Claim and Issue Preclusion Arising from Residential Construction and Other Arbitrations—Part 1

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This two-part article examines when claim and issue preclusion may arise from residential construction and other arbitration proceedings. Part 1 focuses on general issue and claim preclusion principles and their application to arbitration rulings and awards.

Arbitration rulings and awards, and judgments confirming arbitration awards, may result in claim and issue preclusion in later arbitration or court proceedings. This two-part article discusses when claim and issue preclusion may arise from arbitration proceedings. It describes the factors courts consider in determining the preclusive effects of arbitration awards. It also discusses how preclusion principles apply to an arbitrator's purely legal rulings.[1] And it analyzes how preclusion principles may apply to entities who are related to the parties to an earlier arbitration, and the practical and legal effects of arbitration confidentiality provisions. Finally, the article briefly explores whether an arbitration agreement can effectively provide that some or all arbitration rulings may not be used for preclusion purposes later. Because the authors regularly handle residential construction defect arbitrations, this article examines preclusion mainly within this framework, but the underlying principles apply to all arbitrations.

The Role of Preclusion

Claim and issue preclusion aim to avoid unnecessary and duplicative litigation.[2] The doctrines help ensure that orders and judgments of different tribunals are binding and consistent, and economize legal proceedings by making certain determinations in one proceeding binding on later proceedings involving the same claims or issues. But do these preclusion principles apply equally to arbitration rulings and awards, and to court judgments confirming arbitration awards? Many argue they do or should, based on arbitration's reputation as faster, cheaper, and as fair as litigation.[3]

Consider a homeowner suing her homebuilder for defectively installed window and skylight flashings resulting in widespread moisture intrusion and resulting damage. The matter is arbitrated and, in a lengthy written ruling, the arbitrator denies the builder's pre-hearing motion for summary judgment on the narrow legal question whether Colorado's Construction Defect Reform Act's damages limitations, CRS § 13-20-802.5(2), bar the homeowner's claim for water damage to her personal property.

After the arbitration hearing, the arbitrator issues an award that includes personal property repair and restoration cost damages caused by the defective flashing. The arbitrator also finds that the builder violated both CRS § 13-20-806(7)(a) of the Homeowner Protection Act and CRS § 6-1-105(r) of the Colorado Consumer Protection Act by including a liability disclaimer for personal property damage in its standard form purchase contract, misleading the homeowners into believing they could not recover such a loss from the builder. Because the builder immediately pays the award in full, a district court never formally confirms the award.

Several months later, a different homeowner sues the same builder for the same kind of defective flashing installation. The builder moves for summary judgment on that homeowner's personal property damage claim on identical grounds as in the earlier case. The second homeowner seeks summary judgment on his defective flashing claim. Is the earlier arbitration ruling and unconfirmed award binding on the builder?

> "Invoked defensively, a defendant seeks to preclude a plaintiff from relitigating a claim or issue for which the plaintiff previously litigated and lost against a *different defendant*. Used offensively, a plaintiff seeks to preclude a defendant from defending against a claim or issue the defendant previously litigated and lost against a *different plaintiff*."

Nuts and Bolts

Claim and issue preclusion are affirmative defenses that may be waived if not timely invoked.[4] The burden of establishing the elements of preclusion rests with the party seeking preclusion.[5]

Claim preclusion, historically called "res judicata," prevents relitigation of the same claim or cause of action.[6] The doctrine avoids repetitive lawsuits and arbitrations, conserves judicial resources, and encourages reliance on adjudication by preventing inconsistent decisions.[7] Claim preclusion generally bars a claim in a current proceeding if (1) the judgment in the earlier proceeding was final; (2) the earlier and current proceedings involved the same subject matter (i.e., the same evidence would sustain both claims); (3) the earlier and current proceedings involved the same claims for relief; and (4) the parties to both proceedings were the same or in privity with one another.[8] The last element is often called the mutuality requirement.[9]

While some earlier Colorado cases eliminated the mutuality requirement when a defendant sought to preclude a plaintiff from relitigating a claim,[10] in 2017 the Colorado Supreme Court clarified that mutuality generally is required to establish claim preclusion.[11] The Court also indicated that it might permit non-mutual claim preclusion asserted by a defendant where (1) indemnity relationships are involved; (2) the defendant in the later action can show that he should have been included as a party in the first action, and the plaintiff cannot establish a good reason for not having included the defendant; or (3) vicarious liability is implicated, such as with employee-employer, principal-agent, or indemnitor-indemnitee relationships.[12]

In contrast, issue preclusion, historically called "collateral estoppel," prevents relitigation of particular issues rather than claims. Generally, after a specific issue is finally determined in one proceeding, parties to that proceeding cannot relitigate the issue again in a second proceeding, even if the claims in the two proceedings are different.[13] Issue preclusion is broader than claim preclusion in that it applies to claims different from those litigated in the first action, but narrower in that it applies only to issues actually litigated.[14] Issue preclusion generally applies if

