



CLASS ACTION LITIGATION



REPORT

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The U.S. Supreme Court in *Taylor v. Sturgell*, rejected the use of “virtual representation” to preclude relitigation of a previously decided issue, write Jones Day attorneys Gary W. Nugent and Sarah Conway in this Analysis & Perspective. The authors advise defendants to tailor their preclusion arguments against certification to avoid the pitfalls raised by *Taylor* and state court analogues.

Did the Supreme Court Just Make an Issue Preclusion Claim More Difficult?

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One of the consistent issues presented in class action litigation is successive case filings by plaintiffs seeking class treatment for the same or similar classes and claims after a court has ruled in a prior case that class treatment for the purported class or issues is not appropriate. To try to overcome prior adverse rulings on class treatment, plaintiffs’ lawyers often attempt to redefine the class or issues to be adjudicated, but in some instances the lawyers do little more than change the named plaintiff and alter some causes of action in the later suit. Courts have routinely applied issue preclusion, often referred to as “collateral estoppel,” to dismiss repetitive suits that do not present new

issues or controversies.¹ While issue preclusion generally applies only to parties to a previous action, some courts have developed a theory of “virtual representation” as an exception to the rule against nonparty preclusion.²

In essence, “virtual representation” means that plaintiffs in an earlier case can be found to be “virtual representatives” of plaintiffs in a later-filed suit when the issues and interests adjudicated are the same, thus barring the later plaintiffs’ claims. By increasingly

¹ The term “issue preclusion” is increasingly replacing use of the term “collateral estoppel,” although the two terms are functionally equivalent. Issue preclusion bars the “successive litigation of an issue of fact or law actually decided and resolved in a prior court determination essential to the prior judgment.” *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008).

² See *Taylor v. Blakely*, 490 F.3d 965 (D.C. Cir. 2007); *Alvarez v. May Dept. Stores Co.*, 143 Cal. App. 4th 1223 (Cal. Ct. App. 2006); *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005); *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999); *Klugh v. United States*, 818 F.2d 294 (4th Cir. 1987); *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978).

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broadening the standards for what can constitute “virtual representation,” courts in recent years have been applying issue preclusion in an ever-widening range of cases to ban subsequent lawsuits by similarly situated parties.

Recently, however, in *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008), the Supreme Court rejected the use of “virtual representation” for purposes of issue preclusion. Although the *Taylor* decision explicitly applies to the federal courts, at least one state court in California has suggested that *Taylor* may limit how the theories of “virtual representation” and issue preclusion are applied to successive plaintiffs’ claims in the state-court class action context.³ At a minimum, *Taylor* eliminates the expansion and use of “virtual representation” in federal cases. In addition, defendants who assert issue preclusion as a defense to repetitive class claims may see wider citation to *Taylor* by plaintiffs’ attorneys in both state and federal courts, arguing that *Taylor* precludes or narrows application of issue preclusion to dispose of a later-filed claim. To avoid these concerns, defendants in state courts may wish to position issue preclusion arguments as consistent with any applicable state law on “virtual representation,” as well as the Supreme Court’s analysis of “adequate representation” in *Taylor*.

‘Virtual Representation’ in Class Certification Proceedings Prior to *Taylor*

Traditionally, courts have used issue preclusion principles in the class action context to prevent duplicative class action filings where class issues and members are the same.⁴ Courts fear that without issue preclusion, “every motion denying class certification could be relitigated until the desired result [is] reached. The losing class plaintiff could merely insert the name of a different individual to be the potential class representative.”⁵ Generally, to apply issue preclusion, five elements must be met: 1) the issue must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated in the prior proceeding; 3) the issue must have been necessarily decided in the prior proceeding; 4) the decision must have been final and on the merits; and 5) preclusion must be sought against a person who either a) was a party to the prior proceeding or b) had a

substantive legal relationship⁶ with a party to the prior proceeding.⁷ Meeting the last element can be problematic for defendants in class action proceedings, however, because with each refiling of the class action, plaintiffs’ attorneys will name as plaintiff a new person who was not a party to the first certification proceeding.⁸

