

Reinsurance

The Preclusive Effect Of Arbitration Awards

by
James M. Westerlind

Arent Fox
New York, New York

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Commentary

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By

James M. Westerlind

[Editor's Note: Mr. Westerlind is a senior associate at Arent Fox in New York where his primary focus is on the resolution of insurance and reinsurance disputes. Copyright 2010 by James M. Westerlind. Comments can be sent to westerlind.james@arentfox.com.]

This article analyzes the general principles of collateral estoppel, its application to arbitration awards and against individuals who are in privity with a party in the arbitration, and how these principles may practically apply in various reinsurance scenarios. Collateral estoppel will generally bar a party from disputing an issue previously adjudicated in an arbitration. Whether a prevailing party may use the award against a non-party to the arbitration, such as a principal owner of the losing party, depends on several factors but may be permitted in a subsequent proceeding.

A. Collateral Estoppel May Be Applicable To Prior Arbitration Awards

The doctrine of collateral estoppel precludes relitigation of issues that were previously adjudicated: "Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67 n.6 (1982).¹ The purpose of the doctrine is twofold: (1) to promote judicial economy; and (2) to protect parties of a prior action from the unnecessary pain and expense of relitigating an issue simply because an adversary therein was unhappy with the result.² The doctrine is premised upon the notion that, once decided by a tribunal, an issue ought to be resolved and not subject to further inquiry in a subsequent proceeding. That is, the doctrine prevents a party from getting two bites at the apple.

Generally, collateral estoppel will apply to an arbitration award.³ "When an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated." *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) (citing RESTATEMENT (SECOND) JUDGMENTS § 84(3) and cmt. c (1982)).⁴ Thus, as Judge Learned Hand noted over half a century ago, those parties who choose to arbitrate their disputes must remain content with the award issued by the arbitrators:

Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

A panel selected to hear a reinsurance dispute often views its role as limited to the contract(s) at issue and, consequently, the panel does not allow the broad type of discovery that the parties would have been entitled to had the dispute been litigated in court. Restrictions on a panel's authority to order discovery from third parties also means that the litigants in the arbitration may

not have the information they could have in a lawsuit.⁵ If, however, the parties in the prior arbitration were afforded the opportunity to present relevant evidence and examine and cross-examine witnesses without undue restriction, the award may be binding for *res judicata* or collateral estoppel purposes in a future proceeding.⁶

What happens, however, when a party in a prior arbitration attempts to use the arbitration award to collaterally estop a non-party to the arbitration from litigating a particular issue in a subsequent proceeding? In an arbitration I was previously involved in, my firm represented a closely-held corporation that acted as a manager ("Manager") for a pool of foreign reinsurance companies ("Members"). Each Member had signed a separate, but identical, Management Agreement with the Manager, outlining the rights and responsibilities of the parties. Each Management Agreement contained a standard arbitration provision, which stated, in relevant part, as follows:

If any dispute shall arise between the MANAGER and the MEMBER, either before or after the termination of this Agreement, with reference to the interpretation of this Agreement or the rights of either party with respect to any transaction under this Agreement, the dispute shall upon the request of one of the parties to said dispute be referred to a panel of two arbitrators and an umpire, one arbitrator to be chosen by each party and the umpire to be chosen by the two arbitrators, all of whom shall be active or retired, disinterested executive officers of insurance or reinsurance companies.

Decades after its Management Agreement had been executed, one of the Members demanded arbitration against the Manager pursuant to the above clause. Shortly thereafter, the Member also commenced an action in Federal Court against the Manager, as well as its principals in their individual capacities, alleging, *inter alia*, fraud and other tort claims. The Federal Action was subsequently stayed in part pending the arbitration. During oral argument on the motion to stay the litigation, the federal judge stated that he would not resolve the issues of liability against the individual defendants until the arbitrators in the underlying

arbitration had made a determination. The federal judge further suggested that the parties in the arbitration request the arbitrators to issue an award with discreet findings of fact so that issue preclusion would be in place and carry over with regard to considerations of the individual defendants.

