Claim and Issue Preclusion Arising from Residential Construction and Other Arbitrations—Part 2

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This two-part article examines when claim and issue preclusion may arise from arbitration proceedings. Part 2 focuses on how preclusion may apply in specific situations and examines the practical pros and cons of giving preclusive effect 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, the factors courts consider in determining the preclusive effects of arbitration awards, how preclusion principles apply to an arbitrator's purely legal rulings,[1] and how preclusion principles may apply to entities who are related to parties to an earlier arbitration. This part 2 focuses on the binding effect of unconfirmed arbitration awards, the practical and legal effects of arbitration confidentiality provisions, and whether an arbitration agreement can effectively provide that some or all arbitration rulings may not be used for preclusion purposes later. It concludes with practical pros and cons of giving preclusive effect to arbitration rulings and awards. 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.

Preclusion Generally

As discussed in part 1, claim preclusion (res judicata) 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.[2] Issue preclusion (collateral estoppel) 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, or a party with whom it is in privity, 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 to, or in privity with a party in, the earlier proceeding.[3]

Arbitration Awards as Tantamount to Final Judgments

In Colorado, a party may assert issue preclusion based on an arbitration award confirmed as a final judgment by a district court after all avenues and times for appeal, including certiorari to the Colorado and US Supreme Courts, have been exhausted.[4] Two recurring questions concerning issue preclusion based on arbitration rulings are:

1. What is the effect of arbitration rulings and awards that are never reduced to judgment by confirmation?
2. Is a party to an arbitration bound, in a later proceeding brought by or against a different party, by an earlier arbitration ruling resolving an issue of law?

Preclusive Effect of Arbitration Awards not Reduced to Judgment

"An arbitration award is tantamount to a judgment, *and the arbitrator is the final judge of both fact and law*,"[5] unless constrained by statute or contract.[6] One commentator has questioned the continuing viability of this broad pronouncement of arbitral authority, suggesting that some courts may not permit arbitrators to "dispense [their] own brand of justice," at least

under the Federal Arbitration Act (FAA).[7] Under the Colorado Revised Uniform Arbitration Act (CRUAA), an arbitration award may be vacated solely on the grounds provided for by the Act.[8]

Nevertheless, after the parties empower an arbitrator to resolve an issue, the arbitrator's decision on the merits, such as contract interpretation, generally is not subject to judicial review.[9] Arguably, if an arbitrator's factual and legal rulings are not subject to judicial review, confirmation of the award may be irrelevant to issue and claim preclusion analysis relating to such rulings.[10]

Parties may elect not to confirm an arbitration award in district court, particularly after they have settled the claims.[11] One Colorado commentator notes that although it is "uncertain" whether an unconfirmed award will give rise to issue preclusion, an unconfirmed award "may prevent one party from pursuing a second action in court or in arbitration on the same claim under the principle of claim preclusion."[12] The same commentator suggests that the parties may be "bound" by an unconfirmed arbitration award, even though "judicial enforcement may not be available."[13] Competing public policies relating to finality and protecting contractual expectations may inform courts' analyses of the preclusive effect of unconfirmed awards.

Current Colorado case law supports the conclusion that when the time to seek review of an unconfirmed arbitration award has passed, the award may give rise to issue preclusion. As noted above, an arbitration award is "tantamount to a judgment."[14] Moreover, the Colorado Supreme Court has observed that a judgment may be deemed final if "there was an opportunity for review," even if such review was not sought.[15] Thus, it has been argued that an unconfirmed arbitration award is entitled to the same preclusive effect as a confirmed award once all potential appeals have been exhausted or time-barred.[16]