Many courts find the fifth element met based upon a finding of the prior class representatives’ “virtual representation” of the subsequent named plaintiff.⁹ “Virtual representation” requires different elements in different jurisdictions. The D.C. Circuit, for example, uses a five-factor test,¹⁰ while the California state courts merely determine whether “the party in the earlier case [had] interests sufficiently similar to the party in the later case, so that the first party may be deemed the ‘virtual representative’ of the second party.”¹¹

In *Alvarez v. May Department Stores Co.*, decided prior to the *Taylor* case, the California Court of Appeal applied issue preclusion to plaintiffs relitigating class certification by finding that the current plaintiffs had been “virtually represented” in the prior proceeding because there was sufficient similarity when the past interested parties, claims, and counsel were the same.¹² The *Alvarez* plaintiffs were past and present sales managers employed by the defendant, May Department Stores Company, who alleged that the defendant had

⁶ The *Taylor* decision notes that the “substantive legal relationships” justifying preclusion are sometimes collectively referred to as “privity.” *Taylor*, 128 S. Ct. at 2171. The term “privity,” however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. *Id.* To ward off confusion, the *Taylor* court avoids the term “privity” in its opinion as we do in this article, unless used by a state court in its analysis. See *Goldsworthy*, 2008 Colo. App. LEXIS 1926 at *15-16.

⁷ See *Calpine Const. Fin. Co. v. Arizona Dept. of Rev.*, 2009 Ariz. App. LEXIS 63 (Ariz. Ct. App. 2009); see also *Goldsworthy*, 2008 Colo. App. LEXIS 1926 at *15-16; see also *Alvarez*, 143 Cal. App. 4th 1223.

⁸ See *Alvarez*, 143 Cal. App. 4th 1223.

⁹ See *id.*

¹⁰ “The first two factors—1) ‘identity of interests’ and 2) ‘adequate representation’—are necessary but not sufficient for virtual representation. In addition, at least one of three other factors must be established: 1) ‘a close relationship between the present party and his putative representative,’ 2) ‘substantial participation by the present party in the first case,’ or 3) ‘tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment.’” *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008) (citing *Taylor v. Blakely*, 490 F.3d 965, 971 (D.C. Cir. 2007)).

¹¹ *Alvarez*, 143 Cal. App. 4th at 1236. Other courts use different tests. The Ninth Circuit uses a five-factor test. *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005). The Eighth Circuit uses a seven-factor test that requires an identity of interests, while the Fourth Circuit uses a narrow approach “which treats a party as a virtual representative only if the party is ‘accountable to the nonparties who file a subsequent suit’ and ‘has tacit approval of the court’ to act on the nonpart[ies]’ behalf.” *Taylor*, 128 S. Ct. at 2169. Broader “virtual representation” tests allow issue preclusion when the class, issues, and counsel are the same. *Taylor*, 128 S. Ct. 2161, 2169, 2170 n. 3. For other examples of “virtual representation” tests, see also; *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999); *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978).

¹² *Alvarez*, 143 Cal. App. 4th at 1238.

³ *Johnson v. Glaxosmithkline, Inc.*, 166 Cal. App. 4th 1497, 1511 n. 8 (Cal. Ct. App. 2008).

⁴ See *Olson v. Auto. Club of So. California*, 2009 Cal. App. Unpub. LEXIS 3019, *77 (Cal. Ct. App. 2009); *Goldsworthy v. American Family Mutual Ins. Co.*, 2008 Colo. App. LEXIS 1926, *23 (Colo. Ct. App. 2008); *Alvarez*, 143 Cal. App. 4th 1223; *Frazier v. Richmond*, 184 Cal. App. 3d 1491, 1498, 1499 (Cal. Ct. App. 1986).

⁵ *Alvarez*, 143 Cal. App. 4th at 1240; see also *Goldsworthy*, 2008 Colo. App. LEXIS 1926 at *23 (“we cannot subscribe to the policyholder’s position, because it could lead to the filing of a series of identical class actions in which new named plaintiffs continuously seek class certification despite the fact that certification was denied in prior proceedings”); *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763, 767 (7th Cir. 2003) (“[t]his happens whenever plaintiffs can roll the dice as many times as they please – when nationwide class certification sticks (because it subsumes all other suits) while a non-certification decision has no enduring effect”).

