*Vandenberg v. Superior Court**

I. INTRODUCTION

The U.S. judicial system widely applies the doctrine of collateral estoppel as a form of issue preclusion. By precluding a party from relitigating an issue conclusively decided prior to litigation, collateral estoppel helps prevent harassing and vexatious litigation.[1] This doctrine is applicable only when a fact or issue in subsequent litigation is essentially identical to one actually adjudicated and decided in a prior judgment.[2]

In its original application, mutuality was a requirement of collateral estoppel.[3] This meant that parties to a previous suit could not relitigate the authenticity of a question in a subsequent suit between them.[4] Either of the parties to the first suit, however, could relitigate the same question in a later suit with a third party.[5]

The mutuality requirement of collateral estoppel was criticized as early as the 1800s when commentators such as Jeremy Bentham felt that litigants were entitled only to one day in court on any given issue.[6] Following a landmark 1942 decision by the Supreme Court of California, the federal courts and many state courts abandoned the mutuality requirement.[7] Justice Traynor's opinion in *Bernhard* established three new requirements to determine proper application of collateral estoppel, as follows: (1) "Was the issue decided in the prior adjudication identical with the one presented in the action in question?"; (2) "Was there a final judgment on the merits?"; and (3) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"[8] The U.S. Supreme Court also agreed to abandon the mutuality requirement because "[i]n any lawsuit where a

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* 982 P.2d 229 (Cal. 1999).

[1] *See* WARREN FREEDMAN, *RES JUDICATA* AND COLLATERAL ESTOPPEL: TOOLS FOR PLAINTIFFS AND DEFENDANTS 2 (1988).

[2] *See id.* (citing Moore v. United States, 360 F.2d 353 (4th Cir. 1965)).

[3] *See id.* at 7–8.

[4] *See* Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 70 (1988).

[5] *See id.*

[6] *See id.* at 72 (citing Jeremy Bentham, *Rationale of Judicial Evidence*, *in* 7 WORKS OF JEREMY BENTHAM 171 (John Bowring ed., 1843).

[7] *See id.* at 73(citing Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 895 (Cal. 1942)). The abolishment of the mutuality requirement applies only to collateral estoppel (which deals with relitigation of specific issues); res judicata (dealing with relitigation of an entire cause of action) still requires mutuality. *See id.*; *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.14, at 704 (1999).

[8] *Bernhard*, 122 P.2d at 895.

defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim [that] the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources."[9]

Once again, the Supreme Court of California has faced the application of nonmutual collateral estoppel, this time in the context of an arbitration judgment. In *Vandenberg v. Superior Court*,[10] the court, rejecting the approach of several other states, held that a private arbitration award does not have nonmutual collateral estoppel effect without an express agreement by the arbitration parties.

II. THE FACTS OF THE CASE

From 1958 to 1988, Vandenberg Motors ("Vandenberg")[11] leased property from Eugene and Kathryn Boyd.[12] The Vandenberg business and leasehold ended in 1988, at which time the Boyds planned to sell the land.[13] In preparing the land for sale, the Boyds discovered underground waste oil storage tanks. Additional testing revealed contaminants in the soil and groundwater beneath the property.[14] After discovering the contaminants, the Boyds filed suit against Vandenberg, alleging that the installation and operation of the waste oil tanks caused the petroleum contamination.[15] The Boyds' causes of action included "breach of contract, breach of the covenant of good faith and fair dealing, public and private nuisance, negligence, waste, trespass, strict liability, equitable indemnity, declaratory relief, and injunctive relief."[16]

Several insurance policies held by Vandenberg provided coverage for sums Vandenberg was obligated by law to pay because of property damage.[17] However, some policies contained pollution exclusion language. Two of the insurers, United States Fidelity and Guaranty Company (USF&G)

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[9] Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 329 (1971).

[10] 982 P.2d 229 (Cal. 1999).

[11] Vandenberg Motors collectively includes four individuals (John B. Vandenberg, Jeanette B. Vandenberg, James A. Keil, and Bonnie J. Keil), a general partnership known as Vandenberg & Keil, and Vandenberg Motors, Inc. *See id.* at 234 n.3.

