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Summary Judgment in Virginia: One Solution To The Limitations of Rule 3:20 (A Response to the Fall 2010 Litigation News)

by Shari L. Klevens, Randy Evans, Alanna Clair

As Gary Bryant noted in the last issue of *Litigation News*, obtaining summary judgment in Virginia can be quite difficult. The rules do not permit summary judgment based on discovery depositions unless all parties consent to it. This article presents one solution to that challenge, showing how the doctrines of judicial notice and collateral estoppel can be combined to create a factual record adequate to support summary judgment.

Use of Judicial Notice

The narrow confines of Virginia Code § 8.01-420 and Supreme Court Rule 3:20 make it difficult for Virginia practitioners to establish an "undisputed" factual record. Practitioners may, however, use judicial notice to avoid litigation of well-known facts. Code §§ 8.01-386 and -388 provide that a court may take judicial notice of official publications or laws of other jurisdictions. Additionally, a "trial court may take judicial notice of those facts that are either (1) so 'generally known' within the jurisdiction or (2) so 'easily ascertainable' by reference to reliable sources that reasonably informed people in the community would not regard them as reasonably subject to dispute." *Taylor v. C* .E.2d 113, 116 (Va. Ct. App. 1998) (citations omitted). Applying these principles, courts have recognized that it is appropriate for a "trial court [to take] judicial notice of the records of [an] underlying action." *Titan America, LLC v. Riverton Inv. C* ., 264 Va. 292, 305 (2002).

An important corollary to this power is the rule that Virginia trial courts have discretion in determining the scope of judicial notice: "Judicial notice permits a court to determine the existence of a fact without formal evidence tending to support that fact." *Scafetta v. Arlington County*, 13 Va. App. 646, 648, 414 S.E.2d 438, 439, *aff'd on rehearing*, 14 Va. App. 834, 425 S.E.2d 807 (1992). To maximize the impact of judicial notice, however, a Virginia practitioner should combine its tenets with the doctrine of collateral estoppel.

Use of Collateral Estoppel

Virginia's collateral estoppel doctrine "serve[s] the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy, and of promoting judicial economy by preventing needless litigation." *Alderman v. Chrysler Corp.*, 480 F. Supp. 600, 604 (E.D. Va. 1979). Collateral estoppel allows a trial court to conclude that there are no factual matters remaining because all legal issues have been resolved. *See, e.g., Alderman*, 480 F. Supp. a .E.2d 412 (Va. Ct. App. 1986).

To prove that collateral estoppel should apply: (a) the parties to the two proceedings, or their privies, must be the same; (b) the factual issue sought to be litigated must have been litigated in the prior action and must have been essential to the prior judgment; and (c) the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action. *Transdulles Ctr., Inc. v. Sharma*, 252 Va. 20, 22-23 (1996). Courts also must examine whether there is "mutuality," *i.e.*, whether a party to a current litigation would have been bound by the prior litigation if the factual issues in the prior action reached the opposite result. *Id.* at 23; *Nero v. Ferris*, 222 Va.

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807, 812 (1981). Litigants have some flexibility in what evidence they use in seeking the application of collateral estoppel, as the doctrine of collateral estoppel does not prevent a party from relying upon or using the same evidence in subsequent proceedings to prove a fact other than that for which it was offered in prior proceeding. *Dorn*, 348 S.E.2d 412.

Although successful application of these factors does require careful drafting and argument, the relevant case law makes it possible to establish collateral estoppel in Virginia state courts. For example, Virginia courts have discretion to determine "that a party's interest is so identical with another that representation by one party is representation of the other's legal right." *State Water Control Bd. v. Smithfield Foods, Inc.*, 261 Va. 209, 214 (2001) (recognizing that there is "no single fixed definition of privity") (internal citations omitted). The Virginia Supreme Court has also said that "the mutuality doctrine should not be mechanistically applied." *Bates v. Devers*, 214 Va. 667, 671 n.7 (1974). Accordingly, the doctrine of collateral estoppel can be a useful tool in the belt of a Virginia litigator.

