Pace University
DigitalCommons@Pace

Pace Law Faculty Publications | School of Law

2000

Second Circuit 1999-2000 Res Judicata Developments

Jay C. Carlisle
Elisabeth Haub School of Law at Pace University, jcarlisle@law.pace.edu

Follow this and additional works at: http://digitalcommons.pace.edu/lawfaculty

Part of the Civil Procedure Commons, and the Litigation Commons

Recommended Citation
Jay C. Carlisle, Second Circuit 1999-2000 Res Judicata Developments, 20 QLR 75 (2000), http://digitalcommons.pace.edu/lawfaculty/20/.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

SECOND CIRCUIT 1999-2000 RES JUDICATA DEVELOPMENTS

Jay Carlisle[*]

During the 1999-2000 survey year the United States Court of Appeals for the Second Circuit has issued at least twenty-five *res judicata* decisions[1] expanding the doctrines of claim preclusion[2] and issue preclusion. The court liberally applied claim preclusion but infrequently applied the more expansive doctrine of issue preclusion.[3] Also, the Second Circuit released over fifty unpublished decisions[4] that affect the rights of pro se litigants appearing before the court.[5] These decisions demonstrate the court's immense respect for the doctrine of *res judicata*. Similarly, the decisions illustrate the extent to which the

---

* Professor of Law, Pace University Law School; Editor, *Second Circuit Digest*, 1990-1994.

1. *See infra* notes 19-20, 30, 39, 41, 43, 46-49, 55, 57, 59, 61, 63-64, 66, 69-70 and accompanying text.

2. Claim preclusion is sometimes referred to as *res judicata*. Claim preclusion has been defined by the United States Court of Appeals for the Second Circuit as follows: After a final judgment on the merits rendered by a court of competent jurisdiction, *res judicata* bars subsequent litigation between the same parties and those in privity with them involving the same cause of action. *See* Anaconda-Ericsson, Inc. v. Hessen (*In re* Teltronics Servs., Inc.), 762 F.2d 185, 190 (2d Cir. 1985). "If subsequent litigation arises from the same cause of action, both those matters actually offered to sustain the claim and those that might have been offered in the prior action are barred from being relitigated; that is, there is claim preclusion." Rezzonico v. H. & R. Block, Inc., 182 F.3d 144, 148 (2d Cir. 1999).

3. Issue preclusion is sometimes referred to as collateral estoppel. The Second Circuit has defined issue preclusion as follows:

> If subsequent litigation arises from a different cause of action, the prior judgment bars only those matters or issues common to both actions that were expressly or by necessary implication adjudicated in the prior litigation. This prong of *res judicata* is referred to as issue preclusion. The Supreme Court has stated that issue preclusion means that when an issue has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Rezzonico, 182 F.3d at 148 (quoting Schiro v. Farley, 510 U.S. 222, 232 (1994)).

4. *See infra* note 70.

5. The majority of these law suits are civil rights (42 U.S.C. § 1983) and Title VII litigation involving allegations of discrimination and unlawful termination of employment.

HeinOnline -- 20 QLR 75 2000-2001

court relies on the doctrine to achieve finality, to prevent inconsistent judgments and to allocate judicial resources.[6] This survey article will review some of the court's significant decisions and comment on future trends for application of the law of *res judicata* in the Second Circuit.

I. INTRODUCTION

In its broadest sense, the term *res judicata* has been used by the Second Circuit to refer to a variety of concepts dealing with the preclusive effects of a judgment on subsequent litigation.[7] Claim preclusion is the doctrine that 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 upon different theories or if seeking a different remedy.[8] Issue preclusion basically precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether the tribunals or causes of action are the same.[9] Its typical application occurs when one of the parties to a civil action argues that preclusive effect should be given to one or more issues determined in an earlier civil action between the same parties in the same jurisdiction.[10] The United States Supreme Court has explained the

---

6. *See* Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 84-94 (1986).

7. Leather v. Ten Eyck, 180 F.3d 420, 423 (2d Cir. 1999).

8. L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc., 198 F.3d 85, 87-88 (2d Cir. 1999) ("The doctrine of *res judicata*, or claim preclusion, prevents a plaintiff from relitigating claims that were or could have been raised in a prior action against the same defendant where that action has reached a final judgment on the merits.").

9. Johnson v. Arbitrium (Cayman Islands) Handels A.G., 198 F.3d 342, 346-47 (2d Cir. 1999). The Second Circuit points out that the doctrine of collateral estoppel or issue preclusion bars the relitigation of issues actually litigated and decided in the prior proceeding as long as that determination was essential to that judgment. The court states that the

> [a]pplication of . . . collateral estoppel or issue preclusion is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions.

