IADC COMMITTEE NEWSLETTER

PROFESSIONAL LIABILITY

JANUARY 2016

IN THIS ISSUE

This month's article discusses the applicability of the "rule against claims-splitting" to malpractice actions against attorneys, particularly in situations where the plaintiff is seeking a "second bite" at the apple after failing to obtain relief from the attorney's former client.

No 'Good Reason' for a Second Bite at the Apple: Recent Nevada Supreme Court Decision on Nonmutual Claim Preclusion May Prove Useful for Legal Malpractice Defense Counsel

ABOUT THE AUTHORS

Erin K. Higgins and **Andrew R. Dennington** are trial partners at Conn Kavanaugh Rosenthal Peisch & Ford, LLP, in Boston. Erin's practice is focused on professional and product liability defense. She can be reached at EHiggins@ConnKavanaugh.com. Andrew's practice is focused on business litigation and professional liability defense. He can be reached at ADennington@ConnKavanaugh.com. **Kathleen R. O'Toole** is an associate at Conn Kavanaugh with a focus on employment, business litigation, and professional liability defense. She can be reached at kotoole@connkavanaugh.com.

ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact

Erin Higgins
Vice Chair of Publications
Conn Kavanaugh Rosenthal Peisch & Ford, LLP
EHiggins@ConnKavanaugh.com

In recent years, defense practitioners have seen an uptick in "aiding and abetting" or "civil conspiracy" claims brought against attorneys—not by their former clients—but instead by their former clients' *adversaries*, based solely on the attorneys' associations with and representation of the adversaries. For example, Plaintiff Shareholder sues not only Defendant Shareholder for breach of fiduciary duty and breach of contract, but also Defendant Shareholder's attorneys for "aiding and abetting" or "conspiring with" Defendant Shareholder in the commission of the alleged breaches. In this article, we refer to these as "second bite" cases: cases in which plaintiffs seek the famed "second bite at the apple" in claims against their adversaries' attorneys after unsuccessful claims against the adversaries themselves.

When faced with these "second bite" cases, practitioners may initially consider substantive and public policy defenses such as the litigation privilege, the attorneys' scope of representation, agent's immunity, and the intra-corporate conspiracy doctrine.[1] These could be effective, depending on the facts of the case and the jurisdiction, but may involve too many factual issues to be useful at the Rule 12 stage. Other potentially effective ways to defend against "second bite" cases are through procedural defenses, such as the claim-splitting rule[2], collateral estoppel (i.e., issue preclusion), or *res judicata* (i.e., claim preclusion).[3] These procedural defenses have the advantages of minimal factual development, and may be effectively used in a motion to dismiss filed in response to the initial complaint. Of these procedural defenses, this article will focus on claim preclusion—specifically, *nonmutual* claim preclusion. In particular, we will highlight a 2015 Nevada Supreme Court decision, *Weddell vs. Sharp*, which contains some helpful language and analysis for

[1] Ryan D. Bolick and Meagan I. Kiser, *"Civil Conspiracy" - Lawyers' Vicarious Liability for Clients' Torts*, For the Defense, Volume 53, Number 1, January 2011, 41.

[2] In some jurisdictions, the rule against claim splitting is codified (*see*, *e.g.*, Mass. R. Civ. P. 12(b)(9) ("Pendency of a prior action in a court of the Commonwealth" as basis for motion to dismiss)), while it is common law in other jurisdictions (*see, e.g.*, *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000) ("As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit.").

[3] The use of the terms "collateral estoppel," "res judicata," "issue preclusion" and "claim preclusion" has evolved over many years. Presently, the term "issue preclusion" is used as the modern term for "collateral estoppel," while "claim preclusion" replaces "res judicata." *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77, n.1 (1984) (explaining "conflicting terminology" used to describe preclusion concepts); *see also Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1323, n.2 (Fed. Cir. 2008) (noting that "res judicata" was once used primarily to denote the concept of claim preclusion, but that today courts often substitute the terms "claim preclusion" and "issue preclusion" to maintain the analytical distinction between res judicata and collateral estoppel); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4402 (2d ed. 2002).

practitioners utilizing a nonmutual claim preclusion defense for "second bite" cases.[4]

