Evidence

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Contrasting the Evidentiary and Preclusive Effects of Judicial Findings of Fact

A court taking judicial notice of a fact, document, or other authorized piece of evidence is an efficient way to introduce otherwise admissible evidence and eliminates the need for additional proof.[1] This process is convenient for clear and bright-line matters like the Constitution, statutes, and other known facts that cannot reasonably be disputed. But can this same streamlined process be used by a court to take judicial notice of a determination of facts in a prior order, finding of fact and conclusion of law, or judgment?

This article, which is not limited to 2015 cases, will examine judicial notice generally, the scope of judicial notice, and the limitations courts impose on litigants' ability to rely on prior judicial determinations in subsequent proceedings, and, in particular, on courts' conflicting decisions regarding the scope of judicial notice as it applies to factual findings made by other courts. The prevailing rule permits courts to take judicial notice of court records, including of prior judgments, orders, and decisions, but generally forbids courts from taking judicial notice of the facts contained in those records or of the factual findings on which those decisions are based. This prevailing rule tends to deprive previous decisions of distinctly evidentiary weight. Instead, litigants must rely on doctrines of preclusion, rather than rules of evidence, to the extent that they wish to rely on previous judicial determinations and avoid re-litigation of factual questions.

Background: Matters of Which Courts May Take Judicial Notice

It is well established that courts may take judicial notice of the records of a court, including prior judgments of a court.[2] Section 452 of the Evidence Code codifies this rule, providing that judicial notice may be taken of "[o]fficial acts of the legislative, executive, and judicial departments of the United States," and "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."[3] The statute sets forth additional categories of facts subject to judicial notice, including, notably, those "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."[4] In general, the rationale for allowing judicial notice to be taken is that judicial notice may be taken of certain matters in lieu of formal proof where those matters are indisputably true.[5]

The Scope of Judicial Notice

While there is little dispute concerning the power of a court to take judicial notice of proceedings in prior litigation, the scope and extent of that power are more ambiguous. Specifically, courts have articulated the general rule that while the contents of court records are subject to judicial notice, the truth of any facts contained in those records generally is not. Under this rule, a court may take judicial notice that certain documents were filed in prior litigation, or that certain factual findings were made, but generally may not take judicial notice of the contents of those filings, or of the factual findings themselves.[6] This was the approach taken in *Flores v. Arroyo*, in which the California Supreme Court held that a court could take judicial notice of the judgments in a prior action in the course of ruling on a demurrer.[7] In *Flores*, the defendant demurred primarily on the basis of res judicata, advancing the prior judgments as grounds

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1. See, e.g., *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564 (*Sosinsky*); *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578 ("It is well recognized that the purpose of judicial notice is to expedite the production and introduction of otherwise admissible evidence.").
2. See, e.g., *Flores v. Arroyo* (1961) 56 Cal.2d 492, 496 (*Flores*) (taking judicial notice of prior judgments in the course of reversing trial court's sustaining of demurrer, which principally raised res judicata arguments, and concluding that the noticed prior judgment "can be regarded only as a step in the execution of the alleged plan").
3. Evid. Code, § 452, subds. (c), (d).
4. *Id.*, § 452, subd. (h); see also *Id.*, § 451 (setting forth categories of facts for which judicial notice is mandatory).
5. See, e.g., *Mack v. State Bd. of Ed.* (1964) 224 Cal.App.2d 370, 373.
6. See, e.g., *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 483–484 (*Arce*).
7. *Flores, supra*, 56 Cal.2d at pp. 496–497.
8. *Id.* at p. 494.

for dismissal of the case.[8] The trial court took judicial notice of two prior judgments and sustained the demurrer.[9] The Supreme Court concluded that judicial notice was properly taken of the judgments, but reversed the sustaining of the demurrer, concluding that the defendant was alleged in the current action to have obtained the judgments only as part of a scheme to defraud the plaintiff.[10] Accordingly, while *Flores* affirmed the proposition that a court may take judicial notice of court records, it dismissed notwithstanding the prior judgments based on the allegations in the complaint before it.[11]

The rule permitting judicial notice of court records, but preventing judicial notice from being taken of the truth of the contents of those records, arguably applies more intuitively to some court records than to others. For instance, it is well established that courts may not take judicial notice of the truth of facts contained in pleadings and related records, or in evidentiary submissions that comprise part of the court's records, including statements within affidavits, hearing or deposition transcripts, or other documents filed with the court.[12]