1. the earlier proceeding was a final judgment on the merits,
2. the issue in the current proceeding is the same as that actually adjudicated in the earlier proceeding,
3. the party resisting issue preclusion had a full and fair opportunity in the earlier proceeding to litigate the issue, and
4. the party against whom issue preclusion is asserted was a party or in privity with a party to the earlier proceeding.[15]

The third elements necessary to apply claim and issue preclusion differ in that the focus in the claim preclusion analysis is on the nature of the underlying *claims* that were brought or could have been brought, while the focus in the issue preclusion analysis is on the underlying *issue* and whether the party resisting preclusion (or the party with which that party is in privity) had a full and fair opportunity to litigate the issue. While often these analyses overlap because a party will have had a full and fair opportunity to litigate various issues embedded in claims that were brought in the prior proceeding, this is not necessarily so, and some of the cases discussed below highlight this distinction. Moreover, an issue preclusion inquiry tends to involve more complications than a claim preclusion inquiry because such analysis frequently involves persons who were not parties to the prior dispute.

Issue preclusion may not apply where a ruling's potential adverse impact on the public interest or the interests of non-parties clearly and convincingly necessitates a new determination of the issue.[16] However, the Colorado Court of Appeals has observed in dicta that "the continuing viability of violations of public policy and manifest disregard of the law as bases for attacking an arbitration award," at least under the under the FAA, is unclear.[17]

An appellate court reviews a district court's issue preclusion decision de novo.[18] But an arbitrator's preclusion decision is usually not reviewable.[19] Generally, an arbitrator may exercise the same discretion as a trial court in applying preclusion principles.[20]

Defensive versus Offensive Preclusion

Parties may invoke preclusion defensively or offensively.

> Invoked defensively, a defendant seeks to preclude a plaintiff from relitigating a claim or issue for which the plaintiff previously litigated and lost against a *different defendant*. Used offensively, a plaintiff seeks to preclude a defendant from defending against a claim or issue the defendant previously litigated and lost against a *different plaintiff*.[21]

Union Insurance Co. v. Hottenstein involved defensive preclusion.[22] There, a homeowner and a construction company arbitrated various construction defect and other claims. The arbitrator's final award attributed specific damages to breach of contract ($67,250) and to negligence ($9,915), and the homeowner did not appeal the judgment confirming the arbitrator's award "delineating which damages were attributable to breach of contract and negligence . . . ."[23]

In a separate district court action, the homeowner sought to satisfy the breach of contract damages judgment from the construction company's liability insurance policy. The Colorado Court of Appeals affirmed the district court's holding that the policy did not cover the breach of contract damages. The Court found that the homeowner and the construction company had a full and fair opportunity to arbitrate liability and damages for all claims. Therefore, the trial court properly relied on the arbitrator's findings of fact and conclusions of law in granting the insurer summary judgment, and issue preclusion prevented the homeowner from "recharacteriz[ing] her contract damages as negligence damages" to obtain coverage.[24]

Antelope v. Mobil Rocky Mountain, Inc. illustrates offensive issue preclusion.[25] There, the plaintiff argued that a Wyoming court's finding that a contract was ambiguous under Colorado law bound the defendant. The defendant conceded that the issues in the two cases were identical, that it was a party to the prior proceeding, and that the prior proceeding resulted in a final judgment on the merits. The defendant's summary judgment brief also admitted it was bound by the Wyoming ruling. But the defendant argued it had not had a full and fair opportunity to litigate the ambiguity issue because it was merely a third party in the prior proceeding, and the plaintiff was not a party to the prior proceeding. The Colorado Court of Appeals held that issue preclusion prevented the defendant from contesting the contract's ambiguity where the defendant's counsel was present throughout the relevant testimony in the prior proceeding and its interests were aligned with the defendant there.[26]

Applying Preclusion to Arbitration Decisions

Generally, claim and issue preclusion principles may apply to arbitration rulings.[27] Thus, "[t]he doctrine of issue preclusion applies to issues decided in arbitration,"[28] and an order confirming an arbitration award is entitled to preclusive effect once that order becomes a final judgment, that is, after all appeals are exhausted or time-barred.[29]

Generally, if the finality factor is met, courts proceed to analyze the remaining preclusion requirements for whether (1) there is subject matter/issue identity; (2) party identity or privity exists; and (3) preclusion comports with certain fairness standards, which differ depending on whether a party asserts claim or issue preclusion. Claim preclusion may apply when a party asserted, or could have asserted, the same claims. Issue preclusion may apply when the resisting party had a full and fair opportunity to litigate the issue in the prior proceeding. As discussed below and will be extensively discussed in part 2, an *unconfirmed* arbitration award may be given preclusive effect in some circumstances, and the contours of the preclusion doctrine's application in this regard are not yet settled. Some of this uncertainty emanates from the Colorado Supreme Court's statement, albeit in dicta, that, "An arbitration award is tantamount to a judgment . . . ."[30]

"Generally, claim and issue preclusion principles may apply to arbitration rulings Thus, '[t]he doctrine of issue preclusion applies to issues decided in arbitration,' and an order confirming an arbitration award is entitled to preclusive effect once that order becomes a final judgment, that is, after all appeals are exhausted or time-barred."

