Filed 9/25/19 In re Automobile Antitrust Cases I and II CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

IN RE AUTOMOBILE ANTITRUST CASES I AND II.	A152295 (San Francisco City & County, JCCP Nos. 4298 & 4303; CJC03004298)

After years of litigation, the sole remaining defendant in this coordinated antitrust proceeding, Ford Motor Company of Canada, Ltd. (Ford Canada), filed in the superior court a request for entry of judgment on grounds of claim preclusion and issue preclusion. Ford Canada argued that a summary judgment entered by a federal court in a related proceeding precluded the plaintiffs here (certain purchasers of new automobiles in California) from pursuing their claims under California state antitrust and unfair competition statutes. The superior court agreed that the claim preclusion doctrine barred plaintiffs' claims (while finding that issue preclusion did *not* apply) and entered judgment for Ford Canada.

On appeal, plaintiffs contend the superior court erred in concluding the federal judgment has claim-preclusive effect. Ford Canada counters by arguing that (1) claim preclusion does apply, and (2) as an alternative ground for affirmance, issue preclusion bars plaintiffs from litigating an essential element of their claims (causation of injury), and the superior court's holding to the contrary was error. We conclude neither claim

preclusion nor issue preclusion applies in the present case because the plaintiffs here were not parties to the federal proceeding, and were not in privity with the parties against whom the judgment in that case was entered. We therefore reverse the superior court's judgment.

I. BACKGROUND

A. The Coordinated Proceeding in California State Court

In our opinion addressing a prior appeal in this matter, we described the underlying litigation: "In this coordinated proceeding, certain purchasers of new automobiles in California (plaintiffs) brought state law claims against a number of automobile manufacturers and dealer associations under the Cartwright Act (Bus. & Prof. Code, §§ 16720–16728) and the unfair competition law (Bus. & Prof. Code, §§ 17200–17210). Specifically, plaintiffs allege that defendant manufacturers and associations conspired to keep lower-priced, yet virtually identical, new cars from being exported from Canada to the United States, thereby keeping new vehicle prices in California higher than they would have been in a properly competitive market." (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 131 (*Automobile Antitrust Cases*).)

"This litigation began over a decade ago when, in early 2003, more than a dozen different lawsuits were filed in California against various automobile manufacturers and trade associations, each alleging state law causes of action for antitrust conspiracy and unfair business practices and each filed as a class action on behalf of individuals who purchased or leased new vehicles in California that were manufactured or distributed within a certain period of time by one of the named defendants. The lawsuits were eventually coordinated into this proceeding. [Citation.] Thereafter, in October 2003, plaintiffs filed their consolidated amended class action complaint, the operative pleading in this matter. In addition to [Ford Canada], the class action complaint named numerous other automobile manufacturers [and two trade organizations] as defendants." (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at pp. 132–133, fn. omitted.)

"Plaintiffs—the majority of whom eventually became class representatives in this litigation—are George Bell, Wei Cheng, Laurance de Vries, Joshua Chen, Jason

Gabelsberg, Ross Lee, Jeffrey M. Lohman, Christine Nichols, Local 588 of the United Food & Commercial Workers Union, Estelle Weyl, Michael Wilsker, and W. Scott Young. Each plaintiff alleges an injury caused by one or more of the defendants." (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at pp. 132–133, fn. 2.) "Plaintiffs filed their motion for class certification in the instant matter in the Spring of 2005. Proceedings were stayed, however, while the parties conducted extensive coordinated discovery and litigated their class certification motion in" a related federal proceeding. (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.)

B. The Federal Proceeding and the Coordination Order

"In addition [to the California state court proceeding], a similar lawsuit had been filed in federal court against many of the same defendants, alleging violation of federal antitrust laws. (See *In re New Motor Vehicles Canadian Export* (D.Me. 2004) 307 F.Supp.2d 136, 137–138 (the federal multidistrict litigation or federal MDL).) Parallel cases were also pending in a number of other state courts. In June 2004, the trial court issued an order, after consultation with Judge Hornby—the judge in the federal MDL [sitting in the District of Maine]—coordinating discovery among this action, the federal action, and other state actions." (*Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.)

C. Proceedings in the Federal District and Appellate Courts: The Dismissal of the Federal Claims and the Vacatur of Class Certification (2004–2008)

In March 2004, Judge Hornby dismissed the federal antitrust damage claims brought by the plaintiffs in the federal MDL but declined to dismiss the federal claims for injunctive relief. (*In re New Motor Vehicles Canadian Export*, *supra*, 307 F.Supp.2d at pp. 136, 137, 141–144.) The federal plaintiffs then amended their complaint to add damage claims under the laws of various states, including California. (*In re New Motor Vehicles Canadian Export Antitrust* (D.Me. 2004) 335 F.Supp.2d 126, 127.) In September 2004, Judge Hornby decided to exercise supplemental jurisdiction over these state law claims under title 28 United States Code section 1367. (*In re New Motor Vehicles Canadian Export Antitrust*, *supra*, 335 F.Supp.2d at pp. 127–128, 132.)

