Focus

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The Practitioner Appellate Law

Red Cow

Sister-State Decision May Have Collateral-Estoppel Effect

By James C. Martin and Benjamin G. Shatz

The Holy Grail of legal research is the "red cow" — a case that is directly on point, is factually on all fours and reaches exactly the "right" result. *Corn v City of Lauderdale Lakes*, 997 F2d 1369 (11th Cir. 1993). The quest for a red cow is especially important when engaging in research for an appeal. Appellate legal research should start from scratch, view the issues anew and search for the best authorities given the applicable standard of review. The depth necessary for such analysis often leads practitioners to explore precedent from other states.

Appellate courts typically regard analogous sister-state authority as falling into the "nice to know" category of persuasive precedent. But such opinions can have a far more significant effect when addressing issues of first impression under California law. E.g., *Aydin Corp. v First State Ins. Co.*, 18 Cal.4th 1183 (1998) (looking to sister-states in absence of California authority); *Union Safe Deposit Bank v Floyd*, 76 Cal.App.4th 25 (1999) (sister-state opinions "instructive" for question of first impression).

Indeed, finding exactly the right case could be determinative as a matter of collateral estoppel. In such a scenario, a prior opinion could have a preclusive effect if the legal issue is identical, was actually litigated, was necessarily decided, was final and was on the merits; and, there was privity between the parties in the first and second case. *Lucido v Superior Court*, 51 Cal.3d 335 (1990).

Imagine then, researching for an appeal and finding the ruddiest of red cows: not only do the facts and legal issues of the case mirror your case in the key essentials, but the parties are exactly the same as well. But now imagine a fly in the ointment: The red cow is an opinion from another state.

Does this defeat its preclusive effect? To be sure, collateral estoppel generally involves the effect of a judgment in the courts of the state where it was rendered. But shouldn't the doctrine apply with equal force when the second action is brought in the courts of a different state?

This hypothetical is not as far-fetched as it might appear. In today's marketplace of nationwide commerce, companies litigate recurring issues in multiple states, often against the same competitors. Identical insurance-policy or other contract language is used nationwide, and there are ever-increasing instances of nationwide tort and fraud claims. It should not be surprising, then, that businesses with coast-to-coast operations will encounter the same opponents in similar or identical litigation in several states.

Such a situation arose recently in *American Continental Insurance Co. v American Casualty Co.*, 86 Cal.App.4th 929 (2001), with arguably surprising results. The Court of Appeal held that collateral estoppel would not prevent American Casualty from relying on a legal theory of defense previously rejected by the Arizona Court of Appeals in a published opinion in an identical case brought by American Continental against American Casualty.

In *American Continental*, the mother of a baby born with neurological damage brought a medical-malpractice action against the hospital and her treating physicians. An attending nurse admitted in deposition that she had failed to recognize the signs of fetal distress displayed on monitoring equipment and had failed to call the treating physician during the critical hours before delivery. The complaint, however, never named the nurse as a defendant, but simply alleged professional negligence by the hospital and its employees.

The hospital and its employees were insured by American Continental, which undertook the defense. The nurse also had her own professional-liability policy with American Casualty. When American Continental discovered that the nurse had her own insurance, it demanded that her insurer, American Casualty, also participate in the defense. American Casualty refused, explaining that because the nurse was not a named defendant in the lawsuit, it had no duty to defend.

After American Continental negotiated a settlement in the malpractice action on behalf of the hospital and its employees (including the nurse), American Continental sued American Casualty for equitable contribution. American Casualty successfully demurred on the ground that it never had an obligation to provide coverage because its insured had never been named in the underlying lawsuit. When the trial court sustained the demurrer without leave to amend, American Continental appealed.