Thereafter, the Member requested the arbitrators to issue a reasoned award in accord with the federal judge's statement, and the arbitrators agreed to do so. After a hearing (in which the individual defendants had testified as principals of the Manager), the arbitrators awarded a substantial sum of money to the Member, and found, among other things, that the Manager had breached the Management Agreement and committed various torts against the Member through the conduct of the principles of the closely-held corporation who were the individual defendants in the Federal Action. The arbitration award was confirmed by the Federal Court, as permitted by the FAA.

While the matter (both as to the Manager in the arbitration and the individual defendants in the Federal Action) was settled shortly thereafter, the next obvious issue was whether the findings set forth in the arbitration award that were adverse to the individual defendants could be used offensively by the Member in the Federal Action against the individual defendants, possibly precluding a trial with respect to the allegations made against them in the lawsuit.

B. Collateral Estoppel As A Sword, Not A Shield

One issue presented in the case described above was whether collateral estoppel may be used offensively to prohibit a defendant in a subsequent proceeding from relitigating an issue decided in a prior action. In earlier cases, collateral estoppel was recognized as a defense, *i.e.*, a defendant could use the doctrine to prevent a plaintiff from asserting a claim that the plaintiff had previously litigated and lost against another defendant in a separate action. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). In *Parklane Hosiery, supra*, the United State Supreme Court permitted the offensive use of collateral estoppel by allowing a plaintiff to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff in a separate action.⁷

In *B. R. DeWitt v. Hall*, 19 N.Y.2d 141 (1967), the New York Court of Appeals allowed a plaintiff to use a prior judgment against the defendant in a prior action offensively with respect to the issue of liability:

While it is true that most of the relevant cases in this area in New York have arisen under circumstances wherein the defendant sought to use the prior adjudication against the plaintiff, there seems to be no reason in policy or precedent to prevent the “offensive” use of a prior judgment.

In this case, where the issues, as framed by the pleadings, were no broader and no different than those raised in the first lawsuit; where the defendant here offers no reason for not holding him to the determination in the first action; where it is unquestioned (and probably unquestionable) that the first action was defended with full vigor and opportunity to be heard; and where the plaintiff in the present action, the owner of the vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the *Farnum* case is not conclusive in the present action.

B. R. DeWitt, 19 N.Y.2d at 143, 148 (citations omitted).⁸

Since *Parklane Hosiery* and *B. R. DeWitt* were decided, the courts have focused on whether the use of collateral estoppel offensively would be fair under the circumstances.⁹ The various factors that the courts have considered to determine whether the use of offensive collateral estoppel would be unfair under the circumstances have evolved from a list of 4 non-exhaustive examples articulated by the *Parklane Hosiery* Court: (1) where the party asserting it easily could have joined in the action upon which reliance is placed; (2) where the party against whom it is to be applied had no incentive to defend vigorously the first action; (3) where the second action offers procedural opportunities unavailable in the first action; or (4) where the judgment relied on is inconsistent with other decisions. *Parklane Hosiery*, 439 U.S. at 328-31.

Thus, in current jurisprudence, a party may use collateral estoppel either defensively (*i.e.*, a defendant in a subsequent action using a prior judgment adverse to the plaintiff to estop the plaintiff from relitigating issues that the plaintiff previously litigated and lost in a prior action) or offensively (*i.e.*, a plaintiff in a subsequent action using a prior judgment against the defendant to estop the defendant from relitigating certain issues again). In the context of insurance disputes, depending on the circumstances, parties may be inclined to attempt to use collateral estoppel either way.

C. Collateral Estoppel Effect Of A Prior Arbitration Award Against Non-Signatories Who Are In Privity With A Party To Prior Arbitration

Another issue that would have been presented in the situation described above is whether the principals, who signed the Management Agreement in their official capacities for the Manager but not in their individual capacities and were not parties in the arbitration, could nevertheless be bound by the resulting arbitration award. Generally, a party to a lawsuit cannot be bound by the results of a prior arbitration to which it was not a party.¹⁰ An exception arises, however, if the party in the subsequent lawsuit is deemed to be in privity with a party in the prior arbitration.¹¹ “A privity [for purposes of collateral estoppel] is defined as: 1) a non-party who has succeeded to a party’s interest in property (a successor in interest); 2) a non-party who controlled the original suit; or 3) a non-party whose interests were adequately represented by a party in the original suit (through ‘virtual’ or ‘adequate’ representation).” *Asahi Glass Co., Ltd. v. Toledo Engineering Co., Inc.*, 505 F. Supp.2d 423, 434 (N.D. Ohio 2007) (citing *Becherer v. Merrill Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054, 1069-70 (6th Cir. 1995)).¹²