[12] *See id.* at 234.

[13] *See id.*

[14] *See id.* at 234.

[15] *See id.* at 234–35.

[16] *Id.* at 235.

[17] *See id.* The Court named six of Vandenberg's insurance providers, but suggests there are others. However, the United States Fidelity and Guaranty Company and the Centennial Insurance Company are the two insurers relevant to the case. *See id.*

and Centennial Insurance Company (Centennial), had policies that did not cover property damage caused by pollutants or contaminants except a "sudden and accidental discharge."[18] Vandenberg turned over defense of the Boyd action to its insurers, but only USF&G agreed to provide a defense.[19]

Judicially supervised settlement proceedings were held, and USF&G, the Boyds, and Vandenberg agreed that the parties would contribute jointly to the "investigation and remediation of the contamination."[20] As part of the agreement, USF&G would bear the brunt of the cleanup cost, the Boyds would release USF&G from any claims, and Vandenberg would release the insurer from the claims of bad faith, contract breach, and extracontractual damages.[21] Boyd also released all claims against Vandenberg in exchange for a single breach of lease claim, which was to be resolved through arbitration or trial.[22] One of Vandenberg's conditions to the settlement agreement was that the arbitration would be binding.[23]

The arbitration commenced with USF&G defending for Vandenberg.[24] The parties conducted formal discovery and were represented by counsel, who presented "extensive evidence, briefings, and argument."[25] An arbitrator, a retired federal judge, ruled for the Boyds, finding that the contamination resulted primarily from Vandenberg's improper installation, use, and maintenance of the underground tanks.[26] The arbitrator also ruled that the contamination was not "sudden and accidental."[27] The Boyds were awarded more than $4 million, and a California superior court confirmed the judgment.[28]

Vandenberg thereafter filed for indemnification for the $4 million award from his insurers. The insurers rejected the indemnification request,[29] and Vandenberg filed suit against its insurer for "failure to defend, settle, or

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[18] *Id.*

[19] *See id.*

[20] *Id.*

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *Id.*

[26] *See id.*

[27] *Id.*

[28] *See id.* at 235.

[29] *See id.* The insurance policy only provided indemnification for "sudden and accidental" contamination. Because the arbitrator determined the contamination had not been "sudden and accidental," the insurers refused to pay. *Id.* at 235–36.

indemnify."[30] The lower court granted summary judgment against Vandenberg, finding that the arbitrator had already decided the issue of causation against Vandenberg.[31] Vandenberg then petitioned for preemptory writs of mandate, which were issued by the court of appeals.[32] The Supreme Court of California, upholding the court of appeals, held that the private arbitration award, even if judicially confirmed, did not have nonmutual collateral estoppel effect unless the parties had agreed to such.[33] The court also decided an alternate issue, holding that the commercial general liability policy, which provided coverage for any sums that Vandenberg was "legally obligated to pay as damages," did not "necessarily preclude []coverage for losses pleaded as contractual damages."[34] An insurer should decide coverage based on the nature of the property, injury, and risk that caused the injury in light of the particular provisions of each applicable policy.[35]

III. APPLICATION OF NONMUTUAL COLLATERAL ESTOPPEL TO ARBITRATION DECISIONS

The holding in Vandenberg goes against the growing trend of states that apply nonmutual collateral estoppel to arbitration decisions.

> The predominant view is that unless the arbitral parties agreed otherwise, a judicially confirmed private arbitration award will have collateral estoppel effect, even in favor of nonparties to the arbitration, if the arbitrator actually and necessarily decided the issue sought to be foreclosed and the party against whom estoppel is invoked had full incentive and opportunity to litigate the matter.[36]

This is the approach taken by New York courts, including in *Clemens v. Apple*.[37] In that case, plaintiff Clemens, a man with Alzheimer's disease, was in an automobile accident and sued the other driver, Apple, alleging the

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[30] *Id.* at 235.

[31] *See id.*

[32] *See id.* at 236.

[33] *See id.* at 243.

[34] *Id.* at 243, 246.

[35] *See id.* at 245–46.

[36] *Id.* at 240.

