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Issue Preclusion in Products Liability

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I. Introduction

Issue preclusion, also known as collateral estoppel,[1] is one of several doctrines intended to secure finality in dispute resolution.[2] When raised between or among parties, or their privies, who were bound by an earlier judgment[3] on a similar subject matter,[4] issue preclusion prevents a party from relitigating an issue necessarily and finally decided in the earlier action.[5] When

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1. The Restatement (Second) of Judgments and a growing number of contemporary decisions demonstrate the preference for the term "issue preclusion" over the older usage "collateral estoppel." RESTATEMENT (SECOND) OF JUDGMENTS §§ 26-29 (1982); *See, e.g.*, Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 315 (D.N.J. 1989) (citations omitted) ("[T]he terms 'claim preclusion' and 'issue preclusion' will be used. The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel.").

2. A primary list of such common law and procedural devices includes the doctrine of res judicata, or claim preclusion, from which the rule of issue preclusion derives; the rules liberalizing amendment of pleadings; the constructive conformance of pleadings with claims proved at trial; the rules of permissive and compulsory joinder of parties; and the rules governing class actions and those giving structure to multi-district litigation. *Cf.* Scott v. Monsanto Co., 868 F.2d 786 (5th Cir. 1989) (discussing issue preclusion as a sanction available under Federal Rule of Civil Procedure 37 for willful or bad faith noncompliance with discovery requests).

3. In such circumstances, "mutuality" is said to exist between the parties to the earlier action and the parties of the later suit in which issue preclusion is asserted.

4. Issue identity, and not subject matter similarity, is the gravamen of issue preclusion. Where, however, nonmutual issue preclusion is asserted, the party opponent's opportunity and incentive to litigate the issue in the earlier action can be determinative in resolving the appropriateness of reliance upon the earlier disposition. An arguably identical issue decided in an earlier action on a quite different subject matter will bolster the opponent's argument that the prior suit provided a distinguishable opportunity and lesser incentive to litigate the issue in question.

5. *See, e.g.*, *In re* Bendectin Prods. Liab. Litig., 732 F. Supp. 744, 746 (E.D. Mich. 1990) ("The doctrine of collateral estoppel provides that an actual and necessary determination of an issue by a court of competent jurisdiction is conclusive in subsequent cases based upon a different cause of action but involving a party to the prior litigation.") (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)); Goodson v.

raised by a party who played no role in the earlier adjudication,[6] the court may estop litigation of an issue where, balancing the goal of judicial economy against the consideration of fairness to the parties, it concludes that the issue has already been fully and finally determined.[7]

Modern application of issue preclusion is dated from the two Supreme Court decisions in *Blonder-Tongue Laboratories v. University of Illinois Foundation*[8] and *Parklane Hosiery Co. v. Shore*.[9] *Blonder-Tongue* marked the Supreme Court's abandonment of party mutuality as a prerequisite for defensive issue preclusion,[10] and eight years later *Parklane Hosiery* approved offensive application of nonmutual preclusion.[11]

Review of the policies underlying issue preclusion in prod-

McDonough Power Equip., Inc., 2 Ohio St. 3d 193, 195, 443 N.E.2d 978, 981 (1983):

> Case law in Ohio concerning the general doctrine of *res judicata* has long ago established the general principle that material facts or questions which were in issue in a former suit, and were there judicially determined by a court of competent jurisdiction, are conclusively settled by a judgment therein so far as concerns the parties to that action and persons in privity with them.

2 Ohio St. 3d at 195, 443 N.E.2d at 981; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

6. Issue preclusion absent complete commonality between the earlier suit's parties or their privies and the parties to the later suit is described as "nonmutual." *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979).

7. *E.g., In re* Bendectin Prods. Liab. Litig., 732 F. Supp. 744, 746 (E.D. Mich. 1990):

> The doctrine of mutuality has been eroded, and a defendant may now preclude a nonparty to the previous suit from contesting an issue a plaintiff in the prior suit has already litigated and lost *if* the nonparty plaintiff has had a full and fair opportunity to be heard on the issue.

Id. at 746 (citations omitted) (emphasis in original); *see also* Kortenhaus v. Eli Lilly & Co., 228 N.J. Super. 162, 549 A.2d 437 (App. Div. 1988):

> [C]ollateral estoppel is a rule of efficiency — a principle which seeks to promote efficient justice by avoiding the relitigation of matters which have been fully and fairly litigated and fully and fairly disposed of. Its preclusive effect will always be efficient in a narrow sense of judicial economy, but it will only be just when the criteria of full and fair determination of precisely the same issues have been met. Its application "necessarily rest[s] on the trial courts' sense of justice and equity."