Nonmutual Claim Preclusion: A Primer

Under the doctrine of claim preclusion, parties may not contest matters that they previously had a full and fair opportunity to litigate.[5] The doctrine "protects against 'the expense and vexation attending multiple lawsuits, conserv[es] judicial resources, and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions.'"[6] *Nonmutual* claim preclusion goes one step further. It allows parties *not* named in a prior action to raise the defense in a "subsequent suit involving sufficiently related subject matter."[7]

Courts have used the doctrine more often to prevent plaintiffs from getting a second bite at the apple than they have to protect defendants from a lawsuit by a new plaintiff.[8] This is likely because dismissing a case brought by a subsequent plaintiff can trigger due process and constitutional concerns.[9] On the other hand, dismissing a case brought against a subsequent *defendant* by a plaintiff who has already had at least one bite at the apple serves to discourage excessive litigation and promote those principles of judicial economy that lie at the heart of the claim preclusion doctrine. This article focuses on the latter: When may a defendant attorney *not* involved in a prior action argue that the plaintiff missed his opportunity to sue that attorney in the first lawsuit?

In federal courts, the elements of nonmutual claim preclusion are generally uniform. A defendant bears the burden of proving three elements: (1) a final judgment on the merits in an earlier suit, (2) sufficient identicality between the causes of action asserted in the earlier and later suits, and (3) sufficient identicality between the parties in the two suits.[10]

Imagine a circumstance in which a plaintiff unsuccessfully sued an attorney's client, redrafted the caption to replace the client's

[4] 350 P.3d 80 (2015), *reh'g denied* (July 23, 2015).
[5] *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), citing *Montana v. United States*, 440 U.S. 147, 153–154 (1979).
[6] *Id.*
[7] *Mancuso v. Kinchla*, 60 Mass. App. Ct. 558, 568 (2004).
[8] *See Airframe Systems, Inc. v. Raytheon Co*., 601 F.3d 9, 17, n.8 (1st Cir. 2010) (noting that cases like *Taylor v. Sturgell, supra*, have limited the circumstances under which nonparty *plaintiffs* are precluded from suing the same defendants).
[9] *See, e.g., Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (declining to dismiss a case brought against the same defendants by a *friend* of the initial plaintiff less than one month after initial plaintiff's case was dismissed, and rejecting the argument that the second plaintiff should be bound by the first judgment because the second plaintiff's interests were "virtually" represented by the first); *Meza v. General Battery Corp*., 908 F.2d 1262, 1266 (5th Cir. 1990) ("The prohibition against using the result of prior judicial proceedings to determine the rights of strangers to those proceedings is required by the due process guarantees of the Fifth and Fourteenth Amendments. The popular expression of this principle is that 'everyone is entitled to his own day in court.'").
[10] *See, e.g., Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 755 (1st Cir. 1994) (citing the elements of claim preclusion under federal law).

name with the attorney's, and added the words "aiding and abetting" to the claims. In such a case, the defendant attorney may easily establish the first and second prongs of the test. The third prong can be murkier, however, because the concept of "sufficient identicality between the parties" is not a bright line test.

Of note, this third prong—"sufficient identicality"—is essentially a modern phrasing of "privity." Practitioners should be aware of the elusive and evolving nature of this term. At common law, the courts construed claim preclusion more narrowly, and applied it solely to those nonparties in privity with the parties.[11] Today, many courts have expanded the term "privity" to more broadly describe "various relationships between litigants that would not have come within the traditional definition of that term."[12] In fact, courts even resist the use of the term "privity" in claim preclusion analyses because of its vagueness.[13] The United States Supreme Court, in a case analyzing claim preclusion, expressly avoided the use of the term "privity" "to ward off confusion."[14]

The Third Prong: Sufficient Identicality Means A "Close and Significant" Relationship

The First Circuit in *In re El San Juan Hotel Corp.*—a case considering a former comptroller of a distressed hotel's claim against the trustee's attorney—observed that "a version of claim preclusion is appropriate [where] the new defendants have a *close and significant* relationship with the original defendants."[15] (*emphasis* added). The First Circuit cited to several cases in which courts dismissed plaintiffs' claims in light of nonmutual claim preclusion arguments:

- *Gambocz v. Yelencsics,* 468 F.2d 837, 841 (3d Cir.1972) (new defendants, some of whom were named but not joined in original complaint, allegedly were co-conspirators of original defendants);
- *Fowler v. Wolff,* 479 F.2d 338, 340 (8th Cir.1973) (new defendants were prison officials while previous defendants were parole and other prison officials);

