Civil Procedure Notes, 11/27/17

Issue Preclusion

Remember that in general you can’t be bound by a determination of an issue unless you were a party in the earlier litigation or in privity with the party

If you admitted an issue in an earlier case, the admission does not have issue preclusive effect in subsequent litigation

Default judgments do not have issue preclusive effect (but they have claim preclusive effect)

Summary judgment and directed verdicts have issue preclusive effect

* No reasonable jury could decide in party’s favor; case was so rotten as far as evidence is concerned, so should have preclusive effect; can’t even get to jury!
* Remember, however, if you never brought it up (e.g. never introduced an affirmative defense), it will not have issue preclusive effect
	+ Affirmative defenses that were not raised were not actually litigated and decided so do not have issue preclusive effect

With consent judgments, it depends

* Make sure it states that it does not have issue preclusive effect when entering into consent judgment

Must be the same issue that was actually litigated and decided

* However, subtle differences probably won’t remove the issue preclusive effect

The determination of the issue also must be essential to the earlier judgment

Example of two issues, both essential:

* 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?

Answer: the fraud in the execution of the note is the only relevant issue in the second lawsuit; Because both issues were essential in first lawsuit, D IS issue precluded

Example of two issues, one essential, one not

* Cambria v. Jeffrey (Mass. 1940
P sues D for negligence
D wins – D negligent but P contributorily negligent
D then sues P for negligence
is D precluded from relitigating own negligence?
* Answer: D is not precluded; he can relitigated because the determination of D’s negligence was not essential to the earlier judgment
	+ Jury may not have taken the issue seriously in the first suit

example of alternative determinations – two issues, neither essential (because either sufficient on its own)

* 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?
* Answer: Depends; Some courts say yes, some no; some say preclusive if issue was given thorough and careful deliberation
	+ Only fraud in execution of note is relevant in second note, but this might be the issue jury didn’t take seriously in the first litigation
	+ Jury may not have treated an issue as important, but we don’t know which one; maybe jury took both issues seriously

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 then sues for subsequent interest
D alleges fraud in execution of note and release of obligation to pay interest
Is P issue precluded?
* Answer:
	+ Here, each defense is relevant; at least one of those issues was taken seriously in the earlier litigation, so issue preclusion is appropriate

Exceptions to Issue Preclusion

**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:

- P sues D for negligence
- P was also negligent
- It is held that P is barred due to contributory negligence (the doctrine of 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?

ANSWER: P is not issue precluded

* The issue is one of law and the two actions involve claims that are substantially unrelated;
* The pure issue of law has been actually litigated and decided, but seems unfair for you to be stuck with contributory negligence standard when rest of jurisdiction has changed to comparative negligence
* You also might say that P could not have foreseen that this issue would arise and subsequent litigation

Hypo:

- Business A sues gov’t
- the S.D.N.Y. determines that the widgets it imports do not have to have an import duty
- Business B sues gov’t
- the N.D. Ca. determines that the same type of widgets have an import duty
- subsequently the gov't sues A in the D. Del. to make it pay an import duty going forward
- is the government issue precluded?

ANSWER: this is an exception to issue precluded; not issue precluded here

* (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; or
* Why is there a problem about inequity here if there is issue preclusion?
	+ Unfair where one person is required to pay a duty and one isn’t; A will put B out of business!
	+ Inequitable administration of the laws; you can’t have businesses in competition with one another subject to different import duties

HYPO: US v. Moser (U.S. 1924)

- a federal court determined that Moser (who was a cadet the Naval Academy during the Civil War) “served in the Civil War” for the purposes of pension benefits
- Jasper then sued on the same question and lost by reference to another relevant statute
- U.S. refuses to give Moser his benefits and he sues
- is U.S. issue precluded?

ANSWER: U.S. is issue precluded; exception to issue preclusion did not apply; Moser won;

* Moser and jasper aren’t in business competition with each other, so no substantial inequitable administration of law problem here (although there is some inequity, it is not enough to prevent issue preclusion)

SEE RESTATEMENT FOR EXCEPTION TO ISSUE PRECLUSION

Now – the mutuality requirement, which used to exist, but now only exists for two jurisdictions –Ohio and Georgia

HYPO:

- P, D, and X got into an accident **-** P sues D for negligence
- it is determined that P was contributorily negligent **-** P then sues X for negligence
- can X issue preclude P concerning his contributory negligence?

