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Issue Preclusion In Complex Litigation

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**Introduction**

In an era of multiparty, multijurisdictional, multidistrict litigation, federal cases have grown increasingly complex. As judges struggle to manage complicated cases, a new litigation paradigm has emerged. Rather than attempting to try all cases in one action, federal judges are now breaking the litigation down into smaller pieces, using "fast tracks" or "bellwether" cases, hoping that resolution of one or two cases will lead to settlement of the rest. Inevitably, because the cases involve identical fact issues and identical defendants, the doctrine of prior adjudication comes into play. This article identifies and analyzes significant issues that arise in the application of the doctrine of prior adjudication to multiparty, multijurisdictional, multidistrict litigation. These issues include: (1) whether issue preclusion applies where an appeal is pending; (2) whether invocation of issue preclusion is proper where its use would effectively foreclose the right to jury trial; (3) the issue preclusive effect of an order denying class certification; (4) whether a subsequent court is bound by the preclusion rules of the prior court; and (5) whether vacatur nullifies the issue preclusive effect of a judgment.

**I. Background**

The doctrine of prior adjudication describes the ways in which a prior judgment may have preclusive effect in a subsequent action. It consists of two interrelated concepts: (1) res

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2 See, e.g., *Weaver Corp. v. Kidde, Inc.*, 701 F. Supp. 61, 63-64 (S.D.N.Y. 1988) (“One difficulty is that the courts use 'res judicata' for two different concepts. Some use it to mean claim preclusion. Others employ res judicata in a general sense to encompass both claim preclusion and issue preclusion.”).
judicata or claim preclusion; and (2) collateral estoppel, also known as issue preclusion. The principle underlying claim preclusion and issue preclusion is that once a litigant has had a full and fair opportunity to litigate its case, it will not get a second chance to do so. Simply put, a litigant gets one bite, and only one bite, of the apple.

3 For an excellent explanation of modern preclusion terminology, see, Kasper Wire Works, Inc. v. Leco Engineering & Machinery, Inc., 575 F.2d 530, 535-36 (5th Cir. 1978):

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

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

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

1. Origins of Claim Preclusion

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

A corollary to this principle is that a successful plaintiff may not sue a second time on the same cause of action, even if the first judgment did not fully compensate it for its injuries. For example, suppose a plaintiff is injured while skiing due to the ski resort’s negligence for not properly marking, maintaining or policing ski trails. The plaintiff sues the ski resort for personal injury and recovers a monetary judgment. During its rehabilitation, plaintiff’s doctor discovers additional injuries that had been suffered in the skiing accident but which were not the subject of the initial lawsuit. Plaintiff is barred from pursuing the second claim under the doctrine of merger.\(^8\)

Under the doctrine of bar, an unsuccessful plaintiff may not re-sue the victorious defendant on the same claim.\(^9\) For example, suppose a plaintiff brings an action in federal court based on diversity of citizenship and loses. Plaintiff could have chosen to sue in state court

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

\(^6\) Restatement (Second) of Judgments, § 18.

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

\(^8\) Id.

\(^9\) Restatement (Second) of Judgments, § 19; *Ryan*, 810 F.2d at 654 ("Bar means that a final judgment in favor of the defendant bars a second action by the plaintiff on the same claim.")
rather than federal court. However, having chosen to prosecute the claim in federal court the
plaintiff is now barred from pursuing the same claim against the same party in state court, even if
the federal decision were wrong. Error in judicial decisions can be corrected only by appeal, not
the relitigation of the same claim in a court of coordinate jurisdiction.

2. Requirements of Claim Preclusion

Claim preclusion has three requirements: (a) identical parties; (b) identical causes of
action; and (c) a judgment on the merits.\textsuperscript{10}

a. Identical Parties

A person cannot be bound by a judgment to which it was not a party.\textsuperscript{11} Normally, the
question of whether parties are identical, and hence whether the first prong of claim preclusion is
met, is a straightforward exercise. Nonetheless, the courts have recognized at least six
exceptions to the general rule under which a non-party to a prior litigation (the “F-1 litigation”) may be bound by the judgment therein.\textsuperscript{12}

1. A non-party to F-1 may be bound by that judgment where it agrees to be bound.\textsuperscript{13}

2. A non-party may be bound by F-1 based on certain “pre-existing substantive legal relationships” between it and a

\textsuperscript{10} Ryan, 810 F.2d at 654; Keith v. Aldridge, 900 F.2d 736, 739 (4th Cir. 1990); see generally C. Wright, A. Miller &

\textsuperscript{11} Taylor v. Sturgell, 128 S. Ct. 2161, 2166-67 (2008) (“It is a principle of general application in Anglo-
American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not
designated as a party or to which he has not been made a party by service of process.”) (quoting Hansberry v. Lee,
311 U.S. 32, 40 (1940). See also Richards v. Jefferson County, 517 U.S. 793, 798 (application of claim preclusion
to non-parties runs counter to the “deep-rooted historic traditions that everyone should have his own day in court.”);

\textsuperscript{12} Taylor, 128 S. Ct. at 2172.

\textsuperscript{13} Id., Citing 1 Restatement (Second of Judgments § 40, p. 390 (1980) and D. Shapiro, Civil Procedure:
Preclusion in Civil Actions 77-78 (2001).
party to the judgment.\textsuperscript{14} These relationships include, but
are not limited to, successorship, bailor-bailee and
assignor-assignee.\textsuperscript{15} The term “priority” is sometimes used
collectively to describe all such relationships but that term
is confusing and has been avoided by the Supreme Court.\textsuperscript{16}

3. Where a non-party was adequately represented in F-1 by a
party with the same interests, it may be bound by F-1.\textsuperscript{17} The principal example of this situation is the class action,
but it also applies to suits brought by trustees, guardians
and other fiduciaries on behalf of their beneficiaries.\textsuperscript{18}

4. A non-party who had “assumed control” of F-1 litigation is
bound by the judgment rendered by the F-1 court.\textsuperscript{19} Such a
party, having been given the opportunity to present
evidence, has had its day in court.\textsuperscript{20}

5. A non-party suing an action as a proxy for one already
bound by an earlier litigation is likewise bound by that
litigation.\textsuperscript{21}

6. Various statutory schemes may expressly foreclos[e] successive litigation by non-litigants,” provided those
schemes are consistent with due process.\textsuperscript{22} Examples of
these schemes include bankruptcy and probate, as well as
quo warranto and other similar suits that may be brought on
behalf of the public.\textsuperscript{23}