This rule was examined in 2015 in *Richtek USA, Inc. v. uPI Semiconductor Corporation*, in which the Court of Appeal reversed a trial court's order sustaining a demurrer because the court had used judicial notice of pleadings in a separate case to determine a factual issue concerning the statute of limitations.[13] The plaintiff in *Richtek* filed a trade secret misappropriation case in California several years after having filed misappropriation and patent infringement cases in Taiwan.[14] The defendants demurred on statute of limitations grounds, alleging that the plaintiff had knowledge of the purported misappropriation more than two years earlier, when it filed the actions in Taiwan.[15] The trial court judicially noticed the Taiwanese complaints and, based on allegations in those complaints, determined when the plaintiff had gained knowledge of the misappropriation.[16] Using allegations contained in judicially noticed documents to resolve a factual issue at the heart of a demurrer, according to the appellate court, is error.[17] A "hearing on a demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable."[18]

Courts recite several rationales for preventing judicial notice from being taken of the truth of the facts set forth in a court file. Some decisions note the impropriety of taking judicial notice of facts in court records where those facts were not the product of an adversarial hearing.[19] For example, in *People v. Rubio*, the prosecution sought judicial notice of a court's statement, included in a minute order following a hearing where the defendant had failed to appear, that "defendant fails to appear without sufficient excuse."[20] The prosecution sought to introduce the defendant's flight as evidence of his guilt for the crime with which he was charged.[21] The appellate court rejected this approach, concluding that there was "no exception to the hearsay rule that would render admissible the judge's statement, contained in a minute order, that 'defendant fails to appear without sufficient excuse.'"[22] Given the lack of an adversarial hearing, a "litigant should not be bound by the

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9. *Ibid.*
10. *Id.* at p. 497.
11. *Ibid.*
12. See, e.g., *Arce, supra*, 181 Cal.App.4th at p. 483 (court may "not take judicial notice of the truth of any factual assertions" within pleadings filed in separate court action); *Tarr v. Merco Construction Engineers, Inc.* (1978) 84 Cal.App.3d 707, 715 (a court "may not take judicial notice of the truth of allegations made in documents such as pleadings, affidavits and allegations in bankruptcy proceedings"); see also *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 (truth of statements within affidavit are not subject to judicial notice); *Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 22 (existence of statements within deposition transcript filed with the court may be judicially noticed, but not truth of those statements); *Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 878–879 (court may take judicial notice of existence of arrest report, but not the truth of factual matters asserted therein); *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914, 915 fn.1 (*Day*) (court may take judicial notice of averments on information and belief in affidavit, but not of truth of those averments); *People v. Long* (1970) 7 Cal.App.3d 586, 591 (court may not judicially notice truth of matters stated in public records, such as juvenile court file); *Love v. Wolf* (1964) 226 Cal.App.2d 378, 403 (court may take judicial notice of existence of congressional hearing transcript).
13. *Richtek USA, Inc. v. uPI Semiconductor Corp.* (2015) 242 Cal.App.4th 651, 660–662.
14. *Id.* at pp. 655–656.
15. *Id.* at p. 657.
16. *Ibid.*
17. *Id.* at p. 660.
18. *Id.* at p. 660, quoting *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113–114.
19. See, e.g., *Flores, supra*, 56 Cal.2d at p. 496 (approving judicial notice of prior judgment that "is appropriately drawn to the court's attention and . . . plaintiff has adequate notice and opportunity to be heard on the question of the effect of such judgment").
20. *People v. Rubio* (1977) 71 Cal.App.3d 757, 764, disapproved on another ground in *People v. Freeman* (1978) 22 Cal.3d 434, 438–439.
21. *Ibid.*
22. *Id.* at p. 766.

court's inclusion in a court order of an *assertion of fact* that such litigant has not had the opportunity to contest or dispute."[23]

Other decisions accurately describe certain facts in court records as "hearsay allegations" and point to an independent rule that courts cannot take judicial notice of hearsay as being true.[24]

Underlying both of these rationales is the broader understanding that the function of judicial notice is to establish a given fact as true for purposes of proof: "Under the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required. Judicial notice is thus a substitute for formal proof."[25] Thus, courts consider that judicial notice should not be taken except of facts that are beyond reasonable dispute, and that therefore should not be subject to formal proof. By this rationale, the function of judicial notice—to establish facts as proven—determines the scope of the doctrine: judicial notice should only be taken of facts that are indisputably true.