Commentators have observed that "'courts have held repeatedly and authoritatively that confirmation is not required to apply preclusion so long as the award is final under the applicable arbitration rules.'"[17] In *Wellons v. T.E. Ibberson Co.*, the Eighth Circuit Court of Appeals held that the unconfirmed nature of an arbitration award and the fact that it was modified by a later settlement did not "vitiate" the award's finality.[18] Similarly, in *Jacobson v. Fireman's Fund Insurance Co.*, the Second Circuit Court of Appeals noted that "res judicata and collateral estoppel apply to issues resolved by arbitration 'where there has been a final determination on the merits, notwithstanding a lack of confirmation of the award,'" and held that under New York law an unconfirmed arbitration award precluded "any further litigation of all issues that were or could have been addressed within the context of that arbitration proceeding."[19]

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A California appellate court held that a nonparty to an arbitration agreement and unconfirmed award must be a third-party beneficiary of the award to obtain "issue preclusion" based on the award.[20] The court noted that this requirement "preserves significant policies and incentives of arbitral finality," while considering "both the parties' and nonparties' contractual expectations."[21] Similarly, the Tenth Circuit Court of Appeals has indicated that it may treat an arbitration award as a final judgment for preclusion purposes,[22] depending on the parties' intent.[23]

Preclusive Effect of an Arbitrator's Legal Rulings

In some cases, an arbitrator may rule on a discrete legal issue before an arbitration hearing occurs. As described in the example at the beginning of part 1, one such discrete legal issue may be whether Colorado's Construction Defect Action Reform Act (CDARA) permits recovery of damages for injury to personal property. Such discrete legal rulings raise the question whether arbitration rulings not reflected in an arbitration award may have preclusive effect.[24]

Generally, issue preclusion applies to mixed questions of fact and law if the issue involves the same legal principles and the same facts.[25] The US Supreme Court has held that "a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a later subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law."[26] The Colorado Supreme Court has affirmed a trial court order applying issue preclusion to bar a bank's negligent misrepresentation claim as untimely based on a prior judgment applying the three-year statute of limitations for fraud, despite the fact that an intervening appellate ruling held that the six-year limitations period applied to negligent misrepresentation claims.[27] The Court stated, "when a party has a full and fair opportunity to litigate an issue, the mere fact that the judgment was incorrect does not affect its conclusiveness. In such circumstances it is not unfair to apply collateral estoppel simply because the prior judgment may be wrong."[28]

A leading commentary posits that preclusion should typically apply if two cases present the same legal issues, "the same general legal rules govern both cases," and "the facts of both cases are indistinguishable as measured by those rules."[29] This same commentary notes

that "[p]reclusion should not apply if there has been a change either in the facts or the governing rules."[30] Moreover, preclusion generally does not apply to "abstract" legal rulings disconnected from particular facts or affected by changes in the "surrounding legal climate."[31]

Consider, for example, Colorado's Homeowner Protection Act,[32] which provides that "any express waiver of, or limitation on, the legal rights, remedies, or damages provided by" CDARA or the Colorado Consumer Protection Act "or on the ability to enforce such legal rights, remedies, or damages within the time provided by applicable statutes of limitation or repose are void as against public policy."[33] What is the preclusive effect, if any, of a Colorado arbitrator's ruling or award finding a homebuilder's standardized contract provision void as violative of public policy as a matter of law? Assuming the ruling or award was not the result of fraud or other impropriety, is the arbitrator's ruling ever subject to substantive review? Can future claimants rely on the preclusive effect of the arbitrator's ruling and/or ensuing award in later arbitrations or court proceedings?

Construction professionals and others who use boilerplate liability and damages limitations, claim and subrogation waivers, and indemnity and similar clauses in their contracts might consider the potential preclusive effect of an adverse arbitral ruling concerning the legal effect of such provisions when drafting arbitration agreements, especially in light of the limited scope of review of such rulings.[34]

Effect of Provisions Purporting to Limit Preclusive Effect

Fundamental constitutional principles ensure that Colorado courts are generally open to the public: "Courts of justice shall be open to every person . . . ."[35] But arbitrations are private proceedings, sometimes cloaked with confidentiality.[36] Because the American Arbitration Association (AAA) rules refer to confidentiality, the Colorado Court of Appeals has suggested that it may consider arbitration proceedings subject to these rules confidential.[37] Review of the AAA's rules suggests, however, that this non-disclosure obligation applies only to the AAA and its arbitrators.[38]