ANSWER:

* If X could preclude P, X has an upside but no downside
* In mutuality states (now only Ohio and Georgia) the fact that X would not have been bound by the earlier litigation means he can’t take advantage of it
	+ You can’t take advantage of issue preclusion unless you were bound/in privity with the earlier litigation
	+ Mutuality states say you have to have been a party or in privity with the party in the earlier litigation to take advantage of issue preclusion; restricts issue preclusion substantially;

Some states (including VA) only allow defensive nonmutual issue preclusion

* Nonmutual issue preclusion means we have given up mutuality requirement; you can use issue preclusion if you weren’t a party or in privity, but only defensively (only when you are using issue preclusion as a shield to protect yourself from liability)
	+ Don’t necessarily have to be a defendant (could be a counterclaim or third party complaint) but must be used defensively
* Example: Blonder-Tongue Labs
	+ Univ. of Illinois Foundation first sues Winegard Co. concerning patent infringement
	- U. of Ill. lost (patent invalid)
	- U. of Ill. then sues B-T concerning infringement of same patent
	+ Defensive non-mutual issue preclusion allowed in this case
	+ B-T could keep U. of Ill. From relitigating the validity of the patent
* What makes it defensive is that the party that is bound is a plaintiff (or more generally someone demanding relief) in the second action
* This seems to make good sense; P shouldn’t be able to litigate same issue over and over just by choosing different defendants

Some states also allow offensive non-mutual issue preclusive (it is also allowed under Federal law)

* This is the Modern approach; heavily regulated, but available
* Plaintiff in second suit was not a party in the first suit and uses issue preclusion as a sword
* Why is this a problem, such that it needs to be heavily restricted?
* HYPO
	+ P1 sues D Corp for damages from defective product – loses (product not defective)
	P2 sues D Corp for damages from defective product – loses (product not defective)
	P3 sues D Corp for damages from defective product – loses (product not defective)
	P4 sues D Corp for damages from defective product – wins (product defective)
	P5-1000 take advantage of offensive nonmutual issue preclusion against D Corp…?
	+ ANSWER:
		- Last in time rule: last determination of issue is determinative going forward (which is why P5-1000 take advantage)
		- Imagine just P4 sued, and it was for $10, but next suit involves a class action for a lot of money; in this case, offensive non-mutual issue preclusion would be problematic
		- also Problems with inconsistent determinations; also ask why P5-1000 didn’t intervene earlier
* Parklane Hosiery
	+ First filed action was a shareholder class action (Shore was the plaintiff); claimed that a proxy statement was materially misleading in connection with merger; action with damages
		- After the class action is filed, SEC brings action for injunctive relief on same issue
		- SEC action comes to judgment first (it is determined that the proxy statement was materially misleading); then, Shore (Plaintiff in first action) moves for issue preclusion on that issue
	+ Big question (setting aside 7th amendment issues) should we allow offensive non-mutual issue preclusion?
		- Plaintiffs were using the issue preclusion as a sword
		- A lot of discussion why offensive non-mutual issue preclusion is more problematic than defensive
			* With offensive, there is an encouragement to plaintiff in second action to hold back and not join; if P joins it is bound; if not it can wait and see what happens – will not be bound if it’s an adverse determination, and if it is a favorable determination than P can take advantage of it
			* Offensive can encourage more lawsuits while the point of issue preclusion is to decrease amount of litigation
			* also Defendant in first action may have had little incentive to defend vigorously or may not have been able to foresee that the issue would arise in subsequent litigation
				+ Actually these are possible problems with all issue preclusion, not just offensive non-mutual
	+ As a matter of federal preclusion law (federal question case, not necessarily diversity), SCOTUS says we will accept offensive non-mutual issue preclusion, but will be very careful in how we apply it
	+ Factors that recommend not allowing offensive non-mutual issue preclusion
		- Have there been inconsistent determinations of the same issue in multiple previous litigations?
			* Here, there was only determination of the issue: the fraudulent proxy statement was held to be materially misleading
		- Could the plaintiff and the subsequent litigation have easily intervened in the earlier action?
			* Here the Plaintiffs weren’t hanging back and waiting to jump in if there was a favorable determination of the issue; Shore could not have intervened in SEC action, and regardless, Shore sued first, before the SEC
		- Could the precluded party in the second litigation not have reasonably foreseen that the same issue would arise in subsequent litigation?
			* Here not a problem, because the defendants already knew that the shareholder class action was proceeding and concerned the same issue
		- Did the precluded party have insufficient incentive to defend vigorously in the earlier action?
			* Here not a problem - Parklane had a big incentive to litigate the issue vigorously (everyone is terrified of the SEC and the injunctive relief it was asking for was serious)
* Parklane is a perfect example of when offensive non-mutual should be allowed