In rulings issued in 2006 and 2007, Judge Hornby certified a nationwide injunctive class under federal antitrust law, as well as 20 state damage classes (including a California class) seeking recovery under state antitrust and consumer protection statutes. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. Mar. 10, 2006, MDL Docket No. 1532) 2006 WL 623591, pp. *1–*2, *10 [certifying nationwide injunctive class]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2006) 235 F.R.D. 127, 129, 148 [preliminarily approving certification of five exemplar state damage classes, including a California class]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2007) 241 F.R.D. 77, 78–79, 84 & fn. 11 [concluding certification was appropriate for the five exemplar states and for 15 additional states]; *In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2007) 243 F.R.D. 20, 21–23 [certifying class action and appointing class counsel]; see *Automobile Antitrust Cases, supra,* 1 Cal.App.5th at p. 136, fn. 7.) As to the federal court class seeking damages under California law, the class representatives were Lindsay Medigovich and Parry Sadoff (the federal California plaintiffs). (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 243 F.R.D. at p. 23.)

In March 2008, the First Circuit Court of Appeals reversed Judge Hornby's certification of the injunctive class under federal law and ordered dismissal of the federal claim for injunctive relief. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (1st Cir. 2008) 522 F.3d 6, 9, 16, 30.) As a result, no federal claims remained in the case. (*Id.* at p. 16.) The First Circuit noted, however, that there might still be a basis for the federal district court to exercise jurisdiction over at least some of the state law damage claims (either diversity jurisdiction under 28 U.S.C. § 1332 or supplemental jurisdiction under 28 U.S.C. § 1367). (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 522 F.3d at pp. 9, 16–17.) The appellate court stated that, on remand, the district court should consider these potential grounds for jurisdiction. (*Id.* at p. 16.)

As to supplemental jurisdiction, the First Circuit stated: "The district court may . . . consider whether to exercise its discretion to continue exerting supplemental

jurisdiction, see 28 U.S.C. § 1367, over the state damages claims," despite the dismissal of the federal claims. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 522 F.3d at p. 16.) The appellate court stated that, "[i]n weighing this option, the district court should consider 'the totality of the attendant circumstances,' including considerations of judicial economy, fairness to the parties, and the nature of the applicable state law." (*Ibid.*)

Because there was a potential basis for jurisdiction over the state law claims, the First Circuit reviewed the order certifying the state damage classes. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 522 F.3d at pp. 9, 17.) The appellate court vacated that certification order and stated that, on remand, the district court could reconsider whether to certify state law damage classes in light of principles outlined in the appellate court's opinion and a more fully developed record. (*Id.* at pp. 9, 16, 29–30.)

D. Subsequent Proceedings in the Federal District Court (2008–2009)

On remand, Judge Hornby addressed whether he should continue to exercise supplemental jurisdiction over the state law damage claims under 28 United States Code section 1367. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me., Apr. 29, 2008, MDL Docket No. 1532) 2008 WL 1924993, pp. *1–*2.) In an April 2008 order following a conference with counsel, Judge Hornby stated the parties agreed he should exercise supplemental jurisdiction over the claims brought under the laws of 15 of the 20 states at issue.[1] (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *2.) But as to the remaining five states (including California), where parallel class actions were pending in state court, the parties took differing positions. (*Ibid.*) The plaintiffs argued Judge Hornby should decline to assert supplemental jurisdiction, while the defendants argued judicial economy supported the

[1] The parties agreed diversity jurisdiction was unavailable except as to one Nebraska case. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *1.)

continued exercise of jurisdiction over all the cases pending in federal court.[2] (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *2.)

In his April 2008 order, Judge Hornby concluded "that at this time the prudent course is to exercise supplemental jurisdiction over all the state law claims pending in this Court." (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 2008 WL 1924993, p. *2.) In reaching this decision, Judge Hornby noted that briefing on defense summary judgment motions was underway, and that he would have to examine the factual record and expert opinions to resolve those motions. (*Id.* at pp. *1–*2.) "Thus, there is efficiency in using that record familiarity to resolve the summary judgment issues here as to all the states rather than require other judges to duplicate that effort." (*Id.* at p. *2.)