\textsuperscript{14} Taylor, 128 S. Ct. at 2172 (citations omitted).
\textsuperscript{15} Id.
\textsuperscript{16} Id. n. 8.
\textsuperscript{17} Id. at 2172.
\textsuperscript{18} Id. at 2172-73.
\textsuperscript{19} Id. at 2173.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Martin, 490 U.S. at 762, n. 2.
\textsuperscript{23} Taylor, 128 S. Ct. at 2173.
The Supreme Court in *Taylor* observed that some lower courts had also recognized the doctrine of virtual representation as an exception to the general rule. The Court in *Taylor* rejected any attempt under the label of virtual representation to expand claim preclusions in a manner that would require the Court “to abandon the attempt to delineate discrete grounds and clear rules altogether,” citing three reasons. First, that approach would necessitate an “amorphous balancing test [that] is at odds with the constrained approach to non-party preclusion our decisions advance.” Second, a broad doctrine of virtual representation would create a sort of common law class action but without the considerable protection afforded non-parties by Rule 23. Third, any balancing standard “would likely create more headaches than it relieves because such a test is inherently uncertain and expensive to administrate, thereby adding to, instead of reducing, the burden of litigation on the courts and the parties.

b. Identical Cause of Action

The application of the doctrine of claim preclusion turns on the scope of the claim in the F-1 actions. Historically, whether two causes of action were identical for claim preclusion purposes turned on the theory of the claims. This approach grew out of common law pleading rules, which required that a complaint set forth facts that describe a theory of recovery

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24 *Id.* at 2170, n. 3.
25 *Id.* at 2174.
26 *Id.* at 2175.
27 *Id.* at 2176.
28 *Id.* at 2176-77 (“In this area of the law . . . crisp rules with sharp corners are preferable to a roundabout doctrine of opaque standards”) (citations omitted).
29 Wright & Miller, *supra*, n. 10 § 4407.
30 *Id.*
cognizable at common law. Accordingly, if consecutive complaints regarding a given incident set forth tort theories of recovery, the causes of action would be identical for claim preclusion purposes. On the other hand, if consecutive claims were stylized differently – the first in tort and the second in breach of warranty – the causes of action would be deemed different for claim preclusion purposes, even if they arose on the same set of facts.\(^3\) This narrow approach to what constitutes a cause of action afforded clever attorneys multiple opportunities to recover on the same facts simply by articulating different theories of recovery.\(^3\)

However, the theory-based definition of cause of action began to lose favor as pleading rules were liberalized and the focus of pleading requirements shifted away from theory of recovery to events or occurrences giving rise to a claim for relief.\(^3\) For example, the "notice pleading" standards adopted under the Federal Rules of Civil Procedure make clear that no technical forms of pleading are required and that a party may obtain any relief to which it is entitled, based on the proof at trial, irrespective of how it characterized its claims in the pleadings.\(^3\)

In addition, the Federal Rules of Civil Procedure and other modern pleading codes made it possible, even desirable, to join claims and parties in a single action.\(^3\) Because all claims by single plaintiff against a defendant could be joined in one action under modern pleading codes, it was no longer necessary for plaintiff to proceed seriatim against a defendant based on differing

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\(^3\) See, e.g., Aetna Casualty & Insurance Co. v. Hase, 390 F.2d 151, 153 (8th Cir. 1968) (claim based on tort not identical to claim based on insurance contract).

\(^3\) See, Wright & Miller, supra, n. 10 at ___.

\(^3\) Id.

\(^3\) Fed. R. Civ. P. 8(a)(2).

\(^3\) Fed. R. Civ. P. 42.
theories of recovery.\textsuperscript{36} Modern pleading codes thus enabled the courts to reap the efficiencies of joint litigation.\textsuperscript{37} Courts began to shift away from a technical view of cause of action based on theory of recovery to a more practical view based on the nature of the transactions at issue and whether such transactions would be subject to substantially identical proof at trial.\textsuperscript{38} If the factual proof under the various theories of recovery would be the same, the causes of action are identical for claim preclusion purposes.\textsuperscript{39} The modern "transactional approach" in defining identical cause of action for claim preclusion purposes is the predominate view today.\textsuperscript{40}

\textsuperscript{36} See, C. Wright & M. Kane, Law of Federal Courts ("Wright & Kane") § 100A.
\textsuperscript{37} Id.
\textsuperscript{38} See, e.g., O'Brien v. City of Syracuse, 54 N.Y. 2d 353, 357 (1981) (under the transactional test, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or if seeking a different remedy.").
\textsuperscript{39} Id.
\textsuperscript{40} See, generally Wright & Miller, supra, n. 10, § 4407, n. 45 and cases cited; Restatement (Second) Judgments § 24:

§ 24. Dimensions of "Claim" for Purposes of Merger or Bar – General Rule Concerning "Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar (see§§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.
c. On the Merits

Whether or not a decision is on the merits for claim preclusion purposes turns on whether the decision goes to the substance of the claim.\footnote{See \textit{Semtek Int'l, Inc. v. Lockheed Martin Corp.}, 531 U.S. 497, 501 (2001).} Dismissals based on lack of personal jurisdiction or lack of subject matter jurisdiction or failure to join a necessary party do not go to the heart of the claim and are not on the merits.\footnote{See, generally, \textit{Wright & Miller}, supra, n. 10, § 4436 – 4438.} On the other hand, judgments for the plaintiff are invariably on the merits. This intuitive approach to defining on the merits works well in most cases. The one area where it has posed problems is in cases where courts have granted motion to dismiss for failure to state a claim upon which relief can be granted.\footnote{See, \textit{Fed. R. Civ. P. 41(b )}; \textit{Wright & Miller}, supra, n. 10, § 4435.} Is such a dismissal on the merits? The answer to that question turns on whether the court is saying that the allegations could never give rise to a claim for relief (inherently defective) or whether the plaintiff may have a claim but the pleading of that claim is deficient (technically defective).