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One commentator has observed that "preclusive doctrines are in tension with . . . confidentiality clauses."[39] This is because the confidentiality shrouding some arbitration proceedings raises important questions: Can rulings in a confidential arbitration have preclusive effect? Can a party obtain discovery of and then rely on confidential arbitration rulings and awards to enforce preclusion doctrines? Relatedly, if an arbitration clause states that an award shall not have any preclusive effect, can that proscription bind non-parties?[40] No Colorado decisions answer these questions.

Another commentator notes that arbitral confidentiality creates obstacles to issue preclusion when it bars parties from disclosing information necessary for an arbitrator in a later proceeding to determine if an issue was actually litigated or if its determination was necessary to the prior award.[41] Confidentiality provisions may prevent litigants from learning about other arbitration rulings or awards involving similar or identical issues against the same party, and may "deny all parties the ability to use past arbitrations as precedent."[42]

Parties opposing use of arbitration rulings for preclusion may argue that protecting the proceedings' confidentiality outweighs the fairness concerns supporting preclusion doctrines.[43] Some courts have refused to enforce arbitration confidentiality provisions based on unconscionability or because such provisions prevent the effective vindication of statutory rights.[44] Colorado courts may need to decide whether agreements to keep arbitration rulings and awards confidential are void in whole or in part because they undermine the public policies underlying Colorado's preclusion doctrines.[45] The same policy concerns may apply to contract provisions purporting to prohibit any preclusive use of an arbitration ruling or award.

Arbitration versus Court Proceedings: Faster, Cheaper, and Just as Fair?

If arbitration is faster, cheaper, and just as fair as court proceedings, most claim and issue preclusion principles should apply equally to arbitrations. Indeed, applying preclusion principles to arbitration rulings and awards

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may provide a more expeditious, less expensive path to dispute resolution.

However, there is no express requirement that arbitration and court proceedings be “equally” fair—the absence of juries or any right to appeal substantive rulings, and the arbitrators’ power to deviate from controlling law, among other differences, render arbitrations not “equal” to court proceedings in many important respects. Moreover, arbitrators may rely on hearsay and may not have any legal training whatsoever. And in many cases no record exists of the arbitration proceedings other than the written award.

Still, uniformity in applying justice is an important feature of our legal system.[46] By barring successive litigation, preclusion doctrines protect litigants from “‘needless relitigation of the same issues, further[] judicial economy, and promote[] the integrity of the judicial system by affirming that one can rely upon judicial decrees because they are final.’”[47] Preclusion doctrines derive some of their purpose from the economic benefit of not having to relitigate the same issues, and they are intended to prevent inconsistent results.[48]

Commentators continue to debate the pros and cons of applying preclusion principles to arbitration results, as illustrated in the accompanying sidebar.[49] There is strong disagreement regarding non-mutual defensive issue preclusion, with the majority of courts and the *Restatement (Second) of Judgments* approving its application.[50] The debate recognizes that (1) whether to apply preclusion principles may turn on whether the arbitrating parties are both sophisticated business litigants or one party is an unsophisticated consumer or worker, and (2) whether applying the doctrines permits enough discretion to avoid serious injustices.

Yet if issue and claim preclusion are fundamental to our justice system, they should arguably apply equally to arbitration proceedings. Our courts may be asked to decide whether builders and developers and other businesses can force similarly situated homeowners and other consumers into individual, confidential arbitrations, with the potential effect of greatly limiting or avoiding application of preclusion doctrines, depending on how those doctrines are applied.

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 consider the potentially binding effect of arbitration proceedings.

