

What's the Alternative? Preclusion Doctrines and Alternative Holdings

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The U.S. Court of Appeals for the Sixth Circuit recently confronted the rare intersection of preclusion doctrines and alternative holdings in its decision in *Pogue v. Principal Life Ins. Co.*, 2020 WL 6479662 (6th Cir. Nov. 4, 2020). In the opinion, the Sixth Circuit determined the preclusive effect of an affirmance applies only to one of two alternative bases for the district court's judgment actually affirmed on appeal.

The backstory began when plaintiff James Pogue, a doctor, submitted a disability claim to Northwestern Mutual and Principal Life Insurance Company. His claim was based upon the assertion that he could no longer practice because of a "severe anxiety disorder." The panel explained that "[w]hen submitting his claim, however, Pogue left out one detail—the Tennessee Board of Medical Examiners had suspended his license for mis-prescribing painkillers." Northwestern and Principal learned of this suspension and denied his claims.

The Northwestern Mutual case was decided first. That district court granted summary judgment for Northwestern Mutual on two alternative grounds. It first determined that the suspension occurred before Pogue became disabled. In the alternative, it determined that Pogue's suspension caused stress and anxiety and thus contributed to his disability. On appeal, the Sixth Circuit affirmed on only the first ground, that the suspension occurred before Pogue became disabled, and did not reach the alternative holding, that Pogue's suspension caused stress and anxiety and thus contributed to his disability.

The Principal case was decided after the Northwestern Mutual case. The district court in the Principal case granted summary judgment to Principal based upon issue preclusion. The district court in the Principal case found issue preclusion based on the first district court's holding in the Northwestern Mutual case that the suspension of Pogue's license contributed to his disability. The Sixth Circuit had not affirmed the Northwestern Mutual summary judgment ruling on this ground. Moreover, the district court in the Principal case did not reach the issue decided by the Sixth Circuit in the Northwestern Mutual case, whether the suspension occurred before Pogue became disabled.

In this appeal of the summary judgment in favor of Principal, the Sixth Circuit explained a nuance of issue preclusion. Specifically, it set forth an important exception to the rule of issue preclusion:

[I]ssue preclusion does not apply to issues an appellate court declines to consider on appeal, even when the appellate court affirms the overall judgment. See Restatement (Second) of Judgments § 27, cmt. o (Am. Law Inst. 1982); 18 Federal Practice & Procedure § 4421 (3d ed. 2020 update) ("The federal decisions agree with the Restatement view that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision."). Thus, whenever an appellate court affirms on an alternative ground, "issue preclusion no longer attaches to the ground on which the trial court decided the case, and instead attaches to the alternative ground on which the appellate court affirmed the judgment." *Jennings v. Stephens*, 574 U.S. 271, 278, 135 S. Ct. 793, 190 L. Ed. 2d 662 (2015).

The Sixth Circuit therefore reversed the summary judgment in favor of Principal because "the issue we declined to consider" in the appeal of the judgment in favor of Northwestern Mutual "lost any preclusive effect."

None of the briefs cited comment o to § 27, Restatement (Second) of Judgments, Federal Practice & Procedure, or *Jennings*,

all of which the Sixth Circuit cited. Rather, Pogue focused on comment i in the same section of the Restatement. That comment says that, “[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.” Principal also focused upon the preclusive effect of the *district court’s* judgment in the Northwestern Mutual case.

The appeal originally was scheduled for oral argument, but the panel chose the alternative path and removed the case from the calendar just before issuing its reversal on this alternative basis.

Notably, Principal asked the court to affirm on alternative grounds, if the district court was incorrect on its issue preclusion ruling: “While Dr. Pogue attempts to limit this Court’s decision to issue preclusion, this Court may affirm the district court’s decision on any grounds, including those not relied on by the district court.”

Although this panel’s point of issue preclusion is unlikely to arise very often, this decision serves as an important reminder to practitioners that appellate decisions may alter the preclusive effect of affirmed final judgments.

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