One year later, however, in an April 2009 opinion, Judge Hornby revisited the question of whether to resolve the claims brought under California law by the federal California plaintiffs, Lindsay Medigovich and Parry Sadoff. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (D.Me. 2009) 609 F.Supp.2d 104, 106–107.) By that time, discovery was complete, a class certification motion by some of the federal plaintiffs had been refiled and rebriefed, and summary judgment motions had been filed, briefed and argued. (*Id.* at p. 105.) Counsel for the federal California plaintiffs, however, had decided not to renew their request for certification of a California class in federal court. (*Ibid.*) Also, the federal California plaintiffs, Medigovich and Sadoff, had filed a motion to dismiss their claims without prejudice.[3] (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 106.)

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[2] According to a case management conference statement subsequently filed in the California state court proceedings, counsel for the California state court plaintiffs appeared at the April 2008 conference in the federal action and (consistent with the position taken by counsel for the federal court plaintiffs) asked Judge Hornby not to continue to exercise supplemental jurisdiction over the California law claims pending in federal court.

[3] The federal California plaintiffs had filed this motion several months earlier, and defendants filed an opposition in August 2008.

Judge Hornby granted the motion over the defendants' objection. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at pp. 106–107.) Noting that rule 41 of the Federal Rules of Civil Procedure (28 U.S.C.) required court approval for the voluntary dismissal in light of the advanced stage of the federal proceeding, Judge Hornby concluded dismissal was appropriate under the circumstances. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at pp. 106–107.) In reaching this conclusion, Judge Hornby relied in part on the supplemental jurisdiction statute, 28 United States Code section 1367, which provides that "[federal] district courts may decline to exercise supplemental jurisdiction over a [state law] claim . . . if . . . [¶] . . . the claim raises a novel or complex issue of [s]tate law." (28 U.S.C. § 1367(c)(1); see *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.)

Judge Hornby concluded the claims before him raised a novel or complex issue of California state law, specifically the question of how a plaintiff may prove antitrust causation or injury in an indirect purchaser case. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) Judge Hornby had initially ruled (at an earlier phase of the case) "that, unlike some other states, California law allows a presumption of antitrust injury to an indirect purchaser once the plaintiff proves the antitrust conspiracy," which "is a critical element in this indirect purchaser case." (*Ibid.*) Judge Hornby noted, however, that the California Supreme Court had not definitively resolved this question, and the parties disagreed as to the correct interpretation of the existing case law on the point. (*Ibid.*)

Judge Hornby decided it would be preferable for the California state courts to resolve this issue. He stated: "How to prove antitrust causation or injury in this indirect purchaser case is central to decisions on both class certification and liability. I conclude that it makes most sense to have that issue decided in California where it can be appealed to the California Supreme Court for a final and definitive resolution. My decision on the issue here is likely to contribute to confusion over the status of California law on the subject, and an appeal to the First Circuit cannot provide the definitive resolution that the

California Supreme Court can." (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) Judge Hornby therefore revisited his initial decision to exercise supplemental jurisdiction over the California claims and granted the motion by Medigovich and Sadoff to dismiss those claims without prejudice. (*Ibid.*)

In July 2009, Judge Hornby granted summary judgment for defendants as to the remaining plaintiffs' claims under the laws of 19 states. (*In re New Motor Vehicles Canadian Export Antitrust Litigation* (2009) 632 F.Supp.2d 42, 45, 63.) Judge Hornby concluded the plaintiffs could not prove the element of causation, i.e., that the alleged conspiracy had caused "antitrust (or consumer protection) injury" by raising the prices paid by consumers for new vehicles. (*Id.* at pp. 45–47; see *id.* at p. 56.) Specifically, applying principles set forth in the First Circuit's earlier opinion addressing class certification, Judge Hornby determined the plaintiffs could not prove that every transaction sales price was affected by the alleged conspiracy. (*Id.* at pp. 58–59, 63.) This was true under the laws of each of the 19 states at issue, all of which required affirmative proof of causation. (*Id.* at p. 63.) Judge Hornby did not determine what the result would be under California law (with its "shifting presumption" as to injury), because, in light of the dismissal of the federal California plaintiffs' claims a few months earlier, California was "no longer in the mix." (*Ibid.*)

Following issuance of his summary judgment order, Judge Hornby entered judgment for the remaining defendants in the federal case (i.e., the defendants that had not settled or filed for bankruptcy protection), including both Ford Motor Company (Ford U.S.) and Ford Canada.

E. Class Certification and Summary Judgment Proceedings in the California Superior Court and the Subsequent Appeal to this Court (2009–2016)

In May 2009, the trial court in the present California state court proceeding (Judge Kramer, who previously had stayed class certification proceedings pending developments in the federal case) granted the plaintiffs' motion for class certification. (*Automobile Antitrust Cases, supra,* 1 Cal.App.5th at p. 136.) The certified class included persons who purchased or leased new automobiles in California between 2001 and 2003.

