Volume 37
Number 3 *Summer 2003*

*pp.*879-928

Summer 2003

Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion

Monica Renee Brownewell

RETHINKING THE RESTATEMENT VIEW (AGAIN!): MULTIPLE INDEPENDENT HOLDINGS AND THE DOCTRINE OF ISSUE PRECLUSION

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[1]

I. INTRODUCTION

In a federal district court, Maureen Johnson brought an action against Mark Cohen to recover interest on a promissory note payable to Johnson and signed by Cohen even though the principal was not yet due.[2] In a bench trial, the court found for Cohen on two alternative, independent grounds: first, that he was fraudulently induced to sign the note by Johnson and, second, that Johnson signed a binding release of Cohen's obligations to pay any interest on the note. The note then matured making the principal due, and Cohen refused to pay. Johnson filed a second suit against Cohen for the balance of the note.

If *Johnson v. Cohen II* is filed in a district court of the Ninth Circuit, Cohen can use issue preclusion to prevent the second suit. The first court determined that Johnson fraudulently induced Cohen to sign the note, as one of two reasons supporting the holding that Cohen was not liable for interest allegedly due on the note. Because the issue of fraudulent inducement was actually decided, necessary to the judgment, and contested between the same parties in a previous suit, the court in *Johnson II* should find for Cohen by applying the doctrine of issue preclusion.[3]

---

1 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36 (1881).

2 The following hypothetical is based on the RESTATEMENT (SECOND) OF JUDGMENTS § 27, illus. 16 (1982). It is useful for illustrating the complex issues the courts struggle with when trying to balance both equity and uniformity. This hypothetical and its application are created from the author's imagination and are not intended to reflect any actual person or case.

3 *See infra* Part III.A.1 (explaining the Ninth Circuit's analysis); *infra* text accompanying note 25 (explaining the elements of issue preclusion).

If, however, *Johnson v. Cohen II* is filed in a district court of the Fourth Circuit, the case will proceed, and the parties will be forced to relitigate the question of whether Cohen was fraudulently induced to sign the promissory note. The issue of fraudulent inducement was not necessary to the prior holding because it was only one of two independent determinations leading to the conclusion that Cohen did not owe Johnson the interest on the note.[4] More simply, Cohen could have won the first case solely on the basis that Johnson executed a binding release of his obligation to pay the interest or that Johnson fraudulently induced Cohen to sign the note.

These two conflicting conclusions for the same problem illustrate the current tension among the federal appellate courts regarding the effect of issue preclusion when applied to multiple independent holdings. These differing conclusions by appellate circuits lead to uncertainty and potential forum shopping contrary to uniformity, the basis of the American federal court system.[5]

The principle of issue preclusion states that later courts should honor a prior court's determination of a matter that was actually litigated.[6] Multiple independent holdings implicate the existing doctrine of issue preclusion through the ambiguity of the "necessarily decided" prong.[7] The Second Restatement of Judgments attempted to remedy the problem posed in the hypothetical by disallowing the application of issue preclusion when the first holding was based on multiple independent grounds.[8] However, the Restatement's remedy does not adhere to the

---

4 *See infra* Part III.B.1 (explaining the Fourth Circuit's analysis).

5 *See* ALAN D. VESTAL, RES JUDICATA/PRECLUSION V-3 (1969). In this hypothetical, Johnson would want to take her first case to the Fourth Circuit, instead of the Ninth Circuit, for fear that an alternative judgment might preclude her from bringing a subsequent claim for the principal of the note. Cohen, however, would hope that Johnson brought the case in the Ninth Circuit. If Johnson brought the case in the Fourth Circuit, then Cohen may only defend on the basis that Johnson fraudulently induced him to sign the note because the Fourth Circuit's current rule on issue preclusion could bring him back to court when the principal became due and force him to relitigate. Cohen will not assert useless defenses due to cost and time concerns. *See infra* Part III (discussing the circuit split); *infra* Part IV (analyzing the issues affected by this split).

6 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4416, at 136 (1981).

7 See *infra* notes 31-43 and accompanying text for a discussion of the "necessarily decided" prong of issue preclusion and its implication by multiple independent holdings.

8 See *infra* notes 74-81 and accompanying text for a discussion of the Second Restatement rule. The First Restatement suggested that when a judgment is based on alternative independent grounds, both may be precluded in future litigation. *See*

policy considerations or the purpose behind issue preclusion and warrants a restructuring of the Second Restatement rules and a new application of this doctrine.[9]

Part II of this Note presents the doctrine of issue preclusion, focusing on multiple independent holdings, and explains the jurisprudence of Supreme Court decisions and the Restatements of Judgments.[10] Part III charts the current circuit split and explains how each of the circuits has resolved this issue.[11] Part IV illustrates the concerns created by this split and evaluates the strengths and weaknesses of each circuit's treatment of the problem.[12] Finally, Part V proposes an amendment to the Second Restatement of Judgments.[13] The amendment creates an exception to the general rule of issue preclusion, which applies when the previous decision is based on multiple independent holdings and the party objecting to the application of issue preclusion can prove that without the exception, injustice will result.[14]

II. LEGAL BACKGROUND OF ISSUE PRECLUSION

Part II.A presents the definition of issue preclusion, particularly how it differs from the doctrine of res judicata.[15] This Part also explores the policy considerations that make issue preclusion a necessary and vital doctrine in the state and federal court systems.[16] Part II.B traces the history of issue preclusion by analyzing the Supreme Court's treatment of the doctrine, as well as the changing philosophy of the Second Restatement of Judgments.[17]

A. Definitions and Elemental Considerations

Res judicata is a judicially created doctrine that has been implemented by the courts without reference to either statutory or

---

RESTATEMENT (FIRST) OF JUDGMENTS § 68 cmt. n (1942) [hereinafter RESTATEMENT (FIRST)]. On the other hand, the Second Restatement offers the rule that multiple independent holdings are not precluded in future litigation. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982) [hereinafter RESTATEMENT (SECOND)].

9 *See infra* Part V.

10 *See infra* Part II.

11 *See infra* Part III.

12 *See infra* Part IV.

13 *See infra* Part V.

14 *See infra* Part V.

15 *See infra* Part II.A.

16 *See infra* Part II.A.

17 *See infra* Part II.B.

constitutional principles.[18] Res judicata literally means "a thing adjudicated."[19] The term res judicata encompasses both claim preclusion and issue preclusion, although claim preclusion is often considered the "true res judicata."[20] The elements of claim preclusion are as follows: (1)

---

[18] 18 WRIGHT ET AL., *supra* note 6, § 4403, at 11. Because res judicata is a judge-made doctrine, the parties can mutually waive its application. 18 *id.* at 13. Some federal statutes invoke the doctrine of res judicata. 18 U.S.C. § 1964(d)(2000) ("[A] final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."); 28 U.S.C. § 1346(b) (2000). Section 1346(b) provides that the district courts

> shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . .

28 U.S.C. § 1346(b). *See also id.* § 2519 ("A final judgment of the United States Court of Federal Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy."); 18 WRIGHT ET AL., *supra* note 6, § 4403, at 19.

[19] BLACK'S LAW DICTIONARY 1312 (7th ed. 1999). Res judicata is defined as

> 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been-but were not-raised in the first suit.

Id. Res judicata is also defined as

> The principal that an existing final judgment rendered upon the merits without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

BALLENTINE'S LAW DICTIONARY 1105 (3d ed. 1969).

[20] Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978). Claim preclusion treats a judgment as the full measure of relief between the same parties and the same cause of action. *Id.* When a plaintiff obtains a favorable judgment, his claim "merges" in the judgment. *Id.* When a defendant obtains a judgment in his favor, the judgment acts as a bar against the plaintiff from bringing a future claim. *Id.* Whether or not the issue was raised at trial, claim preclusion extends to all issues relevant to the same claim between the parties. *Id.*; *see* 18 WRIGHT ET AL., *supra* note 6, § 4402, at 13. Many Supreme Court decisions seek to emphasize the distinctions between issue preclusion and claim preclusion. 18 WRIGHT ET AL., *supra* note 6, § 4416; *see also* S. Pac. R.R. v. United States, 168 U.S. 1 (1897). In *South Pacific Railroad*, Justice Harlan stated,

> The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties

an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties or parties in privity with the original parties.[21] The aim of claim preclusion is to avoid multiple suits on identical disagreements between the same parties, which would lead to courts determining the same controversy twice.[22] Claim preclusion can bar issues that were not litigated if they were part of the claim between the parties in the first action.[23]

The second doctrine under res judicata is issue preclusion, or collateral estoppel, which provides that later courts should honor the first holding regarding an issue that has actually been litigated.[24] A party invoking issue preclusion must prove three necessary elements: (1) that the issue was actually decided, (2) that it was necessary to the judgment, and (3) that the person against whom the estoppel will work

---

> or their privies be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

168 U.S. at 48-49. *See* Christopher John Heller, *Collateral Estoppel–Offensive Use of Equity Finding Allowed in Subsequent Law Action.* Parklane Hosiery v. Shore, 439 U.S. 322 (1979); 3 U. ARK. LITTLE ROCK L. REV. 103, 105 (1980). Although res judicata and collateral estoppel are often used interchangeably, they are two distinct principles. *Id.* Further, res judicata is claim preclusion and collateral estoppel is issue preclusion. *Id.*

21 BLACK'S LAW DICTIONARY, *supra* note 19, at 1312. The general rule of claim preclusion states that

> A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:
> (1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment (see § 18);
> (2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim (see § 19); . . . .

RESTATEMENT (SECOND), *supra* note 8, § 17. *See also* 18 WRIGHT ET AL., *supra* note 6, § 4406, at 43-48.

22 *Kaspar*, 575 F.2d at 535-36.

23 *See* RESTATEMENT (SECOND), *supra* note 8, § 17.

24 18 WRIGHT ET AL., *supra* note 6, § 4402, at 6, 136. Unlike claim preclusion, issue preclusion does not prohibit litigation of matters that have never been argued or decided. *Id.* at 136.

had a full and fair opportunity to litigate the issue in the first action.[25] The basic definition of issue preclusion is consistent among the federal courts; however, the secondary question of how to define the issue, or whether an issue is "necessary to the judgment," is where inconsistencies develop.[26]

Courts have generally held that a determination that does not logically support the judgment and is not essential to the judgment may be relitigated in subsequent actions.[27] The Second Restatement of Judgments suggests a series of questions to determine whether the issue in a subsequent suit is the same as that in the previous litigation.[28] If the initial case involves a bench trial, the judge's findings of fact can be used to discover the decided issues.[29] Likewise, in the case of a jury trial, the interrogatories to the jury or a special verdict may be helpful because explicit findings of fact are not provided.[30]

---

25 RESTATEMENT (SECOND), *supra* note 8, § 27; Jo Desha Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings*, 50 U. CHI. L. REV. 701, 701 (1983).

26 *See* Lucas, *supra* note 25, at 702-03.

27 *Id.* at 702. There are three reasons for this general rule. *Id.* First, a finding of fact or a determination of an issue that does not support the judgment is analogous to dicta. *Id.* Second, a nonessential finding is unreliable, since it may have been made with less scrutiny because the ultimate result of the case did not depend on its determination. *Id.* Finally, a decision that is not necessary to the judgment is not available for appeal. *Id.; see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971); Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926). The Second Circuit stated that, even if the losing litigant takes an appeal, the winning litigant might not diligently oppose a claim or error since the winning litigant could demur and rely solely on the argument that the claimed error was not essential to the judgment. Halpern v. Schwartz, 426 F.2d 102, 105 (2d Cir. 1970).

28 RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. c. To determine whether the issues are the same, the Second Restatement suggests asking:

> Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? How closely related are the claims involved in the two proceedings?

Id.

29 VESTAL, *supra* note 5, at V-189.

30 *Id.* In addition to interrogatories or a special verdict, the pleadings may also be used to determine the issues, but pleadings are not conclusive since there is the possibility of trial. *Id.* at V-189 to V-190. In both state and federal practice, there is the possibility that the issues actually tried in the case will not be limited to those in the pleadings. *Id.* at V-190; *see also* FED. R. CIV. P. 15 (stating that a party is allowed to "amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires"). Ultimately,

The second problem in applying issue preclusion is the requirement that the issue must be "necessarily decided," which will be the focus of this Note.[31] It is well settled that, if a court finds it is unable to decide a case on the merits due to a procedural defect, yet does so anyway, the decision is not precluded from relitigation by a proper tribunal.[32] Therefore, dicta or a jury's special verdict, both of which are not binding to the controlling legal issues, will not be precluded from relitigation by the application of issue preclusion.[33] Furthermore, if a court's decision could have been based on narrower grounds than those actually chosen, the resolution of multiple issues was unnecessary to the judgment and will not bind the parties in future litigation.[34] Multiple independent holdings further challenge the "necessarily decided" prong.[35]

A case decided on multiple independent holdings differs from a nonessential determination because multiple grounds for a decision are

---

the second court will have to examine the first suit in its entirety to determine the issues necessarily decided. VESTAL, *supra* note 5, at V-190. This means that the court in the second suit may have to examine the first suit's record to determine what matters were in issue between the parties and, therefore, necessary to the decision. *Id.*

31 *See* 18 WRIGHT ET AL., *supra* note 6, § 4421, at 192-209 (explaining the "necessarily decided" prong as allowing issue preclusion to attach only to determinations that were necessary to support the judgment of the first action). There are two reasons for this requirement. *Id.* First, the tribunal may not have taken sufficient care in deciding an issue that is not necessary to the judgment. *Id.* Second, appellate review may not be available to ensure the quality of the decision. *See* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. h. This issue was not a problem until the 1980s. Lucas, *supra* note 25, at 701, 703. The broad concept of "cause of action" and compulsory counterclaim rules limit the circumstances in which an issue can arise in subsequent litigation between the parties. *Id.* Additionally, through the doctrine of mutuality, a stranger to the litigation could rarely plead the affirmative defense of issue preclusion. *Id.*

32 18 WRIGHT ET AL., *supra* note 6, § 4421, at 207 (citing Stebbins v. Keystone Ins. Co., 481 F.2d 501, 508 (D.C. Cir. 1973)). Stebbins filed a class action against the Insurance Company of North America ("INA") claiming racial discrimination. *Stebbins*, 481 F.2d at 503. The trial court granted the summary judgment motion by the INA on two separate grounds. *Id.* at 505. The plaintiff, Stebbins, refused to file an application for employment with the INA, and he lacked financial prudence, candor, stability, and interest in the business world so that no prudent insurance company could reasonably employ him. *Id.* Stebbins then filed an action against the INA and its subsidiaries, which the district court dismissed under res judicata principles. *Id.* The court of appeals examined this case under principles of collateral estoppel. *Id.* at 506. The court held that the doctrine of collateral estoppel did not apply since it would have the effect of forcing Stebbins to appeal even though he could institute a new action by filing a new application. *Id.* at 508.

33 18 WRIGHT ET AL., *supra* note 6, § 4421, at 194.

34 18 *id.* at 207.

35 Lucas, *supra* note 25, at 703.

not dicta.[36] Second, there is no reason why the judge, the jury, or the parties would believe that the holdings are less important or worthy of less scrutiny.[37] Finally, all of the determinations are reviewable on appeal, unlike unnecessary commentary by the court.[38]

There are four situations in which multiple independent holdings are possible.[39] First, if a plaintiff asserts and fully develops more than one legal theory to support a single claim for relief and the court finds for the plaintiff on more than one theory, multiple independent holdings exist.[40] Second, the plaintiff may plead more than one instance of conduct that gave rise to the claim.[41] Third, certain claims require the plaintiff to prove multiple elements, and the defendant will prevail if the plaintiff fails to establish one or more of the elements.[42] Finally, a defendant can deny the allegations of the complaint, as well as plead an affirmative defense or some other defense to prevail, any of which, in conjunction with a negative finding for the plaintiff, would create multiple independent holdings.[43]

---

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.* at 702.

