

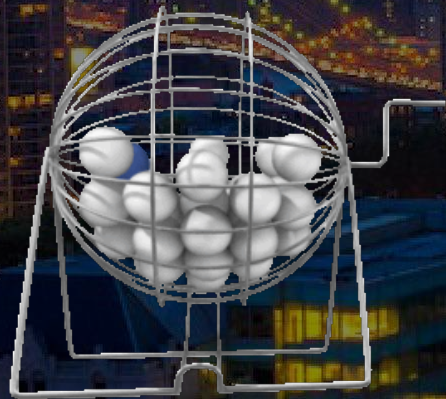


ARIAS•U.S. 2018 Fall Conference
November 7–9, 2018
New York Marriott at Brooklyn Bridge

When Preclusion Is in Play

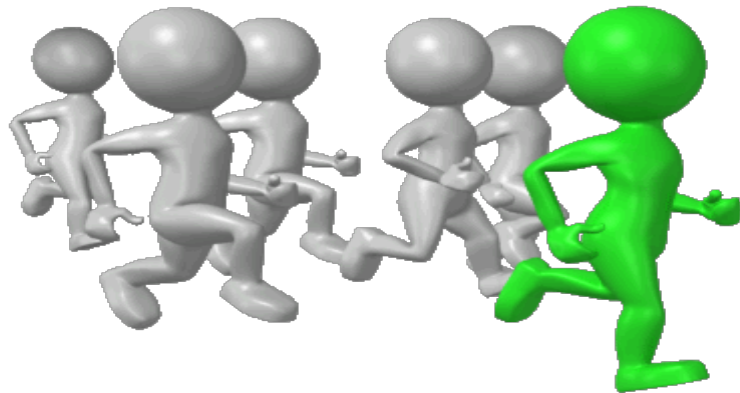
2018 ARIAS-U.S. FALL CONFERENCE
Breakout Session #4

Presenter: Catherine E. Isely



Disclaimer

This session is provided for general educational purposes only. It is not intended to be, and should not be taken as, legal advice. Positions described in materials or by the presenter are offered for discussion purposes, and do not necessarily reflect those of the presenter or her organization or clients. The principles and approaches described may or may not apply to the facts of a particular situation, claim or case. With any claim, know your contract and the law of the applicable jurisdiction.



Why Learn About **PRECLUSION?**

KNOWING THE BASICS
BEFORE YOU NEED TO KNOW
PUTS YOU 'AHEAD OF THE PACK'

RELUCTANCE TO ABDICATE DECISION
RESPECT FOR EARLIER PANEL

CONCERNS ABOUT AUTHORITY
EFFICIENCY INTERESTS



CONFUSION ABOUT STANDARD

Four blue water droplets of varying sizes are positioned on the left side of the slide. They have a light blue gradient and a small yellow highlight, giving them a 3D appearance. They are arranged in a cluster, with one large droplet at the bottom left and three smaller ones above it.

Refresher on the Lingo

Preclusion can be:

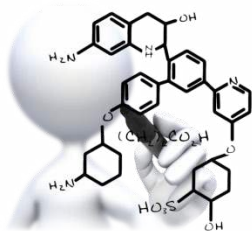
Claim Preclusion (*Res Judicata*)

Issue Preclusion (*Collateral Estoppel*)

Refresher on the Lingo

Claim Preclusion (Res Judicata):

Shouldn't arbitrate a claim (cause of action) that was already arbitrated, or could have been



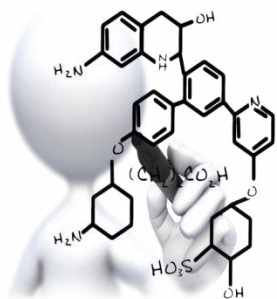
Elements:

- Prior award was final judgment on the merits
- Identical claims were or could have been arbitrated
- Party against whom asserted was party (or privy) in prior proceeding

Refresher on the Lingo

Issue Preclusion (Collateral Estoppel):

Shouldn't arbitrate an issue that was already arbitrated



Elements:

- Prior award was final judgment on the merits
- Identical issue actually decided in prior proceeding
- Determination in prior proceeding was essential to judgment
- Party against whom asserted was party (or privy) in prior case
- Party or privy had a full and fair opportunity to litigate issue in prior proceeding



PANEL AUTHORITY?