Between 2010 and 2012, the parties litigated summary judgment motions in the trial court. (*Automobile Antitrust Cases, supra,* 1 Cal.App.5th at pp. 137–140.) By May 2011, as a result of settlements, bankruptcies and summary judgment rulings, the only remaining defendants were Ford U.S. and Ford Canada. (*Id.* at pp. 137–139.) In November 2011, Judge Kramer granted summary judgment in favor of Ford U.S. and Ford Canada, concluding plaintiffs had not presented sufficient evidence that these defendants participated in an unlawful conspiracy. (*Id.* at p. 140.) Plaintiffs appealed the ensuing judgment to this court.[4] (*Automobile Antitrust Cases, supra,* 1 Cal.App.5th at p. 140.) In 2016, this court affirmed the judgment for Ford U.S. but reversed and remanded as to Ford Canada, concluding triable issues of material fact precluded summary judgment on the question whether Ford Canada participated in an unlawful conspiracy. (*Id.* at pp. 172–173.)

F. Subsequent Proceedings in the Superior Court (2016–2017)

On remand, the trial court (Judge Karnow, to whom the case had been reassigned) conducted further proceedings between plaintiffs and the sole remaining defendant, Ford Canada. In May 2017, Judge Karnow denied Ford Canada's pending motion for summary judgment on the issue of antitrust injury or causation (initially filed in 2010 by multiple defendants). In reaching his conclusion that a triable issue of fact existed on causation, Judge Karnow focused primarily on the expert and other evidence submitted by plaintiffs, as well as Ford Canada's attacks on the opinions of plaintiffs' expert. As to the governing legal standards, Judge Karnow referred to Judge Hornby's July 2009 decision addressing causation and injury, but Judge Karnow stated that California law "may not be in accord" with the First Circuit standards applied by Judge Hornby,

[4] At some point during this time period, the then-remaining defendants, including Ford U.S. and Ford Canada, filed a joint motion for summary judgment on the issue of antitrust impact. (*Automobile Antitrust Cases, supra,* 1 Cal.App.5th at p. 137, fn. 9.) That motion was fully briefed but was not then argued or decided by the trial court. (*Ibid.*) The defendants did not file a motion during this period arguing the federal court's 2009 summary judgment decision had preclusive effect.

specifically because California law may provide for a presumption of injury once there is proof of an unlawful conspiracy.

In April 2017, Ford Canada filed a motion for entry of judgment, arguing that, under principles of claim preclusion and issue preclusion, Judge Hornby's 2009 summary judgment in the federal action barred the plaintiffs in this action from pursuing their claims. Ford Canada argued (1) the two proceedings involved the same claims, and (2) the plaintiffs in the present action were in privity with the plaintiffs in the federal action. As to issue preclusion, Ford Canada contended Judge Hornby had resolved the issue of antitrust injury or causation, precluding the California state court plaintiffs from litigating that issue.

After receiving briefing and holding a hearing, Judge Karnow granted Ford Canada's motion in June 2017. Judge Karnow concluded that, for purposes of claim preclusion, the California and federal actions involved the same "cause of action" because they alleged the same harm, i.e., the plaintiffs paid higher prices for vehicles as a result of Ford Canada's illegal conduct. Judge Karnow also held the plaintiffs in the present California state court action were in privity with the plaintiffs in the federal proceeding. He therefore granted summary judgment on the basis of claim preclusion.

Although he did not need to reach the question, Judge Karnow also addressed issue preclusion (the alternative basis for Ford Canada's motion) and concluded Judge Hornby's ruling as to causation did *not* meet the requirements of the issue preclusion doctrine. While Judge Hornby had decided the federal plaintiffs could not prove causation of injury, Judge Karnow found California law "follows a different standard" on that issue because it allows an inference or presumption of injury once a plaintiff proves the existence of an unlawful conspiracy. Because the federal court "decided the causation issue on a standard of proof different than what might apply in this state court, the specific issue of causation was not litigated and decided in the prior proceeding," so issue preclusion did not apply.

Judge Karnow entered judgment for Ford Canada.[5] Plaintiffs appealed.

G. Preclusion Rulings by Courts in Other States

As noted, in addition to the federal action, which by July 2009 involved plaintiffs asserting claims under the antitrust and consumer protection laws of 19 states (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 45, fn. 2), similar cases were pending in the courts of several states. (See *Automobile Antitrust Cases*, *supra*, 1 Cal.App.5th at p. 136.) Between 2010 and 2018, trial courts in five states—Minnesota, Arizona, Tennessee, New Mexico and Wisconsin—granted motions finding the federal judgment had preclusive effect and barred the parallel actions before them.[6] (*Lerfald v. General Motors Corporation* (Minn.Dist.Ct., Sep. 16, 2010, No. 27-CV-03-3327) (*Lerfald*); *Maxwell v. General Motors Corporation* (Ariz.Super.Ct., Mar. 2, 2011, CV 2003-003925) (*Maxwell*); *Johnson v. General Motors Corporation* (Tenn.Dist.Ct., June 12, 2017, C.A. No. 35028) (*Johnson I*); *Corso v. General Motors Corporation* (N.M.Dist.Ct., Jan. 19, 2018, D-101-CV-2003-00668) (*Corso*); *Rasmussen v. General Motors Corporation* (Wisc.Circ.Ct., Mar. 19, 2018, 03-CV-001828) (*Rasmussen*).) The Tennessee trial court's ruling was affirmed by that state's Court of Appeals. (*Johnson v. General Motors Corporation* (Tenn.App. 2018) 574 S.W.3d 347, 352–356 (*Johnson II*).)

