

RESPECT FOR JUDGMENTS

Chapter 11

A. Claim Preclusion

2. Between the "Same" Parties

Page 688. Add the following after the concluding sentence of Note 4c.

In 2008 the U.S. Supreme Court tackled the question of virtual representation; consider what is left of that doctrine after the following decision.

Taylor v. Sturgell

128 S. Ct. 2161 (2008)

Justice GINSBURG delivered the opinion of the Court.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). Several exceptions, recognized in this Court's decisions, temper this basic rule. In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation. In this case, we consider for the first time whether there is a "virtual representation" exception to the general rule against precluding nonparties. Adopted by a number of courts, including the courts below in the case now before us, the exception so styled is broader than any we have so far approved. . . .

We disapprove the doctrine of preclusion by "virtual representation," and hold, based on the record as it now stands, that the judgment against Herrick does not bar Taylor from maintaining this suit.

I

The Freedom of Information Act (FOIA) accords "any person" a right to request any records held by a federal agency. 5 U.S.C. §552(a)(3)(A) (2006 ed.). No reason need be given for a FOIA request, and unless the requested materials

fall within one of the Act's enumerated exemptions, see §552(a)(3)(E), (b), the agency must "make the records promptly available" to the requester, §552(a)(3)(A). If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction "order[ing] the production of any agency records improperly withheld." §552(a)(4)(B).

The courts below held the instant FOIA suit barred by the judgment in earlier litigation seeking the same records. Because the lower courts' decisions turned on the connection between the two lawsuits, we begin with a full account of each action.

A

The first suit was filed by Greg Herrick, an antique aircraft enthusiast and the owner of an F-45 airplane, a vintage model manufactured by the Fairchild Engine and Airplane Corporation (FEAC) in the 1930's. In 1997, seeking information that would help him restore his plane to its original condition, Herrick filed a FOIA request asking the Federal Aviation Administration (FAA) for copies of any technical documents about the F-45 contained in the agency's records.

To gain a certificate authorizing the manufacture and sale of the F-45, FEAC had submitted to the FAA's predecessor, the Civil Aeronautics Authority, detailed specifications and other technical data about the plane. Hundreds of pages of documents produced by FEAC in the certification process remain in the FAA's records. The FAA denied Herrick's request, however, upon finding that the documents he sought are subject to FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. §552(b)(4) (2006 ed.). In an administrative appeal, Herrick urged that FEAC and its successors had waived any trade-secret protection. The FAA thereupon contacted FEAC's corporate successor, respondent Fairchild Corporation (Fairchild). Because Fairchild objected to release of the documents, the agency adhered to its original decision.

Herrick then filed suit in the U.S. District Court for the District of Wyoming. Challenging the FAA's invocation of the trade-secret exemption, Herrick placed heavy weight on a 1955 letter from FEAC to the Civil Aeronautics Authority. The letter authorized the agency to lend any documents in its files to the public "for use in making repairs or replacement parts for aircraft produced by Fairchild." . . .

Rejecting Herrick's argument, the District Court granted summary judgment to the FAA. . . .

On appeal, the Tenth Circuit. . . affirmed the entry of summary judgment for the FAA. . . .

B

The Tenth Circuit's decision issued on July 24, 2002. Less than a month later, on August 22, petitioner Brent Taylor — a friend of Herrick's and an

antique aircraft enthusiast in his own right — submitted a FOIA request seeking the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed a complaint in the U.S. District Court for the District of Columbia. Like Herrick, Taylor argued that FEAC's 1955 letter had stripped the records of their trade-secret status. But Taylor also sought to litigate . . . two issues concerning recapture of protected status that Herrick had failed to raise in his appeal to the Tenth Circuit.

After Fairchild intervened as a defendant, the District Court in D.C. concluded that Taylor's suit was barred by claim preclusion; accordingly, it granted summary judgment to Fairchild and the FAA. The court acknowledged that Taylor was not a party to Herrick's suit. Relying on the Eighth Circuit's decision in *Tyus v. Schoemehl*, 93 F.3d 449 (1996), however, it held that a non-party may be bound by a judgment if she was "virtually represented" by a party.