It is not always apparent whether the court is saying that a pleading is inherently defective or technically defective. Sometimes the court will be clear by dismissing "with prejudice" or dismissing "with leave to amend." In many cases, the court will simply be silent. That silence traditionally posed difficulties for courts trying to ascertain the intent of an earlier decision granting a motion to dismiss. The problem has been largely solved under modern procedural codes which contain presumptions that govern unless the court states otherwise.\footnote{\textit{Id.}} For example, under the Federal Rules of Civil Procedure, a motion to dismiss for failure to state
a claim upon which relief can be granted is on the merits unless the court states that the dismissal is without prejudice.⁴⁵

B. Issue Preclusion

1. Origins of Issue Preclusion

Issue preclusion is the first cousin of claim preclusion. It is narrower in scope than claim preclusion by definition. Whereas claim preclusion bars relitigation of entire claims, issue preclusion bars relitigation only of certain issues that have been previously determined.⁴⁶ A key distinction between issue preclusion and claim preclusion is that whereas issue preclusion bars relitigation only of issues that have been actually litigated and determined, claim preclusion bars assertion of whole claims that might have been brought in the prior action and were not.⁴⁷

2. Requirements of Issue Preclusion

Issue preclusion bars relitigation of issues that were actually litigated and determined in, and were necessary to, the prior final judgment.⁴⁸ Finality is “an essential component” of issue

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⁴⁶ See, Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 n. 6 (1982): Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Under collateral estoppel, once a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties.

⁴⁷ Id.

⁴⁸ See, Restatement (Second) Judgments, § 27:

§ 27. Issue Preclusion – General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.
preclusion, as well as claim preclusion.\textsuperscript{49} Moreover, as with claim preclusion, a person not a party to a prior judgment cannot be bound by that judgment as a matter of due process.\textsuperscript{50} Due process, however, would not bar a \textit{stranger} to the initial judgment from benefitting from that judgment. For example, drivers A and B are in an automobile crash. A sues B for negligence. At the time of the accident B was driving a car owned by O and with O's permission. In the first action, the court determined that B was not negligent, and B wins. A then sues O for personal injuries suffered in the crash with B, allegedly due to B's negligence. O seeks to invoke the prior judgment, pointing out that B was held not to have been negligent. O further points out that its liability is derivative of B's liability; and if B were not negligent, then O could not have been negligent. All that A is doing in this situation is getting a second bite of the apple on the issue of B's negligence.

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

Initially, the courts invoked the doctrine of mutuality of estoppel, preventing strangers to the prior judgment from invoking its benefits.\textsuperscript{51} Under the rule of mutuality of estoppel, a person

\begin{footnotesize}
\textsuperscript{49} J.R. Clearwater, Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996); Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F2d 1265, 1269 (5th Cir. 1986) (finality requirement "applies just as strongly to collateral estoppel as it does to res judicata").

\textsuperscript{50} See Neenan v. Woodside Astoria Transportation Co., 261 N.Y. 159, 161 (1935).

\textsuperscript{51} Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 n. 6 (1912) ("It is a principle of general elementary law that the estoppel of a judgment must be mutual"); Wright & Miller, § 4463.
\end{footnotesize}
who was not bound by a prior judgment could not invoke its benefits.\textsuperscript{52} Mutuality was accepted by the courts because it seemed fair.\textsuperscript{53} After all, in the first example, if A had defeated B, A could not have used that judgment to preclude O from defending the negligence claim because O had not been a party to the first case. Similarly, in the second example, had D been successful in the first case, it could not have used that judgment to bar P's suit.

Nevertheless, the rule of mutuality of estoppel soon became unwieldy for both theoretical and practical reasons.\textsuperscript{54} As a theoretical matter, introducing fairness into the preclusion analysis was like trying to fit a round peg in a square hole. Preclusion is premised principally on promoting three goals: (1) efficiency of litigation; (2) consistency of outcome; and (3) an end to litigation. Fairness concerns can be, and often are, at odds with one or more of these goals.

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

\textsuperscript{52} Wright & Miller, § 4463 ("For many years, most courts followed the general rule that the favorable preclusion effects of a judgment were available only to a person who would have been bound by any unfavorable preclusion effects.").

\textsuperscript{53} Id.

\textsuperscript{54} Id. (indemnitor - indemnitee relationships); Wright & Kane, supra, n. 36, § 100A (patent infringement cases).
However, B is certain to argue in any such action that the issue of its negligence has already been determined, leaving O out in the cold. 55

Courts began to see the shortcomings of the rule of mutuality, especially in cases involving active/passive wrongdoing. Judges, however, were not willing initially to jettison mutuality lock, stock and barrel. Rather, the first step was to create exceptions to the rule of mutuality in the active/passive wrongdoer situation, where issue preclusion was invoked as a defense. Courts remained unwilling, however, to extend the exception to mutuality cases, such as the bus accident described above, where P, the passenger in the subsequent litigation, is seeking to use issuing preclusion offensively by barring the bus company from relitigating to the determination of its negligence in the prior action. 56

The theoretical rationale of this distinction was that offensive, non-mutual issue preclusion did not promote the goals of issue preclusion in the same way that defensive, non-mutual issue preclusion did. 57 Courts were concerned that offensive non-mutual issue preclusion would (1) encourage proliferation of litigation by encouraging a wait-and-see attitude in litigation; (2) catch a defendant by unfair surprise if the first litigation were for a nominal amount

55 Id.
56 Id.
57 See Wright & Kane, supra, n. 36, § 100A:

There was more hesitation about "offensive" use of issue preclusion, in which a plaintiff is seeking to preclude a defendant from relitigating the issues that the defendant had previously litigated and lost against another plaintiff. In the case of a mass disaster, for example, if one plaintiff sues the common defendant and loses, this would have no preclusive effect in a suit by another plaintiff, while if offensive use of issue preclusion is proper, a victory by any plaintiff effectively establishes defendant's liability to all the remaining plaintiffs. It has been pointed out that this means that each case is essentially a test case for the defendant, but not for the remaining plaintiffs, and leads to great disparity in litigating risks.
and the subsequent litigation in which preclusion is sought were for much larger sums; (3) deny the defendant an important procedural advantage that was unavailable in the first court; or (4) potentially lock in inconsistent judgments if plaintiff sought to invoke preclusion on the basis of a favorable judgment that follows one or more unfavorable judgments.\(^5\)

Nevertheless, courts continued to hammer away at mutuality until the exception swallowed the rule.\(^6\) In *Parklane*,\(^7\) the Supreme Court held that lack of mutuality will no longer bar invocation of offensive, non-mutual issue preclusion and that a court in its discretion may allow a stranger to the first suit to invoke the benefits of that litigation.\(^8\) The Supreme Court

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

59 See, *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942). In *Bernhard*, the executor of an estate brought an accounting so that he might wind up the estate. The three daughters of the decedent were made parties to the accounting and challenged a certain payment that the executor had taken from the estate. The executor claimed that the payment had been a gift from the decedent. The beneficiaries claimed that the transfer had been improper. The court sided with the executor and approved the accounting.