Id. (quoting Montana v. United States, 440 U.S. 147, 153-54 (1979)).

10. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) (quoting B. MOORE, J.D., LUCAS & T.S. CURRIER, FEDERAL PRACTICE § 0.405(1), 622-24 (2d ed. 1974)). *See generally* Montana v. United States, 440 U.S. 147, 153 (1979) (setting forth

HeinOnline -- 20 QLR 76 2000-2001

difference between claim preclusion and issue preclusion in *Parklane Hosiery Co. v. Shore*:[11]

> Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.[12]

The concepts of claim preclusion and issue preclusion are from the common law[13] but each doctrine has a different origin. Claim preclusion is a Roman law concept while issue preclusion originated in Germanic law.[14] The policies supporting these doctrines include many of society's desires: to promote fairness;[15] to prevent inconsistent judgments and to achieve uniformity and certainty;[16] to finalize disputes among the parties;[17] and to conserve judicial resources.[18] These policy concerns underlie each of the Second Circuit's *res judicata* decisions during the survey year.

---

the modern formulation of issue preclusion); Cromwell v. County of Sacramento, 94 U.S. 351, 352-55 (1876) (setting forth fundamental historical differences between claim preclusion and issue preclusion).

11. 439 U.S. 322 (1979).

12. *Id.* at 326.

13. *See* Carlisle, *supra* note 6, at 66.

14. *See generally* Robert Wyners Millar, *The Historical Relation of Estoppel By Record to Res Judicata*, 35 ILL. L. REV. 41, 41-42 (1940) (translating Seelman, Der Rechtszug im alteren deutschen Recht, 107 Gierkes Untersuchungen zur deutschen Staats–und Rechtsgenchichte 90, 103, 198-99 (1911)).

15. Concepts of fair play and due process have consistently been important policy considerations for district courts in the Second Circuit and for the circuit when considering issue preclusion. S.E.C. v. Monarch Funding Corp., 192 F.3d 295, 303-04 (2d Cir. 1999).

16. *See id. See also* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 289 (1957).

17. *See Monarch*, 192 F.3d at 303-04.

18. *See* Leather v. Ten Eyck, 180 F.3d 420, 424-25 (1999).

HeinOnline -- 20 QLR 77 2000-2001

II. CLAIM PRECLUSION

A. Doctrine Applied

Two key survey year decisions applying the doctrine of claim preclusion are *El Bohio Public Development Corp. v. Giuliani*[19] and *Waldman v. Village of Kiryas Joel.*[20] In *Waldman*, the circuit court, speaking through Judge Guido Calabresi, affirmed the judgment of the United States District Court for the Southern District of New York, dismissing Waldman's civil rights suit against the village of Kiryas Joel and its officials. The suit sought to dissolve the village because its existence and operation as a theocracy violated the establishment clause of the United States Constitution. The district court, by Judge Barrington D. Parker, Jr., dismissed the action on *res judicata* (claim preclusion) grounds.[21] The court reasoned that Waldman had previously litigated many of the alleged facts and claims in an earlier action against the same defendants.[22] The district court held that "because this claim 'arise[s] out of the same nucleus of operative facts' as the earlier suit and should have been brought together with the prior action, Waldman is currently barred from seeking the relief he now requests."[23]

Judge Calabresi explained, "*Res judicata* . . . makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, [that] were or should have been adjudicated in the proceeding."[24] He noted that Waldman should have brought his claim for the dissolution of the village as part of the prior actions. Waldman argued that the current suit did not share a common nucleus of operative facts with the prior one, and that it would have been premature to have requested the dissolution of the village in the earlier action because the facts upon which that claim could have been based did not exist at that time.[25] In rejecting these arguments, Judge

19. 208 F.3d 202 (2d Cir. 2000).
20. 207 F.3d 105 (2d Cir. 2000).
21. The United States District Court concluded that Waldman's suit against defendants-appellees, the Village and its officials, was barred by claim preclusion as a result of a prior suit against the Village in which Waldman was a named plaintiff. Waldman v. Vill. of Kiryas Joel, 39 F. Supp. 2d 370, 383 (S.D.N.Y. 1999).
22. *Id.* at 377.
23. *Waldman*, 207 F.3d at 107.
24. *Id.* at 108.
25. *Id.* at 112.