When an insurer arbitrates a dispute with an agent or a reinsurance dispute with a reinsurer, third-parties have vested interests in the dispute. For instance, many agents are closely-held or solely-owned corporations, LLCs or partnerships, and the owners, who have the relationship with the insurer, are likely in “privity” with the agency corporation or partnership that is a party in the arbitration. The reinsurance brokers who arranged the disputed reinsurance agreement(s) are often fallback parties, and, as discussed below, have also been deemed to be in “privity” with the arbitrating parties. The impact of the arbitral decisions on those who are non-parties to

the arbitration but in privity with a party to the arbitration can be significant in a subsequent proceeding.

In the only reinsurance related case on point, an intermediary that was sued after its client failed to recover from the reinsurer was precluded from making a claim over against the reinsurer for indemnity or contribution. In *Commonwealth Ins. Co. v. Thomas A. Greene & Company, Inc.*, 709 F. Supp. 86 (S.D.N.Y. 1989), Commonwealth Insurance Company ("Commonwealth") had underwritten 1.87% (or \$1.35 million) of a risk covering the launch and life of several satellites. Commonwealth bought reinsurance from North River Insurance Company ("North River"), through its underwriting agent, Crum & Forster Managers Corporation ("Crum & Forster"), for \$250,000 of the risk. Commonwealth placed the North River reinsurance through Haddon S. Fraser Associated Ltd. ("Haddon Fraser"), who, in turn, placed it through Thomas A. Greene & Company, Inc. ("Greene"), Commonwealth's reinsurance intermediary.

After a total loss, Commonwealth paid \$1.35 million to its insured and demanded \$250,000 under its reinsurance agreement, which claim was denied by North River and Crum & Forster. In arbitration on the issue of coverage under the reinsurance agreement, the panel decided that North River's refusal to pay Commonwealth's reinsurance claim was proper.

Commonwealth then proceeded in a lawsuit against Greene and Haddon Fraser under various contract and tort theories for their alleged failures to maintain the reinsurance. Greene, in turn, commenced a third-party action against North River and Crum & Forster, seeking indemnification or contribution from them for any damages that Greene was required to pay to Commonwealth. The court granted the third-party defendants' motion to dismiss, stating, in part, as follows:

Greene is estopped from relitigating the issues decided in the arbitration because it was in privity with Commonwealth. In determining whether privity existed sufficiently to bind Greene to the arbitration, it is important to note that the doctrine of privity "is to be applied with flexibility." Here, based on Greene's fiduciary duty of utmost good faith to each of the parties of the reinsurance relationship, the relationship between Greene and Commonwealth

is "sufficiently close to support a finding of privity and thus to preclude . . . [Greene's] relitigation of . . . [the] issue."

The existence of privity between Commonwealth and Greene is further demonstrated by the fact that Commonwealth represented Greene's interests in the arbitration. Here, the subject matter of the arbitration was the Commonwealth-North River reinsurance relationship for which Greene was the intermediary, and this reinsurance is the issue which created fiduciary duties. Thus, Greene is bound by the arbitration.

Finally, Commonwealth fully and fairly represented Greene's interests, for during the Westar VI arbitration, Commonwealth attempted to prove that North River was liable for the \$ 250,000 loss suffered by Commonwealth as a result of North River's declination of coverage. * * * In the third party complaint, Greene's theory is identical to that of Commonwealth in the Westar arbitration, which was expressly rejected by the arbitrators. Therefore, Greene is bound by Commonwealth's arbitration of the particular issues decided by the arbitration panel, so the third party complaint must be dismissed for failure to state a claim upon which relief can be granted.

Thomas A. Greene & Co., Inc., 709 F. Supp. at 88-89 (citations omitted). Since the prior arbitration panel had determined that North River did not have pay Commonwealth for the loss under the reinsurance agreement, Greene (which was in privity with Commonwealth for purposes of the prior arbitration) could not seek to relitigate the issue of whether North River was responsible for the loss to Commonwealth in the litigation.

