

NEVADA ADOPTS THE DOCTRINES OF CLAIM PRECLUSION AND ISSUE PRECLUSION

BY ETHAN J. BIRNBERG, ESQ.

In general, the doctrine of res judicata is well-known among lawyers, as is the recent terminology that defines and separates this legal doctrine: claim preclusion and issue preclusion. However, when investigating beyond the level of a general definition it is apparent that many lawyers and law students easily confuse the concepts of claim and issue preclusion. Previous opinions published by the Nevada Supreme Court did not clearly explain claim and issue preclusion and attorneys failed to properly distinguish these important legal concepts, requiring the court to concretely address the issue. In response, the Nevada Supreme Court adopted the concepts of claim preclusion and issue preclusion in *Five Star Capital Corporation v. Ruby*¹ and expressly outlined the elements of these separate and distinct concepts, which unequivocally show that claim and issue preclusion are not interchangeable and must be separately analyzed for a movant to reap the benefits of their respective preclusive effects.

The modern trend among courts, including the United States Supreme Court, separates the doctrine of res judicata into two concepts: claim preclusion and issue preclusion.²

Issue preclusion refers to the effect of a judgment in foreclosing re-litigation of a matter that has been litigated and decided.³ In addition, issue preclusion is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that was not litigated because of a determination that it should have been advanced in an earlier suit. Therefore, claim preclusion encompasses the law of merger and bar.⁴ While these definitions may appear to be straightforward, the Nevada Supreme Court used *Five Star Capital* to establish clear tests that should be referenced in Nevada, thereby ending any confusion and expressly declaring that Nevada would follow the majority trend.⁵

Understanding claim preclusion and issue preclusion is invaluable to asserting a procedural bar to unnecessary litigation fees and expenses, while at the same time providing the client with an appreciation for finality within the judicial system. Conversely, ignoring these concepts may waste time and money, and result in a counsel's failure to effectively preserve his or her client's interest. As discussed below, the factual circumstances of *Five Star Capital* demonstrate that choosing to initiate litigation as opposed to appealing a district court's decision to dismiss a matter can forever preclude your client from litigating an issue to the extent that the client initially intended. To avoid being trapped by procedural bars it is imperative to understand the recent adoption and legal application of claim preclusion and issue preclusion.

Five Star Capital

Prior to declaring the adoption of claim preclusion and issue preclusion, the court in *Five Star Capital* provided a detailed history of the preclusive terminology in Nevada. Most recently, the decision in *Edwards v. Ghandor* improperly set forth the elements of claim preclusion, requiring the court to overrule *Edwards* with respect to the discussion of claim preclusion.⁶

In the seminal res judicata case, *University of Nevada v. Tarkanian*, the court enunciated a three-factor test for res judicata, in general, and declined to create different tests for claim and issue preclusion.⁷ The court provided this three-factor test:

- 1) The issue decided in the prior litigation must be identical to the issue presented in the current action;
- 2) the initial ruling must have been on the merits and have become final; and
- 3) the party must have been a party or in privity with a party to the prior litigation.⁸

The court explained differences between claim and issue preclusion, but the lack of clear and concise tests allowed practitioners to easily confuse the concepts.

Four years later, in *Executive Management v. Ticor Title Insurance Company*,⁹ the court recognized that the general principles of res judicata only pertained to claim preclusion. The *Executive Management* decision, however, held that the three-part test in *Tarkanian* applied solely to issue preclusion, not claim preclusion, but stated the following with respect to claim preclusion:

“Pursuant to the rule of claim preclusion, a valid and final judgment on a claim precludes a second action on that claim or any part of it. Claim preclusion applies when a second suit is brought against the same party on the same claim. We have further stated

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that the modern view is that claim preclusion embraces all grounds of recovery that were asserted in a suit, and thus has a broader reach than issue preclusion.”¹⁰

In April of 2000, the court once again reaffirmed that the three-factor test in *Tarkanian* applied solely to issue preclusion and further clarified that “[i]ssue preclusion may apply ‘even though the causes of action are substantially different, if the same fact issue is presented.’”¹¹ Once again the court did not provide a definitive test for claim preclusion. As the court noted in *Five Star Capital*, the lack of a clear test for claim preclusion was even more problematic when subsequent case law cited a footnote to *Executive Management*, and stated that the test for claim preclusion was the same as issue preclusion, except that it “embraces not only the grounds of recovery that were asserted in the prior suit but those that could have been asserted.”¹²

The test for claim preclusion, however, was finally enunciated in *Edwards* – only to be overruled in the following year by *Five Star Capital*.¹³ The court found that the *Edwards* decision improperly relied on previous case law that did not stand for a “strict test for the application of claim preclusion,” as *Edwards* declared.¹⁴ Further, the third factor of the *Edwards* claim preclusion test could have been interpreted in “such a way that a party could avoid claim preclusion by merely adding an additional claim for relief in their second suit,” and this outcome contradicted the concept’s purpose of obtaining finality by preventing a party from filing another suit that is based on the same set of facts that were present in the initial suit.¹⁵

Thus, the paramount test for claim preclusion, unequivocally adopted in the state of Nevada, applies the following three-part test:

- 1) The parties or their privies are the same;
- 2) the final judgment is valid; and
- 3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.¹⁶

The three-part test above for claim preclusion was affirmed in *Five Star Capital*, but the court added a fourth factor in order