The Eighth Circuit's seven-factor test for virtual representation, adopted by the District Court in Taylor's case, requires an "identity of interests" between the person to be bound and a party to the judgment. Six additional factors counsel in favor of virtual representation under the Eighth Circuit's test, but are not prerequisites: (1) a "close relationship" between the present party and a party to the judgment alleged to be preclusive; (2) "participation in the prior litigation" by the present party; (3) the present party's "apparent acquiescence" to the preclusive effect of the judgment; (4) "deliberat[e] maneuver[ing]" to avoid the effect of the judgment; (5) adequate representation of the present party by a party to the prior adjudication; and (6) a suit raising a "public law" rather than a "private law" issue. These factors, the D.C. District Court observed, "constitute a fluid test with imprecise boundaries" and call for "a broad, case-by-case inquiry."

The record before the District Court in Taylor's suit revealed the following facts about the relationship between Taylor and Herrick: Taylor is the president of the Antique Aircraft Association, an organization to which Herrick belongs; the two men are "close associate[s]"; Herrick asked Taylor to help restore Herrick's F-45, though they had no contract or agreement for Taylor's participation in the restoration; Taylor was represented by the lawyer who represented Herrick in the earlier litigation; and Herrick apparently gave Taylor documents that Herrick had obtained from the FAA during discovery in his suit. . . .

[T]he District Court held Taylor's suit, seeking the same documents Herrick had requested, barred by the judgment against Herrick.

The D.C. Circuit affirmed . . . , announc[ing] its own five-factor test. The first two factors — "Identity of interests" and "adequate representation" — are necessary but not sufficient for virtual representation. In addition, at least one of three other factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment."

Applying this test to the record in Taylor's case, the D.C. Circuit found both of the necessary conditions for virtual representation well met. . . .

II

The preclusive effect of a federal-court judgment is determined by federal common law. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507-508 (2001). For judgments in federal-question cases — for example, Herrick's FOIA suit — federal courts participate in developing “uniform federal rule[s]” of *res judicata*, which this Court has ultimate authority to determine and declare. *Id.*, at 508.¹ The federal common law of preclusion is, of course, subject to due process limitations. See *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996).

Taylor's case presents an issue of first impression in this sense: Until now, we have never addressed the doctrine of “virtual representation” adopted (in varying forms) by several Circuits and relied upon by the courts below. Our inquiry, however, is guided by well-established precedent regarding the propriety of nonparty preclusion. We review that precedent before taking up directly the issue of virtual representation.

A

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as “*res judicata*.”² . . . By “preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,” these two doctrines protect against “the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.”

A person who was not a party to a suit generally has not had a “full and fair opportunity to litigate” the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the “deep-rooted historic tradition that everyone should have his own day in court.” *Richards*. Indicating the strength of that tradition, we have often repeated the general rule that “one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Hansberry*; *Martin v. Wilks*, 490 U.S. 755, 761 (1989).

B

Though hardly in doubt, the rule against nonparty preclusion is subject to exceptions. For present purposes, the recognized exceptions can be grouped into

1. For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits. See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

2. These terms have replaced a more confusing lexicon. Claim preclusion describes the rules formerly known as “merger” and “bar,” while issue preclusion encompasses the doctrines once known as “collateral estoppel” and “direct estoppel.” See *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77, n. 1 (1984).

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six categories.³ [The Court listed 1) agreement by the parties to be bound by a prior action; 2) preexisting “substantive legal relationships” (such as preceding and succeeding owners of property); 3) adequate representation by someone with the same interests who was a party (such as trustees, guardians, and other fiduciaries); 4) a party “assuming control” over prior litigation; and 6) special statutory schemes such as bankruptcy and probate proceedings, provided those proceedings comport with due process.]

III

Reaching beyond these six established categories, some lower courts have recognized a “virtual representation” exception to the rule against nonparty preclusion. Decisions of these courts, however, have been far from consistent. . . .

The D.C. Circuit, the FAA, and Fairchild have presented three arguments in support of an expansive doctrine of virtual representation. We find none of them persuasive.

