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Issue Preclusion in Complex Litigation

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I. INTRODUCTION

In an era of multiparty, multijurisdictional, multidistrict litigation, federal cases have grown increasingly complex. As judges struggle to manage complicated cases, a new litigation paradigm has emerged. Rather than attempting to try all cases in one action, federal judges are now breaking the litigation down into smaller pieces, using "fast tracks" or "bellwether" cases, hoping that resolution of one or two cases will lead to settlement of the rest.[1]

1. *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig., 252 F.R.D. 83, 86–87 (D. Mass. 2008) (describing a bellwether trial involving two classes of plaintiffs against four defendants); *see also In re* Pharm. Indus. Average Wholesale Price Litig., 491 F. Supp. 2d 20, 29–30 (D. Mass. 2007) (involving two

Inevitably, because the cases involve identical fact issues and identical defendants, the doctrine of prior adjudication comes into play. This Article identifies and analyzes significant issues that arise in the application of the doctrine of prior adjudication to multiparty, multijurisdictional, multidistrict litigation. These issues include: (1) whether issue preclusion applies where an appeal is pending; (2) whether invocation of issue preclusion is proper where its use would effectively foreclose the right to jury trial; (3) the issue-preclusive effect of an order denying class certification; (4) whether a subsequent court is bound by the preclusion rules of the prior court; and (5) whether vacatur nullifies the issue-preclusive effect of a judgment.

II. BACKGROUND

The doctrine of prior adjudication describes the ways in which a prior judgment may have preclusive effect in a subsequent action.[2] It consists of two interrelated concepts: (1) res judicata or claim preclusion; and (2) collateral estoppel, also known as issue preclusion.[3] The principle underlying claim preclusion and issue

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classes of plaintiffs certified against some thirty defendants, five on a fast track and the remainder on a regular track).

2. *See, e.g.*, Weaver Corp. v. Kidde, Inc., 701 F. Supp. 61, 63 (S.D.N.Y. 1988) ("One difficulty is that courts use 'res judicata' for two different concepts. Some use it to mean claim preclusion. Others employ res judicata in a general sense, to encompass both claim and issue preclusion.").

3. For an excellent explanation of modern preclusion terminology, see *Kasper Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530, 535–36 (5th Cir. 1978) (citations omitted):

> The rules of res judicata, as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first such doctrine is "claim preclusion," or true res judicata. It treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial. The aim of claim

preclusion is that once a litigant has had a full and fair opportunity to litigate its case, it will not get a second chance to do so. Simply put, a litigant gets one bite, and only one bite, of the apple.[4]

A. Claim Preclusion

1. Origins of Claim Preclusion

Claim preclusion is rooted in the common law doctrine of bar and merger.[5] At common law, if a plaintiff sued and won, it would be awarded a judgment; under the doctrine of merger, the successful cause of action would become merged into the judgment.[6] The plaintiff could not re-sue on the same claim because that claim has disappeared and metaphysically become part of the judgment.[7]

A corollary to this principle is that a successful plaintiff may not sue a second time on the same cause of action, even if the first

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preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach.

The second doctrine, collateral estoppel or "issue preclusion," recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered.

4. *See* Ute Indian Tribe v. Utah, 935 F. Supp. 1473, 1513–14 (D. Utah 1996) ("At least as to parties with whom the State has litigated and lost, the State is not free to 'litigat[e] the same issue arising under virtually identical facts against the same party' over and over again until it obtains a more favorable result. While the res judicata and collateral estoppel doctrines do not carry the compelling force of a constitutional requirement, the common wisdom that litigants are rightfully entitled to have but *one* 'bite of the apple' reflects the important societal values intrinsic in the *finality* of court judgments, even in instances of litigation among competing sovereigns." (footnotes omitted)).

5. United States v. Ryan, 810 F.2d 650, 654 (7th Cir. 1987).

6. RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982).

7. *Ryan*, 810 F.2d at 654 ("'Merger' means that a plaintiff who obtains a final judgment may not thereafter maintain a second action against the same defendant on the same claim.").

judgment did not fully compensate it for its injuries.[8] For example, suppose a plaintiff is injured while skiing due to the ski resort's negligence for not properly marking, maintaining, or policing ski trails. The plaintiff sues the ski resort for personal injury and recovers a monetary judgment. During its rehabilitation, the plaintiff's doctor discovers additional injuries that had been suffered in the skiing accident but which were not the subject of the initial lawsuit. The plaintiff is barred from pursuing the second claim under the doctrine of merger.[9]

Under the doctrine of bar, an unsuccessful plaintiff may not re-sue the victorious defendant on the same claim.[10] For example, suppose a plaintiff brings an action in federal court based on diversity of citizenship and loses. The plaintiff could have chosen to sue in state court rather than federal court. However, having chosen to prosecute the claim in federal court, the plaintiff is now barred from pursuing the same claim against the same party in state court, even if the federal decision was wrong. Error in judicial decisions can be corrected only by appeal, not the relitigation of the same claim in a court of coordinate jurisdiction.[11]

2. Requirements of Claim Preclusion

Claim preclusion has three requirements: (a) identical parties; (b) identical causes of action; and (c) a judgment on the merits.[12]

a. Identical Parties

A person cannot be bound by a judgment to which he or she was not a party.[13] Normally, the question of whether parties are identical,

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8. *Id.*

9. *Id.*

10. RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982); *Ryan*, 810 F.2d at 654 ("'Bar' means that a final judgment in favor of a defendant bars a second action by the plaintiff on the same claim.").

11. RESTATEMENT (SECOND) OF JUDGMENTS § 19 (1982).

12. *Ryan*, 810 F.2d at 654; Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990).

13. *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2166–67 (2008) ("'It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a

and hence whether the first prong of claim preclusion is met, is a straightforward exercise. Nonetheless, courts have recognized at least six exceptions to the general rule under which a nonparty to a prior litigation (the "F-1 litigation") may be bound by the judgment therein.[14]

1. A nonparty to F-1 may be bound by that judgment where it agrees to be bound.[15]

2. A nonparty may be bound by F-1 based on certain "pre-existing 'substantive legal relationship[s]'" between it and a party to the judgment.[16] These relationships include, but are not limited to, successorship, bailor–bailee and assignor–assignee.[17] The term "privity" is sometimes used collectively to describe all such relationships but that term is confusing and has been avoided by the Supreme Court.[18]

3. Where a nonparty was adequately represented in F-1 by a party with the same interests, it may be bound by F-1.[19] The principal example of this situation is the class action, but it also applies to suits brought by trustees, guardians, and other fiduciaries on behalf of their beneficiaries.[20]

4. A nonparty who had "assumed control" of F-1 litigation is bound by the judgment rendered by the F-1

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party or to which he has not been made a party by service of process.'" (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940))); *see also* Richards v. Jefferson County, 517 U.S. 793, 798 (1996) (application of claim preclusion to nonparties runs counter to the "deep-rooted historic tradition that everyone should have his own day in court"); Neenan v. Woodside Astoria Transp. Co., 184 N.E. 744, 745 (1933) (noting that a judgment "was not res judicata as to" a plaintiff in a subsequent litigation who was not a party in the initial litigation).

14. *Taylor*, 128 S. Ct. at 2172.

15. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 40 (1982) and DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 77–78 (2001)).

16. *Id.* (citations omitted).

17. *Id.*

18. *Id.* n.8.

19. *Id.* at 2172.

