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UNUSUAL NAMES, POWERFUL DOCTRINES: USE OF ROOKER-FELDMAN AND RES JUDICATA IN DEFENDING FEDERAL LAWSUITS BROUGHT AGAINST ATTORNEYS ARISING FROM LITIGATION IN STATE COURT

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10th Annual Meeting in Chicago, Illinois on September 25-27, 2019 at the W Lakeshore Hotel

Defending lawyers in claims arising under federal statutes can be complex and extremely expensive. Often those actions are brought as putative class actions and the statutes they are brought under contain fee shifting provisions. However, many of those cases involve underlying state court lawsuits that may allow for the application of: (1) the *Rooker-Feldman* doctrine to divest the federal court of subject matter jurisdiction and/or (2) a defense based upon claim preclusion or *res judicata*. When defending lawyers in such claims, defense counsel should consider raising these doctrines to defeat a plaintiff's claims in their entirety.

Basics of the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). *Commonwealth Plaza Condo. Assoc. v. City of Chicago*, 693 F.3d 743, 745 (7th Cir. 2012). The doctrine, which is a jurisdictional limitation, "prevents lower federal courts from reviewing state-court judgments, over which only the United States Supreme Court has federal appellate jurisdiction." *Commonwealth Plaza Condo. Assoc.*, 693 F.3d at 645; *see also Kelley* v. *Med-l Sols., LLC, 548* F .3d 600, 603 (7th Cir. 2008) ("A state litigant seeking review of a state court judgment must follow the appellate process through the state court system and then directly to the United States Supreme Court."). The *Rooker-Feldman* doctrine applies when the state court's judgment is the source of the injury of which the plaintiffs complain in federal court. *Harold v. Steele*, 773 F.3d 884, 885 (7th Cir. 2014). It does not matter that the underlying state court judgment might be erroneous or even unconstitutional. *Commonwealth Plaza Condo. Assoc.*, 693 F.3d at 745. Nor does it matter that the time for appeal to the Supreme Court has expired. *Gilbert v. Illinois Board of Education*, 2007 U.S. Dist. LEXIS 23429, *7-8 (N.D. Ill.).

A challenge to jurisdiction under *Rooker-Feldman* is considered a factual attack to subject matter jurisdiction. *Flores v. Village of Bensenville*, 2001 U.S. Dist. LEXIS 13953, * 6-7 (N.D. Ill.). The plaintiff bears the burden of establishing the existence of subject matter jurisdiction by competent proof. *Saperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999). In ruling on a factual

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attack, the Court may properly look beyond the jurisdictional allegations of the plaintiff's complaint to determine whether in fact subject matter jurisdiction exists. *United Transport v. Gateway Western Railway Co.*, 78 F.3d 1208, 1210 (7th Cir. 1996). If the defendant submits evidence that casts doubt on the district court's jurisdiction, the "presumption of correctness" usually accorded to jurisdictional allegations disappears. *Saperstein*, 188 F.3d at 856.

The *Rooker-Feldman* doctrine prohibits indirect attempts to undermine state court decisions. It has been repeatedly held that even where a federal plaintiff's claims "do not on their face require review of a state court's decision," the doctrine still applies if those claims are "inextricably intertwined with a state-court judgment, except where the plaintiff lacked a reasonable opportunity to present those claims in state court." *Jakupovic v. Curran*, 850 F.3d 898, 902 (7th Cir. 2017).

Accordingly, *Rooker-Feldman* bars (1) claims that "directly seek to set aside a state-court judgment;" and (2) "claims that were not raised in state court, or that do not on their face require review of a state court's decision," but are "closely enough related to a state-court judgment." *Mains v. Citibank, N.A.,* 852 F.3d 669, 675 (7th Cir. 2017). To determine whether *Rooker-Feldman* applies, the Court must "ask whether the federal plaintiff is alleging that his injury was caused by the state-court judgment." *Id*. If so, the plaintiff's claim is barred. *Id.* If "the claim alleges an injury independent of the state-court judgment that the state court failed to remedy, *Rooker-Feldman* does not apply." *Id.*

Limitations placed on the scope of the *Rooker-Feldman* doctrine.

In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), the United States Supreme Court limited the application of the *Rooker-Feldman* doctrine. In *Exxon Mobil*, an oil company entered into a joint venture with a Saudi Arabian corporation, and when a dispute arose over royalties, the foreign entity filed a complaint in Delaware state court against Exxon Mobil. *Exxon Mobil Corp.* 544 U.S. at 289. Shortly thereafter, and before any judgment had been entered in the state court action, Exxon Mobil filed a parallel federal action which the Saudi company moved to dismiss based upon the Foreign Sovereign Immunities Act of 1976. *Id*. at 289-290. The district court denied the motion to dismiss and the Saudi corporation took and interlocutory appeal to the Third Circuit. *Id*. at 290.

