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Claim and Issue Preclusion Do Not Protect Tenants from Joint and Several Liability

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In a "was this really necessary?" decision, the California Supreme Court "granted review to clarify a bedrock principle of contract law: Parties who are jointly and severally liable on an obligation may be sued in separate actions." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813 (2015). A landlord's recovery from one tenant does not bar suit against other joint and several tenants.

In *DKN Holdings*, three tenants agreed to "joint and several responsibility" when they leased commercial space to operate a fitness club. One of the tenants, Caputo, sued the landlord on the lease, alleging DKN "failed to disclose that construction on a driveway into the shopping center would not begin for over a year and that state regulations prohibited cutting back vegetation that made the gym less visible." The landlord cross-complained for unpaid rent and other moneys due. The trial court ruled against Caputo and awarded over $2.8 million on the landlord's cross-complaint.

The landlord then sued the other tenants, Faerber and Neel, for breach of the lease. Faerber demurred, arguing the landlord's rights under the lease had already been adjudicated and the suit was barred by the rule against splitting a cause of action. The trial court sided with Faerber and sustained the demurrer. The landlord appealed, and the court of appeal affirmed. The Supreme Court then granted review and reversed.

After looking at earlier authority concerning res judicata and issue and claim preclusion, it is easy to understand how the trial court and appellate court went so wrong. They were misled by the way the term "res judicata" had been historically used by the California Supreme Court. In prior decisions, the court loosely used "res judicata," sometimes describing claim preclusion,

sometimes describing issue preclusion, and sometimes describing both. To make matters worse, the court also occasionally used the term "collateral estoppel" as a substitute for issue preclusion. The terminology was unclear.

The California Supreme Court provided clarity in the *DKN Holdings* decision. To prevent future confusion, the court decided it will exclusively use the terms "claim preclusion" and "issue preclusion" and reject future use of "res judicata." It also clarified the meanings and requirements of these two types of preclusion.

Claim preclusion, on the one hand, prevents re-litigation of the same *cause of action* in a second suit between the same parties or parties in privity with them. Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit.

Issue preclusion, on the other hand, prohibits the re-litigation of *issues* argued and decided in a previous case, even if the second suit raises different causes of action. Under issue preclusion, the prior judgment conclusively resolves an issue litigated and determined in the first action. But under due process, issue preclusion can be asserted only against a party to the first lawsuit or one in privity with such party.

In *DKN Holdings*, claim preclusion is inapplicable because the same parties were not involved in the two lawsuits. It is noteworthy that Faerber argued he was "in privity" with Caputo and therefore claim preclusion should apply. But the court disagreed, saying joint and several liability on a contract does not create privity of contract among those on one side of the deal. Faerber can, however, argue issue preclusion as a shield against re-litigation of issues determined in the *Caputo* action, such as "the rent due, or other losses caused by breach of the lease." DKN had a "full and fair opportunity to litigate the extent of those damages." Thus, adjudication of a claim against one jointly and severally liable defendant creates a limit on recovery, which may be issue preclusion regarding damages in later litigation based on the same facts. The landlord is precluded from contending his loss of rent is greater than previously awarded in the *Caputo* action.

After discussing issue preclusion and claim preclusion, the court held that joint and several liability principles were unaffected by preclusion. "It has long been settled that contracting parties who are severally liable, or subject to joint and several liability, may be sued in the same action or in separate actions at the plaintiff's option." A plaintiff may sue joint and several obligors until he or she has received "satisfaction in some form," and judgment against one obligor does not prevent suit against another. Joint and several liability is not barred by either issue preclusion (liability had not been decided against the landlord in the first case); nor is it barred by claim preclusion (the same parties are not involved in both the first and second lawsuit).

The California Supreme Court reversed and returned the case to the trial court, finding that Faerber and Neel may still be liable to the landlord. In doing so, the court hinted that it might have been easier and more cost-effective for DKN to include Faerber and Neel in the *Caputo* action, which likely crossed DKN's mind once or twice as well.