HYPO: (offensive non-mutual issue preclusion)

* accident involving A, B, and C
A sues B for negligence
A wins (B is found negligent)
C then sues B for negligence in connection with the same accident
 – if offensive nonmutual issue preclusion is allowed, then B is precluded from litigating own negligence

DISTINGUISH! (the two scenarios are completely different!)

P sues D for negligence. P wins (D is negligent). X knew about the suit but refused to intervene. X sues D for negligence in connection with the same accident. X may not be able to issue preclude D concerning D’s negligence.

* Here X may not take advantage of offensive non-mutual issue preclusion because X could have easily intervened in the earlier action (this is the wait and see problem mentioned in Parklane); as a result ***D***is ***not*** precluded

P sues D to put up a dam. X’s property will be flooded, but he refuses to intervene in the suit. P wins. X may be precluded to sue D to take down dam.

* Here because X is a necessary party and failed to intervene, under the cutting edge preclusion law of some jurisdictions ***X*** is ***precluded*** – this is a rare example when someone who was not a party or in privity with a party in the earlier litigation is nevertheless precluded

*Erie* Aspect

* Claim preclusion and issue preclusion are common law matters, so you are in the common law track for *Erie* questions
* So, when federal courts sitting in diversity come to a judgment should federal or forum state preclusion law determine the preclusive effect of the judgment?

*Semtek v. Lockheed Martin*

* Semtek sues Lockheed Martin in CA state court; Lockheed Martin removes to CA federal district court; District court dismisses on statute of limitations grounds
* Under California law, there is no claim preclusive effect on statute of limitations dismissals
* Assume that under federal law a dismissal under statute of limitations grounds has claim-preclusive effect
* Semtek then brings suit in MD state court; MD state court must answer Erie question
	+ Two possible laws at issue: federal law and CA state law; MD state law is not at issue -
* In the federal common law track of *Erie*;
	+ No FRCP or Federal Statute
* Is CA’s preclusion law bound up with the CA cause of action?
	+ Let’s say it is not (Scalia did not address this)
* So, would the difference between federal and state law lead to forum shopping?
	+ Yes, it most certainly will lead to forum shopping
		- A plaintiff will seek a forum where a dismissal on statute limitations grounds would not have preclusive effect
* Are there countervailing federal interests recommending a unified federal rule?
	+ Probably not; you are already using different state statutes of limitations
* Therefore, forum state preclusion law on this issue should be used
	+ The federal law absorbs or copies forum state law

Therefore, we know forum state preclusive law will govern when dismissed on statute of limitations grounds in diversity case

Other examples

HYPO:

* - P sues D in federal court in diversity in California
- P's suit is personal injury due to a defective hot water heater
- judgment for P
- P subsequently sues D in state court in California for property damages due to the water heater
- under California's law of claim preclusion, an action for personal injury and for property damages concern different primary rights
- does the California or the federal (transactional) rule concerning the scope of P's claim against D apply?
* ANSWER: Prof. Green doesn’t think California’s forum law will apply because of countervailing federal interests recommending the federal transactional rule
	+ There probably are forum shopping issues, but countervailing federal interests in favor of federal transaction rule
	+ Interests include efficiency (keep multiple litigation from occurring) of judgments; but even more so, the Federal transactional standard expresses itself in lots of Federal rules of civil procedure, in particular the compulsory counterclaim rule FRCP 13(a)
		- Defendant bound by FRCP 13 Counterclaim rule
		- It is weird to say that the plaintiff suing the defendant in Federal Court in diversity is not bound by a transactional standard for claim preclusion, but the defendant is bound by the transactional standard because of the compulsory counterclaim rule