During the pendency of the appeal in the federal action, the state court action proceeded to verdict and judgment was entered in favor of Exxon Mobil. *Id*. at 289. On its own motion, the Third Circuit raised the issue of whether federal subject matter jurisdiction abated when the judgment was entered in the state court. *Id*. at 290. The Third Circuit held that there was no subject matter jurisdiction and dismissed the appeal on that basis. *Id*. at 290-291.

In reversing the dismissal of Exxon Mobil's federal court action, the United States Supreme Court limited the application of the *Rooker-Feldman* doctrine. Writing for a unanimous court, Justice Ginsburg held that:

> [*Rooker-Feldman*] is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions. *Id*. at 284.

Prior to *Exxon Mobil*, *Rooker-Feldman* had been applied expansively. The result of *Exxon Mobil* is that the *Rooker-Feldman* doctrine "is [now] a narrow doctrine, 'confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Lance v. Dennis, 546 U.S. 459, 464 (2006)* (citing *Exxon Mobil, 544 U.S. at 284*). The doctrine will not prevent a losing litigant from presenting an independent claim to a district court. *Exxon Mobil*, 544 U.S. at 293.

The main emphasis of *Exxon Mobil* is that *Rooker-Feldman* does not apply when defendants in a state court action file a parallel action in federal court as a protective measure while the state matter is still pending. *Id*. at 293-294 fn. 9. The Court specifically held that concurrent jurisdiction does not vanish if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court. *Id*. at 292.

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Examples of specific application of *Rooker-Feldman* in actions against lawyers.

Despite *Exxon-Mobil's* narrowing of the doctrine, *Rooker-Feldman* has been utilized to bar federal suits seeking to recover on a theory that an attorney acting as a debt collector violated federal law during the course of litigation in state court. *Harold v. Steele,*, 773 F.3d 884, 885 (7th Cir. 2014). In *Harold*, the plaintiff alleged in his federal case that the defendant, an attorney by the name of Harold Steele ("Steele"), had misrepresented the judgment creditor's identity in a state court wage garnishment proceeding in violation of the Fair Debt Collection Practices Act ("FDCPA"). The Seventh Circuit held that *Rooker-Feldman* barred plaintiff's claim and stated: "If Steele's client did not own the judgment, then Harold was entitled to decision in his favor. No injury occurred until the state judge ruled against Harold." *Harold*, 773 F.3d at 886. The Court went on to observe that "[s]ection 1692e [of the FDCPA] forbids debt collectors to tell lies but does not suggest that federal courts are to review state-court decisions about whether lies have been told." *Id.* at 887. "Section 1692e does not even hint that federal courts have been authorized to monitor how debt-collection litigation is handled in state courts." *Id.*

Harold is important for an additional reason. After recognizing a disagreement among the circuits on the issue, the Court commented that interlocutory orders entered prior to the final disposition of a state court lawsuit remain subject to *Rooker-Feldman*. *Harold*, 773 F.3d at 886; *see also*, *Sykes v. Cook County Circuit Court Probate Division*, 887 F.3d 736, 742 (7th Cir. 2016) (applying *Rooker-Feldman* to interlocutory order); *Carpenter v. PNC Bank Nat'l Ass'n, 633 Fed. App'x 346 (7th Cir. 2016)* (non-citable under Seventh Circuit Rules, but holding that interlocutory order of foreclosure subject to *Rooker-Feldman*). Thus, at least in the Seventh Circuit, there is an opportunity for litigants to raise a *Rooker-Feldman* challenge to subject matter jurisdiction where a plaintiff's claim seeks redress for injuries caused by a state court's interlocutory order. However, the matter is far from settled, and one should be aware of contrary authority that exists even within the Seventh Circuit. *See, Kowalski v. Boliker*, 893 F.3d 987, 995 (7th Cir. 2018) (suggesting without deciding that *Rooker-Feldman* may not apply to interlocutory orders); *TruServ Corp. v. Flegles, Inc.*, 419 F.3d 584, 591 (7th Cir. 2005) (holding that *Rooker-Felman* did not apply to interlocutory order).

In *Kelley v. Med-1 Solutions, LLC*, 548 F.3d 600, 605 (7th Cir. 2008), the Court held that *Rooker-Feldman* barred a claim under the FDCPA that an attorney made false misrepresentations in a state court lawsuit that it was entitled to recover attorneys' fees. In doing so, the court rejected plaintiffs' argument that the relief sought was "independent" from the state court judgment because it sought to remedy the defendant's representations and requests concerning attorney fees that preceded entry of the state court judgment. *Id*. The court explained that the plaintiffs' claims were inextricably intertwined with the state court's judgment, despite the fact that the allegedly unlawful actions occurred prior to that judgment, because "[w]e could not determine that defendants' representations ... related to attorney fees violated the law without determining that the state court erred by issuing judgments granting the attorney fees." *Id*.