[11] *See Southwest Airlines Co. v. Texas Intern. Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977).
[12] *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996).
[13] *See, e.g., Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc*., 571 F.3d 299, 310 (3d Cir. 2009) (describing courts' efforts to define privity as "notably circular"); *Martin v. American Bancorporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005) ("privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the *res judicata*.") (internal quotation omitted)); *Matter of L & S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir. 1993) ("Privity is an elusive concept. It is a descriptive term for designating those with a sufficiently close identity of interests.").
[14] *Taylor*, 553 U.S. at 894, n.8, *citing* 18A *Wright & Miller* § 4449, pp. 351–353, and n. 33 (collecting cases).
[15] 841 F.2d 6, 10 (1st Cir. 1988).

- *Poster Exchange, Inc. v. National Screen Service Corp.,* 517 F.2d 117, 122–23 (5th Cir. 1975) (new defendant was named as conspirator in first proceeding but not joined in action);
- *McLaughlin v. Bradlee,* 599 F.Supp. 839, 847–48 (D.D.C. 1984) (new defendant allegedly participated in same conspiracy as defendants in prior actions), *aff'd,* 803 F.2d 1197 (D.C.Cir. 1986); and
- *Betances v. Quiros,* 603 F.Supp. 201, 205–07 (D.P.R. 1985) (new defendant allegedly participated in same conspiracy as original defendants).[16]

The First Circuit also cited *Wright & Miller* for "another formulation" of the nonmutual claim preclusion doctrine. It suggested that preclusion is appropriate "if the new party can show good reasons why he should have been joined in the first action and the old party cannot show any good reasons to justify a second chance."[17] Between 1988 and 2013, courts cited the alternate formulation articulated in *In re El San Juan Hotel Corp.* (hereafter, the "good reasons argument") eleven times.[18] Each decision referenced the "good reasons argument," but did not expressly adopt it as a prong of the nonmutual claim preclusion analysis. Though anecdotal, these cases suggested a shift away from rigid and traditional definitions of "privity," and toward a broader interpretation of the term.

In 2015, this trend culminated in the Nevada Supreme Court's *Weddell* decision. This appears to be the first appellate-level case to formally integrate the *Wright & Miller* "good reasons argument" as an element of the nonmutual claim preclusion defense.

The *Weddell* Decision

In *Weddell*, two parties, Stewart and Weddell, submitted a business to a panel of three attorneys (the "Panel") for binding arbitration.[19] After the Panel decided in Stewart's favor, Stewart filed a declaratory action against Weddell to enforce the judgment. Weddell answered and counterclaimed against Stewart, claiming that the Panel was not neutral and had

[16] *In re El San Juan Hotel Corp.*, 841 F.2d at 10.
[17] *Id.*, at 10, *citing* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4464 at 589.
[18] *Fantasy Inc. v. La Face Records*, 1998 WL 916481, at *5 (E.D. Cal. Nov. 12, 1998); *Andrews-Clarke v. Lucent Techs., Inc.*, 157 F. Supp. 2d 93, 101 (D. Mass. 2001); *Mancuso v. Kinchla*, 806 N.E.2d 427, 437 (Mass. App. Ct. 2004); *Marcello v. Harris*, 2007 WL 3274325, at *5 (D.R.I. Nov. 2, 2007); *In re Amador*, 2009 WL 2877426, at *7 (Bankr. D.P.R. Mar. 10, 2009); *In re Amador*, 2009 WL 2898830, at *7 (Bankr. D.P.R. Mar. 10, 2009); *In re Rivera*, 2009 WL 2898844, at *8 (Bankr. D.P.R. Mar. 12, 2009); *McCabe v. Ziady*, 2009 WL 839102, at *4 (Mass. Super. Mar. 16, 2009); *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 18 (1st Cir. 2010); *Silva v. City of New Bedford, Mass.*, 677 F. Supp. 2d 367, 370 (D. Mass. 2009) *aff'd sub nom. Silva v. City of New Bedford*, 660 F.3d 76 (1st Cir. 2011); *Strahan v. Rowley*, 2011 WL 7646206, at *4 (D. Mass. Dec. 20, 2011) *report and recommendation adopted*, 2012 WL 1114350 (D. Mass. Mar. 31, 2012), *aff'd* (Aug. 8, 2013) (cases listed chronologically).
[19] *Weddell,* 350 P.3d at 81.