Unanswered questions remain in Colorado regarding the binding effect of purely legal rulings and unconfirmed awards on parties to an arbitration, and on those in privity with those parties in later proceedings. Uncertainties also exist about whether and how cloaking the proceedings in confidentiality, contractually prohibiting any preclusive use of an arbitration ruling or award, and doing business through multiple, separate special purpose entities may affect issue and claim preclusion. Accordingly, along with existing authority, practitioners should consider the reasons for and against applying preclusion when drafting and evaluating arbitration agreements. CL



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REASONS TO APPLY PRECLUSION TO ARBITRATION PROCEEDINGS

- Arbitration preserves judicial resources, and failing to apply preclusion principles to arbitration rulings, awards, and judgments confirming awards makes arbitration less efficient and less desirable.
- Failing to apply preclusion principles to arbitration rulings, awards, and judgments confirming awards may incentivize multiple lawsuits and harassing litigation.
- The prerequisites for applying preclusion principles are the same for arbitration and court proceedings, with adequate safeguards built in to prevent the doctrines' unfair application.
- Arbitration is a matter of contract, and entry into such contracts usually involves an attorney's supervision and sophisticated parties. Unsophisticated, unrepresented parties may be entitled to statutory and common law protections against unfair application of preclusion doctrines.
- The increasing use of arbitration nationwide, despite the ongoing application of preclusion principles, establishes that arbitration remains economically favored by disputing parties.
- Parties may mutually choose to contractually limit the preclusive effect of an arbitration and the arbitrator's discretion to deviate from controlling law.
- A case-by-case approach to applying preclusion principles will discourage arbitration in the long term and/or pressure arbitrations to adopt the more expensive and cumbersome characteristics of full-fledged litigation.
- Because of the inherent discretion in applying preclusion principles, manifestly unfair application of preclusion should not occur.
- Guardrails exist to prevent abuses of arbitral authority under the CRUAA and FAA, including judicial review to ensure the arbitrators are disinterested and their awards are not tainted by fraud, and, under the CRUAA, precluding arbitrators from awarding exemplary damages.
- In light of court decisions upholding contractual class action waivers and consolidation prohibitions in arbitration agreements, with the likely result of repetitive arbitration of a plethora of similar claims before different arbitrators, applying preclusion principles becomes more important than ever in obtaining the cost and time benefits of arbitration.
- There is no injustice if a litigant has been given a full and fair opportunity to litigate the issues to which preclusion may apply.
- Applying nonmutual collateral estoppel is the fairest way to ensure that a final decision in arbitration is actually final.

REASONS NOT TO APPLY PRECLUSION TO ARBITRATION PROCEEDINGS

- Because arbitrators are often empowered to decide cases on equitable grounds and are the final arbiters of all legal and factual issues, they may reject a legal argument a court might accept.
- A nonparty to a private arbitration who invokes issue preclusion does not avoid vexatious litigation because that party asserts the doctrine to gain a vicarious advantage, not to protect someone who has already prevailed against the same opponent.
- Nonmutual issue preclusion will lead to unpredictable rules for litigants.
- Applying preclusion principles will discourage arbitration and/or increase its formality and expense, making it a less favored alternative to court litigation.
- Issue preclusion principles should be applied on a case-by-case basis, taking into account the differences between arbitration and court proceedings.
- In commercial arbitration, the parties often rely on the arbitrators' expertise and broader perspective; ability to assess the disputing parties' business relationships and industry customs; and discretion to grant or deny a claim, where a court lacks such discretion. Industry-specific arbitrators often apply "the law of the shop, not the law of the land." (*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)).
- Giving preclusive effect to rulings and awards from arbitrators who rely on a specific industry for much of their income may magnify the alleged effect of "repeat-player" implicit biases on such rulings and awards in cases where industry members arbitrate claims against consumers, employees, and others whose interests may be adverse to the industry.
- Allowing a single arbitration ruling to dictate the result in hundreds if not thousands of other individual arbitrations is fundamentally unfair.
- Allowing expansive preclusion may undercut the confidentiality of arbitration proceedings by allowing or requiring the disclosure of rulings and results in those confidential proceedings.
- Arbitration is a matter of contract and mutual consent, so binding non-contracting parties to prior arbitration results undermines these principles.