Similarly, in *Crawford v. Countrywide Home Loans*, 647 F.3d 642, 646 (7th Cir. 2011), plaintiffs who were evicted from their home by sheriff deputies enforcing a state court foreclosure judgment brought suit against the mortgagee, the mortgagee's foreclosure suit counsel, and other defendants alleging that the foreclosure and eviction deprived them of fundamental fairness and equal protection rights. The Court held that plaintiffs' claim was subject to *Rooker-Feldman's* jurisdictional bar because the claim was an impermissible challenge to the state court mortgage foreclosure judgment, and to grant plaintiffs the relief they sought would have required reversal of that judgment. *Crawford*, 647 F.3d at 646-47.

Likewise, in *Taylor v. Federal Mortgage Association*, 374 F.3d 529, 531-32 (7th Cir. 2004), the Court upheld the dismissal of the plaintiff's federal claims against an attorney and others arising out of a state eviction proceeding that the plaintiff claimed was fraudulent. The plaintiff's allegations of civil rights violations arising from the foreclosure proceeding were dismissed because the district court found that the two claims were inextricably linked based upon the plaintiff's injury having been caused by the foreclosure action, not the conduct of the defendants, and that the plaintiff had a reasonable opportunity to be heard in the state court prior to the foreclosure. *Taylor*, 374 F.3d at 532. In upholding the district court's dismissal, the Court found that the injury for which the plaintiff sought recovery did not arise until the foreclosure judgment, and therefore, the two cases were inextricably linked. *Id*. at 534.

It should be noted, however, that not every claim against a lawyer in federal court following a favorable result in state court is barred by the *Rooker-Feldman* doctrine. In *Long v. Shorebank Dev-Corp.*, 182 F.3d 548, 559 (7th Cir. 1999), the Seventh Circuit held that *Rooker-Feldman* did not apply to plaintiff's federal claim for money damages under the FDCPA because the plaintiff was "effectively precluded" from raising her federal claims in an eviction proceeding for unpaid rent previously brought in state court. In that state court proceeding, the defendants had sought to evict the plaintiff in a forcible entry and detainer action. The

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Seven Circuit determines that plaintiff's claim for damages under the FDCPA would not have been considered "germane" to the forcible entry and detainer action and could not have been presented in that state court. Id at 559-60. The Court explained that plaintiff's alleged injury in her federal FDCPA suit alleging misrepresentation in an attempt to collect a debt was independent of the state court judgment because the defendant could have succeeded in its fraudulent attempt to collect rent from the plaintiff without going through the state court proceedings and obtaining a judgment against her.

Similarly, in *Buford v. Palisadeo Collection, LLC,* 552 F.Supp.2d 800, 803 (N.D. Ill. 2008), consumers filed an action under the FDCPA alleging that a collection agency and law firm violated the statute by attempting to collect time-barred cellular phone service debts in state court. Following *Long,* the court held that *Rooker-Feldman* did not bar this claim because plaintiffs' alleged injuries were "independent of and complete" before entry of the state court judgment. Id. at 805. Specifically, the court concluded:

> Defendants' alleged FDCPA violation occurred when they filed the state court action… past the statutorily allowed two-year period. Defendants' alleged FDCP violation-filing and prosecution of time-barred debts was necessarily accomplished before the entry of the judgments months later in February 2007.

Likewise, in *Dexter v. Tran*, 654 F.Supp.2d 1253, 1259-1260 (E.D. Wash, 2009) the Court held that the doctrine did not apply because the plaintiff was not seeking to overturn the state court's judgment or challenging what the state court did, but rather seeking recovery from the defendant for bringing the state court case in the first instance. The Ninth Circuit in *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003) summarized this distinction as follows:

> [i]f a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction.

Use of *res judicata* in conjunction with a motion to dismiss under *Rooker-Feldman*.

Given the limitations of the *Rooker-Feldman* doctrine, counsel representing attorneys in FDCPA suits and other federal statutory matters arising out of the entry of state court judgments, should also argue for application of claim preclusion, or *res judicata*. Under 28 U.S.C. § 1738, a federal court must apply the *res judicata* law of the state in which the judgment was entered. *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984). Most states, like Illinois, require three elements for *res judicata* to apply: (1) identity of parties and their privies in the two suits; (2) identity of cause of action in the prior and current suit; and (3) a final judgment on the merits in the prior suit. *4901 Corporation v. Town of Cicero*, 220 F.3d 522, 529 (7th Cir. 2000). Other states may require additional elements. In Washington state, for example, there are four elements for claim preclusion to apply. There must be: (1) the same subject matter, (2) the same cause of action, (3) the same persons and parties, and (4) the quality of the parties. *Energy Northwest v. Hartje, 148 Wash. App. 454, 464 (2009)*.