> "An arbitration award precludes a civil action based on the same claim or claims. This includes not only 'issues actually decided, but also any issues that could have been raised in the first proceeding but were not.'"

Finality

Generally, preclusion requires a final judgment on the merits.[31] What constitutes a "final judgment" in the context of arbitration is not a simple question to answer. Arbitration awards that have been confirmed and reduced to a final judgment in district court can be enforced. Sometimes, however, claim preclusion based solely on an unconfirmed arbitration award may prevent a party from pursuing a second action on the same claim.[32]

Finality is also affected by the time limits applicable to arbitration proceedings. Two statutory schemes govern arbitration in Colorado, the Colorado Revised Uniform Arbitration Act (CRUAA)[33] and the Federal Arbitration Act (FAA).[34] Each has its own deadlines for taking certain actions, and both limit the grounds upon which district courts may vacate an arbitration award.[35] Whether an arbitration is subject to the CRUAA or the FAA is important because the deadlines for taking post-award actions may differ.[36]

The CRUAA contains no express time limit for a party to move to confirm an arbitration award in district court.[37] However, the CRUAA requires that a motion to vacate an award be made within 91 days after (1) the movant receives notice of the award, or of a modified or corrected award; or (2) the movant knew or should have known the award was procured by corruption, fraud, or other undue means.[38] The FAA imposes a one-year deadline to seek confirmation where the parties have agreed that a court judgment will enter upon the arbitration award.[39] The FAA requires notice of a motion to vacate, modify, or correct an award to be served within three months after the award is filed or delivered.[40] Applicable deadlines may be tolled under certain circumstances.[41] After a district court enters judgment on the arbitration award under the CRUAA or FAA, the usual court rules concerning post-judgment relief and appeal apply.

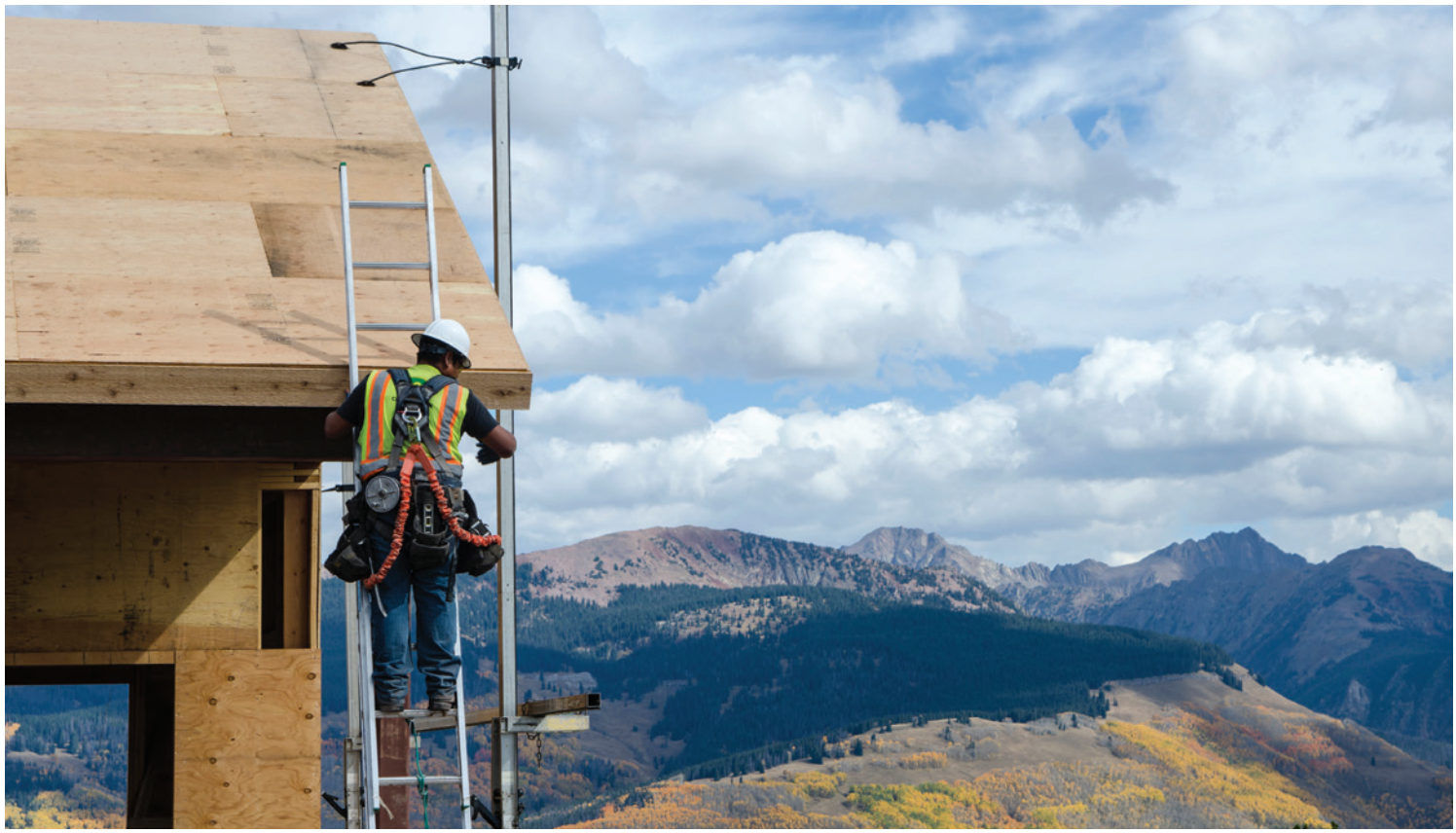
Differences between arbitration and court proceedings raise questions about how preclusion analysis applies to arbitration awards. Arbitration agreements typically identify the rules and standards arbitrators must follow in rendering their decisions. These may closely resemble court rules and standards, or they may grant the arbitrator broad discretion to determine whether or how to apply them and otherwise resolve the dispute. While arbitration awards may be confirmed in district courts as final judgments, confirmation in district court is not required, and parties often elect not to seek confirmation. Parties may generally appeal court decisions on many grounds, but appeals from arbitration awards are limited to very narrow grounds.