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).

3. *Id.*

4. *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 22–23 (Colo.App. 2010).

5. *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922, 925 (Colo. 1982) (emphasis added) (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.")). *See also Magenis v. Bruner*, 187 P.3d 1222, 1224 (Colo.App. 2008) (arbitrator not bound by either "substantive or procedural rules of law").

6. *Magenis*, 187 P.3d at 1224 (court may review arbitration award only on grounds specifically authorized by statute or if the arbitrator exceeded his or her authority under the arbitration agreement).

7. *See* 9 USC § 10 (FAA); Benson, *Colorado and Federal Arbitration Law and Practice: A Guide to Arbitration, Mediation, and other ADR Procedures* § 16.8 (CLE in Colo., Inc. 3d ed. 2017) (quoting *Lynch v. Whitney*, 419 F. App'x 826, 834 (10th Cir. 2011)). The Colorado Court of Appeals has noted that an arbitrator's determination is given "extreme deference" because the review standard for arbitration awards is among the narrowest known to law. *Barnett*, 252 P.3d at 18 (citing with authority *Brown v. Coleman Co.*, 220 F.3d 1180, 1182 (10th Cir. 2000)). *Barnett* declined to decide whether an arbitration award may be vacated for contravening public policy or manifestly disregarding the law because the record did not support either contention. *Id.* at 20–22.

8. *See* CRS § 13-22-223 (CRUAA); *Price v. Mountain Sleep Diagnostics, Inc.*, 479 P.3d 68, 70 (Colo.App. 2020).

9. *Treadwell v. Vill. Homes of Colo., Inc.*, 222 P.3d 398, 400–01 (Colo.App. 2009) (affirming homeowners' arbitration award against builder for misrepresentation). The *Treadwell* court stated, "where the parties empower an arbitrator to resolve an issue, courts may not review the merits—including issues of contract interpretation—of the arbitration decision," and a court may not review an "arbitrator's improvident, even silly, factfinding." *Id.* (citations omitted).

10. *Cf. Treadwell*, 222 P.3d at 401 ("The deference to arbitrators is so great, that referring to judicial review of arbitral awards may be something of a misnomer.") (citations omitted).

11. A substantial line of out-of-state authority holds that settlement of an action generally does not prevent issue preclusion. *See, e.g., Ossman v. Diana Corp.*, 825 F.Supp. 870, 878, n.21 (D.Minn. 1993) (collecting cases).

12. Benson, *supra* note 7 at §§ 16.7, 16.7.2. *But see S.O.V. v. People in Interest of M.C.*, 914 P.2d 355, 359 (Colo. 1996) (in paternity proceeding, a final judgment is an "essential prerequisite" for res judicata and collateral estoppel). *Cf. Annot., Judicial Estoppel: Representation or Conduct, Other than Mere Participation, in Arbitration Proceeding as Barring Contrary Position in Subsequent Litigation*, 121 A.L.R. 5th 403 (Lawyers Coop. Publ'g 2004) (collecting cases).

13. Benson, *supra* note 7 at § 18.6.1 (relying in part on *Judd Constr. Co.*, 642 P.2d at 925–26, and *Container Tech. Corp. v. J. Gadsden Pty., Ltd.*, 781 P.2d 119, 121 (Colo.App. 1989)).

14. *Judd Constr. Co.*, 642 P.2d at 925. For related case law, *see supra* note 5.

15. *Rantz v. Kaufman*, 109 P.3d 132, 141 (Colo. 2005).

16. *Cf. Barnett*, 252 P.3d at 23 (discussing preclusive effect of award confirmed as a judgment).