20. *Id.* at 2172–73.

court.[21] Such a party, having been given the opportunity to present evidence, has had its day in court.[22]

5. A nonparty suing an action as a proxy for one already bound by an earlier litigation is likewise bound by that litigation.[23]

6. Various statutory schemes may expressly foreclose successive litigation by nonlitigants, provided those schemes are consistent with due process.[24] Examples of these schemes include bankruptcy and probate, as well as quo warranto and other similar suits that may be brought on behalf of the public.[25]

The Supreme Court in *Taylor* observed that some lower courts had also recognized the doctrine of virtual representation as an exception to the general rule.[26] The Court in *Taylor* rejected any attempt under the label of virtual representation to expand claim preclusions in a manner that would require the Court "to abandon the attempt to delineate discrete grounds and clear rules altogether,"[27] citing three reasons. First, that approach would necessitate an "amorphous balancing test [that] is at odds with the constrained approach to nonparty preclusion [that the Court's] decisions advance."[28] Second, a broad doctrine of virtual representation would create a sort of common law class action, but without the considerable protection afforded nonparties by Rule 23.[29] Third, any balancing standard "would likely create more headaches than it relieves" because such a test is inherently uncertain and expensive to

21. *Id.* at 2173.
22. *Id.*
23. *Id.*
24. Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (citations omitted).
25. *Taylor*, 128 S. Ct. at 2173.
26. *Id.* at 2170 n.3.
27. *Id.* at 2174.
28. *Id.* at 2175.
29. *Id.* at 2176.

administrate, thereby adding to, instead of reducing, the burden of litigation on the courts and the parties.[30]

b. *Identical Cause of Action*

The application of the doctrine of claim preclusion turns on the scope of the claim in the F-1 actions.[31] Historically, whether two causes of action were identical for claim preclusion purposes turned on the theory of the claims.[32] This approach grew out of common law pleading rules, which required that a complaint set forth facts that describe a theory of recovery cognizable at common law.[33] Accordingly, if consecutive complaints regarding a given incident set forth tort theories of recovery, the causes of action would be identical for claim preclusion purposes.[34] On the other hand, if consecutive claims were stylized differently—the first in tort and the second in breach of warranty—the causes of action would be deemed different for claim preclusion purposes, even if they arose on the same set of facts.[35] This narrow approach to what constitutes a cause of action afforded clever attorneys multiple opportunities to recover on the same facts simply by articulating different theories of recovery.[36]

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30. *Id.* at 2176–77 ("In this area of the law . . . crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards.") (citation and quotation marks omitted).

31. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4407, at 145 (2d ed. 2002) [hereinafter WRIGHT & MILLER].

32. *Id.* at 162–63.

33. *See* Charles Clark, *Ancient Writs and Modern Causes of Action*, 34 YALE L.J. 879, 884–86 (1925) (describing parameters of "cause of action" at common law).

34. *See, e.g.*, RePass v. Vreeland, 357 F. 2d 801, 804 (3d Cir. 1966) (dealing with claims for negligence and negligent misrepresentation constituting a single cause of action); *see generally* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 129–48 (22d ed. 1947).

35. *See, e.g.*, Aetna Cas. & Ins. Co. v. Hase, 390 F.2d 151, 153 (8th Cir. 1968) (holding that claim based on tort was not identical to claim based on insurance contract).

36. The Restatement (Second) of Judgments aptly describes how modern procedural rules have limited the opportunities to relitigate:

> The rules of res judicata in modern procedure therefore may fairly be characterized as illiberal toward the opportunity for relitigation. Their

However, the theory-based definition of cause of action began to lose favor as pleading rules were liberalized and the focus of pleading requirements shifted away from theory of recovery to events or occurrences giving rise to a claim for relief.[37] For example, the "notice pleading" standards adopted under the Federal Rules of Civil Procedure make clear that no technical forms of pleading are required and that a party may obtain any relief to which it is entitled, based on the proof at trial, irrespective of how it characterized its claims in the pleadings.[38]

In addition, the Federal Rules of Civil Procedure and other modern pleading codes made it possible, even desirable, and to join claims and parties in a single action.[39] Because all claims by a single plaintiff against a defendant could be joined in one action under modern pleading codes, it was no longer necessary for a plaintiff to proceed *seriatim* against a defendant based on differing theories of recovery.[40] Modern pleading codes thus enabled the courts to reap the efficiencies of joint litigation.[41] Courts began to shift away from a technical view of cause of action based on theory of recovery to a more practical view based on the nature of the transactions at issue and whether such transactions would be subject to substantially

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> rigor contrasts sharply with the liberality of the rules governing the original event, which is the theme of the Federal Rules of Civil Procedure and similar systems.
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> That difference does not represent a contradiction or ambivalence in procedural policy. Rather, it reflects the relationship between rules of original procedure and rules of res judicata. Inasmuch as the former are now generally permissive, the latter are correspondingly restrictive.

RESTATEMENT (SECOND) JUDGMENTS Chapter 1: Introduction, Relation Between Law of Res Judicata and Law of Procedure (1982).

37. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 100A, at 725–28 (6th ed. 2002) (discussing this shift).

38. *See* FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . .").

39. *See* FED. R. CIV. P. 42 (allowing for the consolidation of actions involving common questions of law or fact).

40. *See* WRIGHT & KANE, *supra* note 37, § 100A, at 725 (discussing ability to join multiple claims under modern pleading regime).

41. *Id.*

identical proof at trial.[42] If the factual proof under the various theories of recovery would be the same, the causes of action are identical for claim preclusion purposes.[43] The modern "transactional approach" in defining identical cause of action for claim preclusion purposes is the predominant view today.[44]

c. On the Merits

Whether or not a decision is on the merits for claim preclusion purposes turns on whether the decision goes to the substance of the claim.[45] Dismissals based on lack of personal jurisdiction, lack of subject matter jurisdiction, or failure to join a necessary party do not go to the heart of the claim and are not on the merits.[46] On the other hand, judgments for the plaintiff are

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42. *See, e.g.*, O'Brien v. City of Syracuse, 429 N.E.2d 1158, 1159 (N.Y. 1981) (stating that under the transactional test, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy").

43. *Id.* at 1159–60.

44. WRIGHT & MILLER, *supra* note 31, § 4407, at 174 n.45; RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982):

> Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"
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> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
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> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

45. *See* Semtek Int'l., Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501–02 (2001) ("The original connotation of an 'on the merits' adjudication is one that actually 'passes directly on the substance of [a particular] claim' before the court." (citing RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982))).

46. WRIGHT & MILLER, *supra* note 31, § 4436, at 149, § 4438, at 187.

invariably on the merits. This intuitive approach to defining on the merits works well in most cases. The one area where it has posed problems is in cases where courts have granted motion to dismiss for failure to state a claim upon which relief can be granted.[47] Is such a dismissal on the merits? The answer to that question turns on whether the court is saying that the allegations could never give rise to a claim for relief (inherently defective) or whether the plaintiff may have a claim but the pleading of that claim is deficient (technically defective).

It is not always apparent whether the court is saying that a pleading is inherently defective or technically defective. Sometimes the court will be clear by dismissing "with prejudice" or dismissing "with leave to amend."[48] In many cases, the court will simply be silent.[49] That silence traditionally posed difficulties for courts trying to ascertain the intent of an earlier decision granting a motion to dismiss. The problem has been largely solved under modern procedural codes which contain presumptions that govern unless the court states otherwise.[50] For example, under the Federal Rules of Civil Procedure, a motion to dismiss for failure to state a claim upon which relief can be granted is on the merits unless the court states that the dismissal is without prejudice.[51]

B. Issue Preclusion

1. Origins of Issue Preclusion

Issue preclusion is the first cousin of claim preclusion. It is narrower in scope than claim preclusion by definition. Whereas claim preclusion bars relitigation of entire claims, issue preclusion

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47. *Compare* FED. R. CIV. P. 41(b) ("[A] dismissal . . .—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits."), *with* WRIGHT & MILLER, *supra* note 31, § 4435, at 145 (discussing the issue of a dismissal for failure to state a claim as one that requires "clear independent thought" and noting that Rule 41(b) "cannot automatically provide sound answers").

48. *See, e.g.*, Barris v. Sulpicio Lines, Inc., 74 F. 3d 567, 573 n.7 (5th Cir. 1996) (noting confusion surrounding the phrase "with prejudice").

49. *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 416 (2004) (dismissing complaint).