A

The D.C. Circuit purported to ground its virtual representation doctrine in this Court’s decisions stating that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. But the D.C. Circuit’s definition of “adequate representation” strayed from the meaning our decisions have attributed to that term. . . .

The D.C. Circuit misapprehended *Richards*. . . . [O]ur holding that the Alabama Supreme Court’s application of res judicata to nonparties violated due process turned on the lack of either special procedures to protect the nonparties’ interests or an understanding by the concerned parties that the first suit was brought in a representative capacity. . . .

B

Fairchild and the FAA do not argue that the D.C. Circuit’s virtual representation doctrine fits within any of the recognized grounds for nonparty preclusion. Rather, they ask us to abandon the attempt to delineate discrete grounds and clear rules altogether. Preclusion is in order, they contend, whenever “the relationship between a party and a non-party is ‘close enough’ to bring the second litigant within the judgment.” Courts should make the “close enough”

3. The established grounds for nonparty preclusion could be organized differently. See, e.g., 1 & 2 Restatement (Second) of Judgments §§39-62 (1980) (hereinafter Restatement); D. Shapiro, Civil Procedure: Preclusion in Civil Actions 75-92 (2001); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4448, pp 327-329 (2d ed. 2002) (hereinafter Wright & Miller). The list that follows is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy.

determination, they urge, through a “heavily fact-driven” and “equitable” inquiry. . . .

We reject this argument for three reasons. First, our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party. . . .

Our second reason for rejecting a broad doctrine of virtual representation rests on the limitations attending nonparty preclusion based on adequate representation. A party’s representation of a nonparty is “adequate” for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, see *Hansberry*; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty, see *Richards*. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented.⁴ In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

An expansive doctrine of virtual representation, however, would “recogniz[e], in effect, a common-law kind of class action.” *Tice*, 162 F.3d at 972. That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry*, *Richards*, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to “create de facto class actions at will.”

Third, a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves. Most obviously, it could significantly complicate the task of district courts faced in the first instance with preclusion questions. An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven- or five-prong tests. . . .

C

Finally, relying on the Eighth Circuit’s decision in *Tyus*, the FAA maintains that nonparty preclusion should apply more broadly in “public-law” litigation than in “private-law” controversies. To support this position, the FAA offers two arguments. First, the FAA urges, our decision in *Richards* acknowledges that, in certain cases, the plaintiff has a reduced interest in controlling the litigation “because of the public nature of the right at issue.” . . .

4. *Richards* suggested that notice is required in some representative suits, e.g., class actions seeking monetary relief. See 517 U.S., at 801 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950)). But we assumed without deciding that a lack of notice might be overcome in some circumstances. See *Richards*, 517 U.S., at 801.

[W]e said in *Richards* only that, for the type of public-law claims there envisioned, [state and federal legislatures] are free to adopt procedures limiting repetitive litigation [involving public rights]. . . . It hardly follows, however, that this Court should proscribe or confine successive FOIA suits by different requesters. Indeed, Congress' provision for FOIA suits with no statutory constraint on successive actions counsels against judicial imposition of constraints through extraordinary application of the common law of preclusion.

The FAA next argues that "the threat of vexatious litigation is heightened" in public-law cases because "the number of plaintiffs with standing is potentially limitless." . . .

But we are not convinced that this risk justifies departure from the usual rules governing nonparty preclusion. First, *stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others." This intuition seems to be borne out by experience: The FAA has not called our attention to any instances of abusive FOIA suits in the Circuits that reject the virtual-representation theory respondents advocate here.

IV

For the foregoing reasons, we disapprove the theory of virtual representation on which the decision below rested. 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. . . .

We now turn back to Taylor's action to determine whether his suit is such a case, or whether the result reached by the courts below can be justified on one of the recognized grounds for nonparty preclusion.

A

It is uncontested that four of the six grounds for nonparty preclusion have no application here. . . .

That leaves only the fifth category: preclusion because a nonparty to an earlier litigation has brought suit as a representative or agent of a party who is bound by the prior adjudication. Taylor is not Herrick's legal representative and he has not purported to sue in a representative capacity. He concedes, however, that preclusion would be appropriate if respondents could demonstrate that he is acting as Herrick's "undisclosed agen[t]." . . .