17. *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F.Supp. 1060 (N.D.Ill. 1998) (quoting MacNeil et al., *Federal Arbitration Law* § 39.65 (Little, Brown: Boston 1994) and collecting cases); *accord In re Texaco, Inc.*, 218 B.R. 1, 10 (S.D.N.Y. Bankr. 1998) ("The doctrine of collateral estoppel applies to arbitration awards, including final, though unconfirmed, arbitration awards.") (citations omitted). *Cf. Waterfront Marine Constr., Inc. v. N. End 49ers Sandbridge Bulkhead Groups A, B and C*, 468 S.E.2d 894, 902, n.4 (Va. 1996) ("A number of jurisdictions apparently do not distinguish between confirmed and unconfirmed awards for purposes of res judicata" and collecting cases). *See also generally* Wright and Miller, *Federal Practice and Procedure* § 4475.1 (Thomson West 2d ed. Oct. 2021 update); *Restatement (Second) of Judgments* § 84 (Am. Law Inst. Oct. 2021 update) (discussing arbitration preclusion); Motomura, "Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices," 63 *Tulane L. Rev.* 29 (Nov. 1988) (accord).

18. *Wellons v. T.E. Ibberson Co.*, 869 F.2d 1166, 1169 (8th Cir. 1989).

19. *Jacobson v. Fireman's Fund Ins. Co.*, 111 F.3d 261, 266–68 (2d Cir. 1997) (quotations and citations omitted).

20. *Bio-Psychiatric-Toxicology Lab., Inc. v. Radcliff & West*, 62 Cal.Rptr.2d 853, 861 (Cal. App. 2 Dist. 1997), withdrawn, 1997 Cal. LEXIS 5159 at *1 (Cal. Aug. 13, 1997).

21. *Id.*

22. *See MACTEC, Inc. v. Gorelick*, 427 F.3d 821, 824 (10th Cir. 2005) (holding clause prohibiting judicial review of arbitration provision enforceable, precluding review of district court's denial of application to dismiss award; unclear from opinion if the award was confirmed). The *MACTEC* court stated, "As for finality, a valid and final award by arbitration generally has the same effect under the rules of res judicata as a judgment of a court." *Id.* at 831 (citing with authority *Restatement (Second) of Judgments* § 84(1) and cmt. b (Am. Law Inst. 1980)). *See also Chen v. Dillard Store Servs., Inc.*, 500 F.3d 1140, 1147 (10th Cir. 2007) (accord, but unclear from opinion if the award was confirmed).

23. *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 666 (10th Cir. 2006) ("Where, as here, the parties have invested considerable time and resources arbitrating an issue identical to that before a court, and the arbitration panel clearly articulates its findings on that issue, the court may consider this evidence that the parties intended the arbitration to have preclusive effect.").

24. Courts have applied issue preclusion to trial court orders never reduced to judgment, such as attorney disqualification rulings, to preclude litigants from continually moving to disqualify the same opposing counsel. *See, e.g., Frazee v. Niles*, No. B242395, 2014 WL 31712 at *4, 2014 Cal. App. Unpub. LEXIS 41 at *14 (Cal. Ct.App. Jan. 6, 2014) (denial of disqualification motion is "final and binding for purposes of collateral estoppel.") (citation omitted); *FMA/ Constr. Mgmt. Corp. v. Yaabetz*, 552 N.Y.S.2d 41, 42 (N.Y.App.Div. 1990) (applying collateral estoppel to hold a former client could not file a lawsuit seeking to disqualify attorneys).

25. Wright and Miller, *supra* note 17 at § 4425.

26. *United States v. Moser*, 266 U.S. 236, 242 (1924) (emphasis in original) (but also stating, "[where] a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases." *Id.*).

27. *Cent. Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson*, 940 P.2d 1097, 1104 (Colo. App. 1997).