40 *Id.*; *see, e.g.*, Kaiser Indus. Corp. v. Jones & Laughlin Steel Corp., 515 F.2d 964, 980-87 (3d Cir. 1975).

41 Lucas, *supra* note 25, at 702; *see* Tanker Hygrade No. 18 v. United States, 526 F.2d 805, 809-12 (Ct. Cl. 1975) (holding that a decision based on the cumulative effect of oil spills precludes relitigation of the individual spills as distinguished from *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970), in which the grounds for the decision were independently supported).

42 Lucas, *supra* note 25, at 702-03. A common example of requiring a plaintiff to prove multiple elements of a claim is a negligence claim where the plaintiff must prove a duty owed by the defendant, a breach of that duty, and damages caused by the breach of that duty. *See* RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n, illus. 8.

> A and B, while operating automobiles, have a collision. A brings an action against B, alleging that the collision was caused by the negligence of B. B denies that he was negligent and alleges that the collision was due to A's negligence. The jury in answer to the interrogatories finds that the collision was caused by the negligence of A and that B was not negligent and gives a verdict for B on which judgment is entered. Thereafter B brings an action against A to recover for the damage to his automobile resulting from the collision. The judgment in the prior suit is conclusive that the collision was caused by the negligence of A and was not caused by the negligence of B.

Id.

43 Lucas, *supra* note 25, at 703. The hypothetical in the introduction of this Note illustrates an example of a defendant offering two defenses and the court ruling on both,

After a court determines that the elements of issue preclusion are established, it must consider whether an injustice exception applies before invoking the doctrine of issue preclusion.[44] A few rare situations exist in which applying issue preclusion is inappropriate, despite the fact that all of the elements are present.[45] Such situations include those in which there are changes in the legal climate, concerns with the impact of the decision on nonparties, changes in the context in which the issue arose, parties who lacked a full and fair opportunity to litigate, constitutional defects that existed in the first proceeding, and categories of litigants who need special treatment.[46] Finally, when a losing party

---

either of which standing alone would be sufficient for the defendant to prevail. *See supra* Part I.

[44] 18 WRIGHT ET AL., *supra* note 6, § 4426, at 264-65. Claim preclusion might function better than issue preclusion with an unfairness exception, since claim preclusion can prohibit litigation of an issue that was never decided. *Id.* at 268. A general injustice exception should be applied as narrowly as a claim preclusion exception when issue preclusion is used in conjunction with claim preclusion. *Id.* However, in other cases, issue preclusion may allow a broader exception in unusual circumstances. *Id.* The Second Restatement provides five exceptions to the general rule of issue preclusion:

> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

RESTATEMENT (SECOND), *supra* note 8, § 28.

[45] 18 WRIGHT ET AL., *supra* note 6, § 4426, at 266-67.

[46] 18 *id.* For example, the court in *Moch v. East Baton Rouge Parish School Board* noted that, when public policy demands an exception to the rule of finality, it is inappropriate to apply issue preclusion in an effort to uphold the general policy of the rule. 548 F.2d 594, 598 (5th Cir. 1977). In this case regarding a claim by plaintiffs that their votes were being

lacked an incentive to litigate the issue at the first trial and the stakes are much higher in the second trial, the application of issue preclusion may not be fair or appropriate.[47]

B. *Policies that Drive Issue Preclusion*

The purpose of res judicata is firmly based in public and private policy.[48] Res judicata is designed to protect our court system from the corrosion that would occur if the same issues or claims were litigated

---

diluted through districting, the Fifth Circuit noted that from 1972 to 1977 the law had changed. *Id.* The court reasoned that this would make an application of collateral estoppel in the 1977 case, using the 1972 decision, unjust. *Id.* This case also stands for the proposition that an unconstitutional districting could cause a negative impact on future voters and that collateral estoppel could not prevent curing this impact on other parties. *Id.*

Another injustice exception is the "constitutional defect." 18 WRIGHT ET AL., *supra* note 6, § 4426, at 267. In *Smith v. United States*, the notice given to Smith was so inadequate that the court refused to give collateral estoppel effect to the prior judgment. 403 F.2d 448, 450 (7th Cir. 1968). Since Smith was, in essence, denied his opportunity to have his day in court, the Seventh Circuit found that Smith was entitled to litigate his claim despite collateral estoppel. *Id.* at 451.

A final injustice exception is "changes in context." 18 WRIGHT ET AL., *supra* note 6, § 4426, at 266. In *Title v. Immigration and Naturalization Service*, the court noted the difficulty when determinations made under one statute are considered binding under a different statute. 322 F.2d 21, 25 n.11 (9th Cir. 1963). Since the context under which the provisions of the statutes were considered could differ, a determination under one statute should not necessarily preclude litigation of the issue under a different statute. *Id.*

> Because the legislative history of two statutes is always different, because the purposes of two statutes are never the same, and because the context of provisions must be taken into account, the conclusion is probably sound that a determination under one statute need not necessarily be res judicata when the same question arises under identical words of another statute.

Id. (citing 2 DAVIS, ADMINISTRATIVE LAW TREATISE 578 (1958)).

47 18 WRIGHT ET AL., *supra* note 6, § 4423, at 221. Sometimes the stakes in the first action may be so small that it would not be reasonable to expend the time and money needed to vigorously defend an action. *Id.* For example, few litigants would spend $5000 defending a $500 claim unless there was reason to foresee that the issue would be relevant in a subsequent suit. *Id.*

48 18 *id.* § 4403, at 11-22. The Supreme Court stated in *Parklane Hosiery Co. v. Shore* that res judicata has the dual effect of promoting certainty for litigants by eliminating the burden of relitigating identical issues that have already been decided, as well as promoting judicial economy by preventing needless litigation. 439 U.S. 322, 326 (1979). These purposes are captured in the Latin maxims: "*interest reipublicae ut sit finis litium*" and "*nemo debet bis vexari pro eadem causa.*" 18 WRIGHT ET AL., *supra* note 6, § 4403. The foregoing Latin maxims are translated respectfully as: "it is in the interest of the state that there be a limit to litigation" and "no one ought to be twice troubled for one and the same cause." BLACK'S LAW DICTIONARY, *supra* note 19, at 1647, 1661. "The doctrine of collateral estoppel is based on the policy of limiting litigation to one fair trial on an issue." Heller, *supra* note 20, at 105.

twice with inconsistent results.[49] Res judicata also preserves the courts' time by preventing repetitious litigation of previously decided claims and issues.[50] Furthermore, parties should only have "one bite at the apple," which means that wealthy litigants cannot continue to retry a case until they win against a poorer opponent.[51] Despite these significant policy justifications, issue preclusion does not exist without potential negative effects.[52]

Issue preclusion's effect on litigants' behavior warrants consistent application of this doctrine.[53] Issue preclusion is determinative in a subsequent action when the party arguing for preclusion succeeds.[54] Another significant effect is that litigants must take into account the possibility of preclusion in future litigation when tailoring the first lawsuit.[55] The zealous nature by which a party argues a case in the first instance is significantly affected by a court's rule on the preclusive effects of multiple independent holdings.[56] If the applicable preclusion law holds that none of the alternative holdings will be precluded in

---

49 18 WRIGHT ET AL., *supra* note 6, § 4403, at 20-45. "It is easier to live with the abstract knowledge that our imperfect trial process would often produce opposite results in successive efforts than to accept repeated concrete realizations of that fact." 18 *id.* at 23-24.

50 18 *id.* at 13-15. The purpose of collateral estoppel is two-fold. *Id.* It is to protect litigants from the burden of relitigation of identical issues and to promote judicial economy through preventing needless litigation. Heller, *supra* note 20, at 106.

51 18 WRIGHT ET AL., *supra* note 6, § 4403, at 15-17; Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 VAL. U. L. REV. 43, 60 (1996).

52 18 WRIGHT ET AL., *supra* note 6, § 4416, at 142. One negative risk of issue preclusion is that the first litigated determination could be wrong. *Id.* Second, if the possibility of future litigation is unforeseen, then the parties may not vigorously defend the case. *Id.* Third, issue preclusion could expand rather than reduce litigation. *Id.* Parties may feel the need to exhaust all possible issues in fear of issue preclusion and cause more "cautionary" appeals. *Id.* Finally, "the values of issue preclusion can be served effectively only by clear rules." *Id.* Without clear rules, an invitation of second litigation exists to test the limits of issue preclusion. *Id.*

53 Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 950 (1998).

54 *Id.* Parties will try to tailor their pleadings to either avoid or implicate the issue preclusion doctrine. *Id.*

55 *Id.* Erichson breaks down the considerations of litigants at the first case into seven categories: zeal and appeal, delay, joinder, settlement, other litigation decisions (including consolidation, compulsory joinder, and class certifications), nonparty participants, and litigation behavior and the first case's policies. *Id.* at 950-63.

56 *See generally id.* at 950-52 (stating that the rational litigant will expend more resources when the stakes are higher). In a jurisdiction where multiple independent holdings are entitled to issue-preclusive effect, a party with a strong case on one theory may not allocate much effort on alternative theories. *Id.* at 952. On the other hand, if alternative holdings are not precluded in future litigation, a party will vigorously litigate each alternative theory. *Id.*

subsequent actions, then a party with a strong case on one theory will not vigorously support any other contentions.[57] If, however, the applicable law allows alternative holdings to be precluded, then the party would be concerned with each theory and zealously argue each potential ground for the decision.[58]

C. *The Influence of the Supreme Court on the Doctrine of Res Judicata*

The Supreme Court has dealt with various aspects of issue preclusion and res judicata.[59] Courts at one time held that a party not bound by a prior decision could not benefit from issue preclusion by estopping a person who was a litigant in a former case involving the same decision.[60] In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,[61] the Supreme Court rejected the concept of mutuality in collateral estoppel.[62] The Court found that unfairness does not result from nonmutual collateral estoppel and that, in fact, such an estoppel

---

57 *Id.*

58 *Id.* "Litigants may also decide whether or not to appeal adverse decisions based on the governing law of issue preclusion." *Id.*

59 Cromwell v. Sac, 94 U.S. 351, 352-53 (1876) (illustrating the differences between claim preclusion and issue preclusion). Federal courts recognize that collateral estoppel is applicable to all cases they hear. Allen v. McCurry, 449 U.S. 90, 95 (1980). *See generally* Montana v. United States, 440 U.S. 147 (1979) ("Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction."). The acknowledgment of collateral estoppel in federal decisions considering issues decided by state courts promotes comity between state and federal courts. Younger v. Harris, 401 U.S. 37, 43-45 (1971). Furthermore, the Full Faith and Credit Clause states that the state court decisions shall have full faith and credit in every court "within the United States and its Territories and Possessions as they have by law or usage in the courts of such State." 28 U.S.C. § 1738 (2000); *Allen*, 449 U.S. at 95.

60 18 WRIGHT ET AL., *supra* note 6, § 4463. The general rule of mutuality stated that "the favorable preclusion effects of a judgment were available only to a person who would have been bound by any unfavorable preclusion effects." 18 *id.* at 677. *Triplett v. Lowell* established the need for mutuality of parties before a judgment would be determinative in a second action. 297 U.S. 638, 642 (1936). This rule stated that common law principles did not preclude relitigation of a claim against a different defendant. *Id.* at 644. This rule was supported by *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912), and the RESTATEMENT (FIRST), *supra* note 8, § 93. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 320-21 (1971). The *Triplett* court held that, unless mutuality is present, "neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Id.* (citing *Triplett*, 297 U.S. at 644).

61 402 U.S. 313.

62 *Id.* at 314-27. The Court rejected the idea that neither party could use a prior judgment as an estoppel against another party unless both parties were bound by the judgment since it would be unfair to allow a party to use a prior judgment when he would not have been bound to a decision against his interest. *Id.*

increases fairness and orderliness in the court system.[63] The Court reasoned that the goal of estoppel is to avoid relitigation of claims while maintaining fairness to the parties.[64] While the judicial system is concerned with the accurate resolution of cases, both fairly and expeditiously, these goals are not best accomplished through a mutuality requirement of issue preclusion.[65] Therefore, a person who was not a party to a previous litigation can estop a party from raising an issue decided in a previous case where the traditional elements of issue preclusion have been established.[66]

In *Parklane Hosiery v. Shore*,[67] the plaintiff used offensive collateral estoppel to estop a defendant from relitigating issues the defendant had previously litigated with another plaintiff and lost.[68] The Court recognized the difference between offensive and defensive use of issue preclusion and held that courts are given broad discretion in deciding whether to allow offensive collateral estoppel.[69] The Court promulgated the general rule that, when a plaintiff could have been easily joined or when application of offensive collateral estoppel would be unfair to a defendant, issue preclusion should not be applied.[70] While the Supreme

---

63 *Id.* at 325. If lack of mutuality exists, then the plaintiff would not be permitted to take advantage of an earlier finding. *Id.* A finding to the plaintiff's benefit in the first suit would not be binding against the defendant in a second suit because the defendant had no opportunity to contest the issue. *Id.* The finding against the plaintiff, on the other hand, would have been made after a full opportunity for the plaintiff to prove the matter that he urges the second time. *Id.* Under this rule, no unfairness results from nonmutual collateral estoppel. *Id.*

64 *Id.* at 328. The Court found that it was no longer tenable to allow a litigant more than one opportunity to have a full and fair litigation of an issue. *Id.* If a defendant, who has already presented a complete defense to a claim in a prior suit, is forced to litigate the same issue against a different plaintiff, judicial resources are wasted and the possibility of inconsistencies exists. *Id.* at 329.

65 *Id.* (citing Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 185 (1952)).

66 *See generally* 18 WRIGHT ET AL., *supra* note 6, § 4463 (stating that nonmutual issue preclusion is now permitted in federal courts and in most state courts).

67 439 U.S. 322 (1979).

68 *Id.* at 329. *Contra Blonder-Tongue*, 402 U.S. at 313 (involving defensive collateral estoppel where a plaintiff was estopped from asserting a claim that the plaintiff had previously asserted against a different defendant).

69 *Parklane*, 439 U.S. at 329.

70 *Id.* at 330. There are two policy reasons for treating defensive and offensive collateral estoppel differently. *Id.* at 329-32. First, the two uses of collateral estoppel create different results in terms of reserving judicial resources. *Id.* at 329. Defensive collateral estoppel precludes a plaintiff from relitigating the same issue by simply switching adversaries. *Id.* For a plaintiff who is aware of the doctrine of collateral estoppel, a strong incentive exists to join all potential defendants and reserve judicial resources. *Id.* at 329-30. Offensive collateral estoppel creates the opposite incentive since a plaintiff could rely on a prior

Court has decided how federal courts should address the problems of mutuality in collateral estoppel, it has not yet decided whether collateral estoppel applies to multiple independent grounds for a decision.

D. The Restatement Reevaluates Its Position

The Restatement of Judgments reviewed collateral estoppel both in the first and second editions.[71] The American Law Institute ("ALI") completely reversed its position on the proper procedure for multiple independent holdings and collateral estoppel between the 1942 edition and the 1982 edition.[72] According to the Restatement of Judgments section 68, comment n, when a judgment is based on alternative grounds, the "judgment is determinative on both grounds."[73] The Second Restatement, however, mandates that, when there are multiple independent holdings in the first decision, the judgment is not conclusive to either issue alone.[74]

The Second Restatement compares a judgment on multiple independent grounds to that of a nonessential determination.[75] One of the main reasons for this shift was that in 1977, when the Tentative Draft Number Four of the Second Restatement of Judgments was published, *Halpern v. Schwartz*[76] was the most recent decision on the question of issue preclusion and multiple independent grounds for a decision.[77] The

---

decision, but the defendant would not be bound by the judgment if the defendant wins. *Id.* at 330. This gives the plaintiff an incentive to take a "wait and see" attitude, thereby wasting judicial resources. *Id.* Secondly, offensive collateral estoppel may be unfair to a defendant who does not have an incentive to defend vigorously in a previous case and then is bound by the judgment in a second case. *Id.*

71 RESTATEMENT (FIRST), *supra* note 8; RESTATEMENT (SECOND), *supra* note 8. The Restatement is composed by the American Law Institute ("ALI").