HeinOnline -- 20 QLR 78 2000-2001

Calabresi identified three indicia as being crucial to a determination of what constitutes a common nucleus of operative facts. First, the court must look to whether the underlying facts are related in time, space, origin, or motivation. Second, the court must also consider whether these facts form a convenient trial unit. Third, whether treatment as a unit conforms to the parties' expectations should be considered. Searching the records for the prior and current actions, he concluded all three indicia had been satisfied. Judge Calabresi also rejected Waldman's "new facts" argument. He stated, "It is true that *res judicata* will not bar a suit based upon legally significant acts occurring *after* the filing of a prior suit that was itself based upon earlier acts."[26] However, he concluded that Waldman's references to "new facts" were "nothing more than additional instances of what was previously asserted."[27] Finally, Judge Calabresi noted Waldman could not use "the mere inclusion of a few post Waldman I Village acts, themselves satisfactorily remediable through appropriately tailored relief, to resurrect a claim, grounded almost entirely upon pre-1997 events . . . ."[28]

The Second Circuit's decision in *Waldman* extends the "might have been litigated" aspect of claim preclusion. It dismisses claims the court recognizes as having an independent basis for being heard in the district court and suggests the circuit is encouraging district court judges to more expansively apply the doctrine of claim preclusion.[29]

In *El Bohio Public Development Corp.*, the circuit court affirmed the district court's[30] grant of summary judgment in favor of the City of New York and two city officials dismissing El Bohio's challenge to the

26. *Id.* at 113.

27. *Waldman*, 207 F.3d at 113.

28. *Id.* at 114.

29. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). *See also* L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc., 198 F.3d 85, 88 (2d Cir. 1999). The Restatement (Second) of Judgments "might have been" or "could have been" litigated requirements for claim preclusion should be applied in a practical and pragmatic manner. Anything arguably "might have been" litigated but the circuit court's expansive application of this "same transaction" requirement is frequently unfair. *See generally* FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE § 14.4 (3d ed. 1999).

30. El Bohio Pub. Dev. Corp. v. Guiliani, No. 99-7829, 2000 WL 326406 (2d Cir. Mar. 28, 2000). Judge Michael Mukasey had noted that El Bohio's opposition presented various facts outside the pleadings and converted defendant's motion to dismiss, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, into a summary judgment motion and granted it, holding that plaintiffs had embellished their claims with later events that were previously known or should have been known to them. *Id.*

HeinOnline -- 20 QLR 79 2000-2001

City's sale of certain property.[31] The district court had dismissed El Bohio's action on the ground that it was barred by *res judicata* (claim preclusion) due to a previous suit instituted in the courts of the State of New York by El Bohio, presenting a pre-sale challenge to the same transaction.[32] The district court, by Judge Michael Mukasey, stressed that the "plaintiffs have embellished their present claim with later events . . . [b]ut the gravamen of their claim would have to be proved . . . out of the same skein of known facts underlying the initial suit."[33] The circuit court's affirmance of Judge Mukasey relied on *Kremer v. Chemical Construction Corp.*,[34] wherein the U.S. Supreme Court held that when applying claim preclusion the Second Circuit must afford the same preclusive effect that the New York state courts give to their own judgments.[35] Also, the circuit court cited *O'Brien v. City of Syracuse*[36] for the proposition that the right to relitigate does not arise from later discoveries.[37]

Several other circuit court opinions, applying the doctrine of claim preclusion, merit attention. In *Skeete v. Pathmark Stores, Inc.*,[38] the circuit affirmed the district court's dismissal of the plaintiff's Title VII action on the grounds that claims previously litigated in New York state court could not be relitigated in a federal court.[39] In *United States v. Flaherty*,[40] the circuit court affirmed the district court's dismissal of

---

31. *Id.*

32. The New York State Supreme Court rejected El Bohio's challenge to the proposed sale, granted summary judgment to the City, and held that the City's actions were within the conditions established for the property's use by the Board of Estimate. The Appellate Division denied El Bohio's appeal in a short opinion on October 13, 1998. El Bohio Pub. Dev. Corp. v. Diamond, 711 N.E.2d 201 (N.Y. 1998). The New York Court of Appeals denied leave to appeal, thus bringing to a close El Bohio's state-court challenge to the property's sale.

33. *El Bohio*, 2000 WL 326406, at *2 (citing Smith v. Russell Sage Coll., 54 N.Y.2d 185, 194, 429 N.E.2d 746, 749 (1981)) (alteration in original).

34. 456 U.S. 461 (1982).

