issue itself has been decided
			* Ex: issue of PJ out was actually decided from an earlier lawsuit that is still going on can be binding on the same party in a subsequent lawsuit

**Felger v. Nichols**

* + Nichols sues Felger for lawyer’s fees
	+ Felger brings up the defense that Nichols’s work was inadequate
	+ Judgment for Nichols
	+ Felger sues Nichols for malpractice
	+ Nichols successfully brings up issue preclusion
		- Why not claim preclusion?
			* Different party suing
		- Why not compulsory counterclaim rule?
			* MD doesn’t have the compulsory counterclaim rule
		- Same Issue?
			* It could imagine that the inadequacy that was at issue in Nichols’s defense was different from the inadequacy at issue in a malpractice action
			* But the court concluded, probably reasonably, that they were the same
		- Actually litigated and decided?
			* Hypo: - P sues D for negligence
			- D admits negligence but introduces the affirmative defense of contributory negligence in his answer
			- at trial, no evidence for or against contributory negligence is offered by either side and the jury finds for P
			- D subsequently sues P for his damages in accident
			- can D be issue precluded from relitigating P’s negligence?
			* Yes – the fact that D brought it into issue means that it was actually litigated and decided, even though D offered no evidence in its favor
				+ It would not have been actually litigated and decided if D had never brought up contributory negligence as a defense
			* Default Judgment issue preclusive?
				+ Used to be, but not anymore, claim preclusive effect but not issue preclusive effect as no issues were litigated or decided
			* Summary judgment?
				+ Issues in summary judgment are actually litigated and decided
			* Consent judgment?
				+ Sue a person, settlement agreement, have court issue judgment

That way if there is a subsequent lawsuit not just the settlement agreement can be offered as a defense but also claim preclusion

Real problem here: sometimes have issue preclusive effect, which means that the settlement agreement has more of an effect than the parties realized

If it is in your favor, say in the consent judgment that it does not have issue preclusive effect!

* + - * Has to be in same issue – though it is true that you cannot be issue precluded for an issue that you did not bring up in the earlier litigation, sometimes the scope of an issue that was actually litigated and decided is understood broadly
				+ P sues D for breach of a contract to buy 10 shares of the C Corp. every month for 2 years. D introduces the defense of fraud, on the ground that at the time they entered into the contract P lied to D about the C Corp.’s oil assets. D loses on that issue; judgment for P. Subsequently D breaches the contract again. P sues D and D introduces two defenses:
				statute of frauds (the contract was not in writing and so was invalid); fraud (at the time that they entered into the contract, P lied to D about the C Corp.’s coal assets). Is D issue precluded?

statute of frauds: not precluded because was not litigated and decided previously

Issue preclusion is about things you did say, NOT things you should have said

Green: but issue of fraud would have been considered litigated, even though the particular question of fraud is somewhat different, or else parties would just wiggle out of preclusion by drawing fine discriminations between issues

* + - * + What if D admitted there was a signed contract in the first suit? That is still not binding because it was not actually litigated and decided

Not bound by admissions in previous litigation

If you were then you would be very disinclined to make admissions

**Panniel v. Diaz**

* Panniel struck ambulance driven by Diaz and owned by RWJ
* Both insured by same company
* First lawsuit: Panniel sues insurance company to get medical expenses
	+ Determined causal connection between accident and removal of toes, but not accident and carpal tunnel
* During first law suit, Panniel sues Diaz and RWJ (we will just consider Diaz)
	+ Court: All of the requirements of issue preclusion are met, but the court took advantage of an exception to issue preclusion
		- Green: the reasoning is wrong here – not all of the requirements of issue preclusion were met
		- an insured is not in privity with his insurance company - the determination of an issue in a suit against an insurance company will not bind the insured
			* + Ex: panniel sues diaz for 8 million, way beyond the insurance coverage: clearly unfair to consider Diaz bound by litigation by the insurance company in which Diaz did not protest a paid
				+ in Panniel case, Panniel waived anything over coverage of insurance, which made it seem as if the second suit was also, in effect, against the insurance company
				+ But in the end the court said an exception to issue preclusion should apply, precisely because of other effects on Diaz – such as increases in his liability insurance subsequently
				+ Green: the better way to reason to this conclusion is simply to say that Diaz is not in privity with his insurance company
		- Sometimes an insurance company will be bound by previous litigation against the insured however
		- Hypo: A brings an action against C for damages to A’s property allegedly resulting from C’s negligence B, an insurance co. that insured C against liability, assumes defense of the action. A judgment in favor of A is preclusive on B as to the issues determined in the action
			* If there wasn’t preclusion here, in a suit by C against B for insurance recovery, B could claim to not be precluded by the determination of C’s liability in the earlier action
			* This is an ancient form of nonparty preclusion called “vouching in”
			* Notice that an alternative to vouching in is for the defendant insured to bring a third-party complaint against the insurance company
				+ Then they are a party to the litigation
* Issue preclusion: earlier determination must be essential to judgment
	+ Those that are not essential to the judgment are generally not preclusive
		- Hypo: P sues D for interest on note D alleged 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?
			* Notice that the defense of release of an obligation to pay interest is not relevant in the second action: only fraud in the execution of the note is
			* P had to overcome both of the defenses to prevail in the first action, each was essential to the judgment, so D is issue precluded