50. WRIGHT & MILLER, *supra* note 31, § 4435, at 140.

51. FED. R. CIV. P. 41.

bars relitigation only of certain *issues* that have been previously determined.[52] A key distinction between issue preclusion and claim preclusion is that whereas issue preclusion bars relitigation only of issues that have been actually litigated and determined, claim preclusion bars assertion of whole claims that might have been brought in the prior action but were not.[53]

2. Requirements of Issue Preclusion

Issue preclusion bars relitigation of issues that were actually litigated and determined in, and were necessary to, the prior final judgment.[54] Finality is "an essential component" of issue preclusion as well as claim preclusion.[55] Moreover, as with claim preclusion, a person not a party to a prior judgment cannot be bound by that judgment as a matter of due process.[56] Due process, however, would not bar a *stranger* to the initial judgment from benefitting from that judgment. For example, drivers *A* and *B* are in an automobile crash. *A* sues *B* for negligence. At the time of the accident, *B* was driving a car owned by *O* and with *O*'s permission. In the first action, the court determined that *B* was not negligent, and *B* wins. *A* then sues *O* for personal injuries suffered in the crash with *B*, allegedly due to *B*'s negligence. *O* seeks to invoke the prior judgment, pointing out that *B* was held not to have been negligent. *O* further points out that

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52. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 n.6 (1982) (citations omitted):

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.

53. *Id.*

54. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

55. J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996); *see also* Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265, 1269 (5th Cir. 1986) (stating that finality requirement "applies just as strongly to collateral estoppel as it does to res judicata").

56. *See supra* text accompanying note 13.

its liability is derivative of *B*'s liability; and if *B* were not negligent, then *O* could not have been negligent. All that *A* is doing in this situation is getting a second bite of the apple on the issue of *B*'s negligence.

Alternatively, suppose an automobile collides with a bus, injuring the driver and the bus passengers. *X*, the bus driver, sues *D*, the automobile driver, for negligence; and *X* wins. Thereafter, *P*, a passenger on the bus, sues *D* for personal injuries; and seeks to invoke issue preclusion, barring *D* from defending on the issue of negligence.

Initially, the courts invoked the doctrine of mutuality of estoppel, preventing strangers to the prior judgment from invoking its benefits.[57] Under the rule of mutuality of estoppel, a person who was not bound by a prior judgment could not invoke its benefits.[58] Mutuality was accepted by the courts because it seemed fair.[59] After all, in the first example, if *A* had defeated *B*, *A* could not have used that judgment to preclude *O* from defending the negligence claim because *O* had not been a party to the first case. Similarly, in the second example, had *D* been successful in the first case, it could not have used that judgment to bar *P*'s suit.

Nevertheless, the rule of mutuality of estoppel soon became unwieldy for both theoretical and practical reasons.[60] As a theoretical matter, introducing fairness into the preclusion analysis was like trying to fit a round peg in a square hole. Preclusion is premised principally on promoting three goals: (1) efficiency of litigation; (2) consistency of outcome; and (3) an end to litigation.[61]

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57. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912) ("It is a principle of general elementary law that the estoppel of a judgment must be mutual."); WRIGHT & MILLER, *supra* note 31, § 4463, at 677.

58. WRIGHT & MILLER, *supra* note 31, § 4463, at 677 ("For many years, most courts followed the general rule that the favorable preclusion effects of a judgment were available only to a person who would have been bound by any unfavorable preclusion effects.").

59. *See id.* (describing the rule as creating a "pleasing symmetry").

60. *Id.* at 680 (explaining that some exceptions to the rule of mutuality rested on the special needs of indeminification relationships); WRIGHT & KANE, *supra* note 37, § 100A, at 730–32 (discussing problems with the application of the rule in patent infringement cases).

61. *See* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 n.6 (1982), *reh'g denied*, 458 U.S. 1133 (1982) ("[I]nvocation of res judicata and collateral estoppel 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s]

Fairness concerns can be, and often are, at odds with one or more of these goals.

As a practical matter, the rule of mutuality could produce undesirable results. This can be illustrated by revisiting the example above involving drivers *A* and *B* and the subsequent lawsuit between *A* and *O*, the owner of the car driven by *B*. If *B* is found not to have been negligent in the first suit, and *A* sues *O*, the only way that *A* can win against *O* is to establish *B*'s negligence. That can be done only by relitigating matters already determined in the first lawsuit. To invoke mutuality here would allow *A* to sue *O* and undermine the goals of efficiency and consistency by creating additional and costly litigation and by creating a possibility of inconsistent results. Mutuality would also interfere with the parties' rights under substantive law. If *A* sues *O* and wins, *O* would have a right to indemnity against *B*, the driver of its automobile. However, *B* is certain to argue in any such action that the issue of its negligence has already been determined, leaving *O* out in the cold.[62]

Courts began to see the shortcomings of the rule of mutuality, especially in cases involving active/passive wrongdoing.[63] Judges, however, were not willing initially to jettison mutuality lock, stock, and barrel. Rather, the first step was to create exceptions to the rule of mutuality in the active/passive wrongdoer situation, where issue preclusion was invoked as a defense.[64] Courts remained unwilling, however, to extend the exception to mutuality cases, such as the bus accident described above, where *P*, the passenger in the subsequent litigation, is seeking to use issue preclusion offensively by barring the automobile driver from relitigating the determination of its negligence in the prior action.[65]

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judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.'" (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980))).

62. *See* WRIGHT & MILLER, *supra* note 31, § 4463, at 683 ("To allow the right of indemnification would be to destroy the victory won by the indemnitor in the first action.").

63. *Id.* § 4463, at 681.

64. *Id.* § 4464; *see* Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n., 122 P.2d 892, 895 (Cal. 1942) ("The courts of most jurisdictions . . . recognize[e] a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts.").

65. *See* WRIGHT & KANE, *supra* note 37, § 100A, at 733–34 (noting hesitation by courts after the decision in *Blonder-Tongue Laboratories, Inc. v.*

The theoretical rationale of this distinction was that offensive, nonmutual issue preclusion did not promote the goals of issue preclusion in the same way that defensive, nonmutual issue preclusion did.[66] Courts were concerned that offensive, nonmutual issue preclusion would (1) encourage proliferation of litigation by encouraging a wait-and-see attitude in litigation; (2) catch a defendant by unfair surprise if the first litigation were for a nominal amount and the subsequent litigation in which preclusion is sought were for much larger sums; (3) deny the defendant an important procedural advantage that was unavailable in the first court; or (4) potentially lock in inconsistent judgments if the plaintiff sought to invoke preclusion on the basis of a favorable judgment that follows one or more unfavorable judgments.[67]

Nevertheless, courts continued to hammer away at mutuality until the exception swallowed the rule.[68] In *Parklane*, the Supreme

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University of Illinois Foundation, 402 U.S. 313 (1971), as reflected in the Restatement (Second) of Judgments).

66. *See id.*, at 733:

> There was more hesitation about "offensive" use of issue preclusion, in which a plaintiff is seeking to preclude a defendant from relitigating the issues that the defendant had previously litigated and lost against another plaintiff. In the case of a mass disaster, for example, if one plaintiff sues the common defendant and loses, this would have no preclusive effect in a suit by another plaintiff, while if offensive use of issue preclusion is proper, a victory by any plaintiff effectively establishes defendant's liability to all the remaining plaintiffs. It has been pointed out that this means that each case is essentially a test case for the defendant, but not for the remaining plaintiffs, and leads to great disparity in litigating risks.

67. *Id.* These concerns were discussed by the Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–30 (1979).