35. *Id.* at 466, 482-83 n.4; *see also* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2000).

36. 54 N.Y.2d 353, 429 N.E.2d 1158 (1981).

37. The circuit court expressly relied on the language of the New York Court of Appeals in *Reilly v. Reid*, 45 N.Y.2d 24, 28, 379 N.E.2d 172, 175 (1978) ("Afterthoughts or after discoveries however understandable and morally forgivable are generally not enough to create a right to litigate anew.").

38. No. 98-9399, 1999 WL 447634 (2d Cir. June 16, 1999).

39. *Id.* at *12 ("Having reviewed the record, we agree with the district court that Skeete received a full and fair adjudication of his employment discrimination claims in state court. Accordingly, he cannot now relitigate those claims in a federal forum.").

40. No. 97-6295, 1999 WL 66153 (2d Cir. Feb. 10, 1999).

HeinOnline -- 20 QLR 80 2000-2001

defendant's counterclaims on claim preclusion grounds.[41] In *Ciuffetelli v. Apple Bank For Savings*,[42] the circuit court affirmed the district court's dismissal of plaintiff's negligence actions on claim preclusion grounds.[43] The court stated that "[p]laintiffs' assertion that the majority of the acts complained of occurred after the execution of the agreement does not save their negligence claim."[44] The court explained that the plaintiffs presented no evidence to support a finding that their claims were meritorious. Finally, on December 29, 1999, the circuit court issued its last *res judicata* decision of the twentieth century.[45] In *Farrell v. Pataki*,[46] the circuit affirmed the district court's dismissal of a pro se civil rights action on the grounds of claim preclusion. Farrell, a disbarred attorney, filed his first pro se complaint in the southern district on March 19, 1997, alleging that New York state disciplinary bodies on two occasions refused to investigate his misconduct charges against judges and members of disciplinary committees, thereby violating a number of his constitutional rights. The district court, by Judge Deborah Batts, dismissed the complaint on the grounds that (1) there was no basis for the exercise of subject matter jurisdiction over the underlying suit, (2) the defendants were immune from suit, and (3) no meritorious issues were stated in the complaint. In a second action, filed on November 2, 1998, Farrell named the same parties as defendants and relied upon facts substantially identical to those fully litigated and adjudicated on the merits in the proceeding before Judge

41. *Id.* Counterclaims that could have been raised as direct or counterclaims in a prior action may arise out of the same transaction and occurrence. They will be barred either under Rule 13(a) of the Federal Rules of Civil Procedure (compulsory counterclaim) or under principles of *res judicata* or defensive claim preclusion.

42. No. 99-7741, 2000 WL 340388 (2d Cir. Mar. 30, 2000).

43. On or about March 22, 1995, Apple commenced a foreclosure action against a number of properties owned by the plaintiff. On June 30, 1995, the parties agreed to sign an agreement disposing of the foreclosure action. Plaintiffs then filed an action against Apple and other named defendants. The district court ordered the dismissal of plaintiff's negligence claim, holding that the allegations with respect to all acts occurring before the June 30, 1995, agreement were subject to the agreement and thus barred by claim preclusion. The doctrine was not applicable to allegedly negligent actions occurring after the execution of the agreement.

44. *Ciuffetelli*, 2000 WL 340388, at *2.

45. *See Farrell v. Pataki*, 205 F.3d 1322 (2d Cir. 1999), which was an appeal from the United States District Court for the Southern District of New York by former Chief Judge Thomas Griesa.

46. 205 F.3d 1332 (2d Cir. 1999).

HeinOnline -- 20 QLR 81 2000-2001

Batts. The district court dismissed the second action under the doctrine of claim preclusion and the circuit court affirmed.[47]

B. Doctine Not Applied

In *Devlin v. Transportation Communications International Union*,[48] the Second Circuit, speaking through former Chief Judge James Oakes, reversed the district court and held that plaintiff's claims under the Age Discrimination in Employment Act ("ADEA") should not be barred under the doctrine of *res judicata* (claim preclusion).[49] Judge Oakes opined that the district court held that federal age discrimination related to the medical benefits "were barred by the doctrine of *res judicata*. We disagree, and we vacate and remand."[50] Judge Oakes noted the district court's reliance on *Woods v. Dunlop Tire Corp.*[51] and devoted a considerable portion of his opinion to distinguishing *Woods* from *Devlin*.[52] *Woods* stands for the proposition that claim preclusion may be applied to prevent relitigation of a related claim not properly joined by a litigant. Judge Oakes held the district court should have considered consolidation of Devlin's claims prior to the application of *res judicata*. He stated:

47. The district court had certified, pursuant to 28 U.S.C. § 1915(a), that any appeal from its order of dismissal would not be taken in good faith. *Id.* at 1332. *See also* Howard v. New York Times Co., 182 F.3d 899 (2d Cir. 1999) (precluding Plaintiff's Title VII claims by claim preclusion because they were resolved in an earlier action). Additional circuit court decisions applying claim preclusion have been decided. E.M.C. Mortgage Corp. v. Martin, 199 F.3d 1321 (2d Cir. 1999) (finding claim preclusion applicable to claims that could have been previously presented); L-Tec Elecs. Corp. v. Cougar Elec. Org., 198 F.3d 85 (2d Cir. 1999) (finding claim preclusion applicable even if claims based upon different legal theories, provided they arise from the same transaction or occurrence); Rezzonico v. H. & R. Block, Inc., 182 F.3d 144 (2d Cir. 1999) (finding claim preclusion applies to both those matters actually offered to sustain the claim and those that might have been offered in the prior action); Zingher v. Vermont Div. of Vocational Rehab., 165 F.3d 1015 (2d Cir. 1999) (finding claim preclusion applicable to claims that could have been raised in earlier action).

48. 175 F.3d 121 (2d Cir. 1999).

49. Retired employees brought an action alleging that their employer had violated Age Discrimination in Employment Act ("ADEA") and Employee Retirement Income Security Act by terminating the company's death benefit fund and that constituted a violation of living adjustment for retirement benefits and violated several federal and state laws. *Id.* at 123.

50. *Id.* at 128.

51. 972 F.2d 36 (2d Cir. 1992).

52. The plaintiff in Woods had waited more than three years to file her second claim which was barred by claim preclusion. *Id.* at 38.

HeinOnline -- 20 QLR 82 2000-2001

> We recognize that requiring a district judge to have a thorough familiarity with the facts and legal issues in every single case on a district court's docket is ludicrous given the heavy caseload district courts carry. In this case, however, both Devlin cases were on the court's active calendar such that we can conclude the district court could well have considered consolidating them.[53]

In *Leather v. Ten Eyck*,[54] the Second Circuit held plaintiff's civil rights action was not barred by claim preclusion or issue preclusion. The court, speaking through Judge Calabresi, held that the plaintiff's action was not barred by *res judicata* because his criminal conviction did not preclude an action for damages against the defendants.[55] Similarly, in *Flaherty v. Lang*,[56] the circuit court held that a student's claims that disciplinary proceedings against him were instituted in retaliation for his having exercised his rights under the Americans with Disabilities Act ("ADA") and the First Amendment of the United States Constitution were not barred by claim preclusion or issue preclusion.[57] Finally, in *United States Trust Co. v. Jenner*,[58] the circuit held that a judge's comments in litigation giving rise to settlement of the issue in interpleader actions, suggesting that only those bondholders who had purchased bonds before default date had a viable cause of action for securities fraud, did not have claim preclusion or issue preclusion effect in interpleader actions concerning distribution of settlement proceeds to investors.[59]

III. ISSUE PRECLUSION

A. Doctrine Applied

In *Johnson v. Arbitrium*,[60] shareholders had brought suit seeking a declaratory judgment that they owned fifty-two percent of the outstanding shares of stock of the defendant-corporation. The complaint was dismissed by the United States District Court for the

53. *Devlin*, 175 F.3d at 130.
54. 180 F.3d 420 (2d Cir. 1999).
55. *Id.* at 422.
56. 199 F.3d 607 (2d Cir. 1999).
57. *Id.* at 615.
58. 168 F.3d 630 (2d Cir. 1999).
59. *Id.* at 633.
60. 198 F.3d 342 (2d Cir. 1999).

HeinOnline -- 20 QLR 83 2000-2001

District of Connecticut on issue preclusion grounds—the shareholders appealed. A divided circuit court held that a previous decision by the Delaware Court of Chancery, in an *in rem* proceeding, which determined that plaintiffs did not own a majority of shares, precluded them from obtaining a declaratory judgment to the contrary. The court also held that due process concerns did not prevent the operation of the doctrine of issue preclusion. District Court Judge Milton Shadur, sitting by designation on the circuit court, dissented on the grounds that the Delaware *in rem* proceeding did not constitute a binding determination of ownership as between the conflicting claimants to stock ownership because that issue determination was not necessary to the chancery court's final judgment.[61]

In *Buford v. Coombe*,[62] the circuit court reminded the bench and bar that, under 28 U.S.C. § 1738, a federal court must give to a state court judgment the same preclusive effect as would be given to the judgment under the law of the state in which the judgment was rendered.