In many cases, therefore, judicial notice cannot be taken of court records because this basic rationale does not apply. There is no underlying contention that all of the facts included in court records are indisputably true—indeed, the opposite contention is more likely—therefore, judicial notice should not extend to all facts within court records. In any event, most evidence—including affidavits, pleadings, and exhibits—would not be treated as indisputably true, and there is no compelling reason why their placement in a court file should alter that conclusion. Usually, the reason that facts are placed in a court file is, precisely, to prove their truth or falsehood, not to treat their truth as already established.

The Permissibility of Taking Judicial Notice of Facts Adjudicated in Prior Proceedings

The critical question is whether a court may properly take judicial notice of the truth of facts asserted in "documents such as orders, findings of fact and conclusions of law, and judgments."[26] California courts have reached different conclusions.

In *Weiner v. Mitchell, Silberberg & Knupp*, the court considered the familiar rationales forbidding judicial notice of facts included in court files and concluded that they did not apply to documents—such as orders, findings of fact and conclusions of law, and judgments—that reflect the outcome of judicial determinations.[27] Citing *Day v. Sharp*, which rejected judicial notice of statements in exhibits attached to a declaration included in the court file, the *Weiner* court observed that "that court went on to recognize expressly that a court may properly take judicial notice of the truth of facts asserted in documents such as orders, findings of fact, conclusions of law and judgments."[28] The court in *Weiner* concluded that it was appropriate to take judicial notice of a Ninth Circuit opinion which made specific findings concerning the plaintiffs' misconduct in ruling on a demurrer to the plaintiffs' complaint for malpractice.[29] The court reasoned that the statements in the appellate opinion "appear to us to possess generally an assurance of accuracy and reliability as great as those associated with the documents specifically mentioned and approved in *Day v. Sharp*."[30]

Despite *Weiner*'s holding that judicial notice may be taken of the specific factual findings in a court opinion, the prevailing rule in California holds that a court may not take judicial notice of the truth of factual findings even in such documents as "orders, findings of fact and conclusions of law, and judgments."[30] Rather, the court may take judicial notice only of the fact that the prior court made the findings in question, not of the truth or falsehood of those facts.[31]

In *Sosinsky v. Grant*, the court reviewed an order granting summary judgment to the defendants in one

23. *Sosinsky, supra*, 6 Cal.App.4th at p. 1568, quoting 2 Jefferson, Cal. Evidence Benchbook (2d ed. 1982), § 47.2, p. 1759 (Jefferson).
24. See, e.g., *Day, supra*, 50 Cal.App.3d at p. 914 (rejecting judicial notice of evidentiary material submitted as an appendix to an affidavit as hearsay); see also *People v. Surety Ins. Co. of Cal.* (1982) 136 Cal. App.3d 556, 564 (rejecting judicial notice of "trial court's statements and Attorney Garcia's statements and accusations . . . made without any contest or adversary proceeding" as "hearsay allegations").
25. 1 Witkin, Cal. Evidence (5th ed. 2012) Jud. Notice, § 1, p. 114.
26. *Day, supra*, 50 Cal.App.3d at p. 914 (citation omitted).
27. *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 45–46.
28. *Id.* at p. 46, citing *Day, supra*, 50 Cal.App.3d at p. 914.
29. *Ibid.*
30. *Ibid.*
31. *Sosinsky, supra*, 6 Cal.App.4th at p. 1564, quoting Jefferson, *supra,* § 47.2, at p. 1757; see also *id.* at p. 1551 ("This case presents the issue of whether a court may properly take judicial notice of the truth of factual findings made by a judge who sat as a trier of fact in a previous case. We hold that the court may not take judicial notice of the truth of those factual findings."); see also *Steed v. Dept. of Consumer Affairs* (2012) 204 Cal.App.4th 112, 121–122 (while court could take judicial notice of the existence of a minute order in prior proceeding,

of several successive actions brought between the same or similar parties.[32] In opposing the defendants' motion for summary judgment, the plaintiffs "did not present any actual evidence in opposition to the [defendants'] motion," but rather requested that the court take judicial notice of documents that had been filed in prior litigation, which they contended created an issue of material fact sufficient to defeat summary judgment.[34] The court disagreed, on the grounds that "the [defendants'] motion for summary judgment made no contention that the . . . documents which the [plaintiffs] asked the court to take judicial notice of did not exist," and that therefore the request for judicial notice could not have given rise to a disputed issue of material fact.[35] The plaintiffs "did not expressly ask the court to take judicial notice of any particularly identified 'fact' or 'facts,'" and the trial court did not formally rule on the request for judicial notice.[36] Nevertheless, the Court of Appeal explicitly held that judicial notice of the facts included in the documents from the prior litigation would have required denial of the defendant's summary judgment motion, and that the motion was properly granted because taking judicial notice of such facts would be impermissible.[37]