68. *See, e.g.*, Bernhard v. Bank of Am. Nat. Trust & Sav. Ass'n., 122 P.2d 892 (Cal. 1942). In *Bernhard*, the executor of an estate brought an accounting so that he might wind up the estate. *Id.* at 893. The three daughters of the decedent were made parties to the accounting and challenged a certain payment that the executor had taken from the estate. *Id.* The executor claimed that the payment had been a gift from the decedent. *Id.* The beneficiaries claimed that the transfer had been improper. *Id.* The court sided with the executor and approved the accounting. *Id.*

After the estate had been closed, one of the beneficiaries obtained letters testamentary and commenced an action against the bank (a predecessor to Bank of America) for improperly transferring the funds at issue in the previous accounting to the executor. *Id.* The bank interposed to prior judgment as preclusive on the

Court held that lack of mutuality would no longer bar invocation of offensive, nonmutual issue preclusion and that a court in its discretion may allow a stranger to the first suit to invoke the benefits of that litigation.[69] The Supreme Court cautioned that offensive, nonmutual issue preclusion should not be permitted where the effect on the defendant would be unfair.[70]

III. SPECIFIC PRECLUSION ISSUES

Among the significant preclusion issues that arise in modern complex litigation are: (1) whether a judgment is final for issue preclusion purposes where an appeal is pending; (2) whether issue preclusion may be invoked where the net effect is to deny a party the right to a jury trial on a given issue; (3) whether an order denying class certification is a final judgment for issue preclusion purposes; (4) whether the preclusion rules of the deciding court bind

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issue of the legality of the transfer. *Id.* at 893–94. The plaintiff argued that mutuality of estoppel foreclosed preclusion as a defense. *Id.* at 894. The court rejected the mutuality argument. *Id.* at 895. Justice Traynor unleashed a devastating attack on mutuality which signaled its demise: "No satisfactory rationalization has been advanced for the requirement of mutuality . . . [and] [m]any courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted." *Id.* As Professor Wright observed, "It is rare that a major change in established legal doctrine can be identified with a single decision and judge." WRIGHT AND KANE, *supra* note 37, § 100A, at 732. *See also* DeWitt Inc. v. Hall, 225 N.E.2d 195, 198–99 (N.Y. 1967) (overturning mutuality in face of increasing exceptions in New York and other jurisdictions).

69. *Parklane*, 439 U.S. at 331. *Parklane* was a shareholders' derivative suit alleging that the defendant corporation had made false and misleading statements in its proxy statements in violation of federal securities laws. *Id.* at 324. Before that case came to trial, the SEC brought an enforcement action against the defendants alleging the same fraud claimed in the derivative suit. *Id.* The court in the SEC action found fraud and ordered injunctive and declaratory relief. *Id.* at 324–25.

Thereafter, the shareholders in the derivative suit sought to invoke the benefits of the judgment in the SEC action. *Id.* at 325. The Supreme Court held that the doctrine of mutuality was not a bar to invocation of offensive, nonmutual issue preclusion. *Id.* at 331 ("We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.").

70. *Id.* at 331.

subsequent courts; and (5) whether findings that are part of a vacated order have issue-preclusive effect.

A. *Impact of an Appeal on the Application of Issue Preclusion*

The well-settled rule in the federal courts is that the pendency of an appeal has no impact on the finality or binding effect of a trial court's holding.[71] That rule is fraught with peril. Any matter on appeal is subject to reversal. If the original judgment is given preclusive effect in a subsequent case while the original judgment is on appeal, and thereafter the original judgment is reversed on appeal, then the decision to allow preclusion in the second action is no longer viable and that case goes back to square one. Otherwise, invocation of issue preclusion would produce inconsistent results.

The answer, however, is not that a judgment for preclusion purposes becomes final only after all appeals have been exhausted, because similar problems of inconsistency may arise. Suppose *C* sues *D*, and *C* wins a judgment. *D* appeals. While the appeal is pending, *C* sues *D* again, raising issues that had been litigated and determined in F-1. If the rule is that the judgment is not final for issue preclusion purposes until all appeals have been exhausted, *D* may relitigate any issues in the second action while the appeal in F-1 is pending without fear of issue preclusion. Suppose the second litigation ends before the appeal in the initial matter is decided, and in that litigation, *D* successfully relitigates issues that had been decided adverse to it in the first action. Thereafter, the appellate

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71. Deposit Bank v. Bd. of Councilmen of Frankfort, 191 U.S. 499, 510–12 (1903); Pharmacia & Upjohn Co. v. Mylan Pharm., Inc., 170 F.3d 1373, 1381 (Fed. Cir. 1999) ("[A] final judgment retains all of its res judicata consequences pending decision of the appeal." (quoting Warwick Corp. v. Md. Dep't of Transp., 573 F. Supp. 1011, 1014 (D. Md. 1983))); Williams v. Comm'r, 1 F.3d 502, 504 (7th Cir. 1993) ("[A] judgment final in the trial court may have collateral estoppel effect even though the loser has not exhausted his appellate remedies."); *see also* WRIGHT & MILLER, *supra* note 31, § 4433, at 78 (stating that an appeal does not alter the preclusionary effect of a judgment); RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f (1982) ("A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings in the trial court to set aside the judgment and grant a new trial or the like . . . .").

court affirms the findings in the initial case. Again, as with the first alternative, there is significant potential for inconsistent judgments.

Thus, either approach—finality at the time a judgment is entered or finality after all appeals have been exhausted—has serious practical limitations. The pragmatic solution to this dilemma is to defer proceedings in the subsequent action until the appellate proceedings in this initial action have been finalized. As the drafters of the Restatement (Second) of Judgments have observed:

> There have been differences of opinion about whether, or in what circumstances, a judgment can be considered final for purposes of res judicata when proceedings have been taken to reverse or modify it by appeal. The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.
>
> *The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of that question until the proceedings addressed to the judgment are concluded.*

Application of this Comment may give rise to a problem of inconsistent judgments when a judgment under appeal, relied on as a basis for a second judgment, is later reversed.[72]

Postponing any decision on preclusion pending appeal is especially appropriate where "there is substantial doubt whether the judgment will be upheld."[73]

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72. RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. f (1982) (emphasis added).

Professors Wright and Miller also recognize that "[s]ubstantial difficulties" may arise when a trial court decision that is given preclusive effect by an F-2 court is subsequently reversed on appeal.[74] They state that "[t]hese difficulties suggest that ordinarily it is better to avoid the res judicata question by dismissing the second action or staying the trial and perhaps pretrial proceedings pending resolution of the appeal in the first action."[75] Wright and Miller also acknowledge that this course of action is not always possible, noting that the case for delaying F-2 is strongest where the resolution of the F-1 appeal would result in preclusion of the F-2 action in its entirety.[76]

Notwithstanding the compelling logic of postponing the imposition of issue preclusion in F-2 pending the results of the appellate process in F-1, courts are reluctant to do so where the appeal is seen simply as a ploy to delay the F-1 victor from reaping the rewards of the F-1 judgment. In *May v. Oldfield*,[77] the F-2 court refused to stay the F-1 court's determination of the defendant's liability because "a final appellate decision . . . may take years" and the delay would have unfairly prejudiced the plaintiff's opportunity to prove damages.[78] Similarly, the court in *Collins v. Seaboard Coastline R.R. Co.*[79] refused to stay imposition of issue preclusion because any "order staying this case until the resolution of the appeal would considerably delay plaintiff's opportunity to prove her damages."[80]

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73. *Id.* § 16 cmt. b; *see also* DeBoom v. Raining Rose, Inc., 456 F. Supp. 2d 1077, 1080 (N.D. Iowa 2006) (following the Restatement (Second) of Judgments).

74. WRIGHT & MILLER, *supra* note 31, § 4433, at 88.

75. *Id.* at 93.

76. *Id.* at 94; *cf.* Perez v. Volvo Corp., 247 F.3d 303, 309 (1st Cir. 2001) (finding it "prudent" to stay F-2 action pending resolution of F-2 appeal); *In re* Sonus Networks, Inc. S'holder Derivative Litig., 422 F. Supp. 2d 281, 290–91 n.5 (D. Mass. 2006) (noting the merits of postponing a decision in F-2 on preclusion pending the conclusion of the F-1 proceedings); Hirschensohn v. West, No. Civ. 772-1990, 1993 WL 813514 (D.V.I. Nov. 29, 1993) (postponing F-2 litigation until F-1 was decided in order to avoid perpetrating an injustice).

77. 698 F. Supp. 124 (E.D. Ky. 1988).

78. *Id.* at 128.

79. 516 F. Supp. 31 (S.D. Ga. 1981), *vacated*, 681 F.2d 1333, 1337 (11th Cir. 1982).

80. *Id.* at 33.