If the reinsurance intermediary is in privity with its ceding company client such that it is bound by a prior reinsurance arbitration to which it was not a party, then it is also likely that the owner of the agent (like the principals of the Manager in my prior case described above) can be deemed to be in privity with the agent if the reinsurer obtains a judgment against the agent. The reinsurer may be able to enforce that judgment against the agent's owner, even without a personal

guaranty, under collateral estoppel principles. While no reported cases discuss offensive use under these circumstances, the rationale in *Greene*, as well as the *Parklane* holding and its progeny — permitting the use of collateral estoppel offensively if all of the elements necessary for issue preclusion are present and it is determined that such use would not be unfair under the circumstances — strongly suggest that such a ruling is possible. Whether there was a full and fair opportunity to litigate the issues of liability will be the key issues for the owner of the agency if the carrier seeks to use a prior arbitration award offensively against him in a subsequent proceeding. But in most cases that individual will have been the person who attended the hearing, provided testimony on behalf of the agency, instructed counsel in the prior arbitration and had a substantial financial stake in the outcome of the arbitration by virtue of his ownership interest in the agency. The *McQueen* case from North Carolina is the closest case on point, although it involved the use of collateral estoppel defensively.

In *Rogers Builders, Inc. v. McQueen*, 331 S.E.2d 726 (N.C. Ct. App. 1985), the plaintiff had entered into a written contract with McQueen Properties, Ltd. (“McQueen Properties”), a corporation controlled by James McQueen, pursuant to which plaintiff agreed to construct a housing unit on land purportedly owned by McQueen Properties. The contract contained an arbitration clause which provided in part as follows: “All claims, disputes and other matters in question between the Contractor [plaintiff] and the Owner [McQueen Properties] arising out of, or relating to, the Contract Documents of the breach thereof, . . . shall be decided by arbitration . . .” A dispute arose between the parties, and plaintiff commenced an arbitration against McQueen Properties, seeking damages. The plaintiff’s arbitration demand sought the “[r]esolution of all claims arising under the contract.” Plaintiff thereafter amended its arbitration demand to name Parkhill Associates, a limited partnership in which James McQueen and McQueen Properties were the general partners, which was the title owner of the land on which the housing project had been built. It was clear from the record that the “Owner” referred to in the amended arbitration demand was James McQueen.

Plaintiff then commenced an action against James McQueen, McQueen Properties and Parkhill Associates

for money owed for labor and materials on the project, and for fraud and unfair and deceptive trade practices. Plaintiff requested that the court delay trial in the action until the outcome of the arbitration. Thereafter, an award was entered “in full settlement of all claims submitted to [the] arbitration,” which directed McQueen Properties and Parkhill Associates, jointly and severally, to pay plaintiff a certain sum of money. The award was confirmed by the superior court and entered as a judgment. Plaintiff then filed an amended complaint in the action, and defendants moved for summary judgment, arguing, among other things, that the lawsuit should be dismissed under the doctrine of *res judicata* based upon the arbitration award. The trial court granted defendants’ motion and the appellate court affirmed.

With respect to the individual defendant, James McQueen, the appellate court held as follows:

Although James McQueen was not named as a party to the arbitration, it is clear that he had a strong financial interest in the determination of the issues there because of his ownership interests in McQueen Properties and Parkhill Associates, and that he was an active and controlling participant in the arbitration. He thus is bound by the judgment entered on the arbitration award as if he were a named party to the proceeding.

McQueen, 331 S.E.2d at 734 (citations omitted). The same rationale could apply to the offensive use of collateral estoppel, requiring the owner of an agency company to pay a judgment that has been awarded by an arbitration panel against the agency company.

D. May A Reinsurer Use The Cedent’s Loss Of A Prior Arbitration Against A Different Reinsurer As A Legal Defense?

Despite the best efforts of some ceding companies to consolidate claims against different reinsurers on a single contract, or claims against reinsurers in consecutive years regarding the interpretation of identical wordings, most cases are not consolidated between different parties. If a cedent arbitrates and loses a claim under a particular wording, and then pursues an arbitration against a different reinsurer concerning the same wording, may the second reinsurer collaterally estop the cedent in the second arbitration? The answer is maybe, depending on the circumstances.