One commentator surveyed cases nationwide and observed that courts have found "finality" for purposes of arbitral preclusion based on (1) court-confirmed arbitration awards; (2) the nature of the arbitration proceeding; and (3) the parties' intent to bargain for a final, binding award with no need for judicial confirmation, as reflected in the arbitration agreement.[42] As part 2 will discuss more fully, the grounds for contesting arbitration awards, how far arbitration proceedings have advanced, and the nature of the proceeding itself may affect application of preclusion doctrines.

The finality analysis may also depend on whether claims and related issues in a particular case are resolved on different timelines in different forums. When some claims are resolved in arbitration, a court may require a confirmed arbitration judgment and exhaustion of all arbitration award challenges and appeals to establish "finality" for purposes of applying preclusion principles to pending court claims.[43]

The Colorado Court of Appeals' decision in *Barnett v. Elite Properties of America* illustrates this point.[44] In *Barnett*, a homeowner sued its builder on 12 claims. Three claims (constructive fraud, civil conspiracy, and CCPA violations) were found non-arbitrable and stayed while the remaining claims proceeded to arbitration. The arbitrator granted summary judgment against some claims and awarded limited damages on other claims. The builder then moved in district court to confirm the arbitration award and dismiss the stayed claims based on issue preclusion, arguing that factual findings in the arbitration dispositively resolved the pending court claims.

The district court confirmed the arbitration award, dismissed the previously stayed fraud and conspiracy claims based on issue preclusion, and certified those orders for immediate appeal.[45] The Court of Appeals affirmed confirmation of the arbitration award, but held that the district court erred in granting summary judgment to the builder on the non-arbitrable fraud and conspiracy claims based on issue preclusion because the homeowner could still pursue certiorari on the district court's rulings.[46]



Same Subject Matter/Same Claim

An arbitration award precludes a civil action based on the same claim or claims.[47] This includes not only "issues actually decided, but also any issues that could have been raised in the first proceeding but were not."[48] Whether claims are the "same" typically depends on whether the claims seek redress for the same basic wrong and are founded on the same or substantially similar facts.[49] In one case, the Colorado Court of Appeals held that the *amount* of an arbitrator's repair cost and non-economic damages award to homeowners against their homebuilder was binding on the homeowners in a later action against a subcontractor but their punitive and CCPA treble damage claims against the subcontractor were not barred because the arbitration did not address those claims.[50]

Full and Fair Opportunity to Litigate Issues

The basic tenet that a party against whom preclusion is asserted had a full and fair opportunity to litigate the issues underlies the preclusion doctrines. One commentator has observed that efforts to satisfy this fairness requirement may "push[] arbitration to be more like litigation," ultimately sacrificing its presumed advantages as arbitration takes on the features of court proceedings.[51]

However, the Colorado Supreme Court's decision in *Bebo Construction Co. v. Mattox & O'Brien, P.C.* illustrates that a decision-maker's broad discretion to determine whether or how to apply rules and other standards does not necessarily deprive a party of a full and fair opportunity to litigate.[52] In *Bebo*, an administrative law judge ruled in a debarment proceeding that a government contractor had "demonstrated wrongdoing reflecting a lack of integrity," and prohibited it from participating in any state construction projects for two years because it improperly installed anchor bolts on a bridge.[53] The Colorado Supreme Court considered whether the debarment proceeding precluded the contractor's later negligence lawsuit against the bridge project engineer.

