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Collateral Estoppel as an Offensive Litigation Tool

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When litigating with a party likely to be involved in frequent litigation, it is important to keep in mind the potential use of what is known as collateral estoppel, or issue preclusion. Collateral estoppel may preclude a party from rearguing an issue it lost in earlier litigation in subsequent, unrelated lawsuits. Many litigators may not realize that some jurisdictions apply collateral estoppel more broadly than others. For instance, some jurisdictions do not require that a party asserting collateral estoppel have been a party to the prior litigation in order to benefit from the doctrine's effects. Litigators should familiarize themselves with the lesser-known nuances of this equitable doctrine so they do not miss an opportunity to assert it where it would be advantageous to their clients.

The collateral estoppel doctrine may be available in a wide range of cases. And parties and their counsel should be aware of when it may or may not apply. For example, individual insurance carriers often use the same provisions in different policies over the course of numerous years, and may litigate particular coverage issues or disputes over specific policy provisions with many different policyholders over time. The same is true of reinsurers that may frequently litigate the same issues with different reinsureds. A court's ruling on those recurring disputes could impact how similar disagreements in subsequent lawsuits are resolved, even if the later lawsuits involve different parties. Individual courts and jurisdictions will need to assess whether the factors and requirements of collateral estoppel have been met in any given case.

Two recent court decisions illustrate how collateral estoppel can be deployed by a party to resolve a lawsuit favorably and efficiently, often without the expense of fully litigating disputed issues all the way to judgment. Last November, a Nevada federal court held in *Rainero v. Archon Corp.*, No. 07-cv-01553, 2013 WL 5965916 (D. Nev. Nov. 7, 2013), that a shareholder could rely on collateral estoppel to prevent a corporation from disputing the correct redemption price for preferred shares where earlier lawsuits, to which the shareholder was not a party, resolved this issue against the corporation in summary judgment decisions. Similarly, in September of last year a New Jersey federal court held in *Fresh Prepared Foods, Inc. v. Farm Ridge Foods LLC*, NO. 10-6310, 2013 WL 4804816 (D.N.J. Sept. 9, 2013), that a plaintiff could rely on collateral estoppel to prevent a defendant in a trademark infringement suit from arguing that it was the proper owner of the disputed trademarks where the defendant had objected to the sale of the trademarked property in an earlier bankruptcy proceeding to which the plaintiff was not a party. In both cases, the parties were able to rely on advantageous decisions in earlier

litigation and avoid the risk and expense associated with having the courts decide the disputes in a different way.

“Mutual” Versus “Nonmutual”

While the majority of jurisdictions do not require that a party asserting collateral estoppel have been a party to the earlier lawsuit in which the disputed issue was previously litigated, some jurisdictions have resisted this trend. The prevailing rule permits nonmutual collateral estoppel so long as: (1) there was a full and fair opportunity to litigate the identical issue in the prior action; (2) the issue was actually litigated in the prior action; (3) the issue was decided in a final judgment; and (4) the party against whom issue preclusion [collateral estoppel] is asserted was a party or in privity with a party to the prior action. It is critical to investigate the litigation history and prior lawsuits of an opponent when that opponent is likely to have previously disputed the same issues with a different party. Asserting collateral estoppel in this situation can save time and money and serve as a shortcut to a favorable result.

In those jurisdictions that require mutuality, both parties must have been bound by the prior judgment, otherwise neither may use it in a subsequent action. However, an individual or entity that was not actually named in the prior lawsuit can still be considered a party for purposes of collateral estoppel. For instance, an estate of a corporation’s largest shareholder was considered a party in the “larger sense” where the estate was directly in charge and in control of the corporation, had control over the defense in the earlier suit, controlled the proceedings, employed the attorneys, and through them presented and cross-examined witnesses. So long as both controlling parties and actual parties are bound by the earlier judgment, that may be sufficient for mutuality purposes. This is similar to the concept of “privity,” which is explored below.

Privity Requirement

Privity means having a close relationship with another party. For collateral estoppel purposes, privity may be required in a few circumstances.

First, where a plaintiff seeks to collaterally estop a defendant from relitigating a certain issue and the defendant was not a party to the prior action in which the issue was originally litigated, the plaintiff may have to prove the defendant had a close relationship, or is in “privity,” with a party to that earlier case. Second, in those jurisdictions that allow only a party to a prior case to assert collateral estoppel, that party must also establish privity with a party in the prior action.

While there is no bright-line rule, privity is established where the “interests of one party are so identified with the interests of another that representation by one party is representation of the other’s legal right.” A technical nonparty that controlled the prior litigation and whose interests

are aligned with a party to that case may be found in privity and thus bound by the legal determinations in that suit. In *Universal Furniture International, Inc.*, the U.S. Court of Appeals for the Fourth Circuit held that a co-owner and manager of a corporation, who was not a party to the prior lawsuit against the corporation, was nonetheless collaterally estopped from asserting defenses resolved in the prior case because the co-owner had every incentive to argue the defense in the prior case, played a substantial role, and had a full and fair opportunity to be heard on the issue. Courts also consider general notions of “fundamental fairness” in determining privity.

“Finality” Requirement

As explained above, for collateral estoppel to apply, the earlier ruling has to be final. When a party has litigated an issue in a prior case, but the case settled before a decision was reached on the merits, a question may arise as to whether the determination of the issue was sufficiently final for collateral estoppel purposes. Some jurisdictions maintain that parties are not bound by rulings in cases that settle, even if the specific issue in question was adjudicated by the court. However, the more common rule is that, so long as the issue sought to be collaterally estopped was resolved in a sufficiently “firm” judgment, collateral estoppel effect may be given, even if the case ultimately settled before the dispositive issue of liability was determined. Further, the Restatement (Second) of Judgments provides that an issue can be resolved for collateral estoppel purposes even where it was decided as part of a denial of a dispositive motion or an interlocutory order:

“An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment[,] . . . a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof.”

Therefore, it is important to carefully review the pleadings and motions in any prior litigation to determine whether an issue was resolved for collateral estoppel purposes.

Conclusion

In sum, parties and attorneys involved in litigation should be familiar with collateral estoppel principles. As shown above, there are many differences in those principles, which can depend on the law that applies to any given case. Nevertheless, for parties who are involved in multiple lawsuits or are litigating against such parties, the collateral estoppel doctrine is an important tool that should not be overlooked.

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