Courts are also concerned about the strength of the appeal on the merits. In *DeBoom v. Raining Rose, Inc.*,[81] the court stated that awaiting final determination in F-2 pending appellate resolution of issues in F-1 "commends itself if the disposition will not be long delayed and especially if there is *substantial doubt* whether the judgment will be upheld."[82]

B. Jury Trial and Issue Preclusion

A second situation that arises in complex litigation is whether, in an action between the same parties where the court in the exercise of its managerial powers has chosen to try an equitable ahead of a legal issue, the court's determination of the equitable issue may preclude a losing party from presenting proof to the jury in the subsequent trial of the legal issue. Put another way, the question is whether invocation of preclusion in these circumstances would deny the losing party its right to a jury trial on that issue.

The Seventh Amendment preserves the right to jury trial in "[s]uits at common law."[83] On the other hand, there is no right to trial by jury for claims that are historically equitable in nature.[84] Nevertheless, where legal and equitable claims are joined as part of the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact."[85]

Even where a jury trial is properly demanded, however, the district court has broad powers of trial management under Rule 42(b) of the Federal Rules of Civil Procedure, including the powers to order separate trial of any claim:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim

81. 456 F. Supp. 2d 1077 (N.D. Iowa 2006).

82. *Id.* at 1080.

83. U.S. CONST. amend. VII; *see also* FED. R. CIV. P. 38 (reaffirming the right to a jury trial under the Seventh Amendment and where permitted by statute).

84. *See* Curtis v. Loether, 415 U.S. 189, 193 (1974) (explaining that the right to jury trial in "[s]uits at common law" excludes equitable claims (citing Parsons v. Bedford, 28 U.S. 433, 446 (1830))).

85. Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990) (quoting Curtis v. Loether, 415 U.S. at 196 n.11).

> . . . *always preserving inviolate the right of trial by jury* as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.[86]

Still, the court's discretion is not without limitations; and the rule itself clearly states that trial courts, in deciding on which issues are to be separately tried, "must ensure that a litigant's constitutional right to a jury is preserved."[87] Similarly, in *Beacon Theatres*,[88] the Supreme Court held that while the same court may try both equitable and legal claims in the same action, "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[89] The Court went on to conclude that the trial court had erred in conducting a bench trial on the equitable claims and resolving issues that were common to the legal claims in the plaintiff's favor, thereby effectively denying the defendant a jury trial on its legal counterclaims.[90] Thereafter, in *Dairy Queen*,[91] the Court held that when legal claims involved factual issues that are "common with those upon which [the] claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims."[92] Accordingly, any attempt to give issue-preclusive effect to the equitable determinations made by the F-1 court with respect to issues common to the legal claims in the F-2 court would foreclose a party's right to a jury trial in the subsequent legal action in direct contradiction of *Lytle*, *Beacon Theatres*, and *Dairy Queen*.

The Supreme Court's decision in *Parklane Hosiery Co. v. Shore* is not to the contrary.[93] *Parklane* did indeed hold that a

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86. Shum v. Intel Corp., 499 F.3d 1272, 1276 (Fed. Cir. 2007) (quoting FED. R. CIV. P. 42(b)).

87. *Id.*; *see also* Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

88. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

89. *Id.* at 510–11.

90. *Id.* at 504.

91. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

92. *Id.* at 479.

93. *See supra* notes 69–70 and accompanying text.

court's determinations of fact issues in an equitable action can have issue-preclusive effect in a subsequent legal action without violating a litigant's Seventh Amendment right to a jury trial.[94] In so ruling, *Parklane* distinguished the *Beacon Theatres* decision and noted that the Court there had emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it "thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel."[95]

Nevertheless, nothing in *Parklane* detracts from the right to a jury trial. *Parklane* addressed only the situation where a *prior* equitable adjudication is followed by a separate legal action to be tried by a jury.[96] The Court emphasized that it had reached a different result in *Beacon Theatres*, because in that case, equitable and legal claims with common factual elements were raised in the *same* case.[97]

In *Lytle*, the Court drew precisely the same distinction. *Lytle* involved civil rights claims by a discharged employee against his former employer.[98] The plaintiff was an African-American who had been fired for unexcused absences.[99] He sued under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, alleging that he had been discharged because of his race and that his former employer had retaliated against him for filing a charge with the EEOC.[100] The trial court dismissed the § 1981 claims, holding that Title VII was the exclusive remedy for Lytle's alleged injuries.[101] Thereafter, the district court conducted a bench trial and granted the defendant's motion for judgment following the close of the plaintiff's case-in-chief.[102]

On appeal, the Fourth Circuit concluded that the trial court had erred in dismissing the § 1981 claim, but nevertheless found that Lytle was collaterally estopped from litigating the § 1981 claim

94. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335 (1979).
95. *Id.* at 334.
96. *Id.*
97. *Id.*
98. Lytle v. Household Mfg., Inc., 494 U.S. 545, 547–48 (1990).
99. *Id.*
100. *Id.* at 548.
101. *Id.*
102. *Id.* at 549.

because the elements of the § 1981 claim were identical to those in the Title VII action.[103] The Supreme Court reversed, holding that the pertinent authorities were *Beacon Theatres* and *Dairy Queen*:

> Only the District Court's erroneous dismissal of the § 1981 claims enabled that court to resolve issues common to both claims, issues that otherwise would have been resolved by a jury. But for that erroneous ruling, this case would be indistinguishable from *Beacon Theatres* and *Dairy Queen*. It would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim. Such a holding would be particularly unfair here because Lytle was required to join his legal and equitable claims to avoid the bar of res judicata.[104]

In so ruling, the Court specifically rejected the employer's argument that issue preclusion must be invoked in order to avoid multiple lawsuits and thereby conserve judicial resources.[105] The Court found that "[a]pplication of collateral estoppel is unnecessary here to prevent multiple lawsuits because this case involves *one suit* in which the plaintiff properly joined his legal and equitable claims."[106] The Court also emphasized that relitigation was "essential to vindicating Lytle's Seventh Amendment rights."[107]

Accordingly, the need for judicial economy does not trump the right to jury trial:

> In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy, to the extent that it supports respondent's

103. *Id.*
104. *Id.* at 552 (footnote and citation omitted).
105. *Id.* at 553.
106. *Id.* (emphasis added).
107. *Id.*

> position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial.[108]

The *Lytle* holding was re-iterated in *Axelrod v. Phillips Academy*.[109] There, parents of a student who had been expelled from prep school sued the school for injunctive and monetary relief, alleging violations of the Americans with Disabilities Act ("ADA") and breach of contract.[110] The court tried the injunctive action under ADA without a jury and held for the school.[111] The defendants thereafter moved for summary judgment on the breach of contract claim, thereby barring the plaintiffs from pursuing their legal claims, on the grounds of issue preclusion.[112] The court denied the motion and, citing *Lytle*, held that "plaintiffs' constitutional right to try their legal claims before a jury was not foreclosed by this Court's ruling on the plaintiffs' equitable claims."[113] In so holding, the court underscored the importance of the jury trial:

> The plaintiffs are not barred from presenting their case for damages to a jury by this Court's earlier denial of their equitable claim for a permanent injunction. The jury, drawn from the people and representative of them, is the democratic constituent of our judicial system. It is the instrument by which citizens are able to participate in their governance and, by applying the general laws to a particular case, resolve society's disputes. It is the foundation of our jurisprudence in a constitutional democracy that a person has a right to have his claim for damages adjudicated by a jury composed of his fellow members of society.[114]

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108. *Id.* at 553–54.
109. 74 F. Supp. 2d 106 (D. Mass. 1999).
110. *Id.* at 107.
111. *Id.* at 107–08.
112. *Id.*
113. *Id.* at 108.
114. *Id.* at 109.

The law is clear and unequivocal. In cases involving both equitable and legal claims, where equitable claims have already been resolved by the judge, courts will not permit invocation of issue preclusion to short-circuit a party's right to a jury trial on legal issues.[115]

C. *Issue-Preclusive Effect of a Denial of Class Action Certification*

Does the decision of a federal district judge denying certification of a nationwide class of plaintiffs bar future plaintiffs seeking to certify a national class on the same claims before another federal district judge on the grounds of issue preclusion? Application of issue preclusion in this situation turns on the answers to three additional questions: (1) Is denial of certification a judgment and is that judgment sufficiently "final" for preclusion to attach? (2) Do federal or state preclusion rules apply? (3) Are the subsequent claimants seeking class certification "parties" to the initial action?