As a practical matter, a non-party to the first arbitration may not know of the resulting award. Most arbitrations are confidential, and only the award itself, which may not include a finding of facts, is usually made a matter of public record when a party moves to confirm. In addition, an arbitration award may never be confirmed if the losing party simply pays, or the prevailing party, owing nothing, chooses to not file a motion for the purpose. Discovery may result in disclosure of the prior award, but parties typically resist producing the details of or the award resulting from a prior arbitration. Indeed, an "honorable engagement" clause in the parties' arbitration agreement may be relied upon by the panel in a subsequent arbitration to disallow the introduction of a prior arbitration award or to ignore it if it is introduced. The second panel may determine that it is not bound by strict rules of law, including prior findings by arbitrators in disputes between the same parties or their privies.¹³

Moreover, based upon some of the very considerations that govern a collateral estoppel analysis, the second tribunal may conclude that the issue decided in the first arbitration was not necessary to the resulting award, did not receive adequate discovery or attention in the first arbitration, or the party against whom collateral estoppel is being asserted (who is a non-party to the first arbitration) was not in privity with the party in the first arbitration, preventing the offensive or defensive use of collateral estoppel in the second proceeding.

Furthermore, a second tribunal may decide that, absent an express agreement to the contrary, the parties contracted to have an arbitrator decide the issues anew, regardless if a prior panel had decided the same issues in whole or part. *See LaSalla v. Doctor's Assocs., Inc.*, 898 A.2d 803, 812 (Conn. 2006) ("In the absence of a specific contractual provision governing the issue, for which the parties are certainly free to bargain, arbitrators are not required to apply claim preclusion; rather, they are free to apply or reject the doctrine to the extent that they deem it appropriate because the parties have bargained for their judgment.").

Conclusion

While the legal principles of issue or claim preclusion may apply to a prior arbitration award in many situations, the practicalities of the circumstances may prevent the use of a prior arbitration award to preclude a party or its privy in a subsequent proceeding from relitigating certain issues. If the legal principles can be applied,

the result could be very beneficial or detrimental, depending on which side of the argument one stands.

As always, a careful analysis of the potential application of the legal principals of claim and issue preclusion should be performed by counsel who is experienced with and sensitive to the foregoing issues if it appears that a prior arbitration award may have preclusive effect in a subsequent dispute, either to a party's advantage or disadvantage.

Endnotes

1. The doctrine of *res judicata* prohibits one party from relitigating a claim against another party in a subsequent proceeding: "Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery*, 439 U.S. 322, 327 n.5 (1979).
2. "[C]ollateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party *or his privy* and of promoting judicial economy by preventing needless litigation." *Norris v. Grosvenor Marketing Ltd.*, 803 F.2d 1281, 1286 (2d Cir. 1986) (quoting *Parklane Hosiery*, 439 U.S. at 326) (internal quotation marks omitted).
3. *See Commonwealth Ins. Co. v. Thomas A. Greene & Company, Inc.*, 709 F. Supp. 86, 88 (S.D.N.Y. 1989) ("Collateral estoppel applies as well to arbitration awards as to judicial adjudications, and thus may bar the relitigation of an issue decided at an arbitration.") (citations omitted); *see also Benjamin v. Traffic Executive Assoc. Eastern Railroads*, 869 F.2d 107, 114 (2d Cir. 1989); RESTATEMENT (SECOND) JUDGMENTS § 84(1) ("Except as stated in Subsections (2), (3) and (4), a valid and final award by arbitration has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court."); *Pujol v. Shearson/American Express, Inc.*, 829 F.2d 1201, 1207-08 (1st Cir. 1987) (prior arbitration award in favor of plaintiff had *res judicata* effect and barred him from subsequently pursuing identical claims in federal court against same party-defendant). *But see Giles v. Blunt, Ellis & Loewi, Inc.*, 845 F.2d 131, 134-35 (7th Cir. 1988) (citing *McDonald v.*

West Branch, 466 U.S. 284, 290 (1984) in support of the statement that it is “not at all clear that arbitration awards could be given a *res judicata* or collateral estoppel effect in a related judicial proceeding.”).