In reaching this conclusion, the court relied heavily on the principle that "[i]t is the consequence of judicial notice that the 'fact' noticed is, in effect, treated as true for purposes of proof."[38] Noting that previous decisions, including *Weiner*, had permitted judicial notice to be taken of the truth of findings of fact, the court concluded that there was "no sound legal basis" for distinguishing between facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments, and facts asserted in other court records.[39] Specifically, the court found no reason why the judicial determination of a disputed fact should be grounds for taking judicial notice of the fact after it had been determined: "[W]e do not see why 'facts' which were in *actuality* the subject of a reasonable dispute would become, after the dispute has been judicially decided, 'facts' which could not reasonably be subject to dispute merely because the doctrines of res judicata or collateral estoppel, if properly shown to apply, might operate to prevent further litigation of the dispute."[40]

The court reached a similar conclusion in *Kilroy v. State*. In that case, plaintiffs had initiated an action against the state of California and a California Highway Patrol officer for alleged violations of civil rights and other tort claims.[41] Plaintiffs alleged that the officer had omitted material facts from his affidavit used to obtain a search warrant to search plaintiffs' business, which resulted in the discovery of one of the plaintiffs' unlawful possession of a firearm and federal criminal charges.[42] The federal court granted a motion to suppress, leading to the dismissal of the criminal case.[43] In the subsequent civil action, plaintiffs requested judicial notice of the federal court's suppression order.[44] The trial court denied the request, and the Court of Appeal affirmed, holding that the "factual findings in a prior judicial opinion are not a proper subject of judicial notice."[45] The court noted that a prior court finding "may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action."[46] But because the issues decided in the prior federal proceeding were different from the issues in the state court proceeding, and the defendants were not parties to the state court proceeding, the court could not take judicial notice of the prior order.[47]

Cases like *Sosinsky* and *Kilroy* imply that the most important mechanisms by which past judicial determinations may be introduced in active litigation are doctrines of preclusion rather than rules of evidence. These doctrines prevent re-litigation of issues that have been previously decided, irrespective of the

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it "simply could not take judicial notice of the truth of the factual findings and determinations on which that minute order is based; it could not accept those findings as true"); *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1050–1051 (holding that court should receive and "credit" prior court's findings "only if the elements of collateral estoppel were satisfied"); *Kilroy v. State* (2004) 119 Cal.App.4th 140, 148 (*Kilroy*) (concluding that "factual findings in a prior judicial opinion are not a proper subject of judicial notice").

32. *Sosinsky, supra*, at pp. 1564–1565.
33. *Id.* at pp. 1551–1552.
34. See *Id.* at p. 1560.
35. *Id.* at p. 1562.
36. *Ibid.*
37. *Id.* at pp. 1562–1563.
38. *Id.* at p. 1564.
39. *Id.* at pp. 1564–1565.
40. *Id.* at p. 1566.
41. *Kilroy v. State of California* (2004) 119 Cal.App.4th 140.
42. *Id.* at pp. 143-144.
43. *Id.* at p. 144.
44. *Ibid.*
45. *Id. at p. 148.*
46. *Ibid.*
47. *Id. at p. 149.*

probative value of the previous decision. Indeed, they presuppose that the correctness of the prior decision is irrelevant: what is relevant is the finality of the prior determination and its bearing on the case in which it is introduced.[48] Yet, the ability of a court to judicially notice prior determinations of fact is limited to situations in which the strict requirements of res judicata or collateral estoppel are satisfied. Unless all the requirements for preclusion are satisfied, courts generally cannot take judicial notice of the truth of matters asserted in prior orders, findings of fact and conclusions of law, and judgments. Thus, it is possible that previously litigated and adjudicated issues in one matter may be decided completely differently in another matter.

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48. See, e.g., *Sosinsky, supra*, 6 Cal.App.4th at p. 1569 ("Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently relitigated a second time.").