[37] 477 N.Y.S.2d 774 (N.Y. App. Div. 1984). For other New York state examples, see generally *In re American Ins. Co. & Messinger*, 371 N.E.2d 798 (N.Y. 1977), and *Kerins v. Prudential Property & Cas.*, 585 N.Y.S.2d 637 (N.Y. App. Div. 1992).

accident had aggravated a herniated disc condition.[38] In a prior arbitration against his insurer, however, Clemens had lost a benefits claim based on a finding that there was a lack of causal connection between the accident and the disc condition.[39] Apple convinced the court that Clemens was collaterally estopped against suing Apple for the same injury, which the arbitrator already had determined the accident did not cause.[40]

The *Clemens* decision, unlike *Vandenberg*, reasoned that the lack of an agreement by the arbitration parties regarding collateral estoppel effects did not justify "barring the application of collateral estoppel."[41] Rather, "given the fact that the negligence suit was pending at the time of the arbitration proceeding, it was reasonably foreseeable that the arbitration decision would impact on that suit."[42] The *Clemens* court also emphasized that Clemens had voluntarily submitted to arbitration.[43] Voluntary submission to the more informal proceedings therefore could bind the parties fairly in a later proceeding.[44]

Other states, including Minnesota and Idaho, have applied similar reasoning. For example, the Supreme Court of Idaho emphasized that if an arbitration proceeding employs adjudicatory procedures and the parties to the arbitration deem the outcome final, then courts should apply collateral estoppel effects.[45] The Idaho court reviewed the following five-factor test for determining whether collateral estoppel is applicable:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior

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[38] *See Clemens*, 477 N.Y.S.2d at 775. Approximately two years after the accident, "Clemens underwent surgery for removal of the herniated disc." *Id.* Clemens claimed that the disc condition he suffered due to Alzheimer's disease was aggravated by the accident. *See id.*

[39] *See id.* After his insurer rejected his application for benefits coverage on the cost of the surgery, Clemens had the option of either bringing a court action or proceeding to arbitration. Clemens opted for arbitration, and an arbitration panel consisting of two doctors rejected the benefits claim due to a lack of causal connection. *See id.*

[40] *See id.* at 776.

[41] *Id.*

[42] *Id.*

[43] *See id.*

[44] *See id.*

[45] *See* Western Indus. & Envtl. Servs. v. Kaldveer Assoc., 887 P.2d 1048, 1051 (Idaho 1994).

> litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the prior litigation.[46]

The Supreme Court of Minnesota agreed that "an arbitration is meant to be a final judgment of both law and fact."[47] Thus, collateral estoppel is applicable to issues decided at arbitration if the following conditions are satisfied: (1) a relitigated issue is identical to an issue decided at arbitration; (2) the estopped party was either a party or in privity with a party to the arbitration; (3) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue; and (4) there was a final judgment on the merits.[48] The Minnesota court also found that a party waives the right to a jury trial on a particular issue when the party voluntarily chooses to have that issue decided with finality in arbitration.[49]

In addition to the state court examples, the *Restatement (Second) of Judgments* supports applying the same res judicata principles to arbitration as are applied to traditional court judgments.[50] Comments within the *Restatement* suggest that arbitration is merely a specialized tribunal, usually involving an impartial decisionmaker and a decision based on evidence, legal argument, and the principles of finality.[51] So long as the procedure given to the arbitration is not radically unfair, courts should afford arbitration a conclusive and final effect, and it "should be accorded claim preclusive effect unless a scheme of remedies requires that it be denied such effect."[52]

IV. THE CALIFORNIAN APPROACH IN *VANDENBERG*

The Supreme Court of California decided to go against popular application of collateral estoppel in the context of arbitration judgments. In *Vandenberg*, the court noted that parties who choose arbitration should not be treated as submitting to the same rules of finality that a typical court

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[46] *Id.* (citing Anderson v. City of Pocatello, 731 P.2d 171, 179 (Idaho 1987)).

[47] Aufderhar, Jr. v. Data Dispatch, Inc., 452 N.W.2d 648, 651 (Minn. 1990) (citing Johnson v. Consolidated Freightways, Inc., 420 N.W.2d 608, 613 (Minn. 1988)).