4. See *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1142 (5th Cir. 1991) (“A district court, in the exercise of its discretion, may preclude relitigation of issues previously determined in an arbitration if the court finds, under the facts of that case, that the arbitral procedures afforded due process, that the requirements of offensive collateral estoppel are met, and that the case raises no federal interests warranting special protection.”). In *Greenblatt*, the court held that an arbitration conducted under the rules of the New York Stock Exchange provided adequate adjudicatory protections to the parties for purposes of collateral estoppel:

[T]he arbitration procedure in the present case adequately protected the rights of the parties. The arbitration was conducted under the arbitration rules of the New York Stock Exchange. Both parties were represented by counsel, made opening and closing arguments, and were permitted every opportunity to examine and cross-examine witnesses and present relevant evidence. A complete record of the proceedings (transcript and documents) was preserved. In light of the above circumstances, it is entirely appropriate to give collateral estoppel effect to all of the factual determinations which were necessary and critical to the arbitration panel’s ultimate award.

Greenblatt, 763 F.2d at 1361.

5. Section 7 of the Federal Arbitration Act (“FAA,” 9 U.S.C. 1, *et seq.*), for example, has been interpreted by some courts to disallow the arbitration panel from issuing subpoenas to non-parties to produce documents or fact witnesses in advance of the hearing. See *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004). Moreover, the territorial limits set forth in Rule 45 of the Federal Rules of Civil Procedure limit the subpoena power of the arbitrators. See *Dynegy Midstream Services, LP v. Trammochem*, 451 F.3d 89 (2d Cir. 2006).

6. While collateral estoppel may apply to a prior arbitration award, it is still necessary for the court to examine whether the same issues were decided: “[I]f the basis of an [arbitrator’s] decision is unclear, and it is thus uncertain whether an issue was actually and necessarily decided in [the arbitration proceeding], then relitigation of the issue is not precluded under [the] doctrine of collateral estoppel.” *Hogue v. Hopper*, 728 A.2d 611, 615 (D.C. 1999) (quoting *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992)). Moreover, if the burden of proof in the prior arbitration was higher or lower than the burden in the later litigation, the court in the later action may refuse to give the prior arbitration award collateral estoppel effect. See *Cobb v. Pozzi*, 363 F.3d 89, 113-15 (2d Cir. 2003); see also *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 531-32 (9th Cir. 1987) (noting that the plaintiff faced a stiffer, clear-and-convincing-evidence standard in the initial fraud action but only a preponderance-of-the-evidence standard in the subsequent RICO case, the court held that the plaintiff should not have been foreclosed from litigating its RICO claim). In addition, cases involving certain federal civil rights may not be subject to issue preclusion by virtue of a prior arbitration award. See, e.g., *McDonald v. West Branch*, 466 U.S. 284, 290 (1984) (holding that collateral estoppel effects of collective-bargaining arbitration could not bar a subsequent civil rights action under 42 U.S.C. § 1983 because of the important federal nature of the civil rights involved).
7. The *Parklane Hosiery* Court also found the petitioners’ Seventh Amendment argument to be unavailing: “A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. In either case, the party against whom estoppel is asserted has litigated questions of fact, and has had the facts determined against him in an earlier proceeding. In either case there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action.” *Parklane Hosiery*, 439 U.S. at 335-36 (citation omitted); see also *Benjamin v. Traffic Executive Assoc. Eastern Railroads*, 869 F.2d 107, 114-16 (2d Cir. 1989).
8. See also *Tolley v. American Transit Ins. Co.*, 638 F. Supp. 1191, 1201 (S.D.N.Y. 1986) (“[b]ecause