“THE FIRST RULE”



In General . . .

Where arbitration agreement is **broadly worded** . . .

Preclusive effect of prior arbitration award is matter for later panel to decide

See Employers Ins. Co. of Wausau v. Continental Cas. Co., No. 15-cv-226-wmc, 2016 WL 632642 (W.D. Wisc. Feb. 17, 2016); *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126 (2d Cir. 2015); *Hancock Fabrics, Inc. v. Rowdec LLC*, 126 F. Supp. 3d 784 (N.D. Miss. 2015); *Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. 2014); and *Liberty Mut. Ins. Co. v. Allstate Ins. Co.*, No. 13-cv-10387, 2014 WL 1289469 (D. Mass. Mar. 31, 2014).

In General . . .

Where arbitration agreement is broadly worded . . .

Preclusive effect of prior arbitration award is matter for later panel to decide



BUT SEE *Arrowhead Gen. Ins. Agency, Inc. v. Lincoln Gen. Ins. Co.*, No. 1:16-CV-1138, 2016 WL 5801920 and 2016 WL 9223831 (M.D. Pa. Oct. 5 and Nov. 4, 2016) (despite growing trend in other circuits to the contrary, Third Circuit precedent mandates that court adjudicate issues of res judicata when a federal judgment is implicated, including judgment confirming arbitration award).

At the Door: RESOURCES “TO GO”

CHECKLIST



CASE LAW



ARTICLES



LET'S PLAY!

Find Your Game Card and Marker



Answer Six True/False Questions: **A-R-I-A-S-U.S.**

Mark ALL True or False Boxes
Under Question Letter



TO WIN: Mark Six Across

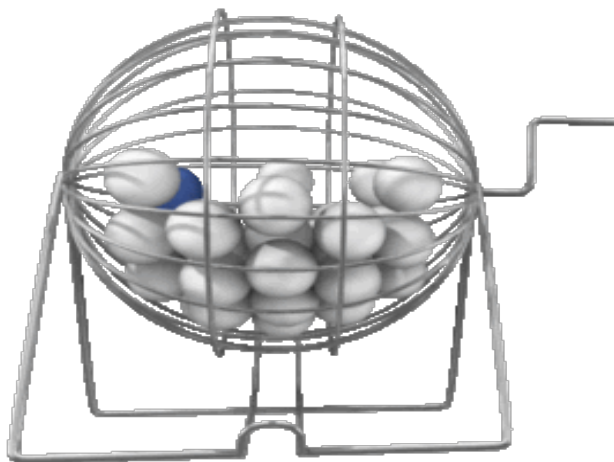


A R I A S -US

PRECLUSION

The same contract must have been involved in the earlier arbitration

TRUE OR FALSE?



MARK YOUR ANSWER



A	R	I	A	S	-US
---	---	---	---	---	-----

PRECLUSION

**The same contract must have been
involved in the earlier arbitration**

FALSE

ARIAS-US

“Preclusion ordinarily is proper if the question is one of the legal effect of a document identical in all relevant respects to another document whose effect was adjudicated in a prior action.”

Restatement (Second) of Judgments § 27 (1982),
cited in Century Indem. Co. v. OneBeacon Ins. Co., 173 A.3d 784, 807 (Pa. Super. Ct. 2017).

BUT: No collateral estoppel if contract language is materially different

Century Indem. Co. v. OneBeacon Ins. Co., 173 A.3d 784, 806-7 (Pa. Super. Ct. 2017).

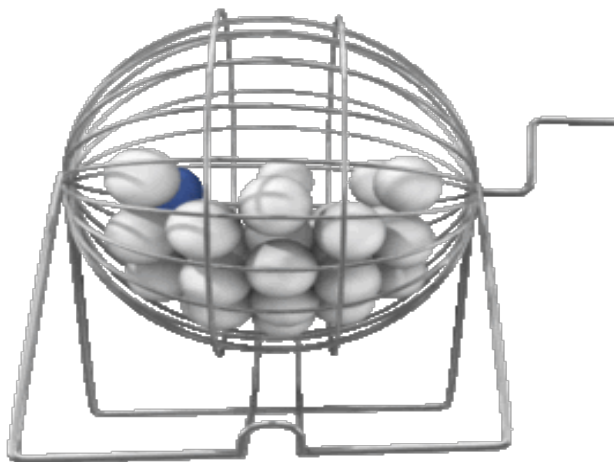


A	R	I	A	S	-US
---	---	---	---	---	-----

PRECLUSION

**A later arbitration panel can apply preclusion
against a non-party to the earlier arbitration**

TRUE OR FALSE?