[48] *See id.* at 650.

[49] *See id.* at 653–54 ("[A] necessary inference arises that plaintiff waived his right to a jury trial on that issue which was identical to a similar issue in the court case and on which plaintiff had been afforded full opportunity to present all evidence . . . to the arbitrators, and, in fact, did so.").

[50] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 84(1)–(2) (1982) ("[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.").

[51] *See id.* cmt. a, b.

[52] *Id.* cmt. b.

judgment affords. Rather, by "choosing private arbitration, the parties 'evince [their] intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels.'"[53] Given the very nature of arbitration, it is more appropriate "to insulate a private arbitral award from close judicial scrutiny" because that is the parties' intent.[54]

The court rationalized the denial of nonmutual collateral estoppel to the *Vandenberg* arbitration for a number of reasons. First, the court felt the parties' silence in the arbitration agreement was not indicative of an implied acceptance to be bound in a later judicial proceeding. "California's statutory scheme nowhere specifies that" a private arbitration award may be binding in this way.[55] Rather, parties who submit to arbitration do so with an intent to bypass the judicial system and with an understanding that judicial review will be limited. [56] Thus, judicial interference with an arbitration judgment goes against the expectations of the parties. If the parties are silent as to the collateral estoppel effects of the arbitration decision, it is more logical to assume that the parties expect the inherent separation between arbitration and the judiciary to be honored.[57] The *Vandenberg* decision states that collateral estoppel effect should be applied based only on the parties' express agreement for such, and "[t]he contractual nature of private arbitration dictates that the scope and effect of an arbitral award must derive from the parties' consent."[58]

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[53] Vandenburg v. Superior Court, 982 P.2d 229, 238 (Cal. 1999) (alteration in original) (quoting Moncharsh v. Heily & Blase, 832 P.2d 899, 903 (Cal. 1992)).

[54] *Id.* at 239.

[55] *Id.* The court notes that California's private arbitration statutes provide no warning that an arbitrator's award could be used against them by third persons to resolve different causes of action. *See id.* at 241–42 (citing CAL. CIV. CODE § 1287.4 (West 1982 & Supp. 2000)).

[56] *See id.* at 242.

[57] *See id.* at 239–40.

[58] *Id.* at 242. By assuming that all arbitrations should be subject to nonmutual collateral estoppel, one may be ignoring the fact that arbitration is a contractual animal. Each arbitration is designed and implemented based on a specific agreement by the parties. Of course, state law often spells out some parameters. The personalized nature of arbitration means that each arbitration proceeding is different from the next. *See* SUSAN M. LEESON & BRYAN M. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA 49–50 (1988). Thus, applying the general binding effect of collateral estoppel would assumptively provide different levels of advantages and disadvantages in each arbitration situation.

Second, although arbitration is often formal, one cannot classify the formalities as typical to those given in a courtroom.[59] The whole point of submitting to arbitration is that parties trade the typical "formalities of court litigation for an expeditious, sometimes roughshod means of resolving their dispute."[60] Strict legal principles do not bind arbitrators, unlike judges and juries. Rather, we permit arbitrators to make decisions based on principles of equity and good conscience.[61] Thus, in reaching a decision arbitrators do not use traditional judicial paths and should not be subject to traditional judicial review.[62] Likewise, a court should not give an arbitration judgment the same collateral estoppel treatment that a litigation judgment receives.

Third, simply because an arbitral party voluntarily submits to an arbitral decision does not mean the result should bind him in the same way as courtroom litigation.[63] *Vandenberg* outlines three reasons why denying collateral estoppel effect to arbitration does not preserve judicial economy or the integrity of the judicial system. For one, "because a private arbitrator's award is *outside* the judicial system, denying the award collateral estoppel effect has no adverse impact on judicial integrity."[64] Also, private arbitration does not use a judge or courtroom, and thus later relitigation does not implicate the issue of judicial economy through using judicial resources to redecide the same issue.[65] Finally, "when collateral estoppel is invoked by a

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[59] Arbitration has been described as "less formal than a trial but much more formal than most everyday negotiating." CRAIG KUBEY, YOU DON'T ALWAYS NEED A LAWYER: HOW TO RESOLVE YOUR LEGAL DISPUTES WITHOUT COSTLY LITIGATION 21 (1991).