The contractor argued that the debarment proceeding did not provide a full and fair opportunity to litigate the engineer's misconduct because the administrative judge had discretion to decide whether and how to apply Colorado's rules of discovery, evidence, and procedure.[54] The Court rejected this contention, holding that

> [a]n inquiry into whether a party received a full and fair opportunity to litigate an issue must look to whether the initial proceeding was so inadequate or so narrow in focus as to deprive an individual of his or her due process rights should application of the doctrine of collateral estoppel be used to bar relitigation of that issue.[55]

The Court found no "procedural failures" that established a denial of due process, stating "we refuse to recognize that agency proceedings differ markedly from judicial proceedings because those administrative proceedings utilize rules of discovery, evidence, and procedure only 'to the extent practicable.'"[56] The Court then held that issue preclusion nevertheless could not bar the negligence claims because

the engineer's negligence was not pleaded, submitted, or addressed in the debarment proceeding, so the issue was never actually litigated or determined.[57]

The Tenth Circuit Court of Appeals' decision in *B-S Steel of Kansas, Inc. v. Texas Industries, Inc.* also illustrates the meaning of a full and fair opportunity to litigate.[58] There, a steel beam distributor sued four affiliated steel manufacturers for price discrimination and related claims. The distributor's claims against one of the manufacturers proceeded in arbitration, and the claims against the other three manufacturers proceeded in court. The distributor's expert disclosures in both matters relied on substantially the same damages models. The arbitrator held that the distributor failed to establish a causal connection between its claims and its alleged damages, and the trial court confirmed the award and dismissed the arbitration respondent from the case.

The remaining defendant manufacturers then sought issue preclusion based on the arbitration award. The distributor argued that (1) it did not have a full and fair opportunity in the arbitration to litigate the issues remaining to be determined in the district court action because the damages alleged in the court case involved different time periods, and (2) it had discovered new evidence relevant to the court case that was unavailable and not considered in the arbitration. The Tenth Circuit agreed with the remaining manufacturer defendants that the issues decided in the arbitration and asserted in the lawsuit were the same; that the arbitration had been fully adjudicated on its merits; that the distributor was a party to the arbitration; and that the distributor had a full and fair opportunity to litigate the issues in the arbitration. Thus, the Tenth Circuit used a multi-factor test centered on the evidence and arguments advanced in the two proceedings to hold that issue preclusion applied.[59]

Privity

Privity between two parties will be recognized if circumstances justify "holding the latter to the result reached in litigation in which only the former is named."[60] Whether the second party is in privity with the first depends on each party's respective legal interests and whether the first party protected the second party's interests.[61] For example, because of lack of privity, an arbitration award between a subcontractor and a property owner did not bind a contractor in its lawsuit against the subcontractor.[62]

Colorado courts have also not decided whether privity exists between affiliated defendant entities or similarly situated consumer plaintiffs for purposes of precluding either group from relitigating the interpretation or enforcement of a developer's boilerplate contract provisions. Generally, where legal formalities to create an entity are followed, a legal entity is treated separately from other legal entities, including parent, affiliated, and subsidiary entities.[63] "[P]rivity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'"[64]

A wholly owned subsidiary may be an agent of a parent entity if its activities as an agent are tantamount to doing the parent's business.[65] And if a subsidiary is its principal's alter ego, the corporate veil may be pierced after applying a multifactor analysis and "if not doing so would defeat public convenience, justify wrong, or protect fraud."[66] More broadly, a federal court of appeals has observed that if "two parties are so closely aligned in interest that one is the virtual representative of the other, a claim by or against one will serve to bar the same claim by or against the other."[67]

Thus, affiliations between related legal entities may be relevant to determining whether two parties are in privity for preclusion purposes.[68] And while a parent-subsidiary relationship alone does not establish privity, preclusion may be proper "if the parent controlled litigation against a subsidiary, or brought or defended an action for the benefit of a subsidiary."[69] Often, residential developers create a special purpose entity (SPE) for each home or development they construct, using substantially identical contracts, and the SPEs are all controlled by the same holding company, parent entity, and/or management. In these circumstances, an arbitration or court ruling concerning an SPE may be binding for preclusion purposes on the SPE's holding company, parent, management, or other related entity, or vice versa, depending on the relationships among these entities and the underlying facts and claims.

Conclusion

Arbitration proceedings may give rise to both claim and issue preclusion, but the precise contours of preclusion remain uncertain. Therefore, practitioners must take care to meet the requirements to prove preclusion and should consider the potentially binding effect of arbitration proceedings.

Part 2 will discuss unanswered questions in Colorado regarding the binding effect of an *unconfirmed* arbitration award on the parties to a residential construction or other arbitration and on those in privity with those parties in later proceedings. It will examine in greater detail whether and when preclusion principles apply to an arbitrator's purely legal rulings. Part 2 will also consider uncertainties regarding whether and how cloaking the proceedings in confidentiality may affect claim and issue preclusion, and whether an arbitration agreement may impose a bar against others relying on any aspect of the arbitration for preclusion purpose. Lastly, part 2 will examine the practical pros and cons of giving preclusive effect to arbitration rulings and awards. CL



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NOTES

1. This article uses the word "ruling" to refer to arbitrators' rulings on purely legal issues, whether the decision occurs before an arbitration hearing commences, such as a ruling on a pre-hearing summary judgment motion, or in the arbitration award itself.