B. Doctrine Not Applied

In an issue of first impression, the circuit court refused to apply offensive issue preclusion to sentencing findings in a subsequent civil proceeding. In *Securities Exchange Commission v. Monarch Funding Corp.*,[63] the Securities Exchange Commission ("SEC") moved for summary judgment on issue preclusion grounds based on findings of fact rendered by the court at a sentencing proceeding. The United States District Court for the Southern District of New York granted summary judgment for the SEC and permanently enjoined the defendant from claiming future securities violations. The circuit court held that: (1) application of offensive issue preclusion to sentencing findings, in a subsequent civil proceeding, is not per se prohibited, but precluding relitigation on the basis of such findings should be presumed improper; and (2) application of issue preclusion to preclude the defendant from relitigating his liability for securities fraud, based on prior sentencing findings, was improper. This case is significant because the appellant had argued that sentencing findings should never be given preclusive effect in civil litigation. This contention was supported by various *amici*. The circuit court declined to adopt this sweeping per se

61. *Id.* at 347.
62. 199 F.3d 1321 (2d Cir. 1999).
63. 192 F.3d 295 (2d Cir. 1999).

HeinOnline -- 20 QLR 84 2000-2001

prohibition. Judge Joseph McLaughlin set forth a four part test for use of the doctrine. First, the issues in both proceedings must be identical. Second, the issue in the prior proceeding must have been actually litigated and actually decided. Third, there must have been a full and fair opportunity for litigation in the prior proceeding. Fourth, the issue previously litigated must have been necessary to support a valid and final judgment on the merits. Judge McLaughlin then explained:

> First, a plenary civil trial affords a defendant procedural opportunities that are unavailable at sentencing and that could command a different result. . . . Second, the incentive to litigate a sentencing finding is frequently less intense, and certainly more fraught with risk, than it would be for a full-blown civil trial. . . . Finally, a defendant, though uniquely knowledgeable about that underlying events, may be reluctant to testify during sentencing.[64]

In *United States v. Hussein*,[65] the circuit court again adopted and explained the four-part test for application of issue preclusion. The court refused to apply the doctrine because the issue in the prior proceeding was not actually decided. The court stated:

> The rationale for the principle that preclusive effect will be given only to those findings that are necessary to a prior judgment is that a collateral issue, although it may be the subject of a finding, is less likely to receive close judicial attention and the parties may well have only limited incentive to litigate the issue fully since it is not determinative.[66]

The court's conclusion that issue preclusion will not be given to alternative findings of fact is not the law in the State of New York.[67] Hence, in federal diversity cases, district courts may sometimes apply the doctrine to fact finding that was not necessary to a prior judgment.

IV. SPECIAL CIRCUMSTANCES

In *National Labor Relations Board v. Thalbo Corp.*,[68] the circuit court recognized a "special considerations" rule that may counsel against application of claim preclusion or issue preclusion against a government agency seeking to enforce federal law. Also, in *Morris v.*

---

64. *Id.* at 305.
65. 178 F.3d 125 (2d Cir. 1999).
66. *Id.* at 129 (quoting Commercial Assocs. v. Tilcon Grammino, Inc., 998 F.2d 1092, 1097 (1st Cir. 1993)).
67. *See* Malloy v. Trombly, 50 N.Y.2d 46, 51, 405 N.E.2d 213, 215-16 (1980).
68. 171 F.3d 102 (2d Cir. 1999).

HeinOnline -- 20 QLR 85 2000-2001

Lindau,[69] the court explained when a settlement agreement should be given *res judicata* effect. In *Morris*, a police chief and his son brought civil rights actions against a town and its officials, claiming that retaliatory acts had been committed in response to the police chief's speech. The chief claimed he was constructively demoted in retaliation for exercising his First Amendment rights. The claim was based on amendments to town procedures substituting a town supervisor for the police chief. These amendments occurred in a resolution deemed to be part of a settlement agreement resolving a prior civil rights lawsuit by the chief and, thus, were given claim preclusive effect.

V. UNPUBLISHED SUMMARY ORDERS GIVEN RES JUDICATA EFFECT

During the survey year, the Court of Appeals for the Second Circuit issued numerous unpublished summary orders,[70] each stating:

---

69. 196 F.3d 102 (2d Cir. 1999).