[60] *Vandenberg*, 982 P.2d at 239.

[61] *See id.* (citing Noguiero v. Kaiser Found. Hosp., 203 Cal. App. 3d 1192, 1195 (1988)).

[62] *See id.*

[63] *See id.* The court points out that it is unreasonable to expect parties to contemplate all possible future controversies at the time they agree to arbitrate the current dispute. Logically, most parties probably would not submit to arbitration if it required them to be bound unendingly by the arbitration in future third-party disputes. Such a submission almost always would burden the losing arbitration party. Thus, forcing such binding effects goes against what the arbitral parties likely would have agreed to, if not silent. It also "would chill, rather than promote, the voluntary use of the arbitral forum as an efficient and informal alternative means of resolving particular controversies." *Id.* at 240.

[64] *Id.* The U.S. Supreme Court has noted that some of the goals of res judicata include the conservation of judicial resources (because courts are not forced to retry the same issue twice), relief to parties from the cost and vexation of multiple lawsuits, and preserving the prestige of the courts by avoiding inconsistent verdicts. *See* Montana v. United States, 440 U.S. 147, 153–54 (1979).

[65] *See Vandenberg*, 982 P.2d at 240.

nonparty . . ., the doctrine does not serve the policy against harassment by vexatious litigation."[66]

Finally, the *Vandenberg* decision rejects the case-by-case approach applied in other jurisdictions.[67]

> By creating the possibility that some arbitral findings will [have] collateral estoppel [effect], the case-by-case approach puts subtle but strong pressure on the arbitration process to conform its perspective and methods to those of litigation, in order to justify the confidence in its findings that collateral estoppel represents.[68]

At least one court has already applied the *Vandenberg* reasoning. The Ninth Circuit, in citing *Vandenberg*, stated that "[j]udicial review would defeat the very advantages that the parties to the arbitration sought to achieve—an informal, expeditious, and efficient alternative means of dispute resolution."[69] Because private arbitration judgments are not subject to judicial review, they also should not be afforded collateral estoppel effect.[70]

V. CONCLUSION

If courts apply nonmutual collateral estoppel to arbitration decisions, the arbitral parties will be bound by the particular findings if those issues ever come up again in later litigation. As noted, some state courts believe that this

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[66] *Id.* Rather, when nonmutual collateral estoppel is applied, it gives nonparties what has been termed the "option effect." Ratliff, *supra* note 4, at 71. This anomaly allows one party to reap the benefits of litigation without accepting its risks. Thus, nonmutual collateral estoppel does not merely prevent so-called "vexatious litigation," it gives nonparties a windfall in that they may use prior decisions to their own advantage, even though they put no risk into the original judgment. Jack Ratliff suggests that reinstating the mutuality requirement would disable this "option effect." *Id.* at 71–72. As the *Vandenberg* court points out, asserting collateral estoppel in this situation does not serve to protect a party "who has already once prevailed" on the issue but rather provides a new opponent with a "vicarious advantage from a litigation victory *won by another.*" *Vandenberg*, 982 P.2d at 240.

[67] As noted above, courts typically apply tests to determine if certain factors have been met, including whether the arbitration proceeding provided a full and fair opportunity to litigate the matter. *See supra* Part III.

[68] Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 71 (1988), *quoted in Vandenberg*, 982 P.2d at 242 (alteration in original).

[69] Chiarello v. Samson, Nos. 98-16088, 98-16093, 1999 U.S. App. LEXIS 28441, at *6 (9th Cir. Oct. 29, 1999).

[70] *See id.* at *6–*7.

is a fair outcome, reducing the opportunity to litigate a particular issue to a single shot. Still, the Supreme Court of California questions whether it is really fair to subject informal arbitration findings to the same rules as formal courtroom decisions. *Vandenberg* asserts that arbitration parties must decide expressly within the arbitration contract whether to be so bound by the decision. If the arbitration parties are silent as to nonmutual collateral estoppel, then *Vandenberg* states it would be unfair to subject the parties to such a binding rule.

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