2. *Foster v. Plock*, 394 P.3d 1119, 1122–23 (Colo. 2017) (describing purposes of claim and issue preclusion doctrines).

3. *See generally* Johnson, "Preserving the Integrity of the Arbitration Process: Requiring the Full and Fair Application of the Claim Preclusion Doctrine," 21 *Suffolk J. Trial & App. Advoc.* 58, 59–61 (2015–16). In *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 22 (Colo.App. 2010), the Court held that issue preclusion principles apply to an arbitration award confirmed as a district court judgment (citing *Guaranty Nat'l Ins. Co. v. Williams*, 982 P.2d 306, 308 (Colo. 1999)). *Barnett* also explained that preclusion principles apply to arbitration awards that cannot be appealed, *id.* at 22–23, suggesting that these principles may apply to unconfirmed arbitration awards and rulings.

4. *Vincent v. Clean Water Action Project*, 939 P.2d 469, 472 (Colo.App. 1997) (affirmative defense of claim preclusion is typically ordinarily waived if not properly raised); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 82, 85 (Colo. 1999) (affirmative defense of claim preclusion is ordinarily waived if not pled in the answer, but in certain instances may be incorporated into the answer when asserted in a summary judgment motion). *See also* CRCP 8(c) ("arbitration and award" and "res judicata" are among affirmative defenses to be affirmatively set forth in pleadings).

5. *Meyer v. Dep't of Revenue, Motor Vehicle Div.*, 143 P.3d 1181, 1184 (Colo.App. 2006) (party asserting a claim preclusion defense bears the burden to prove the defense applies); *Bebo Constr. Co.*, 990 P.2d at 85 (party seeking issue preclusion bears the burden of proof).

6. *E.g., Foster*, 394 P.3d at 1126–27 (holding that the attorney-defendant could assert defensive claim preclusion against the client's husband because the attorney was in privity with the client who prevailed in the earlier proceeding against husband's claims).

7. *Id.* at 1122.

8. *Foster*, 394 P.3d at 1123.

9. *Id.*

10. *Id.* at 1124–25.

11. *Id.* at 1125.

12. *Id.* at 1125–26.

13. *Id.* at 1123.

14. *Id.*

15. *Id. See also Villas at Highland Park Homeowners Ass'n, Inc. v. Villas at Highland Park, LLC*, 394 P.3d 1144, 1152 (Colo. 2017) (identity of issues turns on the essential "elements that the claimant must establish to prove his or her substantive claim or defense").

16. *Restatement (Second) of Judgments* § 28(5) (Am. Law Inst. 1982) (hereinafter *Restatement*).

17. *Barnett*, 252 P.3d at 21.

18. *Villas at Highland Park Homeowners Ass'n, Inc.*, 394 P.3d at 1151.

19. *See* CRS §§ 13-22-223, -224 (describing limited grounds for vacating or altering arbitration award); *Judd Const. Co. v. Evans Joint Venture*, 642 P.2d 922, 925 (Colo. 1982) ("[T]he arbitrator is the final judge of both fact and law."). Upon a timely motion, or if a district court submits the question to the arbitrator, an arbitrator has the power to modify an award under CRS § 13-22-220(4).

20. *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91–92 (2d Cir. 2005) (offensive use of issue preclusion must be "fair" under the circumstances, and arbitrators have "broad discretion" to make this determination).

21. *Foster*, 394 P.3d at 1124, n.5 (emphasis added) (internal citations omitted).

22. *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1202 (Colo.App. 2003).

23. *Id.* at 1198 and 1202.

24. *Id.* at 1201.

25. *Antelope v. Mobil Rocky Mt., Inc.*, 51 P.3d 995 (Colo.App. 2001).

26. *Id.*

27. *Union Ins. Co.*, 83 P.3d at 1202.

28. *Barnett*, 252 P.3d at 22.

29. *Id.* at 24. To be preclusive, the judgment must be "'sufficiently firm' in the sense that it was not tentative, the parties had an opportunity to be heard, and *there was an opportunity for review.*'" *Id.* at 21 (emphasis in original) (quoting *Carpenter v. Young*, 773 P.2d 561, 568 (Colo. 1989)).

30. *Judd Const. Co.*, 642 P.2d at 925 (citing two cases pre-dating the 1975 Colorado Uniform Arbitration Act (CUAA) and the 2004 Colorado Revised Uniform Arbitration Act (CRUAA)): *Sisters of Mercy v. Mead & Mount Constr. Co.*, 439 P.2d 733, 736 (Colo. 1968) ("The award of the arbitrators is of equal dignity with a judgment . . . ." (quoting CRCP 109 (since repealed)), and *Int'l Serv. Ins. Co. v. Ross*, 457 P.2d 917, 924 (Colo. 1969) ("[I]n Colorado an . . . [arbitration] award is final in the absence of fraud or similar misconduct.")).

31. *Foster*, 394 P.3d at 1123.