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115. *See* Robinson v. Metro N. Commuter R.R. Co., 267 F.3d 147, 170 (2d Cir. 2001) (holding that trial of equitable claim first to a judge would foreclose the later presentation of the common issue to a jury, and would thereby violate the trial-by-jury guarantee); Material Supply Int'l, Inc. v. Sunmatch Indus. Co., 146 F.3d 983, 988 (D.C. Cir. 1998) ("When legal and equitable claims are joined in the same action, 'the right to jury trial on the legal claim, including all issues common to both claims, remains intact.'" (quoting Lytle v. Household Mfg., Inc., 494 U.S. 545, 550 (1990))); Harvis v. Roadway Express, Inc., 973 F.2d 490, 495 (6th Cir. 1992) (stating that when legal and equitable claims are joined in the same action, the right to jury trial on the legal claim remains intact); Haymond, Napoli Diamond, P.C. v. Haymond, No. Civ.A.02-721, 2004 WL 2030134, at *11–12 (E.D. Pa. Sept. 8, 2004) (stating that lower court must wait until jury decided issues related to parties' legal claims before making determinations as to credibility and facts in the parties' equitable claim); Axelrod v. Phillips Academy, 74 F. Supp. 106, 109 (D. Mass. 1999) (holding that the court's ruling on the plaintiffs' equitable claim does not foreclose the plaintiffs from trying their legal claims before a jury).

1. Finality

A decision denying a class certification motion is unquestionably a judgment.[116] The real question then is whether that judgment is sufficiently final for issue preclusion to attach. An order denying class certification is not a final judgment in the sense that it does not finally determine the outcome of the litigation between the parties. Accordingly, some courts have held that such an order has no claim preclusive effect.[117] However, other courts have held that application of the doctrine of issue preclusion does not turn on whether a final judgment has been entered. Judge Friendly, writing for the court in *Zdanok v. Glidden Co.*,[118] stated:

> Dealing with this very question of the kind of finality of judgment necessary to create an estoppel, we pointed out, quite recently, that collateral estoppel does not require a judgment "which ends the litigation * * * and leaves nothing for the court to do but execute the judgment," Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945), but includes many dispositions which, though not final in that sense, have nevertheless been fully litigated. Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2d Cir. 1961), cert. denied, 368 U.S. 986, 82 S. Ct. 601, 7 L.Ed.2d 524 (1962), and cases cited. As we there said, "'Finality'

116. *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766 (7th Cir. 2003) (referring to the denial of a class certification as a judgment) [hereinafter *Bridgestone*].

117. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) ("[D]enial of class certification is not a 'judgment' for the purposes of the Anti-Injunction Act while the underlying litigation remains pending."); J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996) ("An order denying class certification is not a final judgment . . . ."); *see also* Canady v. Allstate Ins. Co., 282 F.3d 1005, 1019 n.9 (8th Cir. 2002) ("We recognize that denial of class certification alone does not constitute a final judgment on the merits sufficient to satisfy the res judicata principles underlying the relitigation exception to the Anti-Injunction Act."), *abrogation on other grounds recognized by* Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 821–22 (8th Cir. 2009).

118. 327 F.2d 944 (2d Cir. 1964).

> in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."[119]

The Restatement (Second) of Judgments has adopted a similar view:

> The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior application of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.[120]

Judge Easterbrook, writing for the Seventh Circuit in *Bridgestone*, ruled that an order denying class certification was "sufficiently firm" for issue preclusion to attach.[121] *Bridgestone* involved a putative class of nationwide buyers and lessees of SUVs equipped with tires that had abnormally high failure rates.[122] Certain of the putative class members, however, had not yet experienced tire failure on their vehicles.[123] The trial court certified the class, but the Seventh Circuit reversed.[124] The Supreme Court denied certiorari.[125] Thereafter, plaintiffs' counsel filed additional suits in at least five other jurisdictions.[126] The defendants then sought to enjoin such suits on the grounds of issue preclusion.[127] In holding that the Seventh Circuit's prior order was "sufficiently firm" for issue preclusion to apply, Judge Easterbrook pointed to the following

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119. *Id.* at 955; *accord* John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 563–64 (8th Cir. 1990).

120. RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982); *see also* WRIGHT & MILLER, *supra* note 31, § 4434, at 110 ("Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary ruling or to determinations of liability that have not yet been completed by an award of damages or other relief.").

121. *Bridgestone*, 333 F.3d at 767.

122. *Id.* at 765.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

factors: (1) the certification motion received the "focused attention" of counsel for both parties in both district and circuit courts; (2) both the district and circuit courts addressed the certification issue exhaustively in published opinions and brought the debate to a conclusion; (3) certiorari was sought and denied; and (4) class counsel filed an amended master complaint before the MDL judge assigned to the matter so that a single decision on the issue could be made with respect to all cases, no matter where they originated.[128]

2. Federal Preclusion Rules Apply

Moreover, the Court of Appeals ruled that the preclusive effect of a federal judgment on subsequent litigation turns on the application of federal preclusion principles.[129] A federal court in a subsequent action must honor the prior determination of a federal court on the same issue.[130] Nor is a state court free to ignore federal interlocutory judgments; to do so would be incompatible with federal law.[131]

3. Parties: Putative Class Members Are Bound

As a matter of due process, a person not party to a judgment cannot be bound by that judgment.[132] The question, then, is whether absentee members of the putative class are "parties" for issue preclusion purposes. Again, Judge Easterbrook in *Bridgestone* held that absentee members of the putative class are parties to the certification decision.[133] He pointed out that any member of the class could appeal a certification decision without intervening in the

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128. *Id.* at 767.

129. *Id.* ("The preclusive effect of a judgment rendered by a federal court depends on national rather than state law." (citing Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001))). The court further noted that while *Semtek* would normally require federal courts to incorporate state law principles in diversity cases, that proviso does not apply where a master complaint with two federal claims had been filed, nor where state rules would undermine the finality of a federal judgment. *Id.*; *see also infra* notes 160–161 and accompanying text.

130. *Bridgestone*, 333 F.3d at 767.

131. *Id.*

132. *See supra* note 13 and accompanying text.

133. *Bridgestone*, 333 F.3d at 768.

action.[134] The purpose of permitting absentee class members to seek judicial review is that "otherwise they would be bound by defeat."[135]

Thus, an absentee class member is not free to disregard an adverse decision by a federal court on the certification issue.[136] Nevertheless, as a matter of constitutional law, an absentee member of a putative class can be bound by an adverse ruling on certification if and only if the class representative adequately represented the interests of absentee class members.[137] That determination is a question of fact.[138] Once there is a finding of adequacy of representation, the absentee members are bound by the decision.[139]

In so ruling, Judge Easterbrook rejected what he termed the "heads-I-win, tails-you-lose" arguments of the plaintiffs.[140] First, the plaintiffs had urged that only named class representatives and not absentee members of the putative class were "parties" to the litigation.[141] Therefore, the trial court lacked in personam jurisdiction over the absentee plaintiffs.[142] The Seventh Circuit noted that under *Phillips Petroleum Co. v. Shutts*, absentee members of a putative class are treated as parties whether or not the court has personal jurisdiction over them.[143] In any event, the appellate court observed that the plaintiff's master complaint had been premised on RICO, which permits nationwide service of process, thereby rendering absentee plaintiffs subject to in personam jurisdiction in federal court.[144]

Second, the Seventh Circuit noted that failure to offer absentee plaintiffs the right to opt out of the class prior to the certification decision did not infect the judgment denying certification.[145] The right to opt out under Rule 23(b)(3) of the Federal Rules of Civil Procedure does not attach until after a class

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 768–69.
138. *Id.*
139. *Id.*
140. *Id.* at 767.
141. *Id.* at 768.
142. *Id.*
143. *Id.* (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)).
144. *Id.*
145. *Id.* at 769.

has been certified.[146] One cannot opt out of the certification procedure itself. Indeed, a certification procedure would be meaningless unless made on an all or nothing class-wide basis.[147] More importantly, the point of opting out is to preserve a party's right to litigate its claims individually, "not to launch a competing class action."[148] Denial of certification does not bar a litigant from proceeding on its own; rather, it means that a litigant may not act on behalf of others.[149]

The reaction to Judge Easterbrook's ruling in *Bridgestone* has been mixed. Some commentators have praised the decision;[150] others have expressed grave doubts.[151] Courts have similarly been cautious in applying *Bridgestone*; and the case has gotten little traction,[152] even in the Seventh Circuit.[153] Of particular concern to

146. *Id.* (citing FED. R. CIV. P. 23(c)(2)).