The purpose of *res judicata* is to promote judicial economy by requiring the parties to litigate, in one case, all rights arising out of the same set of operative facts. *Chicago Title Land Trust Co. v. Potash Corp.*, 664 F.3d 1075, 1079 (7th Cir. 2011). A court may dismiss a matter based on *res judicata* pursuant to Rule 12(b)(6) where the facts establishing the defense are definitively ascertainable from the allegations of the complaint, the documents incorporated therein, matters of public record, and other matters subject to judicial notice. *U.S. Bank v. JKM Mundelein, LLC*, 2015 U.S. Dist. LEXIS 61619, * 8 (N.D. Ill.).

Taking the basic elements of *res judicata* in turn, it has often been held that there is an identity between a party and its counsel for the purposes of *res judicata. See, Henry v. Farmer City State Bank*, 808 F.2d 1228, 1235, n. 6 (7th Cir. 1986) (holding that a bank and the attorneys it hired to pursue a mortgage foreclosure judgment were in privity for purposes of *res judicata*); *Langone v. Schad, Diamond and Shedden, P.C.*, 406 Ill.App.3d 820, 832, 943 N.E.2d 673 (1st Dist. 2010) (attorneys are in privity with clients for purposes of *res judicata*).

As to the second element, *res judicata* precludes not only claims that were brought in a prior action, but those that *could have been brought* as well. *4901 Cor-*

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poration, 220 F.3d at 530 (emphasis added). According to the Illinois Supreme Court, causes of action are identical "if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id*; *citing, River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 311 (1998). Further, "[f]or purposes of determining the *res judicata* effect of a judgment, a 'cause of action' is not limited to those issues that were or might have been offered to sustain the claim; it is also deemed to comprise all defenses that were or might have been offered." *Henry*, 808 F.2d at 1233. As the Seventh Circuit stated in *Henry*:

> *[R]es judicata* bars a party from subsequently raising claims based on facts which could have constituted a defense or counterclaim to a prior proceeding if the successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action. *Henry*, 808 F.2d at 1232.

As for the third element, a judgment is deemed final for purposes of *res judicata* if it terminates litigation on the merits so that the only issue remaining is proceeding with its execution. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (4th Dist. 1999). Often state court collection suits result in an entry of a default judgment in favor of the creditor.

In *Byrd v. Homecomings Financial Network*, 407 F.Supp.2d 937, 945 (N.D. Ill. 2005) the Court applied *res judicata* to bar a plaintiff's claim that the company servicing her mortgage violated the FDCPA by declaring her in default on her mortgage, pursuing foreclosure proceedings, and obtaining a judgment resulting in the sale of her property. The Court held that the FDCPA claim involved the same transaction as the foreclosure suit because the basis for the FDCPA claim was the lender's attempt to recover money owed on plaintiff's mortgage through the foreclosure suit itself. *Id*. The court distinguished the case before it from others where *res judicata* was held not to apply because the FDCPA claim was not based upon the state court proceeding to attach the debt, but rather, involved efforts at debt collection that occurred *before* suit was filed. *Id*.

Conclusion.

While *Exxon Mobil* did narrow the application of *Rooker-Feldman*, the doctrine is not dead when it comes to suits against attorneys in federal court for violation of federal statutes such as the FDCPA. The Seventh Circuit has repeatedly recognized that "even federal claims that were not raised in state court, or that do not on this face require review of a state court's decision, may still be subject to *Rooker-Feldman* if these claims are "inextricably intertwined" with a state court judgment." *Jakupovic v. Cunan,* 850 F.3d 898, 902 (7th Cir. 2017). While the concept of "inextricably intertwined" has been described as a "somewhat metaphysical one," ultimately the determination hinges upon whether the federal claim alleges: (1) injury that was caused by the state court judgment and (2) the plaintiff had a reasonable opportunity to raise the issue in the state court proceedings. Practitioners should also evaluate the applicability of claim preclusion or *res judicata* (or the related doctrine of issue preclusion or collected estoppel) in connection with making a *Rooker-Feldman* argument. Both doctrines may apply, but even if *Rooker-Feldman* does not, *res judicata* may be available as a defense. *See, e.g., Dexter*, 654 F. Supp.2d at 1261-62 (holding that *res judicata* barred plaintiff's claim even though *Rooker-Feldman* was inapplicable).

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