Id. at 166, 549 A.2d at 439 (quoting Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313, 334 (1971)).

8. 402 U.S. 313 (1971).

9. 439 U.S. 322 (1979).

10. 402 U.S. at 327.

11. 439 U.S. at 323; *see infra* notes 161-163 and accompanying text.

ucts liability suits, and the litigation experience therewith, invites these propositions:

(1) Certain classes of products liability actions are more suited to issue preclusion than are others. For example, a design, warning, or formulation claim, in which the claimant's conduct, knowledge or expertise is logically probative of the degree of risk, is less suited to application of issue preclusion than is a claim in which such evidence is wholly irrelevant or only marginally relevant.

(2) Granting issue preclusive effect to certain quasi-judicial proceedings often values judicial economy over fairness to the opponent.

(3) Many decisions too readily find privity, and consequent issue preclusion, against parties whose relationship to an earlier claim is either derivative,[12] or based upon limited contractual objectives,[13] exalting judicial economy over the interest of fairness to the opponent.[14]

II. Discussion

A. *Underlying Policy Considerations*

The "very basis of the rule"[15] of issue preclusion has been described as "confidence in the first outcome."[16] The doctrine's axial coordinates are judicial economy and fairness,[17] against the backdrop of the due process clauses of the fifth[18] and fourteenth

12. For example, a spouse's claim in loss of consortium.

13. For example, the reciprocal obligations set forth in a policy of liability insurance.

14. For the purposes of this discussion, "proponent" means the party asserting that litigation of an issue should be precluded by a prior judgment, while "opponent" means the party against whom preclusion is asserted.

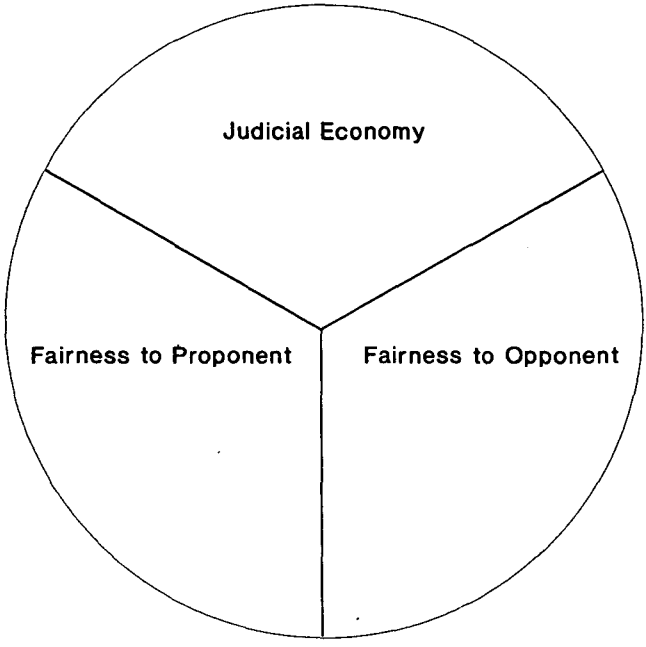
15. Kortenhaus v. Eli Lilly & Co., 228 N.J. Super. 162, 168, 549 A.2d 437, 440 (App. Div. 1988).

16. *Id.*; *cf.* 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 4416, at 142 (1981) ("The dangers of issue preclusion are as apparent as its virtues. The central danger lies in the simple but devastating fact that the first litigated determination of an issue may be wrong.").

17. Referring to offensive use of collateral estoppel, the Supreme Court in *Parklane Hosiery*, described its "dual purpose" as that of "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

18. U.S. CONST. amend. V.

amendments,[19] and the seventh amendment.[20] When the parties to the second litigation were also parties, or privies of the parties, to the first litigation, "mutuality" is said to exist.[21] The proportionate and relational evaluation of judicial economy and fairness to the litigants should be seen schematically as three equivalent sectors within a single circle:



Graph 1

19. U.S. CONST. amend. XIV, § 2.

20. U.S. CONST. amend. VII. It provides that:

> [I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right [of] trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Id.