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[5] The judgment entered by Judge Karnow in 2017 recites the definition of the plaintiff class previously certified by Judge Kramer and states that "[p]laintiffs" will take nothing from Ford Canada. The parties interpret Judge Karnow's judgment as a ruling that both the named plaintiffs and all members of the certified class in this action are bound by the 2009 federal court judgment.

[6] The written rulings of the Minnesota and Arizona trial courts (issued in 2010 and 2011) are in the record, as they were submitted to Judge Karnow as exhibits to Ford Canada's 2017 motion for entry of judgment. We grant Ford Canada's request that we take judicial notice of the rulings of the Tennessee, New Mexico and Wisconsin trial courts (issued in 2017 and 2018).

We also grant Ford Canada's request that we take judicial notice of certain documents filed in the federal action. We previously granted similar judicial notice requests filed by plaintiffs.

Unlike California, each of the above five states was among the 19 whose laws were at issue when Judge Hornby granted summary judgment in the federal action in 2009. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra*, 632 F.Supp.2d at p. 45, fn. 2, 46, 56, 63 & fn. 30.)

II. DISCUSSION

We review a trial court's dismissal on preclusion grounds de novo as an issue of law. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10.) Under the doctrines of claim preclusion and issue preclusion (collectively referred to as "res judicata"), a final judgment prevents successive litigation of certain claims and issues in later proceedings. (*Taylor v. Sturgell* (2008) 553 U.S. 880, 892 (*Taylor*); *People v. Barragan* (2004) 32 Cal.4th 236, 252–253 (*Barragan*).) While issue preclusion "applies only to issues that were actually litigated," claim preclusion applies "more broadly to what could have been litigated." (*Guerrero v. Department of Corrections & Rehabilitation* (2018) 28 Cal.App.5th 1091, 1098 (*Guerrero*).)

Application of the claim preclusion and issue preclusion doctrines prevents parties " 'from contesting matters that they have had a full and fair opportunity to litigate[.]' " (*Taylor, supra,* 553 U.S. at p. 892; see *Guerrero, supra,* 28 Cal.App.5th at p. 1098.) In *Taylor*, the United States Supreme Court noted: "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." (*Taylor, supra,* 553 U.S. at p. 892.) Accordingly, the "general rule" is that a person who was not a party to a prior action is not bound by the judgment entered in that case, subject to certain recognized "exceptions," which collectively are sometimes referred to as establishing "privity" between the nonparty and a party to the prior action.[7]

[7] In addressing this issue, the *Taylor* court applied (1) the "federal common law of preclusion" (because the prior judgment at issue there was entered by a federal court in a federal question case) (*Taylor, supra,* 553 U.S. at p. 891; see *id.* at p. 904; see also *Guerrero, supra,* 28 Cal.App.5th at p. 1101), and (2) "due process limitations" that define the maximum reach of nonparty preclusion (*Taylor, supra,* at p. 891; see *id.* at pp. 896–898, 900–901). The parties here contend state preclusion law should play a role in determining the preclusive effect of Judge Hornby's 2009 federal court judgment, with

(*Taylor, supra,* 553 U.S. at p. 893; see *id.* at p. 894, fn. 8; accord, *Barragan, supra,* 32 Cal.4th at p. 253 [a prerequisite to applying claim preclusion or issue preclusion is that " 'the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding' "].)

The plaintiffs in the present case were not parties to the federal proceeding. Ford Canada, however, argued in the trial court, and contends in its appellate brief, that two exceptions to the general rule against nonparty preclusion recognized in *Taylor* apply here, specifically (1) an exception allowing preclusion when a nonparty was " 'adequately represented' " by someone who was a party to the prior suit (*Taylor, supra,* 553 U.S. at pp. 894–895), and (2) an exception permitting preclusion when a nonparty " 'assume[d] control' " over the prior action (*id.* at p. 895). We agree with plaintiffs that Ford Canada did not establish the applicability of either exception. (See *Taylor, supra,* 553 U.S. at pp. 906–907 [party who asserts claim or issue preclusion applies must establish all necessary elements]; *Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 489 [same].)