MARK YOUR ANSWER



A	R	I	A	S	-US
---	---	---	---	---	-----

PRECLUSION

A later arbitration panel can apply preclusion against a non-party to the earlier arbitration

TRUE



Party or privy

“A privy is defined as : 1) a non-party who has succeeded to a party’s interest in property (a successor in interest); 2) a non-party who controlled the original suit; or 3) a non-party whose interests were adequately represented by a party in the original suit (through ‘virtual’ or ‘adequate’ representation).”

Asahi Glass Co. v. Toledo Eng’g. Co., 505 F. Supp. 2d 423, 434 (N.D. Ohio 2007).

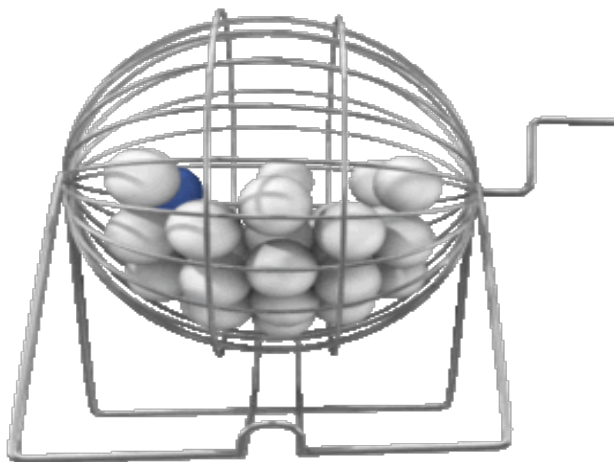


A R I A S -US

PRECLUSION

Later panel should consider whether earlier panel permitted presentation of evidence

TRUE OR FALSE?



MARK YOUR ANSWER



A

R

I

A

S

-US

PRECLUSION

**Later panel should consider whether earlier
panel permitted presentation of evidence**

TRUE

A R I A S -US

“When an arbitration proceeding affords basic elements of adjudicatory procedure, such as an opportunity for presentation of evidence, the determination of issues in an arbitration proceeding should generally be treated as conclusive in subsequent proceedings, just as determinations of a court would be treated.”



Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985).

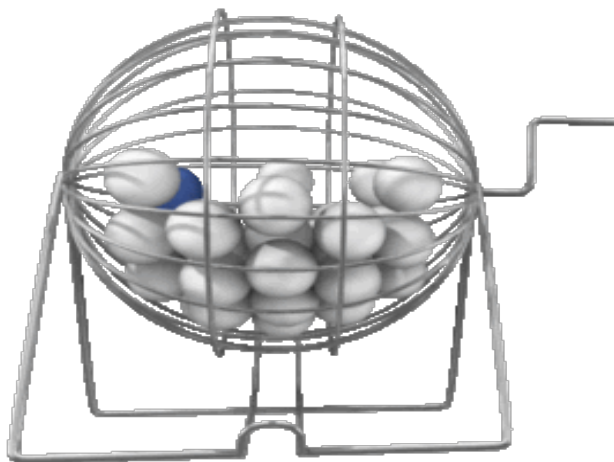


A	R	I	A	S	-US
---	---	---	---	---	-----

PRECLUSION

**Requires a reasoned award
by the earlier panel**

TRUE OR FALSE?



MARK YOUR ANSWER

**A****R****I****A****S****-US**

PRECLUSION

**Requires a reasoned award
by the earlier panel**

FALSE

A	R	I	A	S	-US
---	---	---	---	---	-----

Need only be able to determine that issue was essential to award in prior proceeding

BUT: If award is unclear and it's uncertain whether issue was actually and necessarily decided, then no issue preclusion (collateral estoppel)

See, e.g., Hogue v. Hopper, 728 A.2d 611 (D.C. 1999).