failed to pay overtime compensation.¹³ The trial court sustained without leave to amend the defendant's demurrer to the complaint's class action allegations based on issue preclusion.¹⁴ Based on two previous class certification proceedings brought by a similar class arguing the same issues, the *Alvarez* trial court applied issue preclusion, preventing further litigation on the issue of class certification.¹⁵ The plaintiffs appealed and the Court of Appeal affirmed the trial court.¹⁶

The court determined that although the class representative in *Alvarez* was different than the one in the two prior proceedings, the representative had been "virtually represented" in the prior proceedings because "the interested parties, their claims, and their counsel were the same" and the previous plaintiffs "had a strong motive to assert the same interest as [the named *Alvarez* plaintiff], as each group's goal was identical—each wanted its class certified."¹⁷ Using "virtual representation" to find privity, the California Court of Appeal barred further litigation regarding certification of this class under issue preclusion, noting, "As appellants would have enjoyed the fruits of a favorable outcome, fairness dictates that they should be bound by the effect of the decision against them."¹⁸

Taylor v. Sturgell

In *Taylor v. Sturgell*, the Supreme Court outright rejected "virtual representation" as a legal theory and means to apply issue preclusion to prevent subsequent plaintiffs from bringing the same claims as prior plaintiffs.¹⁹ *Taylor v. Sturgell* arose when two friends successively sued the Federal Aviation Administration (FAA) for information regarding vintage airplanes under the Freedom of Information Act (FOIA).²⁰ Greg Herrick filed the first suit in a U.S. District Court for the District of Wyoming after the FAA invoked the trade-secrets exemption and refused to give him the information he sought under the FOIA.²¹ The district court found in favor of the FAA and the Tenth Circuit affirmed, while noting that Herrick had failed to challenge on appeal two suppositions underlying the district court's opinion.²²

Less than one month later, Brent Taylor, a friend of Herrick who was also an antique aircraft enthusiast, submitted his own FOIA request to the FAA for the same documents.²³ When the FAA failed to respond, Taylor filed suit in a U.S. District Court for the District

of Columbia.²⁴ While making many of the same arguments as Herrick, Taylor also sought to litigate the two suppositions that Herrick had failed to challenge.²⁵ The D.C. district court barred Taylor's suit under claim preclusion, holding that Taylor had been "virtually represented" by Herrick in the first action and granting summary judgment to the FAA.²⁶ The D.C. Circuit affirmed, announcing a five-factor test for determining when a nonparty was "virtually represented" in a prior action.²⁷

The Supreme Court took certiorari and reversed the lower court, rejecting "virtual representation" for purposes of applying issue preclusion to a nonparty.²⁸ First, the Supreme Court noted that "the preclusive effect of a federal-court judgment is determined by federal common law" and that "the federal common law of preclusion is, of course, subject to due process limitations."²⁹ Generally, only those who were parties to a previous proceeding can be bound by issue preclusion. However, in *Taylor* the Court outlined six categories of exceptions to this rule. A court can apply issue preclusion to a nonparty by a prior judgment when: 1) a person "agrees to be bound by the determination of issues in an action between others;" 2) there is "[a] pre-existing 'substantive legal relationship' between the person to be bound and a party to the judgment;"³⁰ 3) "in certain limited circumstances," where the nonparty has been "adequately represented by someone with the same interests who [wa]s a party to the suit," such as class actions; 4) the nonparty "assumed control over the litigation in which that judgment was rendered;" 5) a party bound by the previous judgment seeks to avoid

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 2169.

²⁷ *Id.* at 2169-70.

²⁸ *Id.* at 2178.

²⁹ *Id.* at 2171. There is debate about whether *Taylor* applies to state courts. If the *Taylor* decision is grounded in federal common law, it is merely persuasive to state courts, which can choose to continue to recognize "virtual representation." See *Olson*, 2009 Cal. App. Unpub. LEXIS 3019 at *77 (applying issue preclusion under the theory of "virtual representation" after holding that *Taylor* was based on federal common law and is not binding on the states). If, however, the rejection of "virtual representation" is premised on constitutional grounds, namely due process concerns, then the opinion is binding on state courts and all states must also reject the doctrine. See *Johnson*, 166 Cal. App. 4th at 1511 n. 8. The decision in *Taylor*, however, does not clarify whether its result is based on federal common law or constitutional grounds. While the Court explicitly states that "the preclusive effect of a federal court judgment is determined by federal common law," it qualifies this by saying: "The federal common law of preclusion is, of course, subject to due process limitations." *Taylor*, 128 S. Ct. at 2171. Later in the opinion, the Court notes that one problem with "virtual representation" is that it allows preclusion based on the identity of interests and some kind of relationship between the party and nonparty without procedural protections grounded in due process. *Id.* at 2177. The question becomes: Are these references to due process enough to constitute constitutional interpretation? In the months since *Taylor* was decided, state courts have demonstrated that they do not agree upon the answer to this question. See *Olson*, 2009 Cal. App. Unpub. LEXIS 3019; see also *Johnson*, 166 Cal. App. 4th at 1511 n. 8.