21. *See* Goodson v. McDonough Power Equip., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983):

> There being the general requisite of an identity of persons and parties, or their privies, within the prior proceeding in order for the judgment or decree to operate as an estoppel, strangers to such a judgment or decree will not be affected thereby. For all practical purposes, the mutuality rule is coextensive with the requirement that the plea of *res judicata* is available only to a party to the judgment and to his privies.

Id. at 196, 443 N.E.2d at 982.

For application of issue preclusion where there is de jure or de facto mutuality between the parties,[22] the equivalent dimensions of the above sectors reflect the roughly coequal significance courts accord their respective consideration.[23] What about the application of issue preclusion on behalf of or against a party who has not had his "day in court" on the issue? When a party to the second action was a stranger to the first, one considers the three-sector analysis between the same parties or their privies, with one significant addition: a heightened solicitude for the opponent's earlier opportunity and incentive to litigate. In these circumstances, evaluation of the opponent's opportunity and incentive to litigate transcends the interests of judicial economy and fairness to the proponent.[24] This evaluation is schematically represented in Graph 2.

Where there exists conventional privity[25] between and

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22. De jure mutuality exists where the later action involves the former's parties or privies of those parties. De facto mutuality exists in those limited circumstances where a current party, though neither party nor privy of a party in the earlier action, enjoyed a relationship of control or capacity to control the earlier action that justifies binding it by issues resolved in the earlier outcome.

23. Where appropriate, issue preclusion serves the goal of judicial economy by preserving the integrity of any full and fair resolution of an issue in any future dispute between the initial parties or privies of those parties. Fairness to the proponent is manifest in not requiring him to relitigate an issue on which he has previously prevailed. Fairness to the party opposing preclusive effect of the prior judgment may be more accurately described as absence of unfairness. Mutual issue preclusion works no unfairness on the opponent where, examining the identity of the claim and the context of the initial adjudication, the reasonable opposing party would be prompted to vigorously litigate the issue. Where mutuality exists, therefore, proper invocation of issue preclusion permits a party, or a party's privy, only one bite at the apple.

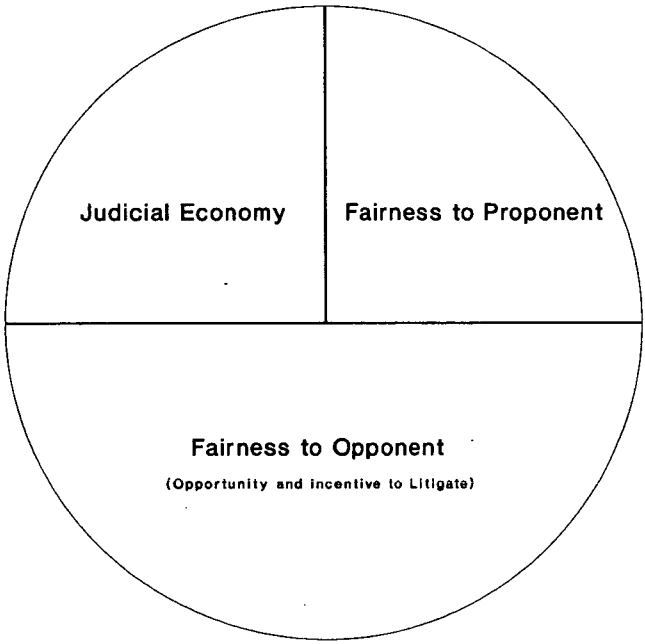
24. Generally, the opponent's marginal or nonexistent opportunity or incentive to litigate the issue in the prior litigation would lessen the effect of de novo litigation upon the policy of judicial economy because one or both parties to the subsequent action had *not* had an earlier actual or nominal day in court on the same issue. Similarly, the party-opponent's inadequate earlier opportunity to litigate this issue against the current proponent undercuts the proponent's argument that mustering prosecution or defense of the claim in the later action is an unfair burden.

25. In Montana v. United States, 440 U.S. 147 (1979), the Supreme Court defined privity as including those

> for whose benefit and at whose direction a cause of action is litigated. . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record.