28. *Id.*

29. Wright and Miller, *supra* note 17 at § 4425. *See also Nat'l R.R. Pass. Corp. v. Penn. Pub. Util. Comm'n*, 288 F.3d 519, 530 (3d Cir. 2002) (where same legal issue presents itself in two suits but the second suit calls for application of the previously selected rule of law in a significantly different context, it may be inappropriate to preclude a party from challenging the governing rule of law applied in the first suit); Buckley, "Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History," 24 *Hous. L. Rev.* 875, 876 (1987) (proposing a "theoretical justification" for a rule preventing parties from relitigating legal issues previously decided).

30. Wright and Miller, *supra* note 17 at § 4425.

31. *Id. Cf. Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 243 (Colo. 2003) (court may decline to apply the law of the case doctrine if a previous decision is no longer sound because of changed legal conditions).

32. CRS §§ 13-20-806(7) and -807.

33. CRS § 13-20-806(7)(a).

34. In *Ronald A. Chisholm, Ltd. v. Am. Cold*

Storage, Inc., No. 3:09-CV-0808, 2013 WL 3967668 at *9, n.9, 2013 U.S. Dist. LEXIS 107204 at *29 (W.D.Ky. July 30, 2013), the court found that issue preclusion barred relitigation of the liability limitation provision's enforceability where the provision had previously been found enforceable in an earlier suit between the two parties. However, the judgment was reversed on appeal because a fact question was presented as to which party first breached the warehouse receipt agreement, possibly rendering the provision unenforceable. *See Ronald A. Chisholm, Ltd. v. Am. Cold Storage, Inc.*, 590 F. App'x 593, 596 (6th Cir. 2014).

35. Colo. Const. art. II, § 6.

36. *S. Wash. Assocs. v. Flanagan*, 859 P.2d 217, 220 (Colo.App. 1992) (arbitration is a private means of dispute resolution, and the parties can structure both the arbitration award's boundaries and the arbitral procedures). *Cf.* Schmitz, "Untangling the Privacy Paradox in Arbitration," 54 *U. Kan. L. Rev.* 1211 (2006) ("Arbitration is private but not confidential.").

37. *See A.T. v. State Farm Mut. Auto. Ins. Co.*, 989 P.2d 219, 220 (Colo.App. 1999) ("[T]his arbitration was not conducted under the rules of [AAA], which would have provided confidentiality, but rather, under the [CUAA], which is silent on confidentiality. . . . Therefore, because the plaintiff did not obtain a confidentiality or protective order or agreement, the record was available for use by State Farm in later, separate litigation.").

38. The AAA's Ethical Principles state that while the AAA and its arbitrators will keep confidential the information supplied by the parties, the "AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public." https://www.adr.org/StatementofEthicalPrinciples. *See also* Estreicher and Bennet, "The Confidentiality of Arbitration Proceedings," *N.Y. L.J.*, vol. 240, no. 31 (Aug. 13, 2008) (noting that the ease with which outsiders may be excluded from arbitration may provide a false sense of security regarding the confidentiality of the proceedings, and that even when the parties' agreement provides for confidentiality, or the agreement or applicable rules allow the arbitrator to issue confidentiality orders for cause, such orders only provide a limited assurance of confidentiality, particularly with respect to third parties).

39. Conley, "Promoting Finality: Using Offensive, Nonmutual Collateral Estoppel in Employment Arbitration," 5 *U.C. Irvine L. Rev.* 651, 681 (2015) (noting confidentiality clauses can prevent offensive, nonmutual collateral estoppel because subsequent parties will not learn about prior decisions against the common defendant). *See also* Stempel, "Mandating Minimum Quality in Mass Arbitration," 76 *U. Cin. L. Rev.* 383, 423 (2008) (confidentiality may allow a "repeat offender" to avoid issue preclusion).

40. *See Whitlock v. Triangle Grading Contractors Dev., Inc.*, 696 S.E.2d 543, 547 (N.C.App. 2010) ("The parties contracting for arbitration are free to 'formulate their own contractual restrictions on [the] carry-over estoppel effect' of the arbitration award, but the parties 'cannot, of course, impose similar limitations which would impair or diminish the rights of third persons.'" (citing and quoting *Am. Ins. Co. v. Messinger*, 371 N.E.2d 798, 804 (1977)).

