PERSPECTIVE • Dec. 03, 2009

Preclusion Rules Causes Conflict

By Benjamin Shatz and Lara Krieger

Assume that a California Superior Court relies on two different and independent reasons to reach a judgment. Then, the Court of Appeal affirms the judgment based on one of these reasons, but never bothers to mention the alternative ground. Can the ground that was ignored on appeal still have preclusive effect? Surprisingly, the answer probably depends on whether the preclusion question arises in state or federal court - even though California substantive preclusion rules are supposed to govern this issue regardless of the forum.

Preclusion rules are substantive, so this is not an instance where there is a difference in procedural law between the state and federal courts. Instead, the same set of California preclusion rules governs both in the state and federal courts. *Engquist v. Oregon Dep't of Agriculture,* 478 F.3d 985, 1007 (9th Cir. 2007) So there shouldn't be conflicting results between the state and federal courts, right? Wrong.

Three California Court of Appeal decisions squarely on point hold that if the reviewing court affirms on only one ground of the many relied on by the trial court, only that single ground has preclusive effect.

First, in *Butcher v. Truck Insurance Exchange*, 77 Cal. App. 4th 1442, 1455-56 (2000), Division Four of the 2nd District Court of Appeal surveyed the issue nationwide, and found that there are two schools of thought. One line of cases gives preclusive effect only to the rationale adopted by the appellate court (the "modern" view), and the other gives preclusive effect to all the grounds relied on by the trial court regardless of whether the appellate court relied on those grounds (the "traditional" view). After extensively analyzing California precedent following the traditional view, *Butcher* reasoned that the traditional view "has not withstood the test of time, and it would be unwise to follow a rule that looks only to the judgments, without taking account of the reasons for those judgments as stated in the appellate courts' opinions." *Butcher* therefore held that "if a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established." Second, three years ago, Division Three of the 4th District confronted this same issue and followed *Butcher*. In *Newport Beach Country Club, Inc. v . Founding Members of the Newport Beach Country Club*, 140 Cal. App. 4th 1120, 1130-32 (2006), the Court of Appeal thoroughly reviewed California precedent and the policies underlying both lines of precedent. And like *Butcher*, *Newport* rejected the traditional rule. *Newport* noted that its conclusion is echoed by the Restatement (Second) of Judgments, Section 27, comment "o," which addresses the collateral estoppel (i.e., issue preclusion) effect of an appellate judgment. The Restatement's comment provides that "[if] the appellate court upholds one of [the trial court's] determinations as sufficient and refuses to consider whether or not the other is sufficient and accordingly affirms the judgment, the judgment is conclusive as to the first determination."

Third, just last year in *Zevnik v. Superior Court*, 159 Cal.App.4th 76, 79 (2008), the issue arose again. Division Three of the 2nd District agreed with *Newport* and *Butcher*, holding that "if a trial court relies on alternative grounds to support its decision and an appellate court affirms the decision based on fewer than all of those grounds, only the grounds relied on by the appellate court can establish collateral estoppel."

Thus, it would seem that California law is settled in favor of the modern view: *Zevnick*, *Butcher*, and *Newport* are recent and thoughtfully reasoned Court of Appeal opinions, and their holdings are bolstered by the Restatement. Yet, the 9th Circuit Court of Appeals, which should be applying California substantive law on the issue, has reached precisely the opposite result.

In *DiRuzza v. County of Tehama*, 323 F.3d 1147, 1156 (9th Cir. 2003), the court held that a California appellate judgment is conclusive as to all grounds relied on by the trial court, even those not considered by the reviewing court. *DiRuzza* acknowledged *Butcher* and its adoption of the modern view. But *DiRuzza* didn't stop at Butcher and dug deep into the recesses of California law to find a 1865 California Supreme Court opinion adopting the traditional view: *People v. Skidmore*, 27 Cal. 287 (1865). *DiRuzza* reasoned that this California Supreme Court opinion trumps any contrary Court of Appeal decision - including *Butcher*. *DiRuzza* also relied on an earlier 9th Circuit opinion that had concluded that the "California position" "'is that even if the appellate court refrains from considering one of the grounds upon which the decision below rests, an affirmance of the decision below extends legal effects to the whole of the lower court's determination, with attendant collateral estoppel effect.'" (quoting *Markoff v. New York Life Ins. Co.*, 430 F.2d 841, 842 (9th Cir. 1976)).

In *Newport*, the California Court of Appeal recognized *DiRuzza's* concern that the California Supreme Court has never overruled its 1865 precedent - but *Newport* refused to slavishly adhere to stare decisis principles, and instead concluded that the "'authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it.'" (quoting *Sei Fujii v. State of California*, 38 Cal. 2d 718, 729 (1952)). *Newport* concluded that "[w]e believe the California Supreme Court, if faced with the issue today, would adopt the modern rule expressed in comment o to the Restatement Second." In support of its conclusion, *Newport* first noted that the California Supreme Court has already approved the Restatement (Second) of Judgments Section 27 and its comments, and next reasoned that the traditional rule violates this State Constitution's requirement that courts "set forth decisions in writing 'with reasons stated.'"

But, what *Newport* arguably did was ignore the Supreme Court precedent of *Skidmore* in derogation of stare decisis. Supreme Court opinions, if not qualified or disapproved, are supposed to be binding on all inferior courts, regardless of how old they are. *Lawrence Tractor Co. v. Carlisle Ins. Co.*, 202 Cal. App. 3d 949, 954 (1988); *Mehr v. Superior Court*, 139 Cal. App. 3d 1044, 1049 n.3 (1983); *see also Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353-54 (2007)

At least one California court has noticed the conflict between *DiRuzza* and *Butcher* - but refused to take a position. *Pitts v. City of Sacramento*, 138 Cal. App. 4th 853, 858 n.7 (2006) (3rd District notes, but does not reach, the issue). And the 2008 *Zevnik* decision avoided contradicting *Skidmore* by narrowly construing the hoary Supreme Court precedent to apply only to res judicata (claim preclusion) rather than collateral estoppel (issue preclusion).

The conflict between the *DiRuzza* analysis on the one hand, and the *Butcher/Newport* analysis on the other, creates an anomaly: A federal district judge, bound by 9th Circuit precedent, must follow *DiRuzza's* construction of California law and apply the traditional rule. But a California Superior Court judge facing the exact same preclusion question would most likely follow *Butcher, Newport,* and *Zevnik* - the most recent Court of Appeal decisions on point. Of course, a Superior Court judge (especially those sitting outside of the 2nd District and Orange County) could adopt *DiRuzza's* reasoning that the old Supreme Court precedent governs and therefore follow the traditional view. That, however, is unlikely. Most trial judges are more inclined to follow the most recent pronouncements adopting the modern view. And, those judges sitting in the 2nd District and Orange County probably would not want to pick a fight with their local Court of Appeal. That's not to say that a zealous advocate couldn't (or shouldn't) argue that the traditional view is the right view. Indeed, the *DiRuzza* court noted that it would apply *Skidmore* until it received "definitive indication" that *Skidmore* "no longer represents the law of California." Arguably, *Newport* and *Zevnick* supply that "indication," although the contrary argument would be that only the California Supreme Court can resolve the conflict. Thus, practitioners who find themselves on the losing side of the issue would have solid grounds to pursue a petition for review to the California Supreme Court.

Benjamin G. Shatz is a certified specialist in appellate law in the Appellate Practice Group of Manatt, Phelps & Phillips in Los Angeles. He is currently the Chair of the Los Angeles County Bar Appellate Courts Committee. **Lara M. Krieger** is an associate at Greines, Martin, Stein & Richland in Los Angeles.

****