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to better clarify the distinction between claim and issue preclusion. The fourth factor requires that the issue be actually and necessarily litigated, thereby confirming the four-factor operative test for issue preclusion as:

- 1) The issue decided in the prior litigation must be identical to the issue presented in the current action;
- 2) the initial ruling must have been on the merits and have become final;
- 3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and
- 4) the issue decided in the prior litigation must have been actually and necessarily litigated.¹⁷

Applying the test for claim preclusion to the circumstances in *Five Star Capital*, the court affirmed the District Court's order granting summary judgment based on claim preclusion.¹⁸ *Five Star Capital* concerned a dispute over a real property transaction that was initially dismissed when counsel for Five Star failed to make an appearance at a pre-trial calendar call because he mistakenly appeared in the wrong department. Five Star filed a motion to reinstate the case, based on its discovery that the court minutes had incorrectly stated the department for the calendar call.¹⁹ The District Court granted the motion and reinstated the case. Thereafter, Five Star retained new counsel, who failed to appear at the rescheduled, and second, calendar call. The defendant once again requested dismissal pursuant to EDCR 2.69(c), a failure to attend a calendar call, and the District Court dismissed the action.²⁰ Apparently, Five Star's attorneys were confused as to which one of them was to attend the conference

and, subsequent to dismissal, failed to adhere to the concepts discussed above and instead filed a new action based on the same transaction.²¹

The Nevada Supreme Court affirmed the District Court's summary judgment ruling, declaring that "[t]his is the exact type of case for which claim preclusion is necessary – to prevent a party from continually filing additional lawsuits until it obtains

the outcome it desires by merely asserting an additional claim for relief."²² The court first rejected Five Star's argument that the previous dismissal could not have a preclusive effect because it was not a decision on the merits. NRCP 41(b) expressly states that an order of dismissal "not provided for in this rule" is an adjudication upon the merits unless the basis for dismissal is lack of jurisdiction, improper venue or failure to join a party under NRCP 19.²³ Citing this express rule, and the policy that the "adjudication upon the merits" phrase was meant to preclude the refiling of the same claim in the same court in which the dismissal occurred, the court declared that a dismissal for failure to attend a calendar call was an adjudication upon the merits.²⁴ Lastly, in an apparent sense of desperation, Five Star argued that the public policy of favoring a case on the merits outweighed the application of claim preclusion in its case. The court responded that its public policy exception to claim preclusion was narrowly limited to determinations of paternity and, contrary to Five Star's argument, extending this exception to *Five Star Capital* would defeat the purpose of the mandatory calendar call and the Eighth Judicial District Court's choice to invoke dismissal as a consequence of failing to adhere to EDCR 2.69.²⁵

The *Five Star Capital* decision provides specific guidance to practitioners concerning the legal elements and application of claim preclusion and issue preclusion. With the unequivocal adoption of these concepts in Nevada, a counselor is wise to use the elements set forth in *Five Star Capital* strategically and aggressively to provide effective representation for his or her client. ■

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1 *Five Star Capital Corporation v. Ruby*, 194 P.3d 709 (2008).

2 See *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77 fn. 1 (1984).

3 *Id.* (citing Restatement (Second) of Judgments, § 27).

4 *Id.* (citing Restatement (Second) of Judgments, Introductory Note before § 24).

5 See *Five Star Capital*, 194 P.3d at 713 (citing *Migra*, 465 U.S. at 86-88) (discussing the gradual evolution of preclusion concepts in the state of Ohio when precluding a plaintiff from filing separate suits for both personal injury and property damage in an automobile accident).

6 *Five Star Capital*, however, did not discuss nor overrule the application of NRCP 41(e) as discussed in *Edwards*. See 159 P. 3d 1086, 1094-95 (2007).

7 *University of Nevada v. Tarkanian*, 110 Nev. 581, 598 (1994); *Five Star Capital*, 194 P.3d at 711.

8 *Tarkanian*, 110 Nev. at 598; *Five Star Capital*, 194 P.3d at 710.

9 *Executive Mgmt. v. Tigor Title Ins. Co.*, 114 Nev. 823, 834-36; *Five Star Capital*, 194 P.3d at 712.

10 *Executive Mgmt.*, 114 Nev. at 834-36; *Five Star Capital*, 194 P.3d at 712.

11 *LaForge v. State, University System*, 116 Nev. 415, 420 (2000) (quoting *Clark v. Clark*, 80 Nev. 52, 56 (1964)); *Five Star Capital*, 194 P.3d at 712.

12 *Ayala v. Caesars Palace*, 119 Nev. 232, 253 n. 6 (2003).

13 *Edwards*, 123 Nev. ___, 159 P. 3d at 1094-95; *Five Star Capital*, 194 P.3d at 712.

14 *Five Star Capital*, 194 P. 3d at 712.

15 *Id.*

16 *Id.* at 713 (citations omitted). The court stated, in a footnote, that the frequently required fourth element, that the judgment be by a court with competent jurisdiction, is implicit in the second element's requirement of a *valid* final judgment.

17 *Five Star Capital*, 194 P. 3d at 713.

18 *Id.* at 714. The court noted that issue preclusion was not applicable because there was no litigation of the actual merits.

19 *Id.* at 710.

20 *Id.*

21 *Id.*

22 *Five Star Capital*, 194 P.3d at 716.

23 NRCP 41(b); *Five Star Capital*, 194 P.3d at 715.

24 *Five Star Capital*, 194 P. 3d at 715.

25 *Id.* at 716.