We therefore remand to give the courts below an opportunity to determine whether Taylor, in pursuing the instant FOIA suit, is acting as Herrick's agent. Taylor concedes that such a remand is appropriate. . . .

B

On remand, Fairchild suggests, Taylor should bear the burden of proving he is not acting as Herrick's agent. . . .

We reject Fairchild's suggestion. Claim preclusion, like issue preclusion, is an affirmative defense. See Fed. Rule Civ. Proc. 8(c) . . . Ordinarily, it is incumbent on the defendant to plead and prove such a defense, see *Jones v. Bock*, 549 U.S. 199, 204 (2007), and we have never recognized claim preclusion as an exception to that general rule. We acknowledge that direct evidence justifying nonparty preclusion is often in the hands of plaintiffs rather than defendants. But "[v]ery often one must plead and prove matters as to which his adversary has superior access to the proof." In these situations, targeted interrogatories or deposition questions can reduce the information disparity. We see no greater cause here than in other matters of affirmative defense to disturb the traditional allocation of the proof burden. . . .

For the reasons stated, the judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

NOTES AND PROBLEMS

1. The doctrine of virtual representation takes a hit in *Taylor*. What kind of hit?

a. Suppose Landowner sues Alleged Trespasser for using a path across his land; Trespasser defends, alleging a prescriptive easement — and wins. When Landowner subsequently sells the property, Buyer wants to know if he will be burdened by the same prescriptive easement. In the past, a number of courts have said yes, citing as an explanation the doctrine of virtual representation — that Buyer was "virtually represented" by Landowner. Does *Taylor* change that outcome?

b. Minor is injured in accident and sues Defendant through an appointed guardian ad litem. Minor loses. When Minor becomes an adult can he, assuming the statute of limitations has not run, institute a new suit against Defendant for the same injuries? In the past, courts have said no, citing virtual representation. Does *Taylor* change that outcome?

2. What is the source of law in *Taylor*?

a. We can safely say that it's not a case like *Frier v. City of Vandalia* (casebook page 668), in which the federal court was trying to apply the state's law of preclusion. This is a federal claim, and some variety of federal law will therefore govern.

b. It might be a matter of federal common law — a case deciding the contours of doctrine for the federal courts. If so, state courts would be free to

continue to recognize preclusion by virtual representation, so long as they did not run afoul of constitutional constraints.

c. It might be a matter of constitutional law — decided under the due process clause. If so, state courts could no longer recognize preclusion by virtual representation in cases like *Taylor*.

d. Which is it?

3. Whichever it is, a case like *Taylor* is fairly narrow. While several government agencies (like the FAA) may be annoyed by the decision, it's not one of those Supreme Court cases that has the talking heads chattering for days and requires great realignments of power.

a. That said, why did the Supreme Court bother? It used a scarce resource — the Justices have heard only about 85 cases in recent years. Why did they think this one worth their collective time?

b. And why was the answer so clear that all nine Justices agreed on the outcome and on the reasoning? While the Supreme Court (and certainly the bar) is often happy with unanimous decisions, they are not all that common: In recent years only about a quarter of the Court's decisions have been unanimous; why was this one?

4. The Court in passing distinguishes *stare decisis* from virtual representation or other forms of preclusion. Just what is the distinction?

a. Explain why, on remand, the FAA and Fairchild will be free to argue to the D.C. Circuit that the Tenth Circuit has just decided a closely related case and that the D.C. Circuit should be persuaded by the Tenth Circuit's analysis of the Freedom of Information Act as applied to the design specifications for this particular aircraft.

b. Explain the difference between such an application of precedent and the position for which the FAA and Fairchild were arguing. What would virtual representation (and claim preclusion) do for the FAA (and to *Taylor*) that *stare decisis* would not.

c. Finally, explain how the Court addresses the distinction just drawn when the opinion notes "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others." This intuition seems to be borne out by experience: The FAA has not called our attention to any instances of abusive FOIA suits in the Circuits that reject the virtual-representation theory respondents advocate here." Explain why this passage addresses the difference between preclusion and *stare decisis*.

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