32. Benson, *Colorado and Federal Arbitration Law and Practice: A Guide to Arbitration, Mediation, and other ADR Procedures* (Arb.L.Colo.) § 16.7.2 (CLE in Colo. 2017). *Cf. Layton Constr. Co. v. Shaw Contract Flooring Servs., Inc.*, 409 P.3d 602, 609–10 (Colo. App. 2016) (statutory tolling for bringing reimbursement claims does not abrogate the doctrine of claim preclusion; general contractor could not assert indemnity claims in a separate action where indemnity claims arising from the same contract provision and relating to the same defect claims were previously dismissed with prejudice). *See also Val-U Const. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1998) ("[T]he fact that the award in the present case was not confirmed by a court . . . does not vitiate the finality of the award.") (internal citation omitted). In *Grimes v. BNSF Ry. Co.*, 746 F.3d 184, 188–89 (5th Cir. 2014), the Fifth Circuit noted that courts have "broad discretion" to give arbitral rulings preclusive effect, and the relevant factors include whether: (1) "arbitral pleadings state issues clearly"; (2) "arbitrators set out and explain their findings in a detailed written opinion"; (3) "procedural differences between arbitration and the district court proceeding might prejudice the party challenging the use of" offensive, non-mutual preclusion; (4) procedural differences "might be likely to cause a different result"; (5) the arbitral panel's findings "are within the panel's authority and expertise"; and (6) "the arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence." (internal citations omitted). *Grimes* did not involve claim preclusion or consider a finality analysis.

33. CRS §§ 13-22-201 et seq. *See generally* Benson, *supra* note 32 at § 3.4 (discussing revised and predecessor acts).

34. 9 USC §§ 1 et seq.

35. *Price v. Mountain Sleep Diagnostics, Inc.*, 479 P.3d 68, 71 (Colo.App. 2020) (CRUAA); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008) (FAA).

36. Deadlines under the CRUAA tend to be shorter than the FAA in state courts, and it is unsettled whether in-state court cases governed by the FAA time limitations are procedural and governed by state law, such as for deadlines concerning applicable post-judgment relief and appeal. *See* Benson, *supra* note 32 at § 4.3.7 (comparing deadlines). *But see Chillcott Ent. L.L.C. v. John G. Kinnard Co.*, 10 P.3d 723, 725–27 (Colo.App. 2000) (three-month limitations period to serve notice of motion to vacate arbitration award under FAA cannot be tolled; FAA preempts Colorado "savings" statute permitting extension of time).

37. CRS § 13-22-222. *See also Estate of Guido v. Exempla, Inc.*, 292 P.3d 996, 1002 (Colo. App. 2012) (no deadline to seek award confirmation).

38. CRS § 13-22-223(2). Time limits to review an award are strictly enforced. *Kutch v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 93, 99 (Colo. 1998). "[A]n outstanding issue of attorneys fee and costs under a fee- and cost-shifting provision does not affect the character of the decision on the merits as an 'award.'" *Am. Numismatic Ass'n v. Cipoletti*, 254 P.3d 1169, 1173 (Colo.App. 2011).

39. 9 USC § 9. The federal circuits are split on whether the one-year cutoff is permissive or mandatory. *Compare Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 150–51 (4th Cir. 1993) (one-year period for application to a district court is permissive rather than mandatory) *with Photopaint Techs., LLC v. Smartlens Corp.*, 335 F.3d 152, 158 (2d Cir. 2003) (FAA § 9 imposes a one-year statute of limitations on filing a motion to confirm an arbitration award).

40. 9 USC § 12.

41. *See Swan v. Am. Fam. Mut. Ins. Co.*, 8 P.3d 546, 548 (Colo.App. 2000) (application to arbitrators to modify or correct award tolls

time limit to seek district court review).

42. 8 *Bruner & O'Connor on Construction Law* § 21:272 (Thomson Reuters 2002, Aug. 2021 update).

43. *Barnett*, 252 P.3d at 23.

44. *Id.* at 14.

45. The court later dismissed the remaining CCPA claim on summary judgment and then certified its judgment for immediate appeal. This claim was appealed separately, *id.*, and the court did not analyze whether issue preclusion applied to the CCPA claim.

46. *Id.* at 23. *Cf. Restatement*, *supra* note 16 at § 28(1) (issue preclusion may be inappropriate if review of the judgment was not available to the party against whom preclusion is sought).

47. *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1147–48 (10th Cir. 2007).

48. *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999) (citations omitted).

49. *Foster*, 394 P.3d at 1127.

50. *Quist v. Specialties Supply Co.*, 12 P.3d 863, 867 (Colo.App. 2000). The Idaho Supreme Court has held that following an arbitrated payment award to a contractor, the dismissal of an owner's construction defect counterclaim may not be res judicata as to a subsequent latent defect claim. *Storey Constr., Inc. v. Hanks*, 224 P.3d 468, 477–78 (Idaho 2009) (arbitration under an AIA contract).