Id. at 154 (quoting Souffront v. Campagnie des Sucreries, 217 U.S. 475, 487 (1910)).

among parties to the prior litigation and the current one, the issue preclusion questions to be resolved by the court are relatively limited. First, is the issue before the tribunal identical to that litigated in the earlier action? Second, was that issue finally and necessarily decided in the earlier action? When the parties to the second action are not mutual, the court must evaluate three additional factors: current party de facto privity with an earlier litigant; full and fair opportunity to litigate the issue in the prior proceeding; and comparable incentive to litigate.[26]



Graph 2

In products liability claims, application of the issue identity, ruling finality, and ruling necessity criteria resemble those pur-

26. *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-33 (1979) (relevant factors for determining whether plaintiff can invoke estoppel offensively include: whether plaintiff could have effected joinder in the first action; whether application of estoppel would be inconsistent with previous decisions; and whether procedural opportunities available to defendant were unavailable in the first action); *see infra* notes 111-121 and accompanying text.

sued in other civil litigation, except for markings distinctive to products liability claims. In certain civil subject matters (for example, title to land, existence of a contract, patentable invention) the facts are arguably immutable, if not the inferences to be derived therefrom.[27] Therein resides the logic of reposing confidence in, or at least preclusive effect to, the resolution by the first court.

In products liability actions, however, factual volatility[28] and doctrinal distinctions[29] often militate against the fairness of giving preclusive effect to prior issue resolution. To select only the subject of adverse reactions to pharmaceuticals, use and user environment-specific questions should often preclude adoption of collateral estoppel. The question of whether "one individual might have an adverse reaction whereas another individual might not" differs qualitatively from the issues that might, for

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27. *E.g.*, Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313 (1971). The Court describes its "consistent view . . . that the holder of a patent should not be insulated from the assertion of defenses and thus allowed to exact royalties for the use of an idea that is not in fact patentable or that is beyond the scope of the patent monopoly granted," and concluded that nonmutual defensive issue preclusion should be available to a party "facing a charge of infringement of a patent that has once been declared invalid." *Id.* at 349-50.

28. For example, Goodson v. McDonough Power Equip., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983), held that plaintiffs representing a four-year-old child injured when her foot slipped under a riding mower should not be permitted to assert nonmutual offensive collateral estoppel against the manufacturer, based upon an earlier judgment finding liability for negligent design. The court found that

> there were two totally separate accidents, with two different models of a riding lawnmower manufactured in different years by appellant manufacturer; there were different operators of the equipment with perhaps totally different mechanical capabilities; different terrain and weather conditions. . . . [W]e hold that nonmutual collateral estoppel may not be used to preclude the relitigation of design issues relating to mass-produced products when the injuries arise out of distinct underlying incidents.

Id. at 204, 443 N.E.2d at 988.

29. For example, in a minority of jurisdictions, plaintiff's prima facie case in strict tort liability does not require a showing of an unreasonably dangerous condition of the product, and upon certain proof by plaintiff, effects a shifting of the burden of proof to defendant to show that the attributes of a particular design or formulation choice outweigh the risks. *See* Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). *See generally* Schwartz & Mahshigian, *Offensive Collateral Estoppel: It Will Not Work in Product Liability*, 31 N.Y.L. SCH. L. REV. 583, 588 n.29 (1986) ("Decisions on virtually every aspect of product liability law illustrate great variations among the States and constant changes of legal rules within a State." (quoting S. Rep. No. 670, 97th Cong., 2d Sess. 4 (1982))).

example, be resolved in a negligence action arising from the same automobile accident.[30] Consider as well these hypothetical cases: (1) the class action representative plaintiff seeking Rule 23(b)[31] certification in a toxic tort action even after a court found with respect to an earlier class petition that plaintiffs' damage evidence was too varied to permit certification; (2) the defendant pharmaceutical manufacturer's effort to avoid preclusive effect of an earlier judgment that its product caused limb reduction in newborns, relying now upon newly discovered scientific evidence disproving causation; or (3) the successful workers' compensation claimant now suing the asbestos manufacturer and attempting to avoid the preclusive effect of an earlier administrative conclusion that the claimant could not identify the products of the individual asbestos manufacturers.[32]

B. *Elements of Issue Preclusion*

1. *Generally*

Taken together, res judicata and issue preclusion "prohibit relitigation of claims and issues decided in a prior proceeding."[33] Issue preclusion bars parties from relitigating an issue that was

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30. Vincent v. Thompson, 50 A.D.2d 211, 218, 377 N.Y.S.2d 118, 125 (1975) (quoting Williams v. Laurence-David, Inc., 534 P.2d 173, 178 n.1 (Ore. 1975) (en banc)). In *Vincent*, the court refused to grant issue preclusive effect to an earlier judgment that Parke-Davis' pharmaceutical Quadrigen was marketed with inadequate testing where plaintiff in the latter action offered only "conclusory" expert testimony "that the infant plaintiff's injuries were probably secondary to a DTP injection and that a bad vaccine would cause neurological shock . . . ." *Id.* at 220, 377 N.Y.S.2d at 126.