defrauded him. In the first bite at the apple, Weddell did not name the Panel as defendants. During the first day of the bench trial, Weddell entered a confession of judgment acknowledging that the Panel's decision was, indeed, valid and enforceable against him in its entirety, and stipulated to dismissal of his counterclaim. More than two years later, Weddell sued the Panel in a separate lawsuit, asserting claims arising out of the Panel's conduct in the earlier arbitration (i.e., that the Panel was not neutral and defrauded him).[20]

The Panel moved to dismiss. The lower court granted and dismissed Weddell's claims on the basis of nonmutual claim preclusion. The Nevada Supreme Court upheld the lower court's ruling. In its analysis and holding, the *Weddell* court formally adopted the doctrine of nonmutual claim preclusion and modified Nevada's claim preclusion requirements. It stated that "the privity requirement can be unnecessarily restrictive in terms of governing when the defense of claim preclusion may be validly asserted."[21] The court outlined the modified elements of a successful claim preclusion defense:

> *(1) there has been a valid, final judgment in a previous action;*
>
> *(2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and*
>
> *(3) privity exists between the new defendant and the previous defendant or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff cannot provide a "good reason" for failing to include the new defendant in the previous action.*[22]

Ultimately, the *Weddell* court held that the Panel satisfied the first two prongs of the analysis: (1) the declaratory relief action resulted in a valid, final judgment; and (2) the subject of the declaratory relief action (the dispute resolution process) formed the basis for Weddell's claims asserted against the Panel in the second lawsuit.[23]

As to the third prong, the court concluded that the parties were *not* in privity pursuant to Nevada's "previously used definition of privity."[24] The court stated that under Nevada law, a person was in privity with another "if the person had 'acquired an interest in the subject matter affected by the judgment through...one of the parties, as by inheritance, succession, or purchase.'"[25] The *Weddell* court's definition of "privity" was much narrower than the definition used by the U.S. Supreme Court in both *Richards* and

[20] *Id.* at 81-82.
[21] *Id.*
[22] *Id*.
[23] *Id.* at 85.
[24] *Id.* at 83.
[25] *Id.* at 82-83, *citing Bower v. Harrah's Laughlin, Inc.,* 215 P.3d 709, 718 (Nev. 2009) (*quoting Paradise Palms Cmty. Ass'n v. Paradise Homes,* 505 P.2d 596, 599 (Nev. 1973)).

Taylor.[26] The court could have adopted this line of cases to expand the definition of "privity." Instead, it sidestepped the privity analysis altogether and refocused its inquiry on "whether [Weddell had] shown a good reason to justify this second lawsuit." [27]

Answering this question, the court determined that Weddell could not justify his second bite at the apple.[28] Weddell's assertion that he lacked the necessary facts to file suit against the Panel in the first case was "belied by the record;" in fact, he could have brought these claims in the context of his first lawsuit. Weddell's answer and counterclaim in the first litigation alleged that the Panel had concealed pertinent facts from each other, refused to allow Weddell to present evidence, and failed to answer certain questions that Weddell wanted answered. These allegations formed the basis for the subsequent case against the Panel, filed more than two years later.[29]

In support of its modified claim preclusion analysis, The *Weddell* court cited *In re El San Juan Hotel* (and cases cited) as examples of decisions that applied nonmutual claim preclusion in similar factual circumstances.[30] *Weddell* also relied heavily on *Airframe Systems, Inc. v. Raytheon Co.*, a 2010 First Circuit decision dismissing a copyright infringement suit on claim preclusion grounds.[31] In *Airframe*, the plaintiff brought a nearly-identical second suit against the first defendant's subsidiary and former parent company.[32] The First Circuit recognized that "privity is a sufficient but not a necessary condition for a new defendant to invoke a claim preclusion defense."[33] Despite this statement, the *Airframe* court's analysis followed the traditional claim preclusion elements, as outlined *infra.*[34] *Airframe* alluded to the "good reasons argument" and cited to *Wright & Miller* in the final paragraph of its 12-page opinion, but chose not to formally adopt the argument as an element of the claim preclusion analysis.[35]