72 *Compare* RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n, *with* RESTATEMENT (SECOND), *supra* note 8, § 20 cmt. e.

73 RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n. The Restatement illustrates that, if a defendant defends on two theories, each of which is determined and "found in favor of the defendant, *a judgment for the defendant is not based on one of the issues more than on the other.*" *Id.* (emphasis added).

74 RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i.

75 *Id.* "If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." *Id.*

76 426 F.2d 102 (2d Cir. 1970).

77 Lucas, *supra* note 25, at 707. The ALI was persuaded by the reasoning of the Second Circuit. *Id.* The ALI analogized the scenario of multiple independent grounds for a decision with those of a nonessential determination. RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tentative Draft No. 4, 1977); *see also* Lucas, *supra* note 25, at 707.

rationale behind the Second Restatement's position is that determinations in the alternative may not have been as carefully considered as a judgment based on one holding.[78] The second justification deals with the issue of appeal.[79] The losing party, who is entitled to take an appeal from both determinations, might be dissuaded from appealing because there is a likelihood that at least one of the determinations would be upheld, although the other determination would not even be analyzed by the appellate court.[80] The Second Restatement emphasizes that, "in the interest of predictability and simplicity," the result of nonpreclusion should be uniform.[81]

E. Halpern v. Schwartz*: The Decision that Changed Everything*

Traditionally, a decision resting on two independent grounds was precluded from relitigation on any one of the independent grounds for that decision.[82] In 1970, the Second Circuit held in *Halpern* that, when a

---

[78] RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i. The issue may not have been as rigorously considered because it may not have been necessary to the result and, therefore, has many of the same qualities as dicta. *Id.* The Restatement offers an illustration to more completely explain this rationale:

> 3. A brings an action against B for breach of contract and after trial without a jury, the court holds for B on the basis that (a) the contract is unenforceable because not in writing and (b) in any event B was induced to enter the agreement by A's fraud. A is barred from bringing a secion action on the same claim.
>
> 4. The facts are the same as in Illustration 3, but the trial court also holds that the action is premature because the time for B's performance has not yet arrived. A is not barred from bringing suit on the claim after that time has arrived.

Id. § 20 cmt. e, illus. 3, 4.

[79] *Id.* § 27 cmt. i.

[80] *Id.* See *infra* Part IV.B for an explanation of how a litigant's incentive to appeal is affected by issue preclusion.

[81] RESTATEMENT (SECOND), *supra* note 8, § 27. The Restatement offers two illustrations under comment i. *Id.* § 27 cmt. i. The first illustration involves *A* bringing an action against *B* to recover interest on a promissory note, but the principal is not yet due. *Id. B* alleged fraudulent inducement and that *A* gave him a binding release of interest obligations. *Id.* The court found that *B* was induced by *A*'s fraud and that *A* gave him a binding relation of obligation to pay interest. *Id.* Under the Second Restatement's view, if *B* does not appeal and *A* brings an action for the principal, when the note matures, if *B* brings up the defense of fraud, it must be relitigated. *Id.* The second illustration assumes the same facts; however, if *A* sues for another installment of interest before the principal is due, *B* is not liable for the interest because the determination of fraud from the previous case is conclusive. *Id.* The distinguishing factor is that, in the first action, the court determined liability of the interest due and fraud relevant to the recovery of the principal. *Id.*

[82] Lucas, *supra* note 25, at 703; *see* City of Covington v. First Nat'l Bank, 198 U.S. 100 (1905); Williams v. Ward, 556 F.2d 1143, 1154 (2d Cir. 1997); *In re* Westgate-California

judgment is supported by multiple independent grounds, none of the independent grounds would be precluded from future litigation on the basis of issue preclusion.[83] The trial court found for the Halperns on three grounds: (1) a removal of property with the intent to hinder or delay creditors, (2) a fraudulent transfer of property, and (3) a preferential property transfer.[84] The court noted the concern that the prior court may not have given rigorous consideration to the alternative ground and that the losing litigant would not have an incentive to appeal.[85] The Second Circuit held that the first judgment did not estop Mrs. Halpern's discharge claim because the previous findings were not necessary to the judgment.[86] The court also noted that, at that time, in addition to the Restatement of Judgments, *Moore's Federal Practice*, and a *Harvard Law Review* article, there were only three cases contrary to its

---

Corp., 642 F.2d 1174, 1176-77 (9th Cir. 1981); Winters v. Lavine, 473 F.2d 46, 66-67 (2d Cir. 1978); Irving Nat'l Bank v. Law, 10 F.2d 721, 724 (2d Cir. 1926).

83 426 F.2d 102, 106 (2d Cir. 1970). The first proceeding in *Halpern* involved involuntary bankruptcies against Evelyn and Joseph Halpern ("Halperns") by Chase Manhattan Bank ("Chase"). *Id.* at 103. Chase charged the Halperns with acts of bankruptcy under sections 3a(1) and 3a(2) of the Bankruptcy Act. *Id.* Section 3a(1) did not require proof of intent to defraud, while section 3a(2) required proof of intent to defraud. *Id.*; *see also* Lucas, *supra* note 25, at 704 n.22. The trial court found that an act of bankruptcy took place on three statutory grounds: first, it was a removal of property with the intent to hinder or delay creditors under section 3a(1); second, it was a transfer of property under section 3a(1), fraudulent as to creditors; and third, it was a preferential transfer of property under section 3a(2). *Halpern*, 426 F.2d at 103. The court of appeals affirmed. *Id.* Four years later, Mrs. Halpern filed for a discharge. *Id.* at 103-04. The district court granted Chase's motion for summary judgment, and Mrs. Halpern appealed. *Id.* The court of appeals reversed, holding that the first judgment did not estop her from denying intent in the discharge proceeding because that previous finding was not necessary to the judgment. *Id.* at 104.

84 *Halpern*, 426 F.2d at 103.

85 *Id.* at 105-06. The court reasoned that, if the previous court was sure as to one of the independent holdings, then the lower court may not have felt "constrained to give rigorous consideration to the alternative grounds." *Id.* at 105; *see also* Note, *Developments in the Law Res Judicata*, 65 HARV. L. REV. 818, 845 (1952) [hereinafter *Developments in the Law*] (stating that there is a danger that, if the trier of fact recognizes that the verdict can rest on one of multiple findings, adequate thought will not be given to alternative holdings). The court felt that vigorous review of an error as to one ground would not occur since more than one ground capable of supporting the judgment existed. *Halpern*, 426 F.2d at 105-06. Therefore, the losing litigant would have little motivation to appeal; even if the claim of error was sustained, the decision would still be affirmed on the other independent ground for the previous holding. *Id.* The court did mention the particularity in bankruptcy decisions, stating that debtors are particularly "often handicapped in financing litigation in the predischarge stages of the proceeding." *Id.* at 106. A rule of this nature could ultimately encourage more, rather than less, litigation because parties would take cautionary appeals in fear of their possible effect on "future indeterminate collateral litigation"-litigation that neither party is certain will even occur. *Id.*

86 *Halpern*, 426 F.2d at 104.

decision on issue preclusion.[87] The court distinguished these sources through two criticisms: (1) the seemingly contrary sources did not justify the opinion each asserted, and (2) these contrary authorities stated that a judgment based on alternative grounds either "precludes necessary issues decided in each or precludes no issues necessary to only one ground," a statement that the Second Circuit regarded as self-contradictory.[88] While *Halpern* established one avenue to reconcile the problem of issue preclusion when applied to multiple independent holdings, the federal courts have not all adopted the same methodology.[89]

III. NECESSARY TO THE DECISION OR NOT: CONFLICTING APPELLATE APPLICATIONS OF ISSUE PRECLUSION TO MULTIPLE INDEPENDENT HOLDINGS

Halpern v. Schwartz is one of the leading cases in the federal circuit split regarding the preclusive effect of multiple independent holdings. This Part explains the three main views in the federal circuits, which have created a split in authority. The first view posits that, because each of the holdings could have stood on its own, each of the holdings is "necessary" to the judgment, and each should be precluded in future

---

87 *Id.* at 107. The three cases were *Florida Central Railroad Co. v. Schutte*, 103 U.S. (13 Otto) 118 (1881), *Irving National Bank v. Law*, 10 F.2d 721 (2d Cir. 1926), and *First National Bank v. City of Covington*, 129 F.2d 792 (C.C.E.D. Ky. 1903). *Id.* The Second Circuit distinguished *Schutte* by stating that the Supreme Court did not give the state court judgment the conclusive effect of collateral estoppel but afforded the decision "customary respect" since the determination was based on the state's highest court as an interpretation of state law. *Id.* at 107 n.4. The *Halpern* court distinguished *Irving* by stating that the prior judgment was decided on one legal theory requiring the decision of several facts, and the defendant in the second litigation tried to challenge the conclusiveness of the facts by arguing that the judgment could have been raised on a different legal theory. *Id.* at 107. *Irving* was subject to a meaningful appeal because the holding must have received diligent consideration because "the finding as to that fact was essential to the only legal theory actually utilized in the prior judgment." *Id.* Finally, the court distinguished *First National Bank* on the basis that the court of appeals affirmed it on the grounds of a valid contract and did not reach the alternative question of taxes raised in the district court. *Id.* Since the appellate court based its decision on a single ground, its judgment was conclusive as to the facts necessary to that ground. *Id.*

88 *Id.* at 107-08; RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n; 1B J. MOORE, FEDERAL PRACTICE ¶ 0.443[5], at 3921-23 (1961); Austin Wakerman Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 11-12 (1942). To support its contentions, the Second Circuit also cited *Developments in the Law*, *supra* note 85, at 845. *Halpern*, 426 F.2d at 107-08.

89 *See infra* Part III.

litigation.[90] Second, some of the courts follow the Second Restatement view that, since there are multiple independent determinations supporting the holding, each cannot be "necessary" to the judgment, and these holdings are not precluded in future litigation.[91] Finally, the Sixth Circuit follows the view that the primary issue in the prior litigation should be precluded but that the secondary issue should not.[92]

A. *An Issue Is Necessary to the Outcome of the Prior Proceeding If It Was One of Multiple Independent Grounds for a Decision*

1. *In re Westgate-California Corp.*

In *In re Westgate-California Corp.*,[93] the Ninth Circuit held that, when the prior court rests its judgment on two or more independent grounds, each determination is necessary to support the judgment.[94] Westgate-California Corporation's ("Westgate") receiver brought an action against Smith, a Westgate employee, for furniture and a penthouse occupied by her.[95] The magistrate found that Smith had engaged in conversion, fraud, breach of fiduciary duty, and falsification of records and that all the property in question belonged to Westgate.[96] In the second suit, Westgate filed a motion for summary judgment in bankruptcy court to place all of Smith's claims in a lower class, apart from those claimants who did not participate in the Westgate fraud, and Smith appealed that

---

90 *See infra* Part III.A, C, D. The Second and Seventh Circuits are explained under separate headings to illustrate the uncertainty in the Seventh Circuit and the limited application of the *Halpern* decision in the Second Circuit. *See infra* Part III.C, D.

91 *See infra* Part III.B, D.

92 *See infra* Part III.E.

93 642 F.2d 1174 (9th Cir. 1981).

94 *Id.* at 1176. When the "court rests its judgment alternatively upon two or more grounds, the judgment concludes each adjudicated issue that is necessary to support any of the grounds upon which the judgment is based." *Id.* (citing 1B MOORE, *supra* note 88, ¶ 0.443[5]).

95 *Id.* Two actions, commenced by Westgate-California Corporation ("Westgate") regarding the ownership of furniture and an unlawful detainer to recover possession of the penthouse where Smith lived, were consolidated and heard before a U.S. magistrate. *Id.* Smith acted as the interior decorator for Westgate, which was controlled at the time by her husband. *Id.* at 1175. She lived in the penthouse of the Westgate Plaza Hotel without paying rent or signing a rental agreement until her husband lost control of Westgate, and then they signed a lease. *Id.*

96 *Id.* at 1176. The court ordered Smith to pay the value of the furniture, pay the rent due under the lease, and vacate the apartment. *Id.* Smith appealed the summary judgment order entered in the Chapter X reorganization of Westgate. *Id.* at 1175. The Ninth Circuit affirmed those findings, which also had been adopted by the district court. *Id.* at 1176.

fraud was a genuine issue of material fact as to her claim.[97] Smith argued that, since the magistrate's findings were based on alternative grounds, collateral estoppel did not preclude her from defending the issue of fraud in the bankruptcy proceeding.[98]

On appeal, the Ninth Circuit adopted the definition of collateral estoppel provided by *Moore's Federal Practice*.[99] No contention existed as to whether the parties were the same or in privity with those of the first litigation.[100] The Ninth Circuit decided that the magistrate's decision depended on a determination of whether Smith acted inequitably regarding ownership of furniture on Westgate property and the unlawful detainer of the penthouse.[101] The court of appeals found that the magistrate judge must have determined the issue of fraud in ruling on the validity of the lease.[102] The court reasoned that Smith's argument seeking relitigation of the fraud issue was contrary to the established rule that, when a judgment is based alternatively on two or more grounds, each ground is necessary to the judgment.[103]

---

97 *Id.* The trustees of Westgate filed a motion for summary judgment in the bankruptcy court to place Smith's claims into a lower priority class, for claims of "'insiders and other parties who participated in the Westgate fraud,'" which was granted by the bankruptcy court on the claim for furniture. *Id.* The bankruptcy judge initially ordered subordination of all of the appellant's claims. *Id.* The district court, on appeal, ordered subordination of all claims. *Id.*

98 *Id.* at 1176-77. The Ninth Circuit did not explicitly state the two alternative grounds on which the magistrate based his determination that Smith was unlawfully possessing the penthouse.

99 *Id.* at 1176; *see also* 1B MOORE, *supra* note 88, ¶ 0.441[2].

> Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, and demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended.

1B MOORE, *supra* note 88, ¶ 0.441(2). See *supra* text accompanying notes 24-26 for an explanation of the elements of issue preclusion.

100 *Westgate*, 642 F.2d at 1176. Smith was the party being precluded from relitigating the issue of fraud, and the first action had been between California Little America Corporation, Westgate's receiver, and Smith. *Id.*

101 *Id.* at 1175-76.

102 *Id.* at 1176. To resolve the unlawful detainer proceeding regarding the penthouse, the magistrate had to determine whether Smith's lease was valid. *Id.* Therefore, fraud in procuring the lease was material to a determination of whether the penthouse was obtained lawfully and whether an unlawful detention proceeding would succeed. *Id.*

103 *Id.*

2. *Yamaha Corp. of America v. United States*

Like the Ninth Circuit, the D.C. Circuit, in *Yamaha Corp. of America v. United States*,[104] held that a judgment based alternatively on two independent determinations is an effective adjudication as to both grounds, and, therefore, both issues were precluded from relitigation.[105] In the first suit, Yamaha Corporation of America ("Yamaha") sued ABC International Traders Corporation ("ABC") for trademark infringement and unfair competition under the Tariff Act, 19 U.S.C. § 526.[106] The district court held: first, that Yamaha could not sue under § 526 because protection was not available to American subsidiaries of foreign corporations under the U.S. Customs Regulation of those actions and, second, that § 526 itself excludes Yamaha's claim.[107]

Yamaha then filed a subsequent suit against the United States of America, the Secretary of the Treasury, and the Commissioner of Customs (collectively the "U.S.") seeking two declaratory judgments based on the Tariff Act.[108] The district court found for the U.S., holding

---

104 961 F.2d 245 (D.C. Cir. 1992).