70. Antonelli v. United States, No. 98-2972, 2000 WL 311066 (2d Cir. Mar. 27, 2000); Richard Feiner & Co. v. H.R. Indust., No. 98-9390, 1999 WL 385763 (2d Cir. June 4, 1999); United States v. Walker, No. 98-1591, 1999 WL 385758 (2d Cir. June 4, 1999); Young v. Coughlin, No. 98-3717, 1999 WL 385757 (2d Cir. June 4, 1999); Packard v. United States, No. 98-6223, 1999 WL 500797 (2d Cir. June 1, 1999); Clark v. Mercado, No. 98-7934, 1999 WL 373889 (2d Cir. May 28, 1999); Ortiz v. Coughlin, No. 97-2588, 1999 WL 197191 (2d Cir. Apr. 1, 1999); United States v. Ahmad, No. 98-1480, 1999 WL 197190 (2d Cir. Mar. 31, 1999); United States v. Luisi, No. 98-1616, 1999 WL 197218 (2d Cir. Mar. 26, 1999); United States v. Arce, No. 98-1279, 1999 WL 197215 (2d Cir. Mar. 26, 1999); United States v. Tavarez, No. 94-1575, 1999 WL 197214 (2d Cir. Mar. 26, 1999); Butts v. City of New York Dept. of Hous. Pres. & Dev., No. 98-7209, 1999 WL 187912 (2d Cir. Mar. 25, 1999); United States v. Rosier, No. 98-1485, 1999 WL 197217 (2d Cir. Mar. 24, 1999); United States v. Palacios, Nos. 98-1458, 98-1459, 1999 WL 197216 (2d Cir. Mar. 24, 1999); Loli v. Citibank, Inc., No. 98-7219, 1999 WL 187913 (2d Cir. Mar. 24, 1999); Rivers v. Comm., No. 98-4042, 1999 WL 197219 (2d Cir. Mar. 23, 1999); Habiniak v. Renssalaer City Mun. Corp., No. 98-7817, 1999 WL 164950 (2d Cir. Mar. 22, 1999); United States v. Blackwell., Nos. 97-1143(L), 97-1242(CON), 97-1144(CON), 97-1173(CON), 1999 WL 163980 (2d Cir. Mar. 18, 1999); Best v. Miller, No. 98-7677, 1999 WL 147050 (2d Cir. Mar. 15, 1999); McAllan v. Malatzky, No. 98-7218, 1999 WL 146300 (2d Cir. Mar. 15, 1999); Labensky v. Rozzi, No. 98-7512, 1999 WL 146292 (2d Cir. Mar. 15, 1999); Wells v. New York City Dept. of Corr., No. 98-2039, 1999 WL 132176 (2d Cir. Mar. 11, 1999); United States v. Fulton, No. 97-1681, 1999 WL 132172 (2d Cir. Mar. 9, 1999); Reyes-Aponte v. City of New York Dept. of Corr., No. 98-7672, 1999 WL 132182 (2d Cir. Mar. 8, 1999); Then v. United States, No. 97-2867, 1999 WL 132234 (2d Cir. Mar. 5, 1999); Geathers v. Morgenthau, No. 97-2640, 1999 WL 132233 (2d Cir. Mar. 5, 1999); United States v. Gibson, No. 98-1334, 1999 WL 132232 (2d Cir. Mar. 5, 1999); United States v. Frierson, No. 98-1185, 1999 WL 132231 (2d Cir. Mar. 5, 1999); United States v. Burgos, No. 98-1174, 1999 WL 132230 (2d Cir. Mar. 5, 1999); United States v. Ardakian, No. 98-1359, 1999 WL 132228 (2d Cir. Mar. 5, 1999); Albert v. Strack, No. 98-2350, 1999 WL 132226 (2d Cir. Mar. 5, 1999); Ige v. United States, No. 98-2419,

HeinOnline -- 20 QLR 86 2000-2001

> THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

These summary orders involve pro se complaints filed by plaintiffs in the circuit's federal district courts. They are generally unknown to the practicing bar. The intent of the orders are to prevent pro se parties from relitigating claims that could have been brought in a prior action and from relitigating issue determinations necessary to a final judgment in a different cause of action previously litigated in the circuit.