A. Adequate Representation

In *Taylor*, the Supreme Court stated that, " 'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit. [Citation.] Representative suits with preclusive effect on nonparties include properly conducted class actions, [citation], and suits brought by trustees, guardians, and other fiduciaries, [citation]." (*Taylor, supra,* 553 U.S. at pp. 894–895.)

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plaintiffs urging application of Maine law and Ford Canada arguing for California law. But as to the question of "privity" or "nonparty preclusion" (see *Taylor, supra,* 553 U.S. at p. 894, fn. 8), neither party argues, and the trial court did not hold, that state law permits nonparty preclusion here on any ground beyond the "exceptions" recognized in *Taylor*. We therefore focus on the applicability of those exceptions and do not address the parties' choice-of-law arguments.

Due process principles limit the circumstances in which representation may be found to be "adequate" for purposes of nonparty preclusion. (*Taylor, supra,* 553 U.S. at pp. 896–898, 900–901.) Specifically, "[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, [citation]; 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, [citation]. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented, [citation]." (*Taylor, supra,* 553 U.S. at p. 900.)

When Judge Hornby entered judgment for defendants in 2009, there were no certified classes in the federal action. (See *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 63.) And none of the individual plaintiffs remaining in the federal case was pursuing claims under California law. (*Ibid.*) The question presented thus is whether the individual plaintiffs advancing claims under the laws of other states (the federal non-California plaintiffs)—the losing parties to the federal court judgment—adequately represented the California state court plaintiffs and class members.

Judge Karnow, relying in part on decisions by some of the other state courts that have considered the preclusion question since the 2009 entry of the federal court judgment, found the *Taylor* test for adequate representation was met here.[8] We disagree.

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[8] Judge Karnow considered the issue of "adequate representation" as one component of a test of privity articulated in a California appellate decision, *Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1070, but he relied on the United States Supreme Court's decision in *Taylor* as establishing the minimum requirements for a finding of adequate representation. An additional element of the privity test stated in *Citizens for Open Access* and applied by Judge Karnow is a requirement that " ' "[t]he circumstances [were] such that the nonparty should reasonably have expected to be bound by the prior adjudication." ' " (*Citizens for Open Access, supra,* 60 Cal.App.4th at p. 1070.) Since we find the essential element of adequate representation as defined in *Taylor* was not established here, we do not address the

1. Alignment of Interests

As to the prerequisite element of aligned interests, it is true the interests of the federal court plaintiffs and the California state court plaintiffs were aligned in the basic sense that the two groups did not have opposing interests. (Cf. *Hansberry v. Lee* (1940) 311 U.S. 32, 43–44 (*Hansberry*) [no preclusion where relevant groups of property owners had conflicting interests], cited in *Taylor, supra,* 553 U.S. at p. 900.) Both groups of plaintiffs sought to establish that the defendant auto manufacturers conspired to keep lower-priced cars from being exported from Canada to the United States, resulting in higher vehicle prices. (See *Automobile Antitrust Cases, supra,* 1 Cal.App.5th at p. 131; *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 632 F.Supp.2d at p. 45.) And due to the coordination of discovery, the same body of evidence apparently was available to both sets of plaintiffs.

Of course, the showing of aligned interests here is weaker than in the other state courts that have addressed this question, all of which relied in part on the fact that the two sets of plaintiffs at issue were advancing *identical state law claims*. (See *Johnson II, supra,* 574 S.W.3d at pp. 351, 353 [same Tennessee statutes at issue in federal and state cases]; *Rasmussen, supra,* at pp. 17–18 [federal and Wisconsin state-court plaintiffs asserted the "same claims"]; *Corso, supra,* at p. 6 [federal and state cases involved alleged "violations of the same New Mexico statutes"]; *Johnson I, supra,* at pp. 5–6 [claims in federal and Tennessee state court were the same]; *Maxwell, supra,* at p. 4 [both sets of plaintiffs relied on same Arizona statute]; *Lerfald, supra,* at p. 4 [federal and state plaintiffs asserted claims under same Minnesota statute].)

That factor is not present here—none of the plaintiffs against whom summary judgment was entered in the federal action asserted any claims under California state law.[9] We need not determine, however, whether the absence of that factor precludes a

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parties' arguments as to whether the additional requirement pertaining to reasonable expectations was met.

[9] Judge Karnow noted this issue but found it was not significant because "the elements for proving antitrust claims are the same across the states." As noted, however,

finding of aligned interests, because we conclude below that the second essential element of the *Taylor* test for adequate representation—"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" (*Taylor, supra,* 553 U.S. at p. 900)—was not established here.