105 *Id.* at 255 (citing MOORE, LUCAS, & CURRIER'S MOORE'S FEDERAL PRACTICE ¶ 0.441[2], at 729 (1988) [hereinafter CURRIER]).

106 *Id.* at 248.

107 *Id.* at 249-50. This case was appealed to the Ninth Circuit. *Id.* at 251. The Ninth Circuit affirmed the lower court's summary judgment determination for ABC International Traders Corporation ("ABC") by stating that the district court "correctly granted summary judgment in favor of ABC on Yamaha's claims under the Tariff Act, 19 U.S.C. § 526, . . . [and] [w]e affirm the district court's determination that the regulation leaves no room for Yamaha's Tariff Act claim." *Id.* The D.C. Circuit interpreted this to mean that Yamaha's claim of independent rights under § 526 was "necessarily rejected by the Ninth Circuit." *Id.* at 256.

108 *Id.* at 251-52. Yamaha's complaint requested that Customs should issue an exclusion order prohibiting importation of goods manufactured by Yamaha-Japan and, second, that Yamaha was entitled to a declaratory judgment stating that Customs regulation 19 C.F.R. § 133.21(c)(2), was invalid. *Id.* Yamaha offered five reasons for invalidating 19 C.F.R. § 133.21(c)(2):

> 1) it exceeds the authority granted to the Secretary, for he has power to promulgate only those regulations consistent with law;
>
> 2) it discriminates against Yamaha-America by denying it rights under the Lanham Act and the Tariff Act to which other domestic corporations are entitled, merely on the basis of its Japanese ownership;
>
> 3) it deprives Yamaha-America of its constitutional rights to due process and equal protection by denying it the protections of the Tariff Act and the Lanham Act;
>
> 4) it directly conflicts with Article 2 of the Paris Convention for the Protection of Industrial Property which provides that all members will

that Yamaha was precluded from relitigating these issues because the district court determined them in Yamaha's prior case against ABC.[109]

The D.C. Circuit fully examined the doctrine of issue preclusion and the precedent available from both the Supreme Court and its own courts.[110] The court reasoned that preclusion should not "work a basic unfairness" to the party bound by the first decision.[111] Since the dispute in this case fell under the "actually decided" and "necessary to the judgment" prongs of the issue preclusion analysis, the court analyzed the preclusive effect almost entirely through previous decisions from the D.C. Circuit.[112] The D.C. Circuit decided that if a decision was based on

---

> accord to other member owners of trademarks the same rights as enjoyed by domestic citizens;
> 5) it directly conflicts with Article X of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, which provides for national treatment of corporations owned by the other party.

Id. at 252.

[109] *Id.*

[110] *Id.* at 254. The court cited *Kremer v. Chemical Construction Corp.*, 465 U.S. 461, 467 n.6 (1982), to justify the application of issue preclusion. *Id.* (stating "it fulfills 'the purpose for which civil courts had been established, the conclusive resolution of disputes within their jurisdiction'"). *Id.* The court also used *Allen v. McCurry*, 449 U.S. 90, 94 (1980), for the proposition that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.* The standards for determining preclusive effect of a prior holding are cited from a previous D.C. Circuit case, *McLaughlin v. Bradlee*, 803 F.2d 1197, 1201 (1986). *Id.* "First, the same issue 'must have been actually litigated, that is, contested by the parties and submitted for determination by the court.'" *McLaughlin*, 803 F.2d at 1201 (citing Otherson v. Dep't. of Justice, 711 F.2d 267, 273 (D.C. Cir. 1983)). "Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction." *Id.* at 1201-02 (citing Montana v. United States, 440 U.S. 147, 153 (1979)). The court concluded the analysis by citing the Second Restatement, section 37: "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." *Yamaha*, 961 F.2d at 254.

[111] *Yamaha*, 961 F.2d at 254. The court cites *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979), and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 333 (1971), as well as *Otherson*, 711 F.2d at 273 to explain the injustice exception. *Id.* at 254. The court mentioned that, if the losing party clearly lacked the incentive to litigate the point in the first trial, but the stakes were much higher in the second trial, it would be unfair to preclude the losing party from relitigating the issue. *Id.* See *supra* Part II.C for an explanation of the Court's decisions in *Parklane* and *Blonder-Tongue*.

[112] *Yamaha*, 961 F.2d at 254-55; *see* Am. Iron & Steel Inst. v. EPA, 886 F.2d 390, 397 (D.C. Cir. 1989) (explaining that the prior judgment matters, not the court's opinion, and that, even in the absence of an opinion, a judgment bars the relitigation of an issue necessary to the judgment). Once an issue is raised and determined, the entire issue is precluded and not just the argument in support of it. *Yamaha*, 961 F.2d at 254-55 (citing Sec. Indus. Ass'n

multiple independent grounds, each of the grounds was precluded from relitigation.[113] The court found that the issue and the multiple grounds supporting that decision were already decided and necessary to a previous judgment and, therefore, could not be relitigated in the case at bar.[114]

B. *An Issue Cannot Be Necessary to the Outcome If It Is One of Multiple Independent Grounds for a Decision*

The view adopted by the Ninth and D.C. Circuits is among the first of three differing views. The Fourth and Tenth Circuits take the opposite view, holding that when multiple independent holdings are evaluated under issue preclusion, none of the determinations are precluded.[115]

1. *Ritter v. Mount St. Mary's College*

The Fourth Circuit adopted the Second Restatement view in *Ritter v. Mount St. Mary's College*.[116] The court in the first suit, a Title VII action, determined that Popenfus, the person to whom Ritter was comparing her salary, was "clearly more qualified" for tenure than Ritter and that

---

v. Bd. of Governors, 900 F.2d 360, 364 (D.C. Cir. 1990)). The court also cited the RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). *Id.* at 254. Yamaha argued that the district court did not decide the validity of § 526. *Id.* The D.C. Circuit found that the first district court based its conclusion that Yamaha had no enforceable rights under § 526 on two independent grounds: (1) the government's interpretation of the regulation that was reasonable under the Supreme Court's review and (2) the text of the regulation itself. *Id.* at 253.

113 *Yamaha*, 961 F.2d at 253. The court held that the issue was whether or not Yamaha had *any* rights under § 526, "inside or outside of the Regulation," that were violated by the importation of genuine Yamaha goods. *Id.* The court determined that this was identical to the issue now being challenged by Yamaha. *Id.* Yamaha, defeated by the court's interpretation of the doctrine of collateral estoppel and multiple independent holdings, then argued that the Ninth Circuit opinion relied exclusively on § 526. *Id.* The widely accepted view is that, "when an appellate court affirms on only one of several grounds that served as alternative bases for the lower court decision, collateral estoppel attaches only to the issue expressly considered by the appellate court." *Id.* (citing CURRIER, *supra* note 105, ¶ 0.443 [5.–2], at 790 n.2); *see* Stebbins v. Keystone Ins. Co., 481 F.2d 501 (D.C. Cir. 1973); Martin v. Henley, 452 F.2d 295 (9th Cir. 1971). However, the D.C. Circuit found that the Ninth Circuit had to implicitly reject Yamaha's argument that it had private rights under § 526 to reach its conclusion. *Yamaha*, 961 F.2d at 255. See *supra* note 107 for the Ninth Circuit's statement.

114 *Yamaha*, 961 F.2d at 257.

115 See *infra* Part III.B.1, 2 for an explanation of the Fourth and Tenth Circuit holdings.

116 814 F.2d 986 (4th Cir. 1987).

Ritter was not qualified for tenure.[117] In *Ritter*, collateral estoppel was raised in the context of an Equal Pay Act ("EPA") claim and an Age Discrimination in Employment Act ("ADEA") claim.[118]

The Fourth Circuit held that the determinations made in Ritter's Title VII trial precluded Ritter from litigating her ADEA and EPA claims.[119] The court reasoned that to reject collateral estoppel because the trial court only specifically mentioned one element of the Title VII claim would "constitute an abandonment of serious judicial reasoning and decision-making in exchange for the wooden application of judge-made rules designed to protect litigants."[120] The policy behind collateral estoppel is to ensure that dicta does not estop later litigation since a litigant could essentially be denied an opportunity to present his case to

---

[117] *Id.* at 993. The second suit was an Equal Pay Act ("EPA") claim and an Age Discrimination in Employment Act ("ADEA") claim. *Id.* at 989. The second district court found that the Title VII holding precluded Ritter from establishing an ADEA claim because the issues needed to be proven were identical–whether Ritter was qualified for tenure. *Id.* at 990.

[118] *Id.* at 993. The EPA provides, in part:

> (d) Prohibition of sex discrimination
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except* where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1) (2000) (emphasis added). In an EPA claim, once a plaintiff establishes a prima facie case of an EPA violation, the burden then shifts to the employer to prove that the pay differential is justified by one of the express exemptions listed in the statute, a reason other than gender. *Ritter*, 814 F.2d at 993. Previous cases mention that justifications for pay differentials include job status, salary, and any "factor other than sex." *Id.*

[119] *Ritter*, 814 F.2d at 992. Under Ritter's ADEA claim, she would have had to prove: (1) she was a member of a protected class; (2) *she was qualified for tenure;* (3) despite her qualifications, she was rejected; and (4) after her rejection the position remained open and the school continued to seek or accept applications. *Id.*; *see* 29 U.S.C. § 206(d). In Ritter's Title VII claim, the court found that she was not qualified for tenure. *Ritter*, 814 F.2d at 992. This finding estopped Ritter from establishing a prima facie ADEA claim because she could not satisfy the second requirement; the first court had already determined that she was not qualified for tenure. *Id.* Summary judgment was properly entered against Ritter on the EPA claim because the Title VII court's finding that Ritter was less qualified than Popenfus and that Popenfus was more qualified than Ritter was a sufficient factor, other than sex, for pay discrepancy. *Id.* at 993-94.

[120] *Ritter*, 814 F.2d at 994.

the factfinder.[121] The common concerns with precluding corollary issues, such as protecting a litigant's right to a full and fair opportunity to litigate his claims, were not concerns in this case since Ritter had entertained the issue of qualification for tenure in the first suit.[122]

2. *Turney v. O'Toole*: The Tenth Circuit Dismisses Issue Preclusion with a Footnote

In *Turney v. O'Toole*,[123] the Tenth Circuit included a footnote analyzing issue preclusion and multiple independent holdings.[124] Turney argued that a writ of habeas corpus estopped defendants from alleging that Turney's confinement was unlawful.[125] The petition for the writ of habeas corpus gave two reasons to support the holding that Turney's confinement was unlawful: first, that the oral detention order was invalid and, second, that he was being held in an improper ward.[126] The district court concluded that there was no legal cause for holding him or continuing to hold him, yet the order granting the writ gave no reason why Turney's confinement was unlawful.[127] The court adopted the Second Restatement of Judgments section 27, comments e through i, holding that, since either reason would have been a sufficient ground for granting the writ, both issues were "actually and necessarily decided."[128]

---

121 *Id.* at 993-94. The litigant may not have considered the secondary issue, thereby not giving it full attention and energy. *Id.* at 994.

122 *Id.* The district court noted that the Title VII claim consisted entirely of Ritter attacking the qualifications of Popenfus. *Id.* Furthermore, it was the same court to grant summary judgment on the EPA claim that heard the Title VII claim, thereby ensuring that Ritter was afforded a full hearing before final judgment of her EPA claim. *Id.*

123 898 F.2d 1470 (10th Cir. 1990). Turney was a seventeen-year old, suicidal juvenile who was transferred from a private hospital, via oral order of a district court judge, to be placed in protective custody in Central State Griffin Memorial Hospital ("Central State") where O'Toole was the superintendent. *Id.* at 1471-72. When he was not removed from the adult maximum security unit, Central State's patient advocate secured a writ of habeas corpus, and Turney was released into the custody of his parents. *Id.* at 1472.

124 *See id.* at 1472 n.1.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* The court also mentioned, however, that the writ could not estop defendant's argument because the issues in the writ were not actually litigated or decided. *Id.* The order only stated that there was "no legal cause . . . for such holding and restraint or continuation thereof." *Id.*

C. *The Second Circuit*–Halpern, Williams, *and* Winters

As discussed in Part II, *Halpern v. Schwartz* influenced not only the Second Restatement's view on issue preclusion's effect on multiple independent holdings but also fueled changes in the Second Circuit.[129] The *Halpern* court held that, when a judgment rests on alternative grounds, none of the holdings are precluded from relitigation since none were "necessary to the judgment."[130] *Halpern* was, however, limited by its own language and later by *Williams v. Ward*[131] and *Winters v. Lavine*.[132]

In *Williams v. Ward,* the defendant, Williams, filed two complaints.[133] The first complaint stemmed from the denial of Williams' parole.[134] The second complaint was filed in another district court asking for an injunction against the denial of parole and requesting that the parole board afford him a new hearing.[135] The district court held that the petition was denied on two grounds: first, Williams failed to exhaust state remedies and, second, the denial of parole was based on facially reasonable grounds and not subject to review by a federal court.[136] The Second Circuit found that these were not multiple independent holdings but rather alternative procedural and substantive grounds for the

---

129 *See supra* Part II.E. *See generally* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i (comparing comment i with the RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n). See *supra* Part II.D, E for an explanation of the Restatement's changing view and the *Halpern* decision.

130 Halpern v. Schwartz, 426 F.2d 102, 106-08 (2d Cir. 1970).

131 556 F.2d 1143 (2d Cir. 1977).

132 574 F.2d 46 (2d Cir. 1978).

133 *Williams*, 556 F.2d at 1153.

134 *Id.*

135 *Id.* The claims in *Williams* arose from three letters in Williams' file, which stated that he was mentally unstable; Williams worried that these could prejudice him when seeking parole. *Id.* at 1145-47. Williams argued that by denying him the right to see the letters and argue their content, he was being denied his due process rights and the right to be heard. *Id.* at 1147-48. The district court for the second complaint treated this petition as a habeas corpus request since Williams was attempting to obtain a release from confinement. *Id.* at 1153.

136 *Id.*; United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925, 926 (2d Cir. 1974) ("[A] denial of parole, based on a facially reasonable ground, is not subject to review by a federal court."). The court began its analysis by stating that res judicata did in fact apply to civil rights actions under § 1983. *Williams*, 556 F.2d at 1153. Further, the court resolved any doubt that if the second action came to final judgment first, then it would bar the former underlying claims if the claims were the same. *Id.* at 1154. This rule was based on the RESTATEMENT (FIRST), *supra* note 8, § 43. *Id.* This rule seems harsh if the defendant, rather than the plaintiff, was responsible for the slow progress of the first action; however, this has been resolved as the risk plaintiffs take when choosing to pursue separate actions instead of amending the first action to encompass both claims. *Id.*

decision.[137] Quoting the Second Restatement of Judgments section 49, comment c, the court stated:

> where the judgment is based upon two alternative grounds, one on the merits and the other not on the merits, there is a decision on both grounds although either alone would have been sufficient to support the judgment, and a subsequent action based upon the same cause of action is ordinarily barred.[138]

The *Williams'* court was not concerned that the issue might not have been afforded careful deliberation at the district level because the district court had fully briefed and discussed the substantive issue.[139] The Second Circuit, noting the uncertainty of the rule regarding the preclusive effect of independent holdings, reversed the judgment on the merits instead of reversing on the basis of issue preclusion.[140] The *Williams'* court explained that *Halpern* was not contrary to its decision because Williams was pursuing two actions simultaneously, and he could have anticipated potential preclusive effects from the earlier judgment but chose not to appeal the second court's determination.[141] Therefore, it was equitable to follow the proscribed rule.[142]

Winters v. Lavine limits *Halpern* by holding that the Second Circuit only refused to apply issue preclusion to multiple independent holdings in "certain narrow circumstances."[143] Winters, a Christian Scientist, requested that the New York Medicaid program pay for the medical treatment she received from a Christian Science nurse.[144] In Winters'

---

137 *Williams*, 556 F.2d at 1154. The procedural decision was that, since the defendant did not exhaust all of the state remedies, the case was not procedurally ripe for the federal system. *Id.* at 1153. The substantive decision was that the denial of parole was based on a facially reasonable ground and was not the appropriate subject matter for the federal courts. *Id.* at 1154.