After the estate had been closed, one of the beneficiaries obtained letters testamentary and commenced and action against the bank (a predecessor to Bank of America) for improperly transferring the funds at issue in the previous accounting to the executor. The bank interposed to prior judgment as preclusive on the issue of the legality of the transfer. The plaintiff argued that mutuality of estoppel foreclosed preclusion as a defense. The court rejected the mutuality argument. Justice Traynor unleashed a devastating attack on mutuality which singled its demise. As Professor Wright has observed, "It is rare that a major change in established legal doctrine can be identified with a single decision and judge." Wright and Kane, § 100A. See also, *DeWitt Inc. v. Hall*, 19 N.Y.2d 141, 147 (1967).

60 *Parklane Hosiery Co. v. Shore*, 493 U.S. 322 (1979). *Parklane* was a shareholder's derivative suit alleging that the defendant corporation had made false and misleading statements in its proxy statements in violation of federal securities laws. Before that case came to trial, the SEC brought an enforcement action against the defendants alleging the same fraud claimed in the derivative suit. The court in the SEC action found fraud and ordered injunctive and declaratory relief.

Thereafter, the shareholders in the derivative suit sought to invoke the benefits of the judgment in the SEC action. The Supreme Court held that the doctrine of mutuality was not a bar to invocation of offensive, non-mutual issue preclusion.

61 Id. at 331 (“We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.”)
cautioned that offensive, non-mutual issue preclusion should not be permitted where the effect on the defendant would be unfair.\textsuperscript{62}

II. Specific Preclusion Issues

Among the significant preclusion issues that arise in modern complex litigation are:

(1) whether a judgment is final for issue preclusion purposes where an appeal is pending;
(2) whether issue preclusion may be invoked where the net effect is to deny a party the right to a jury trial on a given issue; (3) whether an order denying class certification is a final judgment for issue preclusion purposes; (4) whether the preclusion rules of the deciding court bind subsequent courts; and (5) whether findings that are part of a vacated order have issue preclusive effect.

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

The well-settled rule in the federal courts is that the pendency of an appeal has no impact on the finality or binding effect of a trial court's holding.\textsuperscript{63} That rule is fraught with peril. Any matter on appeal is subject to reversal. If the original judgment is given preclusive effect in a subsequent case while the original judgment is on appeal, and thereafter the original judgment is reversed on appeal, then the decision to allow preclusion in the second action is no longer viable; and that case goes back to square one. Otherwise, invocation of issue preclusion would produce inconsistent results.

The answer, however, is not that a judgment for preclusion purposes becomes final only after all appeals have been exhausted because similar problems of inconsistency may arise.

\textsuperscript{62} Id.

\textsuperscript{63} Deposit Bank v. Board of Councilmen of the City of Frankfort, 191 U.S. 499, 510-12 (1903); Pharmacia & Upjohn Company v. Mylan Pharmaceuticals, Inc., 170 F.3d 1373, 1381 (Fed. Cir. 1999) ("a final judgment retains all of its res judicata consequences pending decision of the appeal"); Williams v. Commissioner, 1 F.3d 502, 504 (7th Cir. 1993) ("[A]" judgment final in the trial court may have collateral estoppel effect even though the loser has not exhausted his appellate remedies;) see Wright & Miller, supra, n. 10, § 4433 at 78 (appeal does not alter the preclusionary effect of a judgment); Restatement (Second) Judgments, § 13 comment f.
Suppose C sues D, and C wins a judgment. D appeals. While the appeal is pending, C sues D again, raising issues that had been litigated and determined in F-1. If the rule is that the judgment is not final for issue preclusion purposes until all appeals have been exhausted, D may relitigate any issues in the second action while the appeal in F-1 is pending without fear of issue preclusion. Suppose the second litigation ends before the appeal in the initial matter is decided; and in that litigation, D successfully relitigates issues that had been decided adverse to it in the first action. Thereafter, the appellate court affirms the findings in the initial case. Again, as with the first alternative, there is significant potential for inconsistent judgments.

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

There have been differences of opinion about whether, or in what circumstances, a judgment can be considered final for purposes of res judicata when proceedings have been taken to reverse or modify it by appeal. The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed from that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.

The pendency of a motion for new trial or to set aside a judgment, or of an appeal from a judgment, is relevant in deciding whether the question of preclusion should be presently decided in the second action. It may be appropriate to postpone decision of

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64 Restatement (Second) Judgments, § 13 comment f.
that question until the proceedings addressed to the judgment are concluded.

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

(Emphasis added.) Postponing any decision on preclusion pending appeal is especially appropriate where "there is substantial doubt whether the judgment will be upheld." 65

Professors Wright and Miller also recognize that "[s]ubstantial difficulties" may arise when a trial court decision that is given preclusive effect by an F-2 court is subsequently reversed on appeal. 66 They state that "[t]hese difficulties suggest that ordinarily it is better to avoid the res judicata question by dismissing the second action or staying the trial and perhaps pretrial proceedings pending resolution of the appeal in the first action." 67 Wright and Miller also acknowledge that this course of action is not always possible, noting that the case for delaying F-2 is strongest where the resolution of the F-1 appeal would result in preclusion of the F-2 action in its entirety. 68

Notwithstanding the compelling logic of postponing the imposition of issue preclusion in F-2 pending the results of the appellate process in F-1, courts are reluctant to do so where the appeal is seen simply as a ploy to delay the F-1 victor from reaping the rewards of the F-1

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65 Id. § 316, comment b at 146; see DeBoom v. Raining Rose, Inc., 456 F. Supp. 2d 1077, 1080 (N.D. Iowa 2006) (following the Restatement).