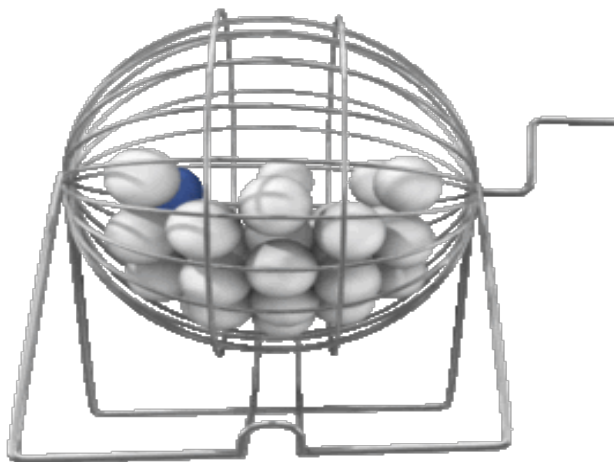


A R I A S -US

PRECLUSION

Earlier award must be confirmed

TRUE OR FALSE?



MARK YOUR ANSWER



A R I A S -US

PRECLUSION

Earlier award must be confirmed

FALSE

A R I A S -US



CONFIRMATION NOT REQUIRED

BUT: Award must be final

Stulberg v. Intermedics Orthopedics, Inc., 997 F. Supp. 1060, 1068 (N.D. Ill. 1998) (collecting cases giving preclusive effect to unconfirmed arbitration awards).

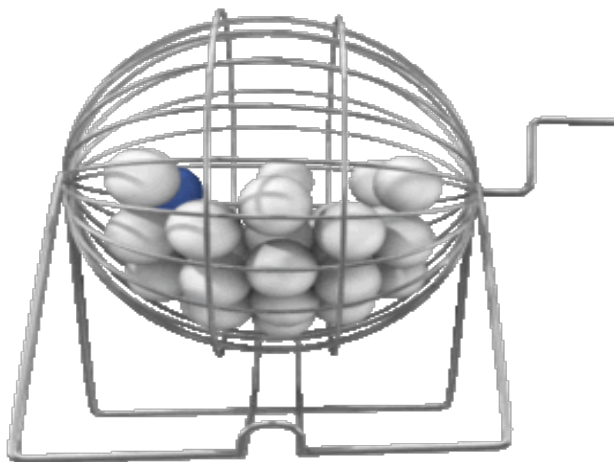


A R I A S -US

PRECLUSION

**Later panel can consider preclusive effect
of earlier award even if award was
subject to confidentiality order**

TRUE OR FALSE?



MARK YOUR ANSWER



PRECLUSION

**Later panel can consider preclusive effect
of earlier award even if award was
subject to confidentiality order**

TRUE

A blue, tilted rectangular stamp with the word 'CONFIDENTIAL' in white, bold, sans-serif font.

BUT FIRST: Read the Confidentiality Agreement / Order

Disclosure of Arbitration Information may be made:

... as is necessary in any future arbitration proceedings between the parties, provided the arbitration authority in the future arbitration proceeding:

- (1) has been convened under the same reinsurance agreements at issue in this Arbitration; and/or
- (2) requires disclosure for good cause shown.

ARIAS-U.S. Sample Form 3.3, ¶ 2(e)



And you may need more than the award . . .

Issue preclusion (collateral estoppel) “inherently involves an examination of the details of the prior arbitration; the arbitrator's path to reaching the decision on the merits determines the preclusive effect of the arbitration.”

Employers Ins. Co. of Wausau v. OneBeacon Am. Ins. Co., 744 F.3d 25, 29 (1st Cir. 2014).



WINNERS

Marked Six Across

PRECLUSION CHECKLIST

Remember to:

- ☐ Read the arbitration clause for authority (prior federal judgment? Circuit?)
- ☐ Address any prior confidentiality order
- ☐ Determine if award is final
- ☐ Consider parties and privies
- ☐ Consider whether issue is identical and contract language is “identical in all relevant respects” or “materially different”
- ☐ Assess if prior arbitration provided “full and fair opportunity” to arbitrate issue through “basic adjudicatory procedures”
- ☐ Determine whether the issue was essential to the earlier award



More Discussion

Questions?

Comments?