2. Representative Capacity or Protection of Interests

a. Representative Capacity

Ford Canada did not meet its burden to show the federal court plaintiffs asserting claims under the laws of states other than California (the parties to the summary judgment) understood they were acting as representatives of the named California state court plaintiffs or the members of the California state court class (i.e., persons who purchased vehicles in California). As discussed, no certified classes existed in the federal action when the summary judgment was entered, so it is not clear the individual federal court plaintiffs could have believed they were representing *anyone else* at that point. (See *Taylor, supra,* 553 U.S. at pp. 894–895 [adequate representation exception is typified by class actions]; *Corso, supra,* at p. 7 [New Mexico trial court concludes that, because federal classes were "never properly certified," federal plaintiffs "could not have thought their actions were as class representatives"].)

More to the point for our purposes, the remaining federal court plaintiffs had never even purported to serve as representatives for any California vehicle purchasers seeking damages flowing from the alleged conspiracy. The certified classes that existed earlier in the federal proceeding included a separate damage class for each involved state, with different class representatives. (See *In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 243 F.R.D. at pp. 21–23.) The plaintiffs who remained in federal court when summary judgment was entered could not have brought claims under California law.[10]

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he concluded later in his opinion that California applies a different standard of proof as to the causation element.

[10] We note that some of the state courts that gave Judge Hornby's summary judgment decision preclusive effect distinguished the California plaintiffs' situation on

The evidence cited by Ford Canada on this point (some of which Judge Karnow also cited) does not establish the federal non-California plaintiffs understood they were acting in a representative capacity with respect to the California state court plaintiffs. Ford Canada points to the discovery coordination order entered in 2004 by the federal and state courts, which, to reduce duplication of expense and effort, designated the federal action the "lead case *for discovery and discovery-related pretrial scheduling*" and allowed parties in the state court proceedings to participate in discovery in the federal action. (Italics added.) The order does not state or suggest that a party to a state court case will be bound by the federal court's non-discovery rulings in the absence of a certified federal court class.

Ford Canada also notes the attorneys for the plaintiffs in the federal and state actions entered what one of them described as a "joint prosecution agreement" that was "intended to protect the interests of all plaintiffs." The agreement itself apparently was kept confidential and is not in the record, but statements made by counsel in the trial court suggest it addresses such matters as coordination of discovery and expert preparation. We cannot conclude from this evidence that there was an agreement by the federal court plaintiffs to represent the state court plaintiffs. Nor does the participation of California state court counsel in other joint activities, such as settlement discussions with some defendants, establish that one group of plaintiffs represented the other.

b. Court's Protection of Nonparty's Interests

Ford Canada also did not establish that, for purposes of nonparty preclusion, "the original court took care to protect the interests of the nonparty" (*Taylor, supra,* 553 U.S. at p. 900). On this point, Judge Karnow noted that Judge Hornby "sent updates to state judges to keep them informed of developments in the federal action." Ford Canada also

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this basis. (See *Corso, supra,* at p. 8 [noting federal court plaintiffs asserting claims under New Mexico law did not seek dismissal from the federal action, unlike the federal California plaintiffs]; *Maxwell, supra,* at p. 5 [Arizona]; *Lerfald, supra,* at p. 6 [Minnesota].)

mentions these updates, as well as referring again to the coordination of discovery that we have discussed above.

Those factors do not provide a basis for nonparty preclusion here. The way Judge Hornby sought to protect the interests of the California plaintiffs was to carve out and dismiss the California-law claims from the federal case because, in his view, California law differed from that of the other involved states and it would be preferable for the California state courts to resolve unique and unsettled questions of California law. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) To now rely on Judge Hornby's actions as a basis for precluding the California plaintiffs from pursuing their claims in state court would stand that ruling on its head.

We note that, when *Taylor* referred to protection of interests by the prior court as a path to showing adequate representation (see *Taylor, supra,* 553 U.S. at pp. 896, 900), it cited *Richards v. Jefferson County* (1996) 517 U.S. 793, 801–802, which in turn cited *Hansberry, supra,* 311 U.S. at p. 43. The *Richards* court stated: "Our opinion [in *Hansberry*] explained that a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that *the litigation is so conducted as to insure the full and fair consideration of the common issue*.' " (*Richards, supra,* 517 U.S. at p. 801, italics added, citing *Hansberry, supra,* 311 U.S. at p. 43; see *Richards, supra,* 517 U.S. at p. 802.) As discussed, Judge Hornby took an approach that did *not* include full consideration of the federal California plaintiffs' claims. As to the pivotal question of antitrust injury presented on summary judgment, he decided not to determine what California law provides. (*In re New Motor Vehicles Canadian Export Antitrust Litigation, supra,* 609 F.Supp.2d at p. 107.) There is no basis for preclusion.

3. Notice

Because the essential second element of the *Taylor* test for adequate representation has not been established here, we need not address the third element specified in *Taylor,* i.e., the extent to which notice of the federal action was required, and whether adequate

notice was provided to the California state court plaintiffs and class members here. (See *Taylor, supra,* 553 U.S. at p. 900.)