147. *Id.* at 769.

148. *Id.*

149. *Id.*

150. *See, e.g.*, Kara M. Moorcroft, Note, *The Path to Preclusion: Federal Injunctive Relief Against Nationwide Classes in State Court*, 54 DUKE L.J. 221, 223 (2004) ("[O]pinion was a bold attempt to provide a much needed solution to the pervasive problem of overlapping putative nationwide classes—notwithstanding criticism that this attempt was unwarranted.").

151. *See, e.g.*, *Civil Procedure—Class Action Certification—Seventh Circuit Holds That Denial of Class Certification Can Have Preclusive Effect In State and Federal Courts*—In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, *333 F.31 763 (7th Cir. 2003)*, 117 HARV. L. REV. 2031, 2035 (2003) ("[T]he Seventh Circuit's legal reasoning departed from Supreme Court precedent and traditional principles of preclusion."); Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power and the Class Action Fairness Act of 2005*, 29 HAMLINE L. REV. 218, 234 (2006) ("[The] decision does more than push the limits of Supreme Court precedent in its interpretation of the relitigation exception; and, it goes well beyond the scope of federal courts' authority to enjoin state court actions pursuant to the Anti-Injunction Act."); Gary Young, *Class Action 'Tort Reform' Ruling*, NAT'L L.J., July 7, 2003, at 5, 5 (noting that the opinion "bowled over attorneys with its sweeping—and, some say, wrongheaded—curtailment of state authority to certify nationwide classes after a federal court has declined to do so").

152. *See, e.g.*, *In re* Ford Motor Co., 471 F.3d 1233, 1254 n.39 (11th Cir. 2006) (distinguishing *Bridgestone*); Ross v. U.S. Bank Nat'l Ass'n, No. C 07-2951 SI, 2008 WL 4447713, at *2 (N.D. Cal. Sept. 30, 2008) (declining to apply *Bridgestone*). *But cf.* Goldsworthy v. Am. Family Mut. Ins. Co., No. 07CA0772, 2008 WL 4878330, at *9 (Colo. App. Jan. 8, 2009) (finding *Bridgestone* persuasive).

153. *See* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 663 (7th Cir. 2004) (noting that *Bridgestone* should not be read "to hold that *any* ruling denying

critics is the court's treatment of the personal jurisdiction and due process issues.[154]

D. *Conflict of Laws*

Issue preclusion questions also arise in the context of conflict of laws. Suppose that in the F-1 action, a federal court finds for the plaintiff following a full trial on the merits. The F-2 action is a claim by different plaintiffs in state court against the same defendants essentially on the same claims. The F-2 plaintiffs file a motion seeking to invoke offensive, nonmutual issue preclusion against the defendants to prevent them from defending in F-2 on an issue decided adversely to them in F-1. If offensive, nonmutual issue preclusion were allowed, the only remaining issue of any significance would be damages.

How should the F-2 court decide the preclusion matter? As a threshold matter, under *Parklane*, lack of mutuality is not a bar to invocation of offensive, nonmutual issue preclusion, provided that doing so would not produce unfair results for defendants.[155] The Court in *Parklane* identified four circumstances in which use of offensive, nonmutual issue preclusion might lead to harsh results and lead a trial court to exercise its discretion in favor of denying issue preclusion: (1) where the stakes in F-2 are disproportionately higher than in F-1 such that a normal judgment for the plaintiff in F-1, which the defendant might not have significant incentive to litigate, would preclude a defendant from litigating stakes that are substantially higher; (2) where procedural rights in F-2 are much broader in F-1 and would enable the defendant to litigate more effectively in F-2; (3) where invocation of issue preclusion would encourage a wait-and-see attitude among other plaintiffs and thereby proliferate, rather than limit, litigation; and (4) where use of issue preclusion would serve to lock in inconsistent judgments by permitting preclusion on the basis of earlier judgments for other

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class certification is binding in future litigation"); Oshana v. Coca-Cola Bottling Co., 225 F.R.D. 575, 579 (N.D. Ill. 2005) (holding issue preclusion not applicable "because different facts and a different plaintiff are before the court"); Vennet v. Am. Intercontinental Univ. Online, No. 05 C 4889, 2005 WL 6215171, at *3 (N.D. Ill. Dec. 22, 2005) (holding *Bridgestone* not applicable where prior judgment emanates from state court rather than federal court).

154. Kerr, *supra* note 151, at 240–41.

155. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

plaintiffs while at the same time ignoring prior judgments for the defendants involving the same issues.[156]

Although the *Parklane* rule abrogating mutuality is the law in federal courts, not all states have followed suit; some still adhere to the rule of mutuality.[157] Where an F-2 plaintiff in state court seeks to invoke offensive, nonmutual issue preclusion based on an F-1 federal judgment, does the application of preclusion principles turn on the law of F-1 or F-2? The general rule is that in federal question cases, the issue preclusion rules of F-1 govern and the F-2 court must follow F-1 preclusion rules.[158] Otherwise, the F-2 court would not be giving full effect to the F-1 judgment. Accordingly, if the F-2 court is a state court, it must honor the federal rule, even if state law requires mutuality.

However, this does not mean that the invocation of offensive, nonmutual issue preclusion must be automatically upheld by the state court. The state court would still have the same measure of discretion as the federal court in deciding whether to invoke offensive, nonmutual issue preclusion, and if it finds that applying this doctrine may yield harsh or unfair results, may decline to allow it.[159]

The question becomes more complicated where F-1 is a federal court sitting in diversity and deciding issues of state law.[160] In *Semtek*, the Supreme Court ruled that the preclusive effects of a California diversity judgment dismissing an action on statute of limitations grounds on a subsequent state court action in Maryland

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156. *Id.* at 330–32.

157. WRIGHT & MILLER, *supra* note 31, § 4464, at 692.

158. *See id.*, § 4468, at 51–52 ("It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts, given the basic requirements that state courts honor the judgments of courts in other states, and the federal courts must honor state court judgments."); *see also* Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255, 265 n.11 (10th Cir. 1989) (citing WRIGHT & MILLER, *supra* note 31, § 4464).

159. WRIGHT & MILLER, *supra* note 31, § 4468, at 66–67.

160. *See id.* § 4472, at 364–65 (calling preclusive effects on F-2 state court of F-1 federal judgment based on state law "bewildering"). *But see* Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265, 1269 n.4 (5th Cir. 1986) (implementing a bright-line rule: "We apply federal law to the question of the *res judicata* or collateral estoppel effect of prior federal court proceedings, regardless of the basis of federal jurisdiction in either the prior or the present action.") (emphasis in original).

were governed by federal common law.[161] However, the Court further ruled that federal common law would incorporate California law because the federal dismissal relied on state substantive law and because incorporating state law would discourage forum shopping and inequitable administration of justice.[162] The Court observed that there was no federal interest in giving the California statute of limitations more effect in states other than California.[163]

On the other hand, the rule of *Semtek* is not absolute. The decision itself contains a proviso that state rules that undermine the finality of federal judgments will not be incorporated under federal common law.[164] Thus, in *Bridgestone*, the Seventh Circuit held that under *Semtek*, state law preclusion principles that would allow a state court to disregard federal interlocutory judgments on class certification must yield to federal law.[165] At first blush, *Semtek* seems to inject an uncomfortable degree of uncertainty into the choice of law analysis on the question of issue preclusion. The reality is, however, that the instances where state law should be incorporated into federal common law are relatively few, and generally, the strong federal interest in finality and efficiency in the conduct of litigation justifies adherence to the federal law of issue preclusion.[166] Suppose that in a bifurcated action, a case is litigated and the court enters a judgment in favor of the plaintiff on the issue of liability. While the trial on damages is pending and before any final judgment in the action is issued, the parties settle. As part of the settlement agreement, the defendant insists that the judgment on liability be vacated. The plaintiff goes along, and the parties agree to petition the court jointly to vacate the judgment on liability. The defendant is especially interested in vacating the liability judgment

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161. Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505–09 (2001); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court.").