66 Wright & Miller, § 4433 at 88.

67 Id. at 93.

68 Id. at 94; see, e.g., Perez v. Volvo Corp., 247 F.3d 303, 309 (1st Cir. 2001) ("prudent" to stay F-2 action pending resolution of F-2 appeal); In re Sonus Networks, Inc. Shareholder Derivative Litigation, 422 F. Supp. 2d 281, 290 n. 5 (D. Mass. 2006) (noting the merits of postponing a decision in F-2 on preclusion pending the conclusion of the F-1 proceedings); Hirschersohn v. West, 1993 WL 813514 (D.V.I. 1993) (postponing F-2 litigation until F-1 decided in order to avoid perpetrating an injustice).
judgment. In *May v. Oldfield*, the F-2 court refused to stay the F-1 court's determination of defendant's liability because "a final appellate decision . . . may take years" and the delay would unfairly prejudice plaintiff's opportunity to prove damages. Similarly, the court in *Collins v. Seaboard Coastline Railroad Co.* refused to stay imposition of issue preclusion because any "order staying this case until resolution of the appeal would considerably delay plaintiff's opportunity to prove her damages."

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

**B. Jury Trial and Issue Preclusion**

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

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70 Id. at 127-28.


72 Id. at 33.

73 456 F. Supp. 2d 1077 (N.D. Iowa 2006).

74 Id. at 1080-81.
The Seventh Amendment preserves the right to jury trial in "[s]uits at common law."\textsuperscript{75} On the other hand, there is no right to trial by jury for claims that are historically equitable in nature. Nevertheless, where, legal and equitable claims are joined as part of the same action, "the right to jury trial on the legal claims, including all issues common to both claims, remains intact."\textsuperscript{76}

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

\begin{quote}
The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim ... \textit{always preserving inviolate the right of trial by jury} Constitution or as given by a statute of the United States.\textsuperscript{77}
\end{quote}

Still, the Court's discretion is not without limitations; and the rule itself clearly states that trial courts in deciding on which issues are to be separately tried "must ensure that a litigant's constitutional right to a jury is preserved."\textsuperscript{78} Similarly, in \textit{Beacon Theatres},\textsuperscript{79} the Supreme Court held that while the same court may try both equitable and legal claims in the same action, "only under the most imperative circumstances ... can the right to a jury trial of legal issues be lost

\begin{flushleft}
\textsuperscript{75} U.S. Const., Amend. VII; see also Fed. R. Civ. P. 38 (reaffirming the right to a jury trial under the Seventh Amendment and where permitted by statute).
\textsuperscript{77} Fed. R. Civ. P. 42(b).
\textsuperscript{78} Shum v. Intel Corp., 499 F.3d 1272, 1276 (Fed. Cir. 2007); see Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of a right to a jury trial should be scrutinized with the utmost care.").
\end{flushleft}
through prior determination of equitable claims.” The Court went on to conclude that the trial court had erred in conducting a bench trial on the equitable claims and resolving issues that were common to the legal claims in plaintiff’s favor thereby effectively denying defendant a jury trial on its legal counterclaims. Thereafter, in Dairy Queen, the Court held that when legal claims involved factual issues that are "common with those upon which [the] claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims.” Accordingly, any attempt to give an issue preclusive effect to the equitable determinations made by the F-1 court with respect to issues common to the legal claims in the F-2 court would foreclose a party’s right to a jury trial in the subsequent legal action in direct contradiction of Lytle, Beacon Theatres and Dairy Queen.

The Supreme Court's decision in Parklane Hosiery Co. v. Shore is not to the contrary. Parklane did indeed hold that a court's determinations of fact issues in an equitable action can have issue preclusive effect in a subsequent legal action without violating a litigant's Seventh Amendment right to a jury trial. In so ruling, Parklane distinguished the Beacon Theatres decision and noted that the Court there had emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it "thought that if an

80 Id. at 510-11.
82 Id. at 479.
83 See, supra, nn. 60-62 and accompanying text.
84 Parklane, 439 U.S. at 335.
issue common to both legal and equitable claims was first determined by a judge, relitigation of
the issue before a jury might be foreclosed by res judicata or collateral estoppel.\textsuperscript{85}

Nevertheless, nothing in Parklane detracts from the right to a jury trial. Parklane addressed only the situation where a prior equitable adjudication is followed by a separate legal action to be tried by a jury.\textsuperscript{86} The Court emphasized that it had reached a different result in Beacon Theatres, because there equitable and legal claims with common factual elements are raised in the same case.\textsuperscript{87}

In Lytle, the Court drew precisely the same distinction. Lytle involved civil rights claims by a discharged employee against his former employer.\textsuperscript{88} Plaintiff was an African American who had been fired for unexcused absences.\textsuperscript{89} He sued under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, alleging that he had been discharged because of his race and that his former employee had retaliated against him for filing a charge with the EEOC.\textsuperscript{90} The trial court dismissed the § 1981 claims, holding that Title VII was the exclusive remedy for Lytle's alleged injuries.\textsuperscript{91} Thereafter the District Court conducted a bench trial and granted defendant's motion for judgment following the close of plaintiff's case-in-chief.\textsuperscript{92}

\begin{itemize}
\item \textsuperscript{85} Id. at 334.
\item \textsuperscript{86} Id.
\item \textsuperscript{87} Id.
\item \textsuperscript{88} Lytle, 494 U.S. at 548.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id. at 549.
\end{itemize}
On appeal, the Fourth Circuit concluded that the trial court had erred in dismissing the § 1981 claim, but nevertheless found that Lytle was collaterally estopped from litigating the § 1981 claim because the elements of the § 1981 claim are identical to those in the Title VII action. The Supreme Court reversed, holding that the pertinent authorities were *Beacon Theatres* and *Dairy Queen*:

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

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

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

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93 *Id.*
94 *Id.* at 552.
95 *Id.* at 553.
96 *Id.*
97 *Id.*
In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial.  

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

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

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98 Id. at 553-54.


100 Id. at 107.

101 Id. at 107-08.

102 Id. at 108.

103 Id. at 109.
The law is clear and unequivocal. In cases involving both equitable and legal claims, where equitable claims have already been resolved by the judge, courts will not permit invocation of issue preclusion to short-circuit a party’s right to a jury trial on legal issues.\(^\text{104}\)

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

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

1. **Finality**

A decision denying a class certification motion is unquestionably a judgment.\(^\text{105}\) The real question then is whether that judgment is sufficiently final for issue preclusion to attach. An order denying class certification is not a final judgment in the sense that it does not finally determine the outcome of the litigation between the parties. Accordingly, some courts have held that such an order has no claim preclusive effect.\(^\text{106}\) However, other courts have held that


\(^{105}\) Bridgestone/Firestone, Inc. Tires Products Liability Litigation, 333 F.3d 763, 766 (7th Cir. 2003).