There is much more state-to-state diversity with regard to issue preclusion than claim preclusion

* Some states still have the mutuality requirement, some states allow only defensive nonmutual issue preclusion, and some states and Federal law allow offensive non-mutual issue preclusion

Issue Preclusion Exam Questions

Question
P, a citizen of New York, sues D, a citizen of New Jersey, for $100,000 in damages under New York battery law in the Federal District Court for the Southern District of New York. P seeks compensation for the partial loss of sight in an eye, as a result of a barroom brawl between P, on one side, and D and D’s friend, X (a citizen of New Jersey), on the other. D joins a contribution action against X for $50,000. After discovery, X brings a motion for summary judgment against D on the grounds that a reasonable jury would have to find that all of P’s damages were the result of D’s actions alone. X’s motion is granted. At trial, P receives a verdict in his favor and the court awards him a judgment against D for $60,000. Some months later, D sues X in New York state court under New York battery law for the $10,000 in damages caused by X’s blows against D during the brawl. Which of the following is most accurate about D’s $10,000 action against X?
a. It is not claim precluded, because X was not a necessary party in the earlier proceedings in federal court.
b. It is not claim precluded. The action could not have been entertained by the federal court because there would have been no federal subject matter jurisdiction for it.
c. It is not claim precluded, because Fed. R. Civ. P. 14(a) would not have allowed the action to be joined. It was not a claim that X was liable to D for all or part of P’s claim against D.
d. It is not claim precluded, because D’s action against X in the earlier proceedings in federal court was disposed of on summary judgment.
e. It is claim precluded.

ANSWER: E. it is claim precluded.

* A is wrong; irrelevant if X was not a necessary party
* B is wrong; it would have supplemental jurisdiction
* C has an element of truth but is wrong; the action can still be joined under 18a
* D is wrong – summary judgment has claim-preclusive effect
* Answer is E because when you sue someone you must join all causes of action concerning that same transaction or occurrence or you lose them; D joined an action against X, so D must join all causes of action he has against X concerning the same transaction

Question

D is a partnership. W and H are wife and husband. In reliance upon statements made by employees of D, W and H each made separate purchases of bonds issued by D. The price of these bonds subsequently plummeted and W and H each had to sell them at a heavy loss. W sued D in federal court in New York for her damages resulting from D’s alleged violation of federal securities laws. On a motion for summary judgment, the court found that no reasonable jury could find that the statements made by D’s employees were materially misleading. The court therefore granted summary judgment to D. Subsequently, D was purchased by the X Corp. After this purchase, H sued the X Corp in federal court in California for H’s damages as a result of D’s violations of federal securities laws. Which of the following is most accurate?
a.    Under Parklane Hosiery, H is issue precluded from relitigating whether D’s employees’ statements were materially misleading.
b.    H is not issue precluded under Parklane Hosiery from relitigating whether D’s employees’ statements were materially misleading, because H could have easily intervened in W’s suit against D.
c.    Parklane Hosiery is irrelevant to whether H is issue precluded, since the matter is determined by New York state law.
d.    H is not issue precluded from relitigating whether D’s employees’ statements were materially misleading, because the X Corp and D are not in privity.
e.    H is not issue precluded from relitigating whether D’s employees’ statements were materially misleading, because W and H are not in privity.

ANSWER: E. W and H are not in privity, which is the ultimate issue

* A is wrong; H was not a party or in privity in the earlier action; Parklane Hosiery is about non parties taking advantage of non-mutual issue preclusion, not about non parties being bound by issue preclusion
* B is wrong; Again, Parklane is about non parties being able to take advantage of issue preclusion, not about non parties being bound by issue preclusion
* C is wrong; not determined by NY state law b/c it is federal question case under federal law
* D is wrong; X Corp and D are in privity; but this is irrelevant to whether H is issue precluded
* E is the right answer – H cannot be bound because H is not in privity with W