138 *Id.* (quoting RESTATEMENT (SECOND), *supra* note 8, § 49 cmt. c).

139 *Id.* at 1155.

140 *Id.* at 1154.

141 *Id.*

142 *Id.*

143 Winters v. Lavine, 574 F.2d 46, 67 (2d Cir. 1978).

144 *Id.* at 50. Winters did not receive, nor solicit, traditional medical services due to her religion. *Id.* Instead, she sought the services provided by Christian Science practitioners and nurses. *Id.* After Winters appealed the denial of services, the case went to the Second Circuit for a determination of whether Winters' claims were barred by res judicata. *See id.* at 49-54. When Winters' request for payment was denied by the New York City Department of Social Services ("City Department"), she appealed to the New York State

first attempt to receive payment, the New York Appellate Division denied her request on two grounds.[145] First, the Christian Science nurse was not a registered nurse, and, second, Winters did not demonstrate that she was entitled to payment under a New York social services law since she did not have an adequate record of her illness or the treatment she received.[146]

The Second Circuit held that Winters' claim had already been decided by the New York Appellate Division.[147] The court further explained that the doctrine of issue preclusion was not affected by a decision based on alternative grounds.[148] The court found that there was no indication in this case that either issue was unnecessary.[149] To distinguish *Halpern*, the court stated that, in "certain narrow circumstances," the Second Circuit has refused to apply issue preclusion to multiple independent holdings; however, even in the Second Circuit, the rule to preclude multiple independent holdings when the elements of issue preclusion are met has continued viability in circumstances unlike *Halpern*.[150]

D. *Uncertainty in the Seventh Circuit*

The Seventh Circuit has addressed the effect of issue preclusion on multiple independent holdings twice and has held that these determinations are both necessary to the judgment and unnecessary to

---

Department of Social Services. *Id.* at 50. After she did not appear for that hearing, the judgment of the City Department was confirmed. *Id.* Then Winters sought review with the New York State Supreme Court, which was transferred to the Appellate Division, which affirmed the State Department of Social Service's decision. *Id.* at 51.

145 *Id.*

146 *Id.* From this decision, Winters unsuccessfully appealed to the New York Court of Appeals and the United States Supreme Court because she lacked jurisdiction in both courts. *Id.* After making three other requests to the Department of Social Services for payment under Medicaid, which were denied, Winters brought this appeal to the Second Circuit. *Id.* at 51-53.

147 *Id.* at 61.

148 *Id.* at 66.

149 *Id.* at 66-67.

150 *Id.* at 67. The court justified the decision in *Halpern* by limiting it to the bankruptcy realm. *Id.* Further, the court noted that *Halpern* suggested not extending its ruling without careful case-by-case evaluation outside bankruptcy cases. *Id.* Therefore, *Halpern* is to be read as an exception to the long-established rule in the Second Circuit. *Id.* A decision is "necessary" when based on alternative grounds for collateral estoppel purposes. Kessler v. Armstrong Cork Co., 158 F. 744 (2d. Cir. 1907).

the judgment.[151] In *Magnus Electronics, Inc. v. La Republica Argentina*,[152] the basic dispute was between Magnus Electronics, Inc. ("Magnus") and the Argentine Republic for damages resulting from what Magnus believed was conversion of its goods.[153] The district court dismissed Magnus' complaint on the basis of res judicata and lack of subject matter jurisdiction.[154] This decision was affirmed by the Seventh Circuit under res judicata principles.[155]

Magnus asserted that it should not be precluded from relitigating the question of subject matter jurisdiction because the district court gave two independently sufficient reasons for dismissing the first suit: lack of personal jurisdiction over Argentina and lack of subject matter jurisdiction.[156] The court summarized Magnus' argument as the following: neither lack of personal jurisdiction nor lack of subject matter

---

[151] See *infra* text accompanying notes 153-69 for an analysis of the two conflicting decisions in the Seventh Circuit.

[152] 830 F.2d 1396 (7th Cir. 1987).

[153] *Id.* at 1397.

[154] *Id.* at 1397, 1400.

[155] *Id.* at 1397. There were three different suits filed by Magnus in the course of this dispute. *Id.* at 1398-99. The first suit was between Magnus and Aerolineas Argentinas ("AA") for AA's breach of contract. *Id.* at 1389. This complaint was dismissed because the two-year statute of limitations, as established in the Warsaw Convention, had expired. *Id.* The second suit was against La Republica Argentina, alleging that Argentina fraudulently converted the goods for the benefit of the Argentine military. *Id.* The court dismissed this suit for lack of personal jurisdiction because Magnus improperly served Argentina under the Foreign Sovereign Immunities Act. *Id.* The court further held that Magnus' complaint failed to allege subject matter jurisdiction under the Foreign Sovereign Immunities Act. *Id.* After a discussion with the court regarding the dismissal and potential remedies, Magnus filed the suit cited above against Argentina, again alleging conversion, and more specifically explaining the basis for jurisdiction. *Id.* at 1399. The court explained that claim preclusion applied to a final judgment on the merits and precluded the same parties or their privies from relitigating the same issue or any other matter that might have been offered. *Id.* at 1400. Since Magnus in both cases claimed that Argentina wrongfully converted its generators and the parties were the same in both suits, res judicata operates as a bar to the litigation of this suit. *Id.* The court further noted that res judicata does extend to issues of subject matter jurisdiction. *Id.* If the problem is that the court before which the case was brought is not a court of competent jurisdiction, then the parties, or the court, may correct that error by bringing the case before a competent tribunal. *Id.* However, this is not what Magnus chose to do. *Id.* Magnus did not file a motion to amend the pleadings under Federal Rule of Civil Procedure ("FRCP") 15(a), to appeal the judgment, or even to have the judgment reopened under FRCP 59 or 60. *Id.* at 1402. Instead, Magnus chose to refile in the same court, with the same theory of damages, and against the same party. *Id.* at 1400-01.

[156] *Id.* at 1402. The court's abbreviated rule of issue preclusion barred relitigation of issues that were actually litigated and determined in the first proceeding and that were also necessary to the judgment in that action. *Id.*

jurisdiction was necessary to the judgment since each was independently sufficient for the court to reach its decision or to dismiss the claim.[157] Magnus cited to *Halpern* to support its claim.[158] The court stated that the rule from *Halpern* had been limited by the Second Circuit: "An alternative ground upon which a decision is based should be regarded as 'necessary' for purposes of determining whether the plaintiff is precluded by the principles of res judicata or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds."[159] Thus, the court rejected Magnus' claims on both res judicata and collateral estoppel grounds.[160]

In *Peabody Coal Co. v. Spese*,[161] the Seventh Circuit held that the general principle of issue preclusion states that alternative independent holdings are not conclusive in substantive litigation to either issue alone.[162] Spese's first claim for benefits under the Black Lung Benefit Act was denied since his medical examination did not show that he had pneumoconiosis.[163] Spese filed a second claim on December 18, 1981; however, this application was denied because a second round of medical

---

157 *Id.*

158 *Id.*

159 *Id.* (citing Winters v. Lavine, 574 F.2d 46, 67 (2d Cir. 1978); Williams v. Ward, 556 F.2d 1133, 1154 (2d Cir. 1977)). The court further stated that no circuit had adopted the unqualified rule as stated by *Magnus* and, therefore, the Seventh Circuit would not. *Id.*

160 *Id.* at 1400-03. The Seventh Circuit held that no circuit has adopted the "unqualified rule" asserted by *Magnus* as stated in *Halpern*. *Id.* at 1402. The court stated that *Magnus* gave the court no reason to not apply the general rule as modified by the Second Circuit decisions following *Halpern*. *Id.* See *supra* Part III.C for an explanation of the Second Circuit's limited view on issue preclusion and multiple independent holdings.

161 117 F.3d 1001 (7th Cir. 1997).

162 *Id.* at 1008 (citing Lisa Lee Mines v. Dir., Office of Workers' Comp. Programs, U.S. Dep't. of Labor, 86 F.3d 1358, 1363 (4th Cir. 1996); RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i). This case involved a coal miner's quest to obtain benefits under the Black Lung Benefits Act ("Act"). *Id.* at 1003. When a coal miner seeks benefits under the Act, it is common for the applicant to file multiple applications in the event that the initial application is denied. *Id.*; *see also* Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2000). Spese retired in February of 1976 from Peabody Coal, and, two months later, he filed his first claim for black lung benefits. *Spese*, 117 F.3d at 1003. Spese underwent a battery of tests as part of the application, including a physical examination, a chest x-ray, and a pulmonary function examination. *Id.* His first claim was denied under the Department of Labor's ("DOL") criteria for evaluating black lung claims. *Id.*

163 *Spese*, 117 F.3d at 1003; *see also* 30 U.S.C. §§ 901-945. Pneumocniosis is "any chronic lung disease ... caused by the inhalation of particles of coal." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1491 (2d ed. 1987). Spese was informed that he would have sixty days to submit additional evidence or request a hearing and one year to submit proof of a changed condition, but he did neither. *Spese*, 117 F.3d at 1003.

tests showed no signs of pneumoconiosis.[164] The Seventh Circuit held that issue preclusion bars relitigation of issues between the same parties when the issues were actually litigated and necessary to the decision of the earlier tribunal, including administrative agencies.[165] The Seventh Circuit noted that a claimant who loses on three possible alternate

---

[164] *Spese*, 117 F.3d at 1003-04. This second claim was filed after the permanent Black Lung regulations were in effect. *Id.* at 1003. The DOL evaluated his claim under 20 C.F.R. § 718. *Id.* The criteria to receive benefits included proving: (1) that the claimant is a miner, (2) that he has pneumoconiosis, (3) that his pneumoconiosis arose at least in part out of coal mine employment, and (4) that he is totally disabled as a result of pneumoconiosis. *Id.* at 1004. After the second denial, Spese requested a formal hearing before an administrative law judge ("ALJ"), which was held four years later. *Id.* Prior to this hearing, a third chest x-ray revealed pneumoconiosis. *Id.* Peabody asked that the record be kept open so that the ALJ could do its own interpretation of the x-ray. *Id.* The record was kept open, but Peabody never offered supplemental evidence to refute the 1985 x-ray. *Id.* The ALJ found in favor of Spese. *Id.* Through an interpretation of 20 C.F.R. § 725.309(c), the ALJ determined that Spese's 1976 claim should be merged into the 1981 claim. *Id.* This meant that Spese would receive his benefits beginning at an earlier date and that it would entitle him to have the whole record reviewed under the more lenient criteria of Part 727, the DOL criteria, since the first claim was filed prior to 1978. *Id.* Further, the ALJ concluded that there was a "material change in conditions" that warranted the consideration of the second claim. *Id.* Spese was awarded benefits starting in April 1976 to his death. *Id.* Peabody then appealed to the Benefits Review Board ("BRB"), which agreed with the ALJ's assessment of the material change but disagreed with the conclusion of a merger of the original claim, and, therefore, remanded the case to the ALJ for reconsideration under the more stringent criteria. *Id.* On remand, the ALJ found that Spese was entitled to benefits even under the new criteria, but the benefits began on December 1, 1981. *Id.* at 1004-05. Peabody appealed to the BRB, which affirmed the ALJ's decision, and then appealed to the Seventh Circuit. *Id.* at 1005. Mrs. Spese, since Mr. Spese had passed away, cross-appealed on the merger of the two claims. *Id.* The Seventh Circuit panel affirmed that award but found that the 1981 claim should have been merged with the 1976 claim for purposes of calculating when the benefits began; the court then took a hearing en banc. *Id.*

[165] *Id.* at 1008; *see also* Astoria Fed. Savings & Loan Ass'n v. Solinino, 501 U.S. 104, 107 (1991) (explaining that preclusion applies to an administrative agency acting in a judicial capacity to resolve fact issues properly before it). The Seventh Circuit addressed whether there was a material change, since a lack of merger resulted in a denial of the new claim, absent a material change in conditions of the applicant. *Spese*, 117 F.3d at 1007. The Fourth Circuit, in deciding *Lisa Lee Mines*, determined three ways to show a "material change in condition." *Id.* (citing *Lisa Lee Mines*, 86 F.3d at 1363). These include: (1) looking to see whether the newly submitted evidence favorable to the claim has a "reasonable possibility" of changing the prior result; (2) requiring the miner to show a material change on every element previously decided against him; or (3) adopting a "one-element" standard where claimant's new claim could proceed once he demonstrated a change in at least one element previously adjudicated against him. *Id.* The court rejected the BRB's approach, which required the miner to show a material change on every element previously decided against him in order to succeed on an argument that his health had materially changed, and he was thereby entitled to benefits. *Id.* at 1008. The approach taken by the BRB made "mincemeat" out of res judicata because it would leave decisions ever changing, and there would be no finality to the decisions made. *Id.*

grounds has no incentive to appeal one or two of the three determinations if the remaining holding is enough to reject benefits.[166] The court held that, if the passage of time led to a material change on one of the grounds for the first denial, the claimant is not barred from proceeding on a new claim solely because he has not negated the other holdings.[167] The court analyzed this reasoning with general principles of issue preclusion, i.e., since either determination would be independently sufficient to support a result, neither issue is conclusive in subsequent litigation with respect to either issue standing alone.[168]

Therefore, under *Magnus*, the Seventh Circuit would allow issue preclusion to prevent relitigation of multiple independent determinations comprising the holding of a previous case. However, *Spese* supports the rule that multiple independent determinations are not essential to the judgment and, therefore, should not be precluded in a subsequent suit.[169] The Sixth Circuit propounded yet a third application of issue preclusion to multiple independent holdings.[170]

E. The Sixth Circuit Shakes Up the Analysis

The Sixth Circuit recently decided *National Satellite Sports, Inc. v. Eliadis, Inc.*[171] and held that only the primary decision from a prior final judgment would preclude an issue from relitigation.[172] In its issue

---

166 *Spese*, 117 F.3d at 1008.

167 *Id.*

168 *Id.*; Comair Rotron, Inc. v. Nippon Densan Corp., 49 F.3d 1535, 1538 (Fed. Cir. 1995) (reasoning that multiple independent holdings are not necessary to the judgment.); Baker Elec. Co-op, Inc. v. Chaske, 28 F.3d 1466, 1475 (8th Cir. 1994); Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 45 n.6 (2d Cir. 1986). The court gave an example of how issue preclusion worked under this rule in the Black Lung Act cases:

> If the earlier denial listed both a failure to show pneumoconiosis and a failure to show total disability, the claimant can avoid automatic denial of his claim on res judicata grounds by showing a material change in either of those elements. That is the alternate ground situation that concerned the Fourth Circuit: because it is impossible to say which of these independently sufficient reasons for a denial was controlling, neither can be conclusive in future litigation. To win benefits on the merits, of course, the claimant would need to prove both . . . .

Spese, 117 F.3d at 1009.

169 *Spese*, 117 F.3d at 1008.

170 *See infra* Part III.E.

171 253 F.3d 900 (6th Cir. 2001).