Importantly, the *Weddell* court pushed the holdings of *In re El San Juan Hotel* and *Airframe* one step further by incorporating the "good reasons argument" into the standard itself. [36] *Weddell* critiqued the federal courts' "close and significant

[26] *See* n.12 and n.14, *supra*.
[27] *Weddell,* 350 P.3d at 85.
[28] *Id*. at 85.
[29] *Id*.
[30] Both *Weddell* and *El San Juan Hotel* cite *McLaughlin v. Bradlee*, 599 F.Supp. 839, 847–48 (D.D.C. 1984) and *Gambocz v. Yelencsics*, 468 F.2d 837, 841 (3d Cir. 1972).
[31] 601 F.3d 9, 11–14 (1st Cir. 2010).
[32] *Id.*
[33] *Id.* at 17.
[34] *Id.* at 14. (starting analysis with, "Claim preclusion applies if (1) the earlier suit resulted in a final judgment on the merits, (2) the causes of action asserted in the earlier and later suits are sufficiently identical or related, and (3) the parties in the two suits are sufficiently identical or closely related.").
[35] *Id.* at 18.
[36] Of note, two justices dissented in *Weddell*. In particular, they expressed concern that the majority's holding "disturb[ed] the balance between need for repose, fairness, and efficiency that informs our claim preclusion law," resisted the notion of expanding the nonmutual claim preclusion doctrine, and advocated for a more "cautious" approach. *Weddell* at 86.

relationship" approach for its circularity, arguing that the analysis "simply reverts back to a consideration of whether privity exists between the new defendant and the previous defendant."[37] The court further reasoned that "[w]hile a 'close and significant' relationship between defendants may be sufficient in some cases to show that a plaintiff lacked 'good reasons' to justify a second lawsuit, we are not persuaded that a close and significant relationship is always necessary to demonstrate that a plaintiff lacked good reasons to justify the second lawsuit." [38]

Conclusion

Courts are trending towards relaxed privity and more liberal application of nonmutual claim preclusion when *defendants* are trying to deflect a plaintiff's "second bite." The *Weddell* decision is novel, but its claim preclusion analysis already has been cited by the Supreme Court of Nevada in three subsequent cases, and by the United States District Court for the District of Nevada.[39] For defense practitioners considering an argument for nonmutual claim preclusion, it is a decision worth reading.

[37] *Id.* at n.2.
[38] *Id*.
[39] *See Ford v. Branch Banking & Trust Co.* 353 P.3d 1200, 1202-03 (Nev. July 23, 2015); *Sandoval v. State ex rel. Nevada Dep't of Corr.*, 2015 WL 5444331, at *1 (Nev. Sept. 11, 2015); *Bradley S. v. Sherry N.*, 2015 WL 7356409, at *2 (Nev. Nov. 17, 2015); *Branch Banking & Trust Co. v. Rad*, 2015 WL 5664393, at *5 (D. Nev. Sept. 24, 2015).

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

MARCH 2015
The Year of the Cyber Breach
Elizabeth S. Fitch and Theodore M. Schaer

FEBRUARY 2015
The Tide Has Turned:
An Update Regarding the Evolution of the Intra-Firm Attorney-Client Privilege
Charles Lundberg and Aram Desteian

JANUARY 2015
Cybersecurity: The Continuing Evolution of Insurance and Ethics
Dan Zureich and William Graebe

OCTOBER 2014
An Attorneys Duty to Disclose Evidence to Opposing Counsel
Michael E. Brown

SEPTEMBER 2014
Defending the Outside Referral Case
Michelle M. Lore

AUGUST 2014
Third Party Litigation Funding – The Perils to Attorneys
Margaret Fonshell Ward

JULY 2014
Where is the Locality Rule?
Brian A. Homza

JUNE 2014
Liability of Insurance Agents and Brokers to Third-Party Non-Clients and Recent Developments
Brad Jones and Anthony Alt

MAY 2014
Who's the Boss? Professional Liability Risks for Insurance Defense Attorneys
Daniel E. Ashmore and Jana Smoot White

APRIL 2014
Recent Professional Liability Cases
Richard L. Neumeier

FEBRUARY 2014
Consumer Protection Laws: Liability and Coverage Implications for Licensed Professionals and Their Insurers
Matthew Marrone

JANUARY 2014
Recent Developments in Legal Malpractice
Richard L. Neumeier