41. Estreicher and Swderski, "Issue Preclusion in Employment Arbitration after *Epic Systems v. Lewis*," 4 *U. Pa. J.L. & Pub. Affairs* 15, 24–35 (Nov. 2018) (discussing cases upholding and voiding arbitration confidentiality provisions, and effect of such provisions on issue preclusion).

42. *Id.* at 24.

43. Estreicher and Swderski argue that "[a]ny confidentiality bar, however, is likely to drop out once a party seeks to confirm or enforce an arbitration award in court . . . ." *Id.* at 29 (citing cases). Parties can take steps to preserve the confidentiality of trade secrets and highly personal information disclosed during an arbitration while making available the substance of arbitration rulings and awards relevant to analyzing preclusion.

44. *Id.* at 24 (discussing cases).

45. *Cf. Asahi Glass Co., Ltd. v. Toledo Eng'g Co., Inc.*, 505 F.Supp.2d 423, 437–38 (N.D. Ohio 2007) (where arbitrating parties deprived third party of a full and fair opportunity to participate in the arbitration by agreeing to keep all arbitration information confidential and by preventing third party's employees from serving as expert witnesses, due process prevented issue preclusion from applying to third party in later action).

46. *Cf. Walgreen Co. v. Charnes*, 819 P.2d 1039, 1046 (Colo. 1991) (Colorado's Constitution requires "that all laws relating to state courts shall be uniform in their application").

47. *Villas at Highland Park Homeowners Ass'n, Inc. v. Villas at Highland Park, LLC*, 394 P.3d 1144, 1151–52 (Colo. 2017) (quoting *Wolfe v. Sedalia Water and Sanitation Dist.*, 343 P.3d 16, 22 (Colo. 2015)).

48. *In re Tonko*, 154 P.3d 397, 405 (Colo. 2007) (issue preclusion is intended to "promote reliance on the judicial system by preventing inconsistent decisions").

49. The sidebar's pros and cons are derived from the following sources: Hall, "Issue Preclusion is no Illusion for Arbitration in Arkansas: Riverdale Development Co. v. Ruffin Building Systems, Inc." 58 *Ark. L. Rev.* 929, 936–40 (2006); Motomura, *supra* note 17; Fasman, "Offensive, Non-Mutual Collateral Estoppel in Arbitration," 34 *ABA J. Lab. & Emp. L.* 217 (2020); Conley, *supra* note 39; 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); Estreicher and Swderski, *supra* note 41.

Because claim preclusion analysis is often less controversial and simpler than issue preclusion analysis, the authors believe these pros and cons are more useful in analyzing the latter than the former.

50. *See generally* Hall, *supra* note 49 at 936–40. *See also Restatement (Second) of Judgments* § 84(1) (Am. Law Inst. Oct. 2021 update) ("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."); § 84(3)(a) and (b), and 84(4) (identifying exceptions to preclusion where preclusion "would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious"; or when the "procedure leading to the award lacked" certain formal elements of adjudicatory procedure; or the arbitration agreement limits the award's binding effect). *Cf. Foster*, 394 P.3d at 1125–26 (limiting application of offensive issue preclusion). One commentator notes that "[d]efensive use encourages the plaintiff to join all potential defendants in one action to avoid preclusion based on collateral estoppel in a later proceeding," while "[o]ffensive use can encourage a plaintiff 'to adopt a "wait and see" attitude' because the plaintiff will not be bound by a previous suit favorable to the defendant, but the plaintiff will be able to use a defendant's previous loss against that defendant," and the "'wait and see' problem cuts against both judicial economy and the purpose of party joinder, giving trial courts a good reason to look askance at a plaintiff attempting to use offensive, nonmutual collateral estoppel in most situations." Conley, *supra* note 39 at 656.