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Practical Applications

By adopting a hybrid approach—combining the concepts of judicial notice and collateral estoppel—Virginia attorneys may improve their chances of recovery on summary judgment. Litigants will often find that there are issues in their cases that have been litigated before by at least one of the parties. By using the principles of judicial notice and collateral estoppel, therefore, a Virginia litigant may succeed in establishing the requisite undisputed factual record to win summary judgment in circumstances where it otherwise might be elusive.

Litigators can—and should—use the Commonwealth's permissive collateral estoppel standard to streamline and resolve disputes prior to the investment and expense of trial. Although collateral estoppel can be argued in a wide range of lawsuits, there are certain recurring types of actions where parties regularly rely on the combination of judicial notice and collateral estoppel to avoid an otherwise costly trial. These include: (1) matters that deal with a "case within a case," such as legal malpractice; (2) cases involving a series of court decisions on legal and/or factual issues, such as any dispute over a contract that has been the subject of other litigation; or (3) any case following a bankruptcy of one of the parties.

This approach is well-suited for legal malpractice actions, where the litigation often stems from an attorney's previous representation of a client. This "case within a case" scenario lends itself well to the judicial notice/collateral estoppel hybrid summary judgment approach, because issues central to the current action may have been addressed by a prior court. For example, in a previous litigation, the trial judge may have decided issues related to the effectiveness of an agreement drafted by a malpractice defendant. Or an underlying case, its orders, and its pleadings may prove a breach of the malpractice defendant's duty.

Further, certain aspects of the Virginia colla l estoppel requirements, such as the mutuality doctrine, appear less difficult to prove in matters of legal malpractice. *See, e.g., Weinberger*, 510 F.3d at 495 (holding that mutuality did not bar attorney from estopping malpractice suit because the attorney would have been bound by the underlying ruling with respect to liability in a malpractice action); *Hozie*

v. Preston, 493 F. Supp. 42, 44-45 (W.D. Va. 1980) (finding mutuality requirement met where plaintiffs unsuccessfully claimed that their attorney did not act within his express authority in an action to enforce settlement agreement by entering into the agreement).

There are other matters in which the hybrid approach—combining the concepts of judicial notice and collateral estoppel—may be advantageous. Indeed, in this age of financial upheaval and insolvency, parties in litigation may have previously litigated financial matters in bankruptcy or other financial litigation. As such, these types of cases can also be a basis for a judicial notice/collateral estoppel action. Courts have recognized that "[a]ny attempt by the debtor to resurrect a claim against a creditor which could have been brought in a prior bankruptcy proceeding is barred by the doctrine of res judicata." *Bill Greever Corp. v. Tazewell Nat'l Bank*, 504 S.E.2d 854 (Va. 1998). In addition, issues critical to a subsequent litigation—such as the validity of a contract or the reasonableness of a settlement—may have already been litigated or adjudged in a bankruptcy proceeding involving any of the parties.

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prior litigation. This is the first step in the practical application of this theory. Once the litigator has identified such an issue and any prior court decision, order, rule, or other item of which a judge could take judicial notice, the next step is to file a motion alerting the court to this prior litigation and requesting the court to take judicial notice of the relevant proceeding or fact. This motion should be drafted separately but can be filed concurrently with a motion for summary judgment based on collateral estoppel.

A motion for summary judgment applying this hybrid approach, therefore, should analyze the collateral estoppel factors and their applicability to the prior litigation. In this way, Virginia litigators can avoid the pitfalls of summary judgment. A motion for collateral estoppel does not rely on information obtained in discovery (whether through documents or depositions), but relies exclusively on court records and other items a litigant may permissibly bring before the court.

There is some flexibility, though, in how a party can use this approach. A separate motion requesting a court to take judicial notice of some prior proceeding or fact at issue can be used in a wide range of cases. Because this combination is uncommonly seen in Virginia courts, it is not thoroughly tested. But litigants faced with the costs and burdens of proceeding to trial in a case in which they have the law and facts on their side may benefit from it.