172 *Id.* at 909-10. The Melody Lane Lounge, owned by Eliadis, Inc., showed a live broadcast of a boxing match, which National Satellite Sports, Inc. ("NSS") had obtained exclusive rights to broadcast to commercial establishments in Ohio. *Id.* at 904. NSS

preclusion analysis, the court first determined whether the issues in the case at bar were the same as those in *National Satellite Sports, Inc. v. Lyndstalder, Inc.* ("*Coach's Corner*").[173] The *Coach's Corner* decision had rested on the holdings that National Satellite Sports ("NSS") failed to state a claim, first, pursuant to the terms of the contract and, second, under 47 U.S.C. § 605.[174] Time Warner, the only defendant left when NSS settled with Eliadis, argued that *Coach's Corner* had dealt with the question of whether NSS had standing to sue under § 605, the same issue that was being litigated in the case at bar.[175] The Sixth Circuit found in favor of Time Warner on the first element of issue preclusion, finding that an identity of issues between *Coach's Corner* and *Eliadis* existed.[176]

---

brought suit against Eliadis and Time Warner. *Id.* NSS alleged that the showing was a violation of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613 (2000). *Id.* Eliadis promptly settled and NSS and Time Warner filed cross-motions for summary judgment, which the district court granted on the issue of liability to NSS and entered a judgment awarding damages, costs, and attorney fees to NSS. *Id.*

173 *Id.* at 908 (citing Nat'l Satellite Sports, Inc. v. Lyndstalder, Inc., No. 5:97 CV 2039 (N.D. Ohio 1998)). Time Warner claimed that the district court erred in failing to give preclusive effect to the adverse judgment against NSS in prior litigation between the parties. *Id.* at 904. The claim that Time Warner referenced for issue preclusion was a case containing many of the same facts. *Id.* NSS learned that Lyndstalder d/b/a Coach's Corner had shown a boxing match that Time Warner received exclusive rights to distribute to residential customers, and NSS received the license for commercial customers. *Id.*

174 *Id.* at 906. The district court held that NSS "failed to state a claim pursuant to the terms of the contracts [for distribution] at issue in this case as well as 47 U.S.C. § 605," the Federal Communications Act of 1934. *Id.* Time Warner argued that this decision in *National Satellite Sports, Inc. v. Lyndstalder, Inc.*, No. 5:97 IV 2309 (N.D. Ohio 1998), ("*Coach's Corner*") precluded NSS from relitigating almost the same issue. *Id.*

175 *Id.* at 908.

176 *Id.* at 908-09. The Sixth Circuit's issue preclusion elements include:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Id. at 908. This analysis included a determination of whether NSS had a proprietary interest in the communication sent from Time Warner to its pay-per-view customers, which was the same issue discussed in *Coach's Corner*. *Id.* Further, the issue of bifurcation of the satellite transmission in *Coach's Corner* was identical to the manner in which the event was sent to Time Warner and NSS. *Id.* NSS contended that the difference between the two cases lied in the means by which the events were distributed to the residential customers, i.e., pay-per-view versus Home Box Office ("HBO"). *Id.* Time Warner stated that *Coach's Corner* was a case in which two alternative but independent grounds supported the court's ultimate judgment and that a plaintiff is precluded from relitigating an issue actually

Next, the court had to determine whether the district court's finding in *Coach's Corner*, that NSS lacked standing under § 605, had been necessary to the judgment.[177] Until *Eliadis*, the Sixth Circuit had not determined whether issue preclusion applied to all or none of the multiple independent grounds for a decision.[178] The court decided not to

---

decided against it in a prior case, even if the decision rests on alternative grounds. *Id.* at 909; *see also* Yamaha Corp. of Am. v. United States, 961 F.2d 245, 255 (D.C. Cir. 1992); Magnus Elecs., Inc. v. La Republica Argentina, 830 F.2d 1396, 1402 (7th Cir. 1987); *In re* Westgate-California Corp., 642 F.2d 1174, 1176 (9th Cir. 1981); Williams v. Ward, 556 F.2d 1143, 1154 (2d Cir. 1977). See *supra* Part III.A.1-2, C, D for a discussion of *Westgate, Yamaha, Williams,* and *Magnus.* The court noted the opposite view supported by the ALI in the RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i. *Eliadis*, 253 F.3d at 909. See *supra* notes 74-81 and accompanying text for an explanation of the Second Restatement position. The court explained that, if a judgment was based on multiple independent determinations, each sufficient to support the result, the judgment was not conclusive with respect to either issue alone. *Eliadis*, 253 F.3d at 909; 18 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 132.03[4][b] (3d ed. 1997). The court further noted that four circuits have adopted this "modern rule": the Third, Fourth, Eighth, and Tenth. *Eliadis*, 253 F.3d at 909. See *supra* Part III.B for an explanation of the Fourth and Tenth Circuit analysis. See *infra* note 178 for an examination of the Third and Eighth Circuits application of state law to a diversity case. The court also mentioned support from the Seventh Circuit in *Peabody Coal Co. v. Spese*, but recognized that the *Spese* decision did not mention the contrary view in *Magnus Electronics. Eliadis*, 253 F.3d at 909. In an attempt to stop the Sixth Circuit from applying issue preclusion, NSS argued that barring it from pursuing a claim against Time Warner would be unfair. *Id.* NSS also argued that it had no incentive to pursue an appeal for the standing under § 605 since the court's determination was equally based on the terms of the contract. *Id.* at 909-10. See *supra* text accompanying notes 74-81 for an explanation of the policy considerations suggesting a rule that bars all the multiple grounds for the determination from being relitigated when issue preclusion applies. The court further emphasized this point by mentioning that NSS won the "battle" over § 605 but lost the "war" in being unable to overcome the contractual prohibition. *Id.* at 910.

[177] *Eliadis*, 253 F.3d at 909. The district court held that Time Warner failed to establish NSS's lack of standing under § 605, which was necessary for a grant of summary judgment. *Id.*

[178] *Id.* at 910. The court cited *Arab African International Bank v. Epstein*, stating that this case represents the Third Circuit's adoption of the Second Restatement rule that when multiple independent holdings exist, none are necessary to the judgment, and, therefore, each holding may be relitigated. *Id.* at 909. However, *Epstein* is based on state law. Arab African Int'l Bank v. Epstein, 958 F.2d 532, 535 (3d. Cir. 1992). This case involved a legal malpractice action. *Id.* at 533. Arab African International Bank ("Bank") made a loan to Sencit S/G Development Company ("Sencit"), and Sencit's attorney, Jonathan Epstein, issued an opinion letter to the Bank ensuring that the mortgage and note were binding and enforceable agreements. *Id.* The opinion letter stated: "[T]he Mortgage and Note . . . constitute binding, and enforceable agreements of the Partnership in accordance with their terms . . . ." *Id.* When Sencit failed to pay the principal, interest, or real estate taxes, the Bank initiated foreclosure proceedings. *Id.* at 533. The proceeding district court had held that the New Jersey Banking Act forbade the Bank from maintaining an action in New Jersey, and the Bank was not exempt from this rule due to Epstein's letter. *Id.* The prior court held that the Bank had not relied on Epstein's opinion and that even if the Bank did

resolve the issue directly and instead held that one ground for the decision in *Coach's Corner* was overtly primary while the other ground was secondary.[179] The court held that the *Coach's Corner* decision had been based primarily on the conclusion that NSS was contractually barred from pursuing an action against Time Warner under the language of the license agreements.[180] The secondary ground, that NSS failed to state a claim under § 605, had not been necessary to the granting of Time

---

rely on Epstein's letter, there was no defense under the New Jersey statute controlling the case. *Id.* at 533-34. The Bank then brought a legal malpractice action in the previous suit, which was disposed of on summary judgment in favor of Epstein on the theory that the defense of reliance on the opinion letter was raised and resolved in the case of the Bank against Sencit. *Id.* at 534. Because this case was in federal court based on diversity of citizenship, the court applied New Jersey law. *Id.* at 535. New Jersey had adopted section 27, comment i of the Restatement (Second) of Judgments, which states that, when a court's determination is based on two issues, either of which could independently be sufficient to support the judgment, then "the judgment is not conclusive with respect to either issue standing alone." *Id.* at 534 (citing RESTATEMENT (SECOND), *supra* note 8, § 27 cmts. i, o). Since each of the previous court's holdings could have supported a ruling in favor of Sencit, issue preclusion did not apply to either holding in this case against Epstein. *Id.* at 537. The key question was whether the RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. o, applied to the Appellate Division's reference to the prior district court's decision–that, if an appellate court upholds both independent determinations for a decision as sufficient to the judgment, the judgment is conclusive as to both determinations. *Id.* at 536. Since the issue of the Bank's reliance on Epstein's opinion letter was not dealt with in the appellate court, the Bank did not obtain an appellate decision on the reliance issue and, therefore, was not barred from relitigating the issue. *Id.* at 537. The Sixth Circuit also cited *Baker Elec. Co-Op v. Chaske*, 28 F.3d 1466, 1475-76 (8th Cir. 1994), stating that the Eighth Circuit also followed the Second Restatement view. *Eliadis*, 253 F.3d at 909. In *Chaske*, the Eight Circuit applied North Dakota law, the Second Restatement view, of issue preclusion and multiple independent holdings. *Chaske*, 28 F.3d at 1475. North Dakota adopted comment i to the RESTATEMENT (SECOND), *supra* note 8, § 27. Vanover v. Kan. City Life Ins. Co., 438 N.W.2d 524, 526 (N.D. 1989). Both the Devils Lake Sioux Indiana Tribe ("Tribe") and the North Dakota Public Service Commission ("NDPSC") sought to exercise regulatory authority over electric services to the Fort Totten Devils Lake Sioux Indian Reservation ("Reservation"). *Chaske*, 28 F.3d at 1469. In the first suit, the North Dakota Supreme Court found that the NDPSC had regulatory authority over competing electric utilities for a service point within the Reservation on two grounds. *Id.* at 1476. First, the Otter Tail Power Company ("Otter Tail") lacked standing to raise the rights of the Tribe, and, second, assuming that Otter Tail had standing, the Tribe had no right to regulate utilities on the Reservation. *Id.* Because North Dakota followed the Second Restatement view, issue preclusion did not preclude litigation of Otter Tail's claims. *Id.* Since either of the bases would have been sufficient to support the result, neither was precluded. *Id.*

179 *Eliadis*, 253 F.3d at 910.

180 *Id.* at 909.

Warner's summary judgment, and, therefore, the court did not preclude NSS's appeal of Time Warner's claims.[181]

IV. EXTREMIST VIEWS VIOLATE THE POLICIES THAT DRIVE ISSUE PRECLUSION

The American system of adjudication is based on unity.[182] Since cases and decisions do not stand alone, but are parts of a continuum, the decisions of one court affect the decisions of other courts.[183] The

---

[181] *Id.* at 910. The Sixth Circuit stated that NSS had not had the incentive to appeal the "secondary decision" that NSS failed to state a claim under § 605 because the language of the contract would still ultimately result in a win for Coach's Corner; therefore, this secondary issue was not precluded from relitigation. *Id.* The court also analyzed whether the decision was final and on the merits. *Id.* at 910-11. The court in *Coach's Corner* resolved the case according to FRCP 56 and made it clear that its judgment was final. *Id.* at 910. The district court stated, "[B]oth parties will more than likely have a disagreement over everything I say, pretty much, and you can take it up to the Sixth Circuit and they can tell us whether I was right or wrong." *Id.* Similarly, summary judgment was a final judgment for purposes of issue preclusion according to *Mayer v. Distel Tool & Machine Co.*, 556 F.2d 789 (6th Cir. 1977). *Id.* Lastly, the court decided that there was a full and fair opportunity for litigation on both sides. *Id.* All four elements of issue preclusion must be met before the prior opinion will be given preclusive effect; therefore, NSS was not bound to the decision in *Coach's Corner*. *Id.* at 911. The Sixth Circuit agreed that the "necessary to the outcome" element was not met but that the "full and fair opportunity to litigate" element was satisfied. *Id.*

[182] VESTAL, *supra* note 5, at V-3. The federal courts suffered the problem of a lack of procedural uniformity until 1934 when Congress passed the Rules Enabling Act, authorizing a single civil procedure system for the federal system. GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 26-27 (1993). "An unpredictable rule may be little better than no rule at all." Brian Levine, Note, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435, 449 (discussing the attorney-client privilege and its confusion, which makes the privilege almost less useful than no privilege at all); *see* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). The doctrine of collateral estoppel is unpredictable because the rules are incomplete, ambiguous, and undermine each other. Eli J. Richardson, *Taking Issue with Preclusion: Reinventing Collateral Estoppel*, 65 MISS. L.J. 41, 46 (1995).

[183] VESTAL, *supra* note 5, at V-3. "A court does not face a legal problem as a new, pristine blackboard 'never writ upon.'" *Id.* Vestal mentions four different facets of the American legal system that aid in the goal of unity. *Id.* at V-3 to V-5. First is stare decisis, a common-law scheme that forces courts of today to look at decisions of the past to determine how the law should be applied. *Id.* at V-3. Second is the "law of the case," which forces a court to follow the decisions made earlier in the same case regarding the same point. *Id.* at V-3 to V-4. Third, the courts are affected by related lawsuits pending concurrently to avoid resolutions that conflict, as well as duplication of cases and the misuse of the court system. *Id.* at V-4. Finally, the Constitution provides safeguards to protect the judicial process from inconsistent decisions. *Id.* The Full Faith and Credit Clause forces a state to recognize an earlier decision by another state court. *Id.*; U.S. CONST. art I, § 1. The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general

question of issue preclusion will almost always be a fact-sensitive analysis; however, predictability and simplicity are vital to a uniform federal system.[184] When the federal circuits adopt different views on the application of issue preclusion, unity is lost, and litigants receive inconsistent treatment in different circuits, in contravention of the goal of unity.[185]

There are three major views on how to apply issue preclusion to multiple independent holdings.[186] The first view states that, when a judgment is based on alternative grounds, the judgment is determinative on all grounds.[187] The second view is the direct opposite. If a judgment is based on the determination of two issues, either of which could independently support the result, the judgment is not conclusive with respect to either issue standing alone.[188] The third view states that the court applying issue preclusion should preclude the primary determination but should not preclude any secondary issues.[189]

Issue preclusion is an appealing doctrine because it is predictable and is easy to apply.[190] In reality, however, courts and scholars have

---

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art I, § 1.

184 *See* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i. The Second Restatement takes the position that multiple independent holdings are unnecessary to the judgment and, therefore, are not precluded from relitigation. *Id.* Comment i acknowledges that the balance might tip to preclusion if an issue was litigated to a complete extent and decided in the first action, but the Second Restatement does not allow judicial discretion to make this decision in the interest of equity. *Id.*

185 *See supra* Part I (illustrating through the hypothetical the contradictory outcomes of *Johnson v. Cohen* depending on the circuit's view of issue preclusion's effect on multiple independent holdings).

186 *See supra* Part III (outlining the three major views in the federal courts).

187 This is the view taken by the Restatement of Judgments, the Ninth Circuit, the D.C. Circuit, *Magnus Electronics v. La Republica Argentina* in the Seventh Circuit, and *Winters v. Lavine* and *Williams v. Ward* in the Second Circuit. *See supra* notes 73, 93-103, 104-14, 152-60, 133-50 and accompanying text.

188 This view is shared by the Second Restatement of Judgments, the Third and Eighth Circuits in state law interpretation, the Fourth Circuit, the Tenth Circuit, *Peabody Coal Co. v. Spese* in the Seventh Circuit, and *Halpern v. Schwartz* in the Second Circuit. *See supra* notes 74-81, 123-28, 161-68 and accompanying text; *supra* note 178 (explaining the decisions of the Third and Eighth Circuits).

189 Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 910 (6th Cir. 2001); *see also supra* Part III.E.