\(^{106}\) See J.R. Clearwater, Inc., 93 F.3d at 179 (“An order denying class certification is not a final judgment”); In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 134 F.3d 133, 146 (3d Cir. 1998) (same); see also Canady v. Allstate Ins. Co., 282 F.3d 1005, 1019, n. 9 (8th Cir. 2002) (“We recognize that denial of class certification alone does not constitute a final judgment on the merits sufficient to satisfy the res judicata principles underlying the relitigation exception to the Anti-Injunction Act.”)
application of the doctrine of issue preclusion does not turn on whether a final judgment has been entered. Judge Friendly, writing for the court in Zdanok v. Glidden Co, stated 107

Dealing with this very question of the kind of finality of judgment necessary to create an estoppel, we pointed out, quite recently, that collateral estoppel does not require a judgment "which ends the litigation * * * and leaves nothing for the court to do but execute the judgment," Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945), but includes many dispositions which, though not final in that sense, have nevertheless been fully litigated. Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2 Cir. 1961), cert. denied, 368 U.S. 986, 82 S. Ct. 601, 7 L.Ed.2d 524 (1962), and cases cited. As we there said, "Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."108

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

The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior application of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. 109

Judge Easterbrook, writing for the Seventh Circuit in In re Bridgestone Bridgestone/ Firestone, Inc., Tires Products Liability Litigation, ruled that an order denying class certification was “sufficiently firm” for issue preclusion to attach.110 Bridgestone involved a putative class of nationwide buyers and lessees of SUVs equipped with tires that had abnormally high failure rates. 111 The putative class member, however, had not yet experienced tire failure on their

107 327 F.2d 944, 955 (2d Cir. 1969).

108 Id.; accord, John Morrell & Co. v. Local Union 304A, 913 F.2d § 44, 563-64 (8th Cir. 1990).

109 Restatement (Second) Judgments, § 13; see also Wright v. Miller, supra, n. 10 at § 4434 (“recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary ruling or to determinations of liability that have not yet been completed by an award of damages or other relief.”)

110 Bridgestone, 333 F.3d at 767.

111 Id. at 765.
vehicles.\textsuperscript{112} The trial court certified the class, but the Seventh Circuit reversed.\textsuperscript{113} The Supreme Court denied certiorari.\textsuperscript{114} Thereafter, plaintiffs' counsel filed additional suits in at least five other jurisdictions.\textsuperscript{115} Defendants then sought to enjoin such suits on the grounds of \textit{inter alia}, issue preclusion.\textsuperscript{116} In holding that the Seventh Circuit's prior order was "sufficiently firm" for issue preclusion to apply, Judge Easterbrook pointed to the following factors: (1) the certification motion received the "focused attention" of counsel for both parties in both district and circuit courts; (2) both the district and circuit courts addressed the certification issue exhaustively in published opinion and brought the debate to a conclusion; (3) \textit{certiorari} was sought and denied; and (4) class counsel filed an amended master complaint before the MDL judge assigned to the matter so that a single decision on the issue could be made with respect to all cases, no matter where they originated.\textsuperscript{117}

2. Federal Preclusion Rules Apply

Moreover, the Court of Appeals ruled that the preclusive effect of a federal judgment on subsequent litigation turns on the application of federal preclusion principles.\textsuperscript{118} A federal court

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 767.

\textsuperscript{118} Id. ("The preclusive effect of a judgment rendered by a federal court depends on national rather than state law"), citing \textit{Semtek Int'l, Inc. v. Lockheed Martin Corp.}, 531 U.S. 497 (2001). The Court further noted that while \textit{Semtek} would normally require federal courts to incorporate state law principles in diversity cases, that proviso does not apply where a master complaint with two federal claims had been filed, nor where state rules would undermine the finality of a federal judgment. \textit{Bridgestone}, 333 F.3d at 767, see infra, nn.148-49 and accompanying text.
in a subsequent action must honor the prior determination of a federal court on the same issue.\textsuperscript{119} Nor is a state court free to ignore federal interlocutory judgments; to do so would be incompatible with federal law.\textsuperscript{120}

3. Parties: Putative Class Members Are Bound

As a matter of due process, a person not party to a judgment cannot be bound by that judgment.\textsuperscript{121} The question then is whether absentee members of the putative class are "parties" for issue preclusion purposes. Again, Judge Easterbrook in Bridgestone held that absentee members of the putative class are parties to the certification decision.\textsuperscript{122} He pointed out that any member of the class could appeal a certification decision without intervening in the action.\textsuperscript{123} The purpose of permitting absentee class members to seek judicial review is that "otherwise they would be bound by the defeat."\textsuperscript{124}

Thus, an absentee class member is not free to disregard an adverse decision by a federal court on the certification issue.\textsuperscript{125} Nevertheless, as a matter of constitutional law, an absentee member of a putative class can be bound by an adverse ruling on certification if and only if the class representative adequately represented the interests of absentee class members.\textsuperscript{126} That

\textsuperscript{119} Bridgestone, 333 F.3d at 767.
\textsuperscript{120} Id.
\textsuperscript{121} See, supra, n. 11 and accompanying text.
\textsuperscript{122} Bridgestone, 333 F.3d at 768.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 768-69.
determination is a question of fact.\textsuperscript{127} Once there is a finding of adequacy of representation, the absentee members are bound by the decision.\textsuperscript{128}

In so ruling, Judge Easterbrook rejected what he termed the "heads I win, tails, you lose" arguments of the plaintiffs.\textsuperscript{129} First, plaintiffs had urged that only named class representatives and not absentee members of the putative class were "parties" to the litigation.\textsuperscript{130} Therefore, the trial court lacked in \textit{personam} jurisdiction over the absentee plaintiffs.\textsuperscript{131} The Seventh Circuit noted that under Phillips Petroleum Co. v. Shutts, absentee members of a putative class are treated as parties whether or not the court has personal jurisdiction over them.\textsuperscript{132} In any event, the appellate court observed that the plaintiffs master complaint had been premised on RICO which permits nationwide service of process, thereby rendering absentee plaintiffs subject to in \textit{personam} jurisdiction in federal court.\textsuperscript{133}

Second, the Seventh Circuit noted that failure to offer absentee plaintiffs the right to opt out of the class prior to the certification decision did not infect the judgment denying certification.\textsuperscript{134} The right to opt out under Rule 23(b)(3) of the Federal Rules of Civil Procedure does not attach until after a class has been certified.\textsuperscript{135} Once cannot opt out of the certification