162. *Semtek*, 531 U.S. at 505–09.

163. *Id.* at 509.

164. *Id.*

165. *Bridgestone*, 333 F.3d at 768; *see generally* WRIGHT & MILLER, *supra* note 31, § 4472, at 375–81 (addressing application of *Semtek* to various preclusion disputes).

166. WRIGHT & MILLER, *supra* note 31, § 4472, at 379–80 ("The number of situations that may justify incorporation of state law may prove to be relatively small in relation to the total range of preclusion questions.").

because it faces similar lawsuits in other jurisdictions with issues identical to the ones litigated and determined by the F-1 trial court prior to vacatur and hence the prospect of adverse rulings based on issue preclusion. The plaintiff will typically go along because, at the end of the day, the plaintiff is getting its recovery, and any benefit that would inure to those in other suits is not necessarily a concern.

If the court obliges and vacates the judgment, the question is whether liability judgment may be accorded issue-preclusive effect in other litigation. The question has ignited a heated debate in the academic literature as to whether the litigation process is simply a means of dispute resolution[167] or a vehicle for declaring public policy.[168]

The arguments for denying preclusion based on vacation derive largely from the dispute resolution model: (1) the judgment is not final; (2) the ruling, once vacated, cannot be appealed; and (3) to rule otherwise would undo a settlement and hence undermine an important public policy designed to unburden the courts.[169] First, traditionally issue preclusion has been accorded only to final

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167. *See* Andrew W. McThema & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1661 (1985) (rejecting a view of litigation as more than dispute resolution); Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233, 239, 250 (1989) (arguing that parties' interests in resolving disputes presumptively outweigh public interests in precedent and collateral estoppel); Stuart N. Rapport, Note, *Collateral Estoppel Effect of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731, 753 (1987) ("The courts' role is to use the law to resolve conflicts between real parties . . . not to resolve conflicts that have not yet materialized.").

168. *See* Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 641–42 (1991) (describing policy concerns raised by "allowing vacatur to be resolved by settlement negotiation"); William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, 96 YALE. L.J. 860, 860–61 (1987) (arguing that settlements vacating entered judgments frustrate "the judicial values of finality of judgments, economy, legitimacy, and consistency"); *see generally* Abram Cheyes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 58 (1982) (comparing the classic litigation model as a mode of dispute resolution and the contemporary model as a grievance involving public policy); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) (stating that courts give effect to public values and do not simply resolve disputes).

169. *See* Klingeman, *supra* note 167, at 248 (noting the concern that denying issue-preclusive effect of vacated judgments would discourage settlement and encourage relitigation).

judgments.[170] By definition, a judgment solely on liability issues as part of a bifurcated action is not final. Second, once an action is vacated, the issues therein become moot and the appellate court lacks jurisdiction over the matter.[171] Preclusion is inappropriate with respect to issues that are insulated from appellate review.[172] Third, permitting invocation of issue preclusion based on a vacated judgment would tend to undermine settlements.[173] That, in turn, would subject the civil justice system to needless and burdensome litigation. As the court in *Dodrill v. Ludt*[174] observed:

> If a judgment could be entirely vacated yet preclusive effect still given to issues determined at trial but not specifically appealed, appellants generally would feel compelled to appeal every contrary factual determination. Such inefficiency neither lawyers nor judges ought to court. Litigants ought to be encouraged to expend their energies on their most compelling issues and arguments, without paranoia about the preclusive effect of other issues or determinations.[175]

On the other hand, the arguments for permitting issue preclusive effect for vacated judgments stems from the public policy model. A judgment of the court does more than simply resolve a dispute between private litigants; it also establishes precedent that benefits other litigants trying similar issues in other cases.[176] Proponents of this approach make quick work of the arguments that vacatur robs a judgment of its preclusive effect. First, while it is true that issue-preclusive effect is given only to final judgments,

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170. WRIGHT & MILLER, *supra* note 31, § 4427, at 4; *see, e.g.*, Kosinski v. Comm'r, 541 F.3d 671, 675 (6th Cir. 2008) (listing final judgment as one of four necessary elements that a party must satisfy to successfully invoke issue preclusion); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008) (same).

171. RESTATEMENT (SECOND) OF JUDGMENTS § 88 (1982).

172. WRIGHT & MILLER, *supra* note 31, § 4433, at 99.

173. *Id.*, § 3533.10, at 610–11.

174. 764 F.2d 442 (6th Cir. 1985).

175. *Id.* at 444.

176. *In re* Mem'l Hosp. of Iowa County, Inc., 862 F.2d 1299, 1303 (7th Cir. 1988).

"finality" in the issue preclusion sense is not synonymous with "finality" as used in the final judgment rule.[177]

Once liability has been determined by a trial, there is simply no good reason to give the litigants another bite of the apple. The fact that a decision may not be "final" in the sense that it would be ripe for appeal does not bar application of issue preclusion, provided the decision is "sufficiently firm" and received the "focused attention" of the parties and the court.[178] Consequently, lack of technical finality is not a bar to issue preclusion.

Nor is the fact that the vacated decision cannot be appealed a persuasive reason for denying issue preclusion. Particularly troubling in this scenario is that the party, here the defendant, engineered the vacation solely for the purpose of avoiding the perpetuation of the potential "stain" of an adverse determination through preclusion down the line in other cases.[179] Issue preclusion, however, is not simply putty in the hands of litigants that can be manipulated to meet the goals of private parties to a litigation. Rather, issue preclusion serves broader public policy interests of (1) promoting efficiency in litigation; (2) assuring that there will be an end point to litigation; and (3) fostering consistency of outcomes. It is one thing for a court to withdraw an opinion because, upon sober reflection, it has concerns about whether the decision is right on the merits. It is quite another to ask a court to withdraw an opinion solely so that a party might avoid issue preclusion assertions in related litigation.[180]

Finally, denying preclusive effect to vacated judgments does not undermine the policies promoted by settlements. Settlements benefit the civil justice system by reducing litigation and easing the workload of the judiciary. Denying preclusive effect to vacated

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177. Syverson v. IBM Corp., 472 F.3d 1072, 1079 (9th Cir. 2007) ("To be 'final' for [issue preclusion] purposes, a decision need not possess 'finality' in the sense of 28 U.S.C. § 1291." (quoting Luben Indus., Inc. v. United States, 707 F.2d 1037, 1040 (9th Cir. 1983))). The proper inquiry "is whether the court's decision *on the issue as to which preclusion is sought* is final." *Id.*

178. *See supra* notes 120–128 and accompanying text.

179. Chemetron Corp. v. Bus. Funds, Inc., 682 F.2d 1149, 1191–92 (5th Cir. 1982) (finding imposition of issue preclusion not unfair to defendant where (1) he chose to litigate and lost; and (2) having lost, he settled prior to final judgment in the hope of avoiding issue preclusion).

180. *But see* Klingeman, *supra* note 167, at 249 (arguing that promoting settlement trumps issue preclusion).

judgments has the very opposite effect by promoting (re)litigation and consequently adding to the judicial burden. To rule that vacation vitiates the issue preclusion effect of a prior judgment would create an unnecessary and undesirable loophole that would thwart the application of the doctrine of prior judgments.

The more recent cases reflect a trend among judges to favor allowing issue preclusion, even where a judgment is vacated. Still, the courts would be well-advised to avoid hard-and-fast rules in this arena. Invocation of offensive, nonmutual issue preclusion has always entailed a degree of discretion on the part of the trial judge. The courts should retain that discretion so as to do justice in individual cases.

IV. CONCLUSION

Principles of issue preclusion apply broadly to recurring factual issues in complex litigation and play a significant role in assuring the just, speedy, and inexpensive determinations of civil actions.