American Continental argued that American Casualty was "on the risk" for any claim arising from the nurse's alleged negligence, and because the hospital's liability arose in part from the nurse's alleged negligence, American Casualty should pay a share of the settlement. American Continental also contended that it previously — and successfully — had litigated this same legal issue with American Casualty in another, essentially identical, case in Arizona. *American Continental Ins. Co. v American Cas. Co.*, 903 P.2d 609 (Ariz. App. 1995).

James C. Martin of the Los Angeles office of Crosby, Heafey, Roach & May is a member of the firm's appellate department and of the American and California Academies of Appellate Lawyers. **Benjamin G. Shatz** is a senior attorney in the firm's appellate department in Los Angeles.

The Arizona case had identical facts: American Continental insured a hospital and its employees; American Casualty insured a nurse; and a malpractice case was filed against the hospital and attending physician but did not name the nurse as a defendant. When American Continental settled the underlying action and sued American Casualty for equitable contribution, the Arizona court ruled that American Casualty was liable because a mutual insured was negligent.

American Continental argued that the Arizona opinion collaterally estopped American Casualty from denying liability for equitable contribution. American Casualty responded that the Arizona case had no preclusive effect because it was based on Arizona law, and to the extent it purported to rely on California law, it was wrongly decided.

The California Court of Appeal agreed with American Casualty. First, it ruled that as a matter of California law, equitable contribution by one insurer against another requires that the second insurer have a legal obligation to provide coverage to a mutual insured for the same risk. Here, because no claim was made against the nurse, coverage under her policy was never triggered. As a result, American Casualty had no obligation to contribute to American Continental's settlement of the underlying malpractice case.

Second, with respect to collateral estoppel, the court concluded that the Arizona opinion "is of no use to ACIC." The court reasoned that the "same issue" element was lacking because the Arizona court reached its decision under Arizona law, which was inconsistent with California law.

As the court explained: "Certainly the doctrine of collateral estoppel cannot be utilized to bind a California litigant to a principle of law adopted in the prior foreign court litigation which is contrary to the law of California; nor can it be utilized to preclude a party from litigating a novel issue of law in California, merely because that party had failed to persuade the courts of another state on the legal wisdom of its position."

American Continental also argued, however, that the Arizona opinion relied on California law in reaching its result and, therefore, should be given greater credence. But the *American Continental* court easily distinguished the cited California case (it was a first-party, not third-party insurance claim) and also noted for good measure that "[t]o the extent [it relied on California law], the Arizona court wrongly applied California law." Thus, the "same issue" element still was not established.

The *American Continental* court further reasoned that collateral estoppel was inapplicable as a matter of policy. Because collateral estoppel is a judge-made, equitable doctrine, a court need not apply it — even if the elements are met — if the underlying policies are not served. Those policies are to preserve the integrity of the judicial system, promote judicial economy and protect litigants from harassment.

The court reasoned that none of those goals would be served by precluding American Casualty from asserting its defense. To the contrary, California courts should have the ability to address questions of first impression under California law, and determining the issue here would not degrade public confidence in the judicial system, which is otherwise threatened when two courts in the same state render inconsistent decisions. Therefore, because the issue was novel — at least in California — its resolution would not be a waste of resources and its assertion would not engender baseless or harassing litigation.

But what would have happened if the Arizona court had expressly based its analysis on California law? Arguably, this would satisfy the "same issue" element and would mean that without collateral estoppel, wasteful relitigation would occur. On the other hand, perhaps collateral estoppel still should not apply because a California court should have the opportunity to correct a sister state's misapplication of California law.

American Continental teaches that when practitioners find a sister-state decision that is on point, down to the very parties, they should look carefully at the legal analysis in the opinion. A collateral-estoppel proponent should argue that the case is premised on correctly decided California law or is consistent with California law, such that the elements and policies of preclusion are satisfied.

On the other hand, collateral-estoppel opponents should argue that the foreign opinion is grounded on sister-state law and that the analysis would not be the same under California law. The goal would be to negate the "same issue" element and urge instead that the legal issue presents a novel question of California law that should be resolved independently by a California court.

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