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 767.
\textsuperscript{130} Id. at 768.
\textsuperscript{131} Id.
\textsuperscript{132} Bridgestone, 333 F.3d at 768.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 769.
\textsuperscript{135} Id., citing Fed. R. Civ. P. 23(c)(2).
procedure itself. Indeed, a certification procedure would be meaningless unless made on an all or nothing class-wide basis.\(^\text{136}\) More importantly, the point of opting out is to preserve a party's right to litigate its claims individually, "not to launch a competing class action."\(^\text{137}\) Denial of certification does not bar a litigant from proceeding on its own; rather, it means that a litigant may not act on behalf of others.\(^\text{138}\)

The reaction to Judge Easterbrook’s ruling in Bridgestone has been mixed. Some commentators have praised the decision;\(^\text{139}\) others have expressed grave doubts.\(^\text{140}\) Courts have similarly been cautious in applying Bridgestone; and the case has gotten little traction,\(^\text{141}\) even in the Seventh Circuit.\(^\text{142}\) Of particular concern to critics is the Court’s treatment of the personal jurisdiction and due process issues.\(^\text{143}\)

\(^{136}\) Id. at 769.

\(^{137}\) Id.

\(^{138}\) Id.

\(^{139}\) See, e.g., Note, the Path to Preclusion: Federal Injunctive Relief Against Nationwide Classes in State Court, 54 Duke L.J. 221, 223 (2004) (“opinion was a bold attempt to provide a much needed solution to the pervasive problem of overlapping putative nationwide classes – notwithstanding criticism that this attempt was unwarranted.”

\(^{140}\) See, e.g., Note, Civil Procedure – Class Action Certification – Seventh Circuit Holds That Denial of Class Certification Can Have Preclusive Effect In State and Federal Courts – In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation, 333 F.3d 763 (7th Cir. 2003), 117 Har. L. Rev. 2031 (“the Seventh Circuit’s legal reasoning departed from Supreme Court precedent and traditional principles of preclusion”); Gary Young, Class Action ‘Tort Reform’ Ruling, July 7, 2003 at p.5 (the opinion “bowled over attorneys with its sweeping – and, some say, wrongheaded – curtailment of state authority to certify nationwide classes after a federal court has declined to do so”); Timothy Kerr, Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts’ Injunctive Power and the Class Action Fairness Act of 2005, 29 Hamline L. Rev. 218, 234 (2006) (the “decision does more than push the limits of Supreme Court precedent in its interpretation of the relitigation exception; and its goes well beyond the authority to enjoin state court actions pursuant to the Anti-Injunction Act.”)


\(^{142}\) See Carnegie v. Household International, Inc., 376 F.3d 656, 663 (7th Cir. 2004) (Bridgestone should not be read “to hold that any ruling denying class certification is binding in future litigation”) (emphasis in original); Oshana v. The Coca-Cola Co., 225 F.R.D. 575, 574 (N.D. Ill. 2005) (issue preclusion not applicable “because
D. Conflict of Laws

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

How should the F-2 court decide the preclusion matter? As a threshold matter, under Parklane, lack of mutuality is not a bar to invocation of offensive non-mutual issue preclusion, provided that doing so would not produce unfair results for defendants.144 The Court in Parklane identified four circumstances in which use of offensive non-mutual issue preclusion might lead to harsh results and lead a trial court to exercise its discretion in favor of denying issue preclusion: (1) where the stakes in F-2 are disproportionately higher than in F-1 such that a normal judgment for plaintiff in F-1, which the defendant might not have significant incentive to litigate, would preclude a defendant from litigating stakes that are substantially higher; (2) where procedural rights in F-2 are much broader in F-1 and would enable the defendant to litigate more effectively in F-2; (3) where invocation of issue preclusion would encourage a wait-and-see attitude among another plaintiff and thereby proliferate, rather than limit, litigation; and

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143 Kerr, supra, n. 138 at 240-41.

144 Parklane, 439 U.S. at 331.
(4) where use of issue preclusion would serve to lock inconsistent judgments by permitting preclusion on the basis of earlier judgments for other plaintiffs while at the same time ignoring prior judgments for the defendants involving the same issues.\(^\text{145}\)

Although the Parklane rule abrogating mutuality is the law in federal courts, not all states have followed suit; and some still adhere to the rule of mutuality.\(^\text{146}\) Where an F-2 plaintiff in state court seeks to invoke offensive, non-mutual issue preclusion based on an F-1 federal judgment, does the application of preclusion principles turn on the law of F-1 or F-2? The general rule is that in federal question cases the issue preclusion rules of F-1 govern and the F-2 court must follow F-1 preclusion rules.\(^\text{147}\) Otherwise, the F-2 court would not be giving full effect to the F-1 judgment. Accordingly, if the F-2 court is a state court, it must honor the federal rule, even if state law requires mutuality.

However, this does not mean that the invocation of offensive, non-mutual preclusion must be automatically upheld by the state court. The state court would still have the same measure of discretion as the federal court in deciding whether to invoke offensive non-mutual issue preclusion; and if it finds that applying this doctrine may yield harsh or unfair results, may decline to allow it.\(^\text{148}\)

\(^\text{145}\) Id. at 330-32.

\(^\text{146}\) See Wright & Miller, supra, no. 10 § 4464.

\(^\text{147}\) See Wright & Miller, supra, n. 10 at § 4468 ("It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts given the basic requirements that state courts honor the judgments of courts in other states, and the federal courts must honor state court judgments"); see also Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255, 265, n. 11 (10th Cir. 1989).

\(^\text{148}\) Id.
The question becomes more complicated where F-1 is a federal court sitting in diversity and deciding issues of state law. In Semtek, the Supreme Court ruled that the preclusive effects of a California diversity judgment dismissing an action on statute of limitations grounds on a subsequent state court action in Maryland were governed by federal common law. However, the Court further ruled that federal common law would incorporate California law because the federal dismissal relied on state substantive law and because incorporating state law would discourage forum shopping and inequitable administration of justice. The Court observed that there was no federal interest in giving the California statute of limitations more effect in other states than in California.