31. FED. R. CIV. P. 23(b).

32. *See* Glow, *Offensive Collateral Estoppel in Arizona: Fair Litigation vs. Judicial Economy*, 30 ARIZ. L. REV. 535, 543 (1988).

33. Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 315 (D.N.J. 1989). *Parklane Hosiery* distinguishes the two doctrines:

> 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.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (citing 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.405(1) at 622-24 (2d ed. 1974)). *See generally* Note, *Claim Preclusion in Modern Latent Disease Cases: A Proposal for Allowing Second Suits*, 103 HARV. L. REV. 1989 n.1 & 1991-92 (1990).

necessarily litigated in an earlier action,[34] and poses the question of "whether a party has had his day in court on an issue, rather than whether he has had his day in court on that issue against a particular litigant."[35] Even a litigant's apparent prior "day in court" on an issue will not, however, automatically preclude relitigation of an issue where the "practicalities" and "details" of the prior proceeding suggest that the party against whom preclusion is asserted did not have a full and fair opportunity to litigate the *factum probandum* before the second tribunal.[36] The vessel for the common law preference for finality in dispute resolution, issue preclusion may apply to evidentiary facts, ultimate facts, or law.[37]

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34. *See* Schwartz & Mahshigian, *supra* note 29, at 583.

35. *Eason*, 706 F. Supp. at 316 (quoting State v. Gonzalez, 75 N.J. 181, 191, 380 A.2d 1128, 1138 (1977)) (quoting McAndrew v. Mularchuk, 38 N.J. 156, 161, 183 A.2d 74, 76 (1962)). See Sucher v. Kutscher's Country Club, 113 A.D.2d 928, 493 N.Y.S.2d 829 (1985), for an example of an action initiated by a country club patron who fell from her wheelchair and was injured while using a chair lifting machine. In resolving the issue preclusion implications of subsequent third-party and fourth-party complaints by the country club and the vendor against the lift manufacturer, the court stated the general rule that

> [t]he doctrine of collateral estoppel applies to preclude relitigation of an issue where it is found that (1) the issue sought to be precluded is identical to one which was necessarily decided in a prior proceeding, and (2) the litigant against whom preclusion is sought in the present proceeding had a full and fair opportunity to litigate the issue in the prior proceeding.

Id. at 930, 493 N.Y.S.2d at 831.

36. Zweig v. E.R. Squibb & Sons, 222 N.J. Super. 306, 311-12, 536 A.2d 1280, 1282-83 (App. Div. 1988).

37. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *see, e.g.*, Hardy v. Johns-Manville Corp., 681 F.2d 334, 338 n.3 (5th Cir. 1982) ("It is well established that collateral estoppel embraces matters both of fact and of law." (citing 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.442, at 3851 (2d ed. 1982))). Examples abound of related if not identical evidentiary treatment of sworn prior statements, judgments based thereon, or judicially-accepted facts. Party admissions, even where later withdrawn, will not operate to estop the party from taking an inconsistent position, although the prior admission is admissible both as impeachment and as evidence of the facts stated. *E.g.*, Contractor Util. Sales Co. v. Certain-Teed Prods. Corp., 638 F.2d 1061, 1085 (7th Cir. 1981) (in action for breach of contract and fraud, it was error to exclude from evidence portions of plaintiff's original complaint, later amended); Raulie v. United States, 400 F.2d 487 (10th Cir. 1968):

> When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent.