**Cambria v. Jeffrey**

* Suit 1: Jeffrey sues Cambria for bodily injury
	+ Both determined to be negligent, Jeffrey’s contributory negligence leads to judgment for cambria
* Suit 2:Cambria sues Jeffrey, no compulsory counterclaim rule
	+ Jury finds for cambria, judge entered judgment for Jeffrey on the basis of issue preclusion – Cambria was determined to be negligent in the earlier suit, so he is contributorily negligent
	+ Reversed on appeal – the determination that Cambia was negligent was not essential to judgment for Cambria in the earlier suit
		- Previous case: only had to prove Jeffrey was contributorily negligent to get judgment for Cambria – a finding of Cambria’s negligence was not essential to the judgment
	+ Why have this rule?
		- The jury, having found Cambria’s to not be liable (because Jeffrey was contributorily negligent) might have thrown in a finding of Cambria’s negligence without really taking it seriously
	+ Essentiality is the rule in most jurisdictions
		- But in some jurisdictions nonessential issues decided in an earlier case can have subsequent issue preclusive effect, if you can show they were taken seriously by the finder of fact in the earlier case
* Hypo: 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 sues for principal: was fraud essential?
	+ - * Notice that the defense of release of an obligation to pay interest is not relevant in the second action: only fraud in the execution of the note is
			* Now we have a problem: neither the finding of fraud in the execution of the note nor finding of a release of the obligation to pay interest was essential to the judgment because either would have been sufficient on its own
			* It is possible the jury didn’t take the finding of fraud in the execution of the note seriously, because they had already found for D on the basis of the release of the obligation to pay interest
				+ If so, it would be unfair to bind P by the finding of fraud in the execution of the note in this subsequent case
			* There is disagreement on such cases, but the majority view is to not allow issue preclusion

*Hypo:* P sues D for interest on note. D alleges fraud in execution of note and releases 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?

* This is not like the earlier case, because both are issues available as defenses in second lawsuit
* As a result issue preclusion is allowed
* Even if only one defense was taken seriously in the earlier lawsuit, that one defense is available in the second lawsuit too

*Hypo:* 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 fails to mention issue preclusion), D wins on issue. D breaches again. P sues D in California. Which determination has issue preclusive effect?

 -inconsistent answers from courts?: would look to the last determination of the issue (incentivizes D to bring forward issue preclusion)

**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.**

* Hypo: D is acquitted of battery in connection with resisting arrest. Gov’t sues D civilly for battery to officer. Is gov’t issue precluded?
	+ OJ Simpson example, acquittal is not preclusive: exception 28(4) applies
	+ **(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;**
* Hypo: D is convicted of battery in connection with resisting arrest. Gov’t sues D civilly for battery for damages to officer. Is D issue precluded?
	+ Yes, 28(4) does not apply here – the government satisfied a higher burden of proof in the earlier action
* Hypo: In Illinois, P 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 the burden concerning his own lack of contributory 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 – 28(4) applies because the burden has now shifted from P to X**
* - P sues D to recover for property damage in small claims ct with a jurisdictional maximum of $500 and which operates informally without pleadings, counsel, or rules of evidence

- there is no possibility of appeal

- D is found negligent

- in a subsequent action by D against P brought in NY state court for $10,000 for personal injuries arising out of the same accident, is D issue precluded concerning his own negligence?
* no -
	+ 28(3) - New determination of the issue is warranted by differences in quality or extensiveness of the procedures followed in the courts
	+ 28(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;