190 Richardson, *supra* note 182, at 42. Collateral estoppel is one of the most sacred doctrines in Anglo-American law. *Id.* at 41. Presumably, if the relatively consistent elements apply, then issue preclusion applies; however, if the elements are lacking, then the issues can be relitigated between the parties. *Id.* at 42.

created a collateral estoppel jurisprudence that is inconsistent and difficult to predict.[191] This jurisprudence takes the virtues and goals of issue preclusion and pits them against conscientious parties who look to predict and strategize their litigation to best succeed in the short and long term.

The three major problems with "all or nothing" views and inconsistent federal rules are that parties' litigation strategies are hindered, parties' rights to appeal are infringed upon, and inefficiency in the court results.[192] First, litigation strategy is based on parties knowing the rules to which they will be held and how to best use them.[193] With a split that causes uncertainty in the federal courts, litigants will be challenged in planning their litigation strategy and may be forced to plead only the strongest arguments in fear of future preclusion. Second, the right to appeal is affected when litigants are forced to plead certain arguments due to the procedural guidelines being applied.[194] Third, both extreme views allow the benefits of collateral estoppel to be crushed by increasing litigation and frustrating judges, juries, and parties.[195]

The Sixth Circuit's decision in *National Satellite Sports, Inc. v. Eliadis, Inc.* held that the "primary" issue would be precluded from relitigation on the basis of issue preclusion, while the "secondary ground" could be relitigated.[196] The court assured that it was not deciding whether multiple independent grounds for a decision automatically prohibited application of issue preclusion; however, this is the only Sixth Circuit case to address this issue.[197] The Sixth Circuit has given an alternative to the black-and-white, preclude or not preclude options, but has not given any guidance to the lower courts for future cases.[198]

---

191 *Id.*

192 *See infra* Part IV.A-C.

193 *See infra* Part IV.A.

194 *See infra* Part IV.B.

195 *See infra* Part IV.C.

196 253 F.3d 900, 910 (6th cir. 2001); *see also supra* Part III.E.

197 *Eliadis*, 253 F.3d at 910; *see also supra* Part III.E.

198 For example, there is no guidance as to what constitutes a "primary" holding and what factors a court should consider when contemplating whether a determination was "primary" or "secondary." Additionally, there is no precedent stating that a secondary holding is not appealable. Therefore, a holding could be both subject to appeal and subject to relitigation. This solution is inequitable.

A. Litigation Strategy

Parties often plead more than one defense or claim more than one basis for relief in the event that they are unable to sufficiently prove either claim.[199] This decision is based on the res judicata doctrine itself.[200] Parties cannot relitigate a claim if an issue that could have been raised was not; therefore, they cannot risk leaving out a potential argument that may win the case.[201] However, depending on whether the jurisdiction allows application of issue preclusion to multiple independent holdings, a litigant may have an incentive to leave out a defense or a claim for efficiency.[202]

In the hypothetical of Maureen Johnson and Mark Cohen introduced in Part I, the federal court in which Johnson filed the first case can affect how vigorously the parties assert each alternative claim in the first case.[203] For example, if *Johnson v. Cohen I* is in a Restatement jurisdiction, and Cohen has a strong case that Johnson signed a binding release of Cohen's obligation to pay the interest on the promissory note, the parties will save time and money. Cohen will not vigorously argue, nor will Johnson vigorously defend, the claim that the note was fraudulently induced. If a future case for the repayment of principal arises, Cohen will be forced to relitigate fraudulent inducement of the note.[204] However, if *Johnson v. Cohen I* is in a jurisdiction that allows issue preclusion of multiple independent holdings, then both parties will vigorously advocate their positions on fraudulent inducement, knowing they will be bound by the judgment of each determination in future cases.[205]

---

199 *See* Lucas, *supra* note 25, at 702.

200 See *supra* Part II.A, D for an explanation of the doctrine of res judicata, the differences between claim and issue preclusion, and the Restatement suggestions.

201 *See* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i (stating that if a judgment based on multiple independent holdings was not conclusive as to both issues, a party who would assert several arguments might be deterred from doing so since the issues would not be precluded from relitigation). The rule of claim preclusion states that a judgment puts an end to the cause of action and cannot be brought into litigation between the parties again, including any other matter that could have been offered for that claim. 18 WRIGHT ET AL., *supra* note 6, § 4406, at 45; *see* RESTATEMENT (SECOND), *supra* note 8, §§ 18-20.

202 RESTATEMENT (SECOND), *supra* note 8, §§ 18-20.

203 *See supra* Part I.

204 *See* RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n.

205 *See* Erichson, *supra* note 53, at 952.

The differing views on whether multiple independent holdings can be precluded in future suits also affect the mutuality rule.[206] For example, *A* sues *B* in a patent infringement case, and *B* wins based on two grounds: *A*'s patent was invalid and *B* was licensed to use the patented item. *A* then sues *C* based on the same patent but for a different claim.[207] If *A v. C* is in a Restatement jurisdiction, then *C* can preclude *A* from arguing that the patent is valid under defensive nonmutual collateral estoppel.[208] However, *A*, master of her claim, would have the ability to chose the forum for *A v. C*, and it would be in her best interest to chose a Second Restatement jurisdiction. *A* could argue that since the *A v. B* judgment was based on two independent reasons for *B*'s win, the issue of patent validity was not necessary to the decision and *A* should be able to relitigate patent validity.[209] As a result, the circuit split encourages forum shopping by *A* because she can sue an infinite number of defendants for patent infringement. Not only does this increase litigation, but parties have strategic advantages or disadvantages depending on the circuit, and the federal courts were created to eliminate this inconsistency.[210]

---

[206] See *supra* Part II.C for an explanation of the Supreme Court's treatment of issue preclusion. The Supreme Court in *Blonder-Tongue* abolished the rule requiring mutuality as an element of issue preclusion. Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971). The requirement of mutuality was eroded because the ultimate goal of issue preclusion is "limiting relitigation of issues where that can be achieved without compromising fairness in particular cases." *Id.* at 328. Another reason for dismissing the rule of mutuality is that courts no longer felt that it was tenable to allow a litigant more than one full and fair opportunity for judicial resolution of the same issue. *Id.* There is a misallocation of resources when a defendant is forced to present a complete defense to a claim that the plaintiff has already fully litigated and lost in a previous case. *Id.* at 329. These goals, which lead courts to reject the mutuality requirement, are implicated with multiple independent holdings and the Second Restatement view that multiple independent holdings are not subject to issue preclusion. *See* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i. The Second Restatement view increases litigation and allows a party more than one opportunity to fully litigate an issue.

[207] If the claims were the same, the plaintiff presumably would have had to join the defendant under compulsory counterclaim rules. *See* FED. R. CIV. P. 19(a) (stating that if a party's absence will cause incomplete relief, the party must be joined unless an exception under 19(b) applies).

[208] See *supra* note 73 for the first Restatement view. The first Restatement allowed the application of issue preclusion to multiple independent holdings. *See* RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n. The plaintiff should not be allowed to relitigate the validity of the patent because that determination was necessary to the prior judgment, and plaintiff was a party. Additionally, the issue was actually litigated and decided.

[209] *See* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i.

[210] *See supra* note 182 and accompanying text (explaining the Rules Enabling Act and the need for predictable and consistent rules in the federal court system).

Further, certain parties can be the targets of issue preclusion in later suits. For example, defendant manufacturers of defective products could lose in a suit against Plaintiff 1. Plaintiff 2 can then sue under the same issue and invoke nonmutual offensive collateral estoppel to prevent relitigation of the issue of defect.[211] This use of issue preclusion is effective for conservation of judicial resources; however, the defendant's litigation strategy will be significantly affected by issue preclusion's existence. The defendant may want to settle the first case if victory is not assured, or the defendant will need to vigorously defend to avoid the effects of issue preclusion.[212]

B. The Right to Appeal

Litigation strategy is further implicated through the appellate process. In a jurisdiction where multiple independent holdings are not precluded in future suits, the losing party does not have an incentive to appeal because the decision cannot be used against that party in future litigation.[213] However, in a jurisdiction where multiple independent holdings can be precluded in subsequent litigation, the losing litigant is encouraged to take a "cautionary appeal" to ensure that a negative decision will not be used in future litigation to that party's detriment.

While the right to appeal is not constitutionally based, it is inviolable in our legal system.[214] The right to appeal is rooted in "process values," the idea that the legal community is concerned with ensuring that litigants feel they were treated fairly.[215] Our society suggests that, at a minimum, we insist that the appropriate rules of decision are

---

[211] See *supra* notes 60-66 and accompanying text for an explanation of nonmutual collateral estoppel and the Supreme Court's decision holding that its application is equitable and efficient.

[212] Even if the defendant were to win against the first plaintiff, she would still have to litigate if the second plaintiff brought suit. Since the second plaintiff was not a party to the first action, the defendant could not use issue preclusion to bar litigation.

[213] See *supra* text accompanying notes 83-88 for *Halpern's* policy considerations.

[214] McKane v. Durston, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently [sic] of constitutional or statutory provisions allowing such appeal."); Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 66 (1985) ("The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country.").

[215] Dalton, *supra* note 214, at 66-67 (citing the American Bar Association Committee on Standards of Judicial Administration Standards Relating to Appellate Courts § 3.10 commentary, at 12 (1977)).

followed.[216] The goal of uniformity across the federal system paired with the right to appeal, reveals an injustice when one jurisdiction creates an incentive to appeal, to ensure that an erroneous decision is not imputed in future litigation, while another jurisdiction makes that appeal a waste of resources.[217]

Halpern v. Schwartz considered the issue of appeal and stated that a court may not have given each determination rigorous consideration if another ground by itself could determine the case.[218] This, however, seems implausible because judges are acutely aware of collateral estoppel's effects, as well as the prerequisite of a final determination for an appeal. Furthermore, vigorous review of one holding would not occur since the other determination could sustain the judgment.[219] While *Halpern* cites this reason as a compelling argument to make alternative holdings immune from issue preclusion, it appears to be a better reason to preclude multiple independent holdings so that accurate decisions are preferred over procedural loopholes. The *Halpern* philosophy results in a denigration of the right to appeal.

C. *Efficiency*

One of the alleged strengths of collateral estoppel is that it decreases litigation.[220] The Second Restatement/*Halpern* view sacrifices this asset by forbidding the application of issue preclusion to multiple independent holdings.[221] Using the *Johnson v. Cohen* hypothetical, it is easy to see how a lack of preclusion caused a duplication in litigation,

---

216 *Id.* Society also insists that the parties have an adequate opportunity to present their case and respond to the adversaries and that the tribunals be unbiased and competent. *Id.* at 67. How parties feel about the process may be just as important, if not more important, than the actual award of damages or fault. *Id.*

217 For example, if *A* sues *B* in a Second Restatement jurisdiction (multiple independent holdings will not be precluded from relitigation) and forces the court to make multiple independent holdings, but if *A* loses, *A* should not appeal. If *A* appeals and the appellate court affirms on one of the two determinations, then *A* will be precluded from relitigating that matter. If *A* does not appeal, *A* could sue another defendant on the same issue and not be precluded from relitigating since the *A v. B* decision was based on multiple independent holdings. This conclusion appears to favor a rule of procedure over accurate judgments.

218 Halpern v. Schwartz, 426 F.2d 102, 105-06 (2d Cir. 1970); Jean F. Rydstrom, Annotation, *Collateral Estoppel Effect, in Federal Court, of Judgment Resting on Independent Grounds*, 29 A.L.R. FED. 764, 766 (1976). See *supra* Part II.E for an explanation of *Halpern v. Schwartz*.

219 Rydstrom, *supra* note 218, at 766.

220 *See supra* Part II.B.

221 *See supra* Part II.D, E.

the precise inefficiency that collateral estoppel seeks to address.[222] Additionally, in a system where multiple independent holdings are subject to an absolute rule of no preclusion, a litigious plaintiff would be encouraged to sue on multiple grounds for the same issue, using different defendants until successful.[223] For example, *A* sues *B* and loses on two issues. In a Second Restatement jurisdiction, if both issues are independent to the judgment against *A*, then *A* can relitigate both issues against *C* in a subsequent suit.[224] Additionally, the Second Restatement rule encourages *A* to make the case more complicated by alleging additional issues so that the case will have multiple independent holdings.

Furthermore, collateral estoppel, as a procedural rule, seeks to create uniformity in judgments, which in turn encourages faith in our judicial system.[225] Repeat litigation on already-decided issues creates a greater potential for inconsistent judgments. For example, if the court in *Johnson v. Cohen II* decided that Cohen was not induced by fraud to sign the note, Cohen would lose on the very issue that the judge in *Johnson v. Cohen I* decided in his favor.

Since *Halpern v. Schwartz*, many scholars have criticized the Second Restatement's change in position on issue preclusion's effect on multiple independent holdings.[226] The ALI, author of the Restatements, reached the new rule by analogizing multiple independent holdings to

---

222 In *Johnson v. Cohen I*, the court determined that Cohen was fraudulently induced to sign the promissory note and that Johnson had executed a release of Cohen's obligation to pay interest. Since, in this example, multiple independent holdings are not precluded from relitigation because they are not necessary to the judgment, *Johnson v. Cohen II* was fully litigated on an issue presented in *Johnson v. Cohen I*. Furthermore, the cited cases in this Note illustrate the vast litigation over the rules of collateral estoppel, thereby circumventing the policies that sustain the doctrine.

223 Goblirsch v. W. Land Roller Co., 246 N.W.2d 687, 691-92 (Minn. 1976).

224 *See* RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i.

225 *See generally* Richardson, *supra* note 182, at 45-46 (stating that the purpose of issue preclusion is to "conserve judicial resources, preserve 'the integrity of the court' by preventing inconsistent resolution of issues, promote 'finality of judgments,' protect defendants from repetitive litigation, ensure that a winning 'party should not have to fight anew a battle it has already won,' and promote 'conclusive resolution disputes'").

226 *See* Lucas, *supra* note 25; *see also* Erichson, *supra* note 53; E. William Stockmeyer, *Res Judicata Effects of Unappealed, Independently Sufficient Alternative Determinations*, 70 CORNELL L. REV. 717 (1985). The Second Restatement prescribes an exemption from the doctrine of issue preclusion when a prior decision is based on multiple independent holdings. RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i.

nonessential holdings.[227] The Second Restatement correlates nonessential determinations to dicta, which would not be available for appeal.[228] Therefore, the Second Restatement indirectly describes multiple independent determinations as dicta.[229] However, there is no reason to believe that each determination is dicta solely because more than one argument could have led to the court's decision.[230] Because multiple independent holdings are appealable, they are more like essential determinations.[231] Furthermore, strict nonapplication of issue preclusion in decisions with multiple independent holdings disregards the substantive worth of the previous decision.[232] Judges, or juries issuing a special verdict, who are overturned on a successful appeal or relitigation of decided issues, feel as if their time and energy have been wasted, the work put forth in the case is unappreciated, and, worst of all, their judgment has been called into question.[233]

The ALI has considered, and implemented, both major views concerning issue preclusion's effect on alternative holdings in the First and Second Restatements of Judgment.[234] The *Halpern* decision raised two compelling arguments that ultimately caused a reversal of the First Restatement rule and adoption of the current rule under the Second

---

227 RESTATEMENT (SECOND), *supra* note 8, § 27 cmts. e, h. The theory is that, since either independent determination could have led to the decision, neither determination is "essential" in the strict sense of the word. Stockmeyer, *supra* note 226, at 727-28 (citing RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i). This strict analysis is also inconsistent with other sections of the Restatement. *Id.* Section 27, comment o, of the Second Restatement states that collateral estoppel effect will be given to alternative determinations that are affirmed on appeal. *Id.* Additionally, section 27, illustration 16, allows preclusion of multiple independent holdings if, when taken together, they necessarily decide the issue. *Id.*

228 RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. h.

229 *See id.*

230 *See* Lucas, *supra* note 25, at 702.