For a prior judgment to have issue preclusive effect, it is not necessary that it have been submitted to the fact finder. A court's resolution of an issue as a matter of law may constitute full and fair litigation of the issue. In *Day v. Volkswagenwerk Aktiengesellschaft*,[38] plaintiff's state court action against the automobile manufacturer followed an adverse federal court ruling on the design and failure to warn claims pertaining to the absence of shoulder harnesses.[39] Affirming the state trial court's summary judgment motion in favor of the manufacturer and importer, the Pennsylvania Superior Court commented: "[I]t was not necessary in order to be 'litigated' that the issues have been determined by the jury."[40] Even issues resolved by trial court consolidation of claims or elimination of claims considered redundant under state law may be considered fully litigated for the purposes of subsequent issue preclusion.[41]

An estoppel resulting from issues determined in a prior judgment is available to either a plaintiff or a defendant in a subsequent suit.[42] In most jurisdictions, the rule can be applied offensively to prohibit a defendant from relitigating issues decided in a prior case, even where the earlier action was brought

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400 F.2d at 526 (emphasis omitted) (quoting Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d 195, 198 (2d Cir. 1929)).

A court of general jurisdiction may accord comparable treatment to prior party admissions even when the earlier statement was entered in a more limited forum, such as a workers' compensation proceeding. *E.g.*, Susemiehl v. Red River Lumber Co., 306 Ill. App. 430, 438-41, 28 N.E.2d 743, 746-47 (1940) (manager's earlier statement that employee had been injured on the job was held admissible in later wrongful death proceeding in which defendant employer claimed that decedent was acting as either an independent contractor or was on a frolic unrelated to employment).

38. 464 A.2d 1313, 318 Pa. Super. 225 (1983).

39. In Day v. Volkswagenwerk Aktiengesellschaft, 451 F. Supp. 4 (E.D. Pa. 1977), *aff'd*, 578 F.2d 1373 (3d Cir. 1978), the court ruled that the absence of shoulder restraints "was both obvious to the naked eye of anyone who made even a cursory inspection of the vehicle, and was specifically referred to in the owner's manual." 451 F. Supp. at 6. The court also ruled as a matter of law that "the danger inherent in riding in the front seat of a rear-engine type vehicle [was] not a latent limitation requiring a warning of the risk involved." *Id.*

40. 464 A.2d at 1319, 318 Pa. Super. at 238; *see supra* note 33 and accompanying text.

41. *See Day*, 464 A.2d at 1319 n.2, 318 Pa. Super. at 238 n.2 ("The cause of action for breach of warranty has also been 'litigated'. It was eliminated prior to trial in favor of the cause based on absolute liability.").

42. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

by a different plaintiff.[43] Defensive application of issue preclusion permits defendant to preclude even a new plaintiff's relitigation of previously decided issues.[44]

The virtues of issue finality are both jurisprudentially and culturally grounded.[45] Less abstractly, upon satisfaction of certain conditions of issue commonality, necessity of determination and amenability to earlier litigation, courts and scholarly authorities are in agreement that issue preclusion is compatible with traditional notions of due process.[46]

The Restatement (Second) of Judgments section 27 states the general rule precluding parties from relitigating "an issue of fact or law" that was "actually litigated and determined" by "valid" and "final" judgment.[47] Preclusive effect is only given

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43. Thus, issue preclusion might be properly applied on behalf of multiple claimants against a single defendant such as when many persons are killed in a single aviation accident. *See generally* 4 AMERICAN LAW OF PRODUCTS LIABILITY § 55:9 (T. Travers, 3d ed. 1987) (citing Williams v. Laurence-David, Inc., 271 Or. 712, 534 P.2d 173 (1975)); Goodson v. McDonough Power Equip., 2 Ohio St. 3d 193, 196, 443 N.E.2d 978, 982 n.7 (1983) (the court, declining itself to adopt nonmutual issue preclusion, cited decisions in other jurisdictions where the requirement of mutuality has been dropped).

44. *E.g.*, Waggoner v. General Motors Corp., 771 P.2d 1195, 1203 (Wyo. 1989) (prior jury verdict finding that nonparty driver's negligence was sole proximate cause of accident collaterally estopped plaintiff from asserting warranty and strict liability claims against the automobile dealer and the manufacturer).

45. Literature is suffused with affirmations of the desirability of symmetry between and predictability among decisions upon identical issues. *E.g.*, S. JOHNSON, THE IDLER, no. 39 at 57 (1758) ("He is no wise man that will quit a certainty for an uncertainty.").

46. *See generally* Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313, 328-29 (1971).

47. "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." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *accord*, Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 718 P.2d 920, 226 Cal. Rptr. 558 (1986):

> The doctrine of collateral estoppel precludes relitigation of an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the plea is asserted was a party, or in privity with a party, to the previous suit.