On the other hand, the rule of Semtek is not absolute. The decision itself contains a proviso that state rules that undermine the finality of federal judgments will not be incorporated under federal common law. Thus, in Bridgestone, the Seventh Circuit held that under Semtek state law preclusion principles that would allow a state court to disregard federal interlocutory judgments on class certification must yield to federal law. At first blush, Semtek injects an

149 See Wright & Miller, supra, n. 10 at § 4472 (determining the preclusive effects of F-1 federal judgment based on state law on F-2 state court “bewildering”), but see Avondale Shipyard, Inc. v. Insured Lloyd’s, 786 F.2d 1265, 1269, n. 4 (implementing a bright-line rule: “we apply federal law to the question of res judicata or collateral estoppel effect of prior federal court proceedings regardless of the basis of federal jurisdiction in either the prior or the present actions.”)


151 Id. at 505-09; see also Restatement (Second) Judgments § 87 (“Federal law determines the effects under the rules of res judicata of a judgment in federal court.”)

152 Semtek, 531 U.S. at 505-09.

153 Id. at 509.

154 Id.

155 Bridgestone, 333 F.3d at 768; see generally Wright & Miller, supra, n. 10, § 4472.
uncomfortable degree of uncertainty into the choice of law analysis on the question of issue preclusion. The reality is, however, that the instances where state law should be incorporated into federal common law are relatively few; and generally the strong federal interest in finality and efficiency in the conduct of litigation justify adherence to the federal law of issue preclusion. Suppose that in a bifurcated action, a case is litigated; and the court enters a judgment in favor of the plaintiff on the issue of liability. While the trial on damages is pending and before any final judgment in the action is issued, the parties settle. As part of the settlement agreement the defendant insists that the judgment on liability be vacated. The plaintiff goes along, and the parties agree to petition the court jointly to vacate the judgment on liability. The defendant is especially interested in vacating the liability judgment because it faces similar lawsuits in other jurisdictions with issues identical to the ones litigated and determined by the F-1 trial court prior to vacatur and hence the prospect of adverse rulings based on issue preclusion. The plaintiff will typically go along because, at the end of the day, plaintiff is getting its recovery and any benefit that would inure to those in other suits is not necessarily a concern.

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

156 Wright & Miller, supra, n. 10 §§4472 (“The number of situations that may justify incorporation of state law may prove to be relatively small in relation to the total range of preclusion questions.”)


The arguments for denying preclusion based on vacation derive largely from the dispute resolution model: (1) the judgment is not final; (2) the ruling, once vacated, cannot be appealed; and (3) to rule otherwise would undo a settlement and hence undermine an important public policy designed to unburden the courts. First, traditionally issue preclusion has been accorded only to final judgments.\[159\] By definition, a judgment solely on liability issues as part of a bifurcated action is not final. Second, once an action is vacated, the issues therein become moot and the appellate court lacks jurisdiction over the matter.\[161\] Preclusion is inappropriate with respect to issues that are insulated from appellate review.\[162\] Third, permitting invocation of issue preclusion based on a vacated judgment would tend to undermine settlements.\[163\] That, in turn, would subject the civil justice system to needless and burdensome litigation. As the court in Dodrill v. Ludt\[164\] observed:

If a judgment could be entirely vacated yet preclusive effect still given to issues determined at trial but not specifically appealed, appellants would generally feel compelled to appeal every contrary factual determination. Such inefficiency neither lawyers nor judges ought to court. Litigants ought to be encouraged to expend their energies on their most compelling

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\[159\] See Note 58 Fordham L. Rev.; supra, n. 158 at 248.

\[160\] 18 Wright & Miller, supra, n. 10 § 4427, Kosinski v. C.I.R., 541 F.3d 671 (6th Cir. 2008); Kendall v. Visa J.S.A., Inc., 518 F.3d 1042, 1050-51 (9th Cir. 2008).

\[161\] See Restatement (Second) Judgments § 88.

\[162\] 18 Wright & Miller, supra, n. 10 § 4433.

\[163\] Id. § 3533.10.

\[164\] 764 F.2d 442, 444 (6th Cir. 1985).
issues and arguments, without paranoia about the preclusive effect of other issues or determinations.  

On the other hand, the arguments for permitting issue preclusive effect for vacated judgments stems from the public policy model. A judgment of the court does more than simply resolve a dispute between private litigants; it also establishes precedent that benefits other litigants trying similar issues in other cases. Proponents of this approach make quick work of the arguments that vacatur robs a judgment of its preclusive effect. First, while it is true issue preclusive effect is given only to final judgments, “finality” in the issue preclusion sense is not synonymous with “finality” as used in the final judgment rule.  

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

Nor is the fact that the vacated decision cannot be appealed a persuasive reason for denying issue preclusion. Particularly troubling in this scenario is that the parties, here the defendant, engineered the vacation solely for the purpose of avoiding the perpetuation of the potential "stain" of an adverse determination through preclusion down the line in other cases.  

165 Id.  

166 In re Memorial Hosp., 862 F.2d 1299, 1303 (7th Cir. 1988).  

167 Syverson v. IBM Corp., 472 F.3d 1072, 1074 (“To be final for [issue preclusion] purposes, a decision need not possess ‘finality’ in the sense of 28 U.S.C. § 1291”) (citations omitted). The proper inquiry “is whether the court’s decision on the issue as to which preclusion is sought is final. Id.  

168 See, supra, n. ___ and accompanying text.  

169 Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149, 1191-92 (3rd Cir. 1982) (imposition of issue preclusion not unfair to defendant where (1) he chose to litigate and lost; and (2) having lost, he settled prior to final judgment in the hope of avoiding issue preclusion.
Issue preclusion, however, is not simply putty in the hands of litigants which can be manipulated to meet the goals of private parties to a litigation. Rather, issue preclusion serves broader public policy interests of (1) promoting efficiency in litigation; (2) assuring that there will be an end point to litigation; and (3) fostering consistency of outcomes. It is one thing for a court to withdraw an opinion because upon sober reflection, it has concerns about whether the decision is right on the merits. It is quite another to ask a court to withdraw an opinion solely so that a party might avoid issue preclusion assertions in related litigation.\textsuperscript{170}

Finally, denying preclusive effect to vacated judgments does not undermine the policies promoted by settlements. Settlements benefit the civil justice system by reducing litigation and easing the workload of the judiciary. Denying preclusive effect to vacated judgment has the very opposite effect by promoting (re)litigation and consequently adding to the judicial burden. To rule that vacation vitiates the issue preclusion effect of a prior judgment would create an unnecessary and undesirable loophole that would thwart the application of the doctrine of prior judgments.

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

Conclusion

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