231 Stockmeyer, *supra* note 226, at 727. Multiple independent holdings are more like essential determinations since they are reviewable on appeal, while dicta or nonessential determinations are not. *Id.*

232 *See* Malloy v. Trombley, 405 N.E.2d 213, 216 (N.Y. 1980) (stating that, while not enunciating a broad rule, issue preclusion is applicable even though the issue decided was one of multiple independent decisions by the trial court since all of the elements of issue preclusion were met); *see also* Goblirsch v. W. Land Roller Co., 246 N.W.2d 687, 691-92 (Minn. 1976) (reasoning that a mechanical application of a collateral estoppel exception for alternative determinations unnecessarily ignores that substantive worth of the prior decision since it would question the jury's full and complete decision).

233 Dalton, *supra* note 214, at 68.

234 *See* RESTATEMENT (FIRST), *supra* note 8, § 68 cmt. n; RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i; *see also supra* Part II.D.

Restatement.[235] However, this change has not rectified the inconsistency, uncertainty, and equity problems in applying issue preclusion to independent holdings.

V. CONTRIBUTION–REVISITING THE RESTATEMENT ONCE MORE

This Note proposes a new rule and comment to the Second Restatement. The new rule creates a discretionary exception to the general rule of issue preclusion for decisions based on multiple independent holdings. The multiple independent holdings exception is invoked when there is no incentive to appeal the prior decision and the party arguing against issue preclusion can show that an injustice would result from the application of issue preclusion.[236] Currently, the Second Restatement sets out the general rule of issue preclusion in section 27 with a note that provides: "exceptions to this general rule are stated in section 28."[237] The exceptions in section 28 illustrate situations in which

---

[235] *See* Halpern v. Schwartz, 426 F.2d 102, 105-06 (2d. Cir. 1970). Even subsequent Second Circuit decisions note the unusual quality of the *Halpern* situation and find its facts to be the exception and not the rule for issue preclusion on multiple independent judgments. *See supra* Part III.C (explaining how *Winters v. Lavine* and *Williams v. Ward* shaped the *Halpern* decision). *Winters* states that *Halpern* is not intended to have extended application, as noted by the court's limiting *Halpern* to the facts. Winters v. Lavine, 574 F.2d 46, 67 (2d Cir. 1978). This narrow reading was confirmed by *Winters*, which stated that *Kessler v. Armstrong Cork Co.*, 158 F. 744, 747-48 (2d Cir. 1907), is still good law, holding that a decision based on alternative grounds is "necessary" for issue preclusion purposes. *Winters*, 574 F.2d at 67. Therefore, *Winters* supports this Note's contribution that the concerns established in *Halpern* are an exception and do not alter the rule of issue preclusion and multiple independent holdings.

[236] Stockmeyer suggests that, when *Halpern* concerns of inadequate reasoning and a lack of full litigation are present, a party should be allowed to escape issue preclusion for alternative determinations. Stockmeyer, *supra* note 226, at 730-31. Stockmeyer suggests that the Second Restatement allows judicial discretion if a party can show a "clear and convincing need for a new determination of the issue because of [an] inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action." *Id.* This interpretation ignores section 27, comment i. *Id.* Section 27, comment i states that

> There may be causes where, despite these [*Halpern*] considerations, the balance tips in favor of preclusion because of the fullness with which the issue was litigated and decided in the first action. But since the question of preclusion will almost always be a close one if each case is to rest on its own particular facts, *it is in the interest of predictability and simplicity for the result of nonpreclusion to be uniform.*

RESTATEMENT (SECOND), *supra* note 8, § 27 cmt. i (emphasis added). Thus, the discretionary exceptions of section 28 do not currently apply to multiple independent holdings. *See generally* Lucas, *supra* note 25.

[237] RESTATEMENT (SECOND), *supra* note 8, § 27. This sections states: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the

the elements of issue preclusion are met, but it would be unfair to preclude relitigation of the issues.[238] However, multiple independent holdings are governed by section 27, comment i, which creates a nondiscretionary exception, prohibiting issue preclusion application for multiple independent holdings.[239]

As an all-encompassing and rigid rule, the Second Restatement has many ill effects, such as increased litigation, tainting parties' incentive to appeal, and encouraging manipulative litigation strategies.[240] Just as the Second Restatement does not give full attention to the implication of a nondiscretionary rule, the First Restatement failed in the same manner. The First Restatement did not consider the problem of a potential lack of incentive to appeal, nor the possibility that there could have been less rigorous consideration by the first court.

Instead of the approaches taken by the First and Second Restatements, this Note proposes that, when any of the injustices feared by the court in *Halpern* surface in a second suit as a result of an earlier decision based on multiple independent determinations, an exception should be available that can be implemented at the discretion of 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." *Id.* The rule on multiple independent holdings and their preclusive effect is found in section 27 under comment i. *Id.* at cmt. i.

238 *Id.* § 28. The exceptions for applying issue preclusion include: (1) when a party could not appeal the issue attempting to be precluded; (2) when the issue is one of law and the actions involving the claims are unrelated, or there has been a change in legal climate; (3) when a new determination is warranted by differing procedures of the two courts; (4) when a party had a heavier burden of persuasion in the first action and the burden has shifted in the second action; or (5) when there is the potential for adverse impact on public interest or it was not foreseeable at the time that the issue would arise again. *Id.* Well-educated litigants and their attorneys should recognize that, while issue preclusion can be used as a shield or a sword during litigation, an "injustice exception" can be used by a party to fight against issue preclusion application. Issue preclusion as a sword means that the party invoking issue preclusion would use it to satisfy their burden of proof without allowing the other party to argue against the previous judgment. Issue preclusion as a shield means that a party would invoke issue preclusion to prevent the other party from bringing new arguments on a previously litigated issue.

239 *Id.* § 27 cmt. i.

240 *See id.* (stating that since each case rests on its own particular facts, in the interest of predictability and uniformity, nonpreclusion should be uniform through an unbending rule). The Second Restatement sacrifices equity and conservation of judicial resources for uniformity. In cases where an issue was fully considered and litigated in the first suit, it will still be subject to relitigation because issue preclusion does not apply if it was accompanied by another independent determination. *See generally id; see also supra* Part IV.

second judge.[241] Issue preclusion is a doctrine that relies on the discretion of the judges.[242] The danger of perpetuating erroneous decisions is a concern of the parties and the court system; therefore, the discretion should be left in the judges' hands.[243]

A. Proposed Amendments

The following proposed amendments to the Second Restatement of Judgments should be adopted by each of the federal circuits. First, section 27: "Issue Preclusion—General Rule" should remain unedited. Second, section 27, comment i, should be redacted in its entirety. Third, under section 28, a new exception should be added as follows:[244]

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> * * *
>
> *(6) A prior decision is based on multiple independent holdings, and the party who objects to the application of issue preclusion can show that (a) one of the multiple independent*

---

[241] *See* Stockmeyer, *supra* note 226, at 719 (stating that the Second Restatement "advocates a nondiscretionary exception" to issue preclusion if a party loses an issue that is determined by multiple independent holdings). This is also essentially what the Sixth Circuit has done. *See* Nat'l Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900 (6th Cir. 2001). The Sixth Circuit recognized the danger in precluding a "secondary" issue, or by analogy, one that was not given rigorous review by the first court. *Id.*

[242] *Cf.* RESTATEMENT (SECOND), *supra* note 8, § 28 (listing the exceptions to issue preclusion, which are dependent on the judge's discretion).

[243] Stockmeyer, *supra* note 226, at 719; *see also* Moch v. East Baton Rouge Parish Sch. Bd., 548 F.2d 594, 598 (5th Cir. 1977). A revision to the Restatement must take into consideration the concerns of *Halpern*, which prompted the change from the First Restatement to the Second Restatement. *Halpern*'s two basic concerns in precluding multiple independent holdings were that the first court might not rigorously consider an issue if it is one of two or more independent reasons for a decision and that a litigant will not have an incentive to appeal an issue because an appellate court that finds an error in issue one could still uphold the judgment with respect to issue two. Halpern v. Schwartz, 426 F.2d 102, 105-06 (2d Cir. 1970). Additionally, *Halpern* was concerned with inefficiency in the appellate court system due to cautionary appeals taken by the losing litigant who fears that the less strong of the multiple holdings could be used in future litigation. *Id.*

[244] The Note's contribution is in italicized text. The text in regular font is taken from the existing Restatement (Second) of Judgments.

> *issues was not given complete analysis by the prior court due to the multiplicity of issues supporting the holding; or (b) the party did not exercise its right to appeal because it was not sufficiently foreseeable at the time of the conclusion of the litigation that the issue would arise in the context of a subsequent action. See illustration 12.*[245]

Finally, comment j should be added to section 28 as follows:

> *Comment j.*
>
> *The First Restatement provided that, when a judgment is based on alternative independent grounds, both grounds are material, and issue preclusion applies to both judgments. In 1970,* Halpern v. Schwartz, *decided by the Second Circuit, suggested a change in the rule to rectify concerns of incomplete analysis by the first trial court and to ensure adequate appellate review. The Second Restatement followed* Halpern's *reasoning and created an absolute rule prohibiting issue preclusion in cases of multiple independent holdings. In light of the criticisms of the* Halpern *decision, the more equitable rule is to allow issue preclusion to be applied to multiple independent holdings with an exception for cases like* Halpern. *Judges can utilize their discretion to determine if the issues were fully considered in the first action and whether there was such a disincentive to appeal that it would be unfair to bind a party to a multiple independent decision of a prior holding. The burden of proof falls on the party seeking to use the exception to prove that an injustice would occur because of the multiplicity of the prior holding. Under this new approach, fairness and equity, through the discretion of judges, trump a rigid rule.*

The new rule encourages a court in the first action to fully consider the issues brought before it. It also limits litigants to one "bite at the apple" and will prevent the first court from having its decisions rendered inconsistent by subsequent courts that view the issue differently.[246] Furthermore, this rule encourages the parties to appeal

---

[245] See *infra* Part V.B for the proposed illustration and resolution of the hypothetical introduced in Part I.

[246] See *supra* Part IV.C for an explanation of the efficiency concerns implicated by the doctrine of issue preclusion and the current First and Second Restatement views.

when it is foreseeable that an issue will become the subject of a subsequent suit, yet the rule does not create a penalty when a party does not take a cautionary appeal, nor does it encourage appeals without justification.[247]

B. Illustration 12 and Resolution of Hypothetical

In addition to the proposed amendment to section 28, the following illustration should be adopted by the Restatement of Judgments:

> *Illustration 12.*
>
> A *brings an action against* B *to recover interest on a promissory note payable to* A, *the principal not yet being due.* B *succeeds on two independent determinations:* B *was induced by fraud to sign the note and* A *executed a binding release of* B*'s obligation to pay interest on the note. After the note matures,* A *brings an action against B for the principal of the note.* A *will be precluded from bringing this suit unless* A *can prove to the court either that the prior court did completely analyze the issue of fraudulent inducement or that* A *did not exercise her right to appeal because it was not sufficiently foreseeable at the time of the conclusion of the prior litigation that the issue of fraudulent inducement would be the context of a subsequent litigation.*

The illustration provides a practical application of the new exception to section 28 for both judicial guidance as well as providing assistance to parties anticipating the issue preclusion application to multiple independent holdings.

The proposed amendment impacts the hypothetical in Part I. In *Johnson v. Cohen I*, the suit for interest on the promissory note signed by Cohen, the court found for Cohen on two independent alternative theories: first, the signing of the note was induced by fraud, and, second, Johnson executed a release of Cohen's obligation to pay the interest. These determinations are independent because Cohen could prevail in

---

[247] This reasoning is in line with the Sixth Circuit, which considered that it would be unfair to allow a "secondary" issue to preclude relitigation in a subsequent suit. *Eliadis*, 253 F.3d at 910; *see also* Part IV.B (discussing the implications on the right, and incentive, to appeal under the current schools of thought on issue preclusion and multiple independent holdings).

the first suit if: first, the note was fraudulent and therefore not enforceable, which logically means that the interest due on such a fraudulently obtained note would not be collected either; or second, the court found that Johnson executed a release on Cohen's obligation to pay the interest.

Suppose Johnson feels that the judge in suit one incorrectly held that Cohen was fraudulently induced to sign the note but recognized Cohen's strong case against her on the waiver of paying interest. Through a cost/benefit analysis, Johnson decides that an appeal would be useless because Cohen would ultimately win on the issue of paying interest because of the waiver. Since the cost and time of an appeal would not be worth Johnson's eventual defeat, she does not seek an appeal.

Johnson then sues Cohen for the *principal* on the note in *Johnson v. Cohen II*. Using the proposed amendment in this Note, the mere fact that *Johnson v. Cohen I* was decided on multiple independent grounds does not summarily mean that Cohen is prohibited from binding Johnson to the decision of the first court that Cohen was fraudulently induced to sign the note.[248] Instead, the burden will fall on Johnson to show either that the issue of fraud was not fully developed in the first suit because the evidence of a waiver was so compelling or that she did not foresee that the issue of fraud would arise in a subsequent suit. In this hypothetical, Johnson will have difficulty convincing a court that she could not foresee a subsequent suit for the principal on the note.

These amendments address the main concerns of both Restatement views. First, parties will not be encouraged to take cautionary appeals.[249] Only if it is sufficiently foreseeable that the issue will be the subject of subsequent litigation will a party have an incentive to take a cautionary appeal. If the issue will be the subject of subsequent litigation, then the policy concern that matters are disposed of correctly and efficiently has been achieved.[250] If Johnson does not have the incentive of the appeal and cannot foresee relitigation of the issue, then judicial resources are saved.[251] If, however, an appeal is in the party's best interest, or the issue is likely to be the subject of future litigation, then she is given the

---

248 See *supra* Part V.A for the proposed additional exception under the RESTATEMENT (SECOND) OF JUDGMENTS § 28.

249 *See supra* Part IV.B.

250 *See supra* Part IV.A.

251 *See supra* Part IV.A.

opportunity and incentive to appeal.[252] Second, the courts will be secure in consistent judgments and will avoid repetitious litigation of already-decided issues.[253] Erroneous determinations, as well as under-analyzed issues, will not be perpetuated through the system because a party will be able to argue to the second court that either the incentive to appeal or the lack of analysis would lead to an injustice. Finally, Cohen has the opportunity to assert all of the potential arguments on his side and be confident that the resources expended in *Johnson v. Cohen I* will be well spent.

VI. CONCLUSION

Issue preclusion, when applied to multiple independent holdings, implicates the important element that an issue be "necessarily decided" before being imputed against the party in subsequent litigation. This Note examines the current circuit split among the federal appellate courts and explains the several reasons why the present analysis under both the First and Second Restatements infringes on litigation strategy, incentive for appeal, and equitable results. Given the competing policy concerns driving collateral estoppel and the inconsistent effects of the current schools of thought, this Note suggests that the Restatement, and, subsequently, the federal courts, should adopt the general rule of issue preclusion and should allow an exception for multiple independent holdings when a party who wants to avoid issue preclusion can prove an injustice would result if collateral estoppel were invoked. As a result of the amendment, parties will only take necessary appeals and are assured full and rigorous analysis of the issue in the first court, and the number of cases filed will decrease rather than increase, while consistent judgments will prevail.

Monica Renee Brownewell*

---

252 *See supra* Part IV.B.

253 *See supra* Part IV.C.

* I would like to thank everyone who read and edited this Note including Professor Laura Gaston Dooley, my Note Editor, Kimberly Connor, and my fellow classmate, Erin E. Goffette. Their attention to detail and critical eye made this a far better product than I could have achieved alone. I would also like to thank my parents, William and Valarie Brownewell, my accomplishments would not be the same without their guidance and wisdom. Finally, I thank my fiancé, Scott Smith; no words can express my gratitude for his never-ending love and support, through all of my endeavors.