B. Control

Apart from adequate representation, Ford Canada briefly invokes another exception noted in *Taylor* that allows preclusion when a nonparty " 'assume[d] control' " over the prior action (*Taylor, supra*, 553 U.S. at p. 895). Judge Karnow did not rely on this control exception as a separate ground for applying claim preclusion, although he stated (as part of his discussion of the parties' expectations) that "[p]laintiffs' counsel here had a financial interest in and controlled the conduct of the federal litigation, suggesting their clients should have expected to be bound by the result there." We hold the control exception does not provide a basis for preclusion here because Ford Canada did not show the California state-court plaintiffs controlled the federal action.

In *Montana v. United States* (1979) 440 U.S. 147 (*Montana*) (cited by *Taylor, supra,* 553 U.S. at p. 895 as the basis for this exception), the plaintiff in the second case, the United States, had exercised extensive control over the first action. (*Montana*, *supra*, 440 U.S. at p. 155.) Specifically, the United States required the first action to be filed, reviewed and approved the complaint in that action, paid the attorneys' fees and costs, and directed the conduct of the appeal taken in the first case. (*Ibid.*) In contrast, Ford Canada has pointed to no evidence in the record showing the California state court plaintiffs (much less the members of the California class) assumed control over the federal action, such as by directing the federal court plaintiffs as to the steps they should take in advancing the litigation.

Instead, Ford Canada relies again on the fact that counsel for the plaintiffs in the federal and state actions cooperated pursuant to a joint prosecution agreement. We are not persuaded that such cooperation establishes that the plaintiffs in each case controlled the prosecution of the other actions. We note that, even within the group of federal court plaintiffs, different courses of action were sometimes taken, such as the decision by the federal California plaintiffs to seek dismissal of their claims, while other federal court plaintiffs proceeded to summary judgment. To the extent some of the state courts

addressing this issue found a sufficient degree of control in these circumstances, we respectfully disagree with their conclusions. (See *Johnson II, supra,* 574 S.W.3d at p. 355 [Tennessee]; *Rasmussen*, *supra,* at p. 25 [Wisconsin]; *Lerfald*, *supra*, at p. 4 [Minnesota]; but see *Corso*, *supra,* at pp. 4–5 [New Mexico court finds no control]; *Maxwell*, *supra*, at p. 4 [Arizona court finds no control].)

Finally, we do not agree with Ford Canada that *Aronow v. Lacroix* (1990) 219 Cal.App.3d 1039 supports a finding that plaintiffs here are precluded on a freestanding control theory. In *Aronow*, the appellate court discussed whether a party before it (Aronow) had exercised control over a prior action, but did so in the context of assessing whether Aronow reasonably should expect to be bound by the prior judgment (*id.* at pp. 1050–1051), and only after determining a party to the prior action had adequately represented Aronow's interests, which the court held was a requirement of due process (*id.* at pp. 1049–1050). In that context, the *Aronow* court noted control did not have to be complete (*id.* at p. 1050) and stated Aronow "at least had the power to suggest courses of action" in the prior case (*id.* at pp. 1050–1051). We do not read *Aronow* as establishing that a nonparty's ability to suggest courses of action to a party in a prior case, without more and without a showing of adequate representation, is enough to bind the nonparty to the result in the prior case.[11]

Because the essential element of privity is missing, neither claim preclusion (the basis for Judge Karnow's ruling) nor issue preclusion (the alternative ground for affirmance urged by Ford Canada) applies here. (See *Taylor*, *supra*, 553 U.S. at pp. 893, 894, fn. 8; *Barragan*, *supra,* 32 Cal.4th at p. 253.) We therefore will reverse the judgment.[12]

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[11] Because Ford Canada did not show the California state court plaintiffs exercised sufficient control over the federal action to provide a basis for preclusion, we do not address plaintiffs' argument that the *Taylor* control exception can only support issue preclusion, not claim preclusion. (See *Montana, supra,* 440 U.S. at p. 154.)

[12] Since we reverse on the grounds discussed in the text, we do not address plaintiffs' other asserted grounds for reversal, including their arguments that (1) principles of waiver and judicial estoppel bar Ford Canada from invoking claim and

III. DISPOSITION

The judgment in favor of Ford Canada is reversed. The matter is remanded to the trial court with directions to enter an order denying Ford Canada's request for entry of judgment. Plaintiffs shall recover their costs on appeal.

issue preclusion, (2) the federal and California actions involved different causes of action, and (3) constitutional or statutory provisions limit the application of preclusion doctrine here.

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STREETER, Acting P.J.

We concur:

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TUCHER, J.

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BROWN, J.

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