51. Bruner and O'Connor, *supra* note 42 at § 21:272 (noting that some believe applying collateral estoppel to arbitration "is equivalent to 'throwing the baby out with the bathwater'") (citations omitted). A chart describing generally the pros and cons of giving preclusive effect to arbitration rulings/awards will be included in part 2.

52. *Bebo Const. Co.*, 990 P.2d at 87.

53. *Id.* at 81.

54. In the authors' experience, the level of procedural formality in construction defect arbitrations is typically greater than in run-of-the-mill consumer arbitrations, and at least equal to or greater than that found in many administrative proceedings.

55. *Id.* at 87. This test appears to set a low bar that can be met in most circumstances, although it is unclear whether or how a decision issued by an arbitrator with no or minimal legal training or experience may impact this analysis. *Cf. McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) (declining to apply issue and claim preclusion based, in part, on recognition that an arbitrator may lack expertise needed to resolve complex legal questions because the arbitrator's expertise relates "primarily to the law of the shop, not the law of the land.") (citation omitted), *questioned by Burkybile v. Bd. of Educ.*, 411 F.3d 306, 310–11 (2d Cir. 2005) (suggesting *McDonald* relates to federal court access rather than preclusion because more recent US Supreme Court cases implicitly recognize the preclusive effect of arbitration orders).

56. *Bebo Const. Co.*, 990 P.2d at 87.

57. *Id.* at 86–87.

58. *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 661–66 (10th Cir. 2006).

59. *Id.* at 663–64. *But see Salida Sch. Dist. R-32-J v. Morrison*, 732 P.2d 1160, 1167 (Colo. 1987) (reversing judgment based on issue preclusion where school district had a greater incentive to defend plaintiff's civil rights claim than to defend her prior unemployment claim, and imposing significant liability based on unemployment compensation hearing findings would deprive the district of a full and fair opportunity to litigate the civil rights claims). *See also Holnam, Inc. v. Indus. Claim Appeals Office*, 159 P.3d 795, 799 (Colo.App. 2006) (differences in the burden of proof may affect issue preclusion, but claim preclusion applies even if the proceedings involve different standards of proof) (citations omitted); *Restatement, supra* note 16 at § 28(4) (issue preclusion may not be appropriate if significant differences in the burden of proof exist); *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 594 (3d Cir. 1989) (holding that because "the process by which the issue was adjudicated cannot be reconstructed on the basis of a new and different burden, preclusive effect is properly denied" (citing *Restatement*, *supra* note 16 at § 28, cmt. f; noting, however, this principle does not apply to claim preclusion)).

60. *Foster*, 394 P.3d at 1126 (quotation and citations omitted).

61. *Id.* ("[P]rivity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'") (internal citations omitted). *But see Vandenberg v. Super. Ct.*, 982 P.2d 229, 239 (Cal. 1999) (agreement to arbitrate does not mean each party also consents that the issues decided against that party "by this informal, imprecise method may bind him, in the same manner as a court trial, in *all future* disputes, *regardless* of the stakes, against *all* adversaries, known and unknown" (emphasis in original)). *Cf. Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330 (1979) (acknowledging that offensive collateral estoppel may be "unfair" if the judgment purportedly supporting the estoppel "is itself inconsistent with one or more previous judgments"). *Parklane* posited a hypothetical to explain this limitation: If a railroad accident injured 50 people, and the first 25 who sued the railroad lost, and the 26th person won, the remaining plaintiffs should not be able to win by estoppel. *Id.* at 330, n.14.

62. *Hosek Mfg.-Overland Foundry Co. v. Teats*, 110 P.2d 976 (Colo. 1941).

63. *Skidmore, Owings & Merrill v. Canada Life Assur. Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990).

64. *Foster*, 394 P.3d at 1126 (internal quotations and citations omitted).

65. *First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 177 (Colo.App. 2007) (analyzing the relationship for in personam jurisdiction purposes and citing *SGI Air Holdings II, LLC v. Novartis Int'l AG*, 239 F.Supp.2d 1161, 1166 (D.Colo. 2003)).

66. *Great Neck Plaza, L.P. v. Le Peep Rests., LLC*, 37 P.3d 485, 490 (Colo.App. 2001). *See also Dill v. Rembrandt Group, Inc.*, 474 P.3d 176, 184–85 (Colo.App. 2020) (horizontal veil piercing between sister entities is proper if the entities share a parent in the ownership chain and the veils separating each entity from the parent are first pierced to find that each sister entity is the alter ego of its owners).

67. *In re Imperial Corp. of Am. v. Alshuler*, 92 F.3d 1503, 1506 (9th Cir. 1996) (quoting *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1405 (9th Cir. 1993)).

68. *Id.*

69. *Dorchen/Martin Assocs., Inc. v. Brook of Boyne City, Inc.*, No. 13-10588, 2013 U.S. Dist. Lexis 77395 at *21, 2013 WL 2418175 at *8 (E.D.Mich. June 3, 2013) (quoting Wright and Miller, *Federal Practice and Procedure* § 4460 (2d ed. 2002)).