The circuit's summary order procedure is arguably unfair to pro se litigants who should not be expected to understand *res judicata*

1999 WL 132217 (2d Cir. Mar. 5, 1999); Gyadu v. Workers' Comp. Comm'n, No. 98-7638, 1999 WL 132213 (2d Cir. Mar. 5, 1999); Moskowitz v. Hammons, No. 98-7664, 1999 WL 132212 (2d Cir. Mar. 5, 1999); Bumpus v. Warden, No. 98-2406, 1999 WL 132218 (2d Cir. Mar. 4, 1999); Suzio Concrete Co., Inc. v. Nat'l Labor Relations Bd., No. 98-4106, 98-4136, 1999 WL 132216 (2d Cir. Mar. 4, 1999); Turk v. Turk, No. 98-5025, 1999 WL 130204 (2d Cir. Mar. 4, 1999); Capton v. City of Niagara Falls, Nos. 98-7018, 98-7072, 1999 WL 130202 (2d Cir. Mar. 4, 1999); Ibrahim v. New York State Dept. of Health, No. 98-7709, 1999 WL 128863 (2d Cir. Mar. 4, 1999); Hanley v. Deluxe Caterers of Shelter Rock, Inc., Nos. 98-7586 L, 98-7716, 1999 WL 130669 (2d Cir. Mar. 3, 1999); Nationwide Mut. Fire Insur. Co. v. Coolidge, No. 98-7654, 1999 WL 130189 (2d Cir. Mar. 3, 1999); United States v. Piggott, No. 97-1715, 1999 WL 110423 (2d Cir. Mar. 1, 1999); Wynn v. Nationwide Insur. Co., No. 98-5003, 1999 WL 106218 (2d Cir. Feb. 26, 1999); Constantinescu v. Dentsply Equip., No. 98-7543, 1999 WL 106217 (2d Cir. Feb. 26, 1999); Summer Communications, Inc. v. Three A's Holding, LLC, No. 97-9095, 1999 WL 106216 (2d Cir. Feb. 26, 1999); States v. Beckerman, No. 98-6195, 1999 WL 97237 (2d Cir. Feb. 24, 1999); Kulniszewski v. Swist, No. 98-7487, 1999 WL 97362 (2d Cir. Feb. 25, 1999); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO, No. 98-6074, 1999 WL 97236 (2d Cir. Feb. 24, 1999); Johnson v. St. Clare's Hosp. & Health Ctr., No. 98-7831, 1999 WL 97232 (2d Cir. Feb. 24, 1999); Howard v. Pierce, No. 97-2854, 1999 WL 97239 (2d Cir. Feb. 23, 1999); Demeritt v. Town of Brunswick, No. 98-7509, 1999 WL 97238 (2d Cir. Feb. 23, 1999); Grandi v. New York City Transit Auth., No. 97-9309, 1999 WL 96128 (2d Cir. Feb. 22, 1999); United States v. Castillo, No. 98-1172, 1998 WL 995131 (2d Cir. Feb. 19, 1999); Davis v. United States, No. 97-2265, 1999 WL 96144 (2d Cir. Feb. 19, 1999); Dean v. Abrams, No. 97-7462, 1999 WL 96140 (2d Cir. Feb. 18, 1999); Manners v. New York, No. 97-9424, 1999 WL 96136 (2d Cir. Feb. 18, 1999); United States v. Terdik, No. 98-1321, 1998 WL 995130 (2d Cir. Feb. 17, 1999); United States v. Bartels, No. 98-1347, 1999 WL 96137 (2d Cir. Feb. 17, 1999); Big Bros. Sportswear, Inc. v. Third Rail, Inc., No. 97-9507, 1998 WL 995129 (2d Cir. Feb. 17, 1999); Rankel v. Acrish, No. 98-7281, 1999 WL 65137 (2d Cir. Feb. 8, 1999); Salten v. Nat'l Trans. Safety Bd., No. 98-4123, 1999 WL 48781 (2d Cir. Feb. 3, 1999); Marel v. Lord, No. 98-2453, 1999 WL 126685 (2d Cir. Jan. 21, 1999).

HeinOnline -- 20 QLR 87 2000-2001

principles. Fairness is a fundamental societal goal of *res judicata*. Principles of finality may be important for conservation of judicial resources in the circuit but, at the very least, pro se litigants should be alerted as to how the doctrines of claim preclusion and issue preclusion can be used against them. Summary orders should not be issued unless the record shows the litigant was given "notice" of the *res judicata* implications of his or her case prior to the proceeding and judgment.

VI. CONCLUSION

Crowded court dockets in the circuit and the increase of civil rights, Title VII, and employment termination cases, along with pro se filings should result in the expanded use of claim preclusion and issue preclusion during the 2000-2001 Survey Year.

HeinOnline -- 20 QLR 88 2000-2001