defendant was privy to the judgment entered after a jury trial in *Tolley I*, it is precluded from relitigating in this action any issues conclusively determined there.”); *Koch v. Consolidated Edison Co.*, 62 N.Y.2d 548, 558 (1984) (“we conclude that the prior determination in *Food Pageant* with respect to Con Edison’s liability for gross negligence in connection with the 1977 blackout is binding and conclusive on Con Edison in this action.”); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. a (1982) (“[a] judgment for the plaintiff in the first action may have the effect of enabling him to recover in the second action without proving his claim, provided that the controlling issues were litigated and determined in the prior action”); *Nachum v. Ezagui*, Index No. 996/07, slip op. (N.Y. Sup. Ct., Kings County Sep. 21, 2009) (granting summary judgment in favor of plaintiff based upon Jewish Beth Din arbitration ruling adverse to defendant). *But see Gatson v. American Transit Ins. Co.*, 11 N.Y.3d 866 (2008) (denying plaintiff’s request to apply collateral estoppel against insurer on issue of coverage based upon two prior default judgments against insurer in separate actions arising out of same occurrence because insurer submitted third judgment in its favor on same issue — in light of the conflicting judgments on the same issue, the application of the doctrine of collateral estoppel was not warranted) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 29[4]).

9. *See Jack Faucett Associates, Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984) (“Where offensive collateral estoppel is involved, the element of ‘fairness’ gains special importance . . . this notion of fairness reflects the equitable nature of issue preclusion.”); *see also Nations v. Sun Oil Co. (Delaware)*, 705 F.2d 742, 744-45 (5th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983) (“Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it Its application is controlled by the principles of equity Fairness to both parties must be considered when it is applied.”).
10. *See Comedy Club, Inc. v. Improv W. Assocs.*, 514 F.3d 833, 844 (9th Cir. 2008) (“generally arbitration clauses and contracts do not bind non-parties in the absence of such extraordinary relationships.”); *see also Vandenberg v. Superior Court*, 21 Cal. 4th 815, 833 (Cal. 1999).
11. *See Thomas A. Greene & Co., Inc., supra; Rodgers Builders, Inc. v. McQueen*, 331 S.E.2d 726, 734 (N.C. Ct. App. 1985) (court applying res judicata defensively — owner of corporation may be bound by an arbitration award against corporation for res judicata purposes if he actively participated in the arbitration on the corporation’s behalf).
12. *See Larson v. Speetjens*, No. C 05-3176 SBA, 2006 U.S. Dist. LEXIS 66459, at *30 (N.D. Cal. Sep. 5, 2006) (“Due process considerations require that the party to be estopped: (1) must have had an identity or community of interest with, and adequate representation by, the losing party in the first action, and (2) should reasonably have expected to be bound by the prior adjudication.”) (citing *Jones v. Bates*, 127 F.3d 839, 848 (9th Cir. 1997)); *see also Pompano-Windy City Partners, Ltd. v. Bear, Sterns & Co., Inc.*, Nos. 87 Civ. 7560 (PKL), 88 Civ. 7159 (PKL), 1993 U.S. Dist. LEXIS 1649, at *21-22 (S.D.N.Y. Feb. 17, 1993) (holding in a defensive collateral estoppel case that the individual defendants, who were employees of Bear Sterns, could receive the benefits of a prior arbitration between plaintiff and Bear Sterns where Bear Sterns prevailed, because Bear Sterns had represented the individuals’ interests in the arbitration proceeding, never sought to distance itself from the individuals’ actions during the arbitration, and both Bear Sterns and the individuals were represented by the same counsel — “[u]nder these circumstances, the individual defendants must be Bear Sterns’ privies with respect to the arbitration proceedings.”).
13. *See Town of Stratford v. Int’l Assoc. of Firefighters, AFL-CIO, Local 998*, 728 A.2d 1063, 1073 (Conn. 1999) (“Although an arbitrator may find well reasoned prior awards to be compelling influence on his or her decision-making process, the arbitrator need not give such awards preclusive effect. Rather, the arbitrator should bring his or her own independent judgment to bear on the issue to be decided, using prior awards as the arbitrator sees fit, as it is the arbitrator’s judgment for which the parties had bargained.”). ■

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1018 West Ninth Avenue, 3rd Floor, King of Prussia Pa 19406, USA
Telephone: (610) 768-7800 1-800-MEALEYS (1-800-632-5397)
Fax: (610) 962-4991
Email: mealeyinfo@lexisnexis.com Web site: <http://www.lexisnexis.com/mealeys>
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