³⁰ This category includes preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. *Taylor* at 2172.

¹³ *Id.* at 1228.

¹⁴ *Id.*

¹⁵ *Id.* at 1228.

¹⁶ *Id.*

¹⁷ *Id.* at 1237-38.

¹⁸ *Id.* at 1238.

¹⁹ *Taylor*, 128 S. Ct. at 2178.

²⁰ *Id.* at 2168.

²¹ *Id.* at 2167-68.

²² *Id.* at 2168 ("the Tenth Circuit noted that Herrick had failed to challenge two suppositions underlying the District Court's decision. First, the District Court assumed trade-secret status could be 'restored' to documents that had lost protection. . .[s]econd, the District Court also assumed that [the FAA] had regained trade-secret status for the documents even though the company claimed that status only 'after Herrick had initiated his request' for the F-45 records").

²³ *Id.*

its preclusive force by relitigating through a proxy; and 6) there is a special statutory scheme expressly foreclosing successive litigation, if the scheme is consistent with due process.³¹ The Court emphasized that these six categories were the only acceptable exceptions to the rule against nonparty preclusion.³²

The Supreme Court stated that it would recognize “virtual representation” as an exception to the rule against nonparty preclusion only if it fell within the third allowable category of nonparty exclusion (adequate representation), but ultimately it concluded that “virtual representation” went beyond the recognized exception and rejected the theory entirely.³³ The *Taylor* Court held that a party’s representation of a nonparty is adequate only if: 1) “the interests of the party and her representative are aligned,” and 2) “either the party understood herself to be acting in a representative capacity or the court took care to protect the interests of the nonparty.”³⁴ Additionally, the Court stated that in some circumstances, adequate representation also requires “notice of the original suit to the persons alleged to have been represented.”³⁵ *Taylor* noted that decisions from lower courts regarding what constituted “virtual representation” had been far from consistent:

[s]ome [courts] use the label, but define “virtual representation” so that it is no broader than the recognized exception for adequate representation . . . but other courts, including the Eighth, Ninth, and D.C. Circuits, apply multifactor tests for virtual representation that permit nonparty preclusion in cases that do not fit within any of the established exceptions.

Therefore, while some courts were correctly applying the “adequate representation” exception to the nonparty preclusion rule but calling it “virtual representation,” the doctrine as applied by the D.C. Circuit and other courts was too expansive, often allowing issue preclusion to be applied to non-parties who could not fit into the “adequate representation” exception.³⁶ Because “[a]n expansive doctrine of ‘virtual representation’ would ‘recogniz[e], in effect, a common-law kind of class action . . . [and] authorize preclusion based on an identity of interest and some kind of relationship between parties and nonparties, shorn of . . . [due process] protections,” the Supreme Court rejected the entire doctrine of “virtual representation.”³⁷

³¹ *Id.* at 2171-72.

³² *Id.* at 2178 (“the preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion described in this opinion”).

³³ *Id.* at 2173.

³⁴ *Id.* at 2176.

³⁵ *Id.*

³⁶ *Id.* at 2176.

³⁷ *Id.* (quoting *Tice v. American Airlines, Inc.*, 162 F.3d 966, 972-73 (7th Cir. 1998)). The Supreme Court noted, however, that “although references to ‘virtual representation’ have proliferated in the lower courts, our decision is unlikely to occasion any great shift in actual practice [because] [m]any opinions use the term . . . in reaching results at least arguably defensible on established grounds.” *Id.* at 2178.

Issue Preclusion in Class Certification Post-Taylor

Although *Taylor* is not a class action case, it may have implications in class action proceedings. Plaintiffs may increasingly argue that *Taylor* limits the application of issue preclusion to bar subsequent class action lawsuits, particularly if class denial was based on the adequacy of the named plaintiffs. At least one court, Division Seven of the Second Appellate District of the California Court of Appeal, has indicated that this may be the case.

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In *Johnson v. GlaxoSmithKline, Inc.*, a case involving issue preclusion in the context of a class certification, the Court of Appeal discussed the effect of *Taylor*:

Literally (and narrowly) read . . . [*Taylor*] would appear to preclude the use of issue preclusion to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit – at least to the extent *Taylor* is understood as resting on due process considerations, and not simply federal common law.³⁸

Johnson suggests that *Taylor* affects state issue preclusion rules, but the court did not definitively decide the issue.³⁹ Notably, this same court allowed issue preclusion in a subsequent class certification case on the basis of “virtual representation” in an unpublished decision, *Daboub v. Bell Gardens Bicycle Club, Inc.*,⁴⁰ less than one month after *Johnson*. The concurrence to the *Daboub* opinion, however, continues to highlight the court’s concern about the proper application of issue preclusion after *Taylor*:

I have serious reservations about the propriety of applying the doctrine of issue preclusion to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit, at least when the basis for the earlier determination was that the named representatives could not adequately represent the putative class.⁴¹

Other courts do not appear to share the California court’s reservations, however.⁴² For example, in *Goldsworthy v. American Family Mutual Ins. Co.*, a Colorado case decided after *Taylor*, the court precluded class certification by finding that the past and present

³⁸ *Johnson*, 166 Cal. App. 4th at 1511, n. 8.

³⁹ The court refused to allow the subsequent class certification proceedings to be estopped; however, it did so because it found that the party and nonparty did not have the requisite identity of issues. *Id.* at 1512-13.

⁴⁰ *Daboub v. Bell Gardens Bicycle Club, Inc.*, 2008 Cal. App. Unpub. LEXIS 9025 (Cal. At. App. 2008).

⁴¹ *Id.* at *24 (Perluss, P.J., concurring).

⁴² See *Olson*, 2009 Cal. App. Unpub. LEXIS 3019; see also *Goldsworthy*, 2008 Colo. App. LEXIS 1926 at *15-16.

plaintiffs were in privity due to the previous party's "virtual representation" of the nonparty.⁴³ In its analysis, the court cited *Taylor* for statements of general principle regarding issue preclusion.⁴⁴ The court did not, however, discuss *Taylor*'s rejection of "virtual representation" and found, without comment about *Taylor*, that issue preclusion was proper.⁴⁵ The *Goldsworthy* court's citation to *Taylor*, while issuing a holding based upon the State of Colorado's theory of "virtual representation," suggests that it did not view *Taylor*'s rejection of "virtual representation" as applicable or binding on state courts, or that Colorado's theory of "virtual representation" was consistent with the "adequate representation" analysis discussed in *Taylor*.

⁴³ *Goldsworthy*, 2008 Colo. App. LEXIS 1926 at *15-16.

⁴⁴ *Id.* at *18 ("As a general rule, 'a litigant is not bound by a judgment to which she is not a party.'" (citing *Taylor*, 128 S. Ct. at 2175)).

⁴⁵ *Id.* at *21-22.

Conclusion

Taylor requires courts applying federal law to cease using a "virtual representation" analysis to assess nonparty claim preclusion, at least to the extent that analysis goes beyond the "adequate representation" framework set forth in *Taylor*. Whether *Taylor* applies to state-court theories of "virtual representation" will depend on whether *Taylor* is held to be based solely upon federal common-law grounds, or whether due process protections are implicated, which would require state courts' adherence to the *Taylor* decision. In either case, it is likely that plaintiffs will increasingly argue that *Taylor* limits the scope and tightens the standards for an "adequate representation" analysis in cases where nonparty issue preclusion is sought. Thus, when asserting issue preclusion as a defense to successive class certification claims, defendants should consider, to the extent possible, framing their arguments to fall within the Supreme Court's "adequate representation" analysis, whether calling it "virtual representation" or not, and not stray into the broader theories of "virtual representation" disapproved by the Supreme Court.