41 Cal.3d at 910, 718 P.2d at 923, 226 Cal. Rptr. at 561.

Another conventional formulation of the elements necessary for finding issue preclusion is stated in these words:

> (1) [W]hether the issue to be decided is identical with the issue decided in the prior litigation; (2) whether the prior litigation resulted in a judgment being decided on the merits; (3) whether the party against whom the assertion of collateral estoppel is being made was a party to the prior litigation; and (4) whether the

determinations "essential to the judgment."[48] In products liability actions the prerequisites are largely compatible, with most jurisdictions imposing four prerequisites:[49] (1) both actions must involve the identical issue;[50] (2) the issue must actually have

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party against whom collateral estoppel is being asserted had a full and fair opportunity to litigate on the issues in the prior suit.

Green v. Montgomery Ward & Co., 775 S.W.2d 162, 164 (Mo. 1989) (following Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713 (Mo. 1979)).

The requirement that the issues have been "actually litigated" was affirmed in Hughes v. Santa Fe Corp., 847 F.2d 239, 240 (5th Cir. 1988) (quoting International Assoc. of Machinists & AeroSpace Workers v. Nix, 512 F.2d 125, 132 (5th Cir. 1975)).

48. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *see also* Eason v. Linden Avionics, Inc., 706 F. Supp. 311 (D.N.J. 1989):

> Among the criteria to be considered before issue preclusion can be invoked are whether: (i) the party to be estopped was a party or in privity with a party in the prior action; (ii) the issue to be estopped is the same as that previously litigated; and (iii) the issue was actually litigated (or finally resolved) and necessary to the prior judgment.

706 F. Supp. at 316.

The Restatement (Second) of Judgments states that "[s]ubsequent action between the parties" preserves the common law predisposition to confine issue preclusion to subsequent actions between the parties or their privies. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

49. Decisions differ on the issue of whether state law or federal common law applies to the preclusive effect of a prior diversity judgment. Courts concluding that federal preclusion law applies note that "the rules of claim and issue preclusion define the finality of the federal judgment and are designed to protect that judgment." Johnson v. Eli Lilly & Co., 689 F. Supp. 170, 172 (W.D.N.Y. 1988); *see, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982):

> The choice of law question is supposedly of significance because, according to appellants, Texas strictly adheres to the doctrine of mutuality, *i.e.*, neither party can use a prior judgment to estop another unless both parties were bound by the prior judgment. If this view of Texas law is correct, the plaintiffs here, none of whom were parties to [Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)] would of course be unable to invoke collateral estoppel.
>
> We need not resolve the question of whether appellant's view of Texas law of collateral estoppel is correct, however, since the district court was bound under the law of our circuit to apply federal law. . . . [F]ederal res judicata principles apply in federal tort claim actions in order to preserve the integrity of federal court judgments, and that this rationale applies equally to diversity cases.

Id. at 337 (citations omitted).

Other courts consider preclusion law to be substantive, requiring application of state preclusion law in diversity actions. *E.g.*, Costanini v. Trans World Airlines, 681 F.2d 1199, 1201 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982); Gasbarra v. Park-Ohio Indus., 655 F.2d 119, 122 (7th Cir. 1981).

50. Thus, for example, the issues raised by an asbestos worker's claims against an asbestos manufacturer, where the defendant manufacturer prevailed for want of proof that the worker suffered from asbestosis, were held not identical to (and therefore did

been litigated in the prior action; (3) the determination of the issue in the first action must have been a necessary part of the judgment therein; and (4) the party against whom preclusion is asserted must have had a full and fair opportunity to litigate.[51] An absolute due process prerequisite to the application of collateral estoppel is that the party asserting preclusion must establish that the identical issue was (1) *actually* litigated; (2) *directly* determined; and (3) *essential* to the judgment in a prior action.[52]

Where it is foreseeable that the issue could subsequently be utilized collaterally, and where the parties to the first action have had the incentive to litigate the action "fully and vigorously,"[53] issue preclusive effect may be given the judgment of any tribunal having subject matter jurisdiction over the claim, including an administrative tribunal.[54] Evaluation of a party's earlier prior opportunity and incentive to litigate looks beyond the presence or absence of formal or nominal opportunity, and is agreed generally to require examination of the particular litigation context in which the earlier action was tried or judgment entered. Review may be had of such factors as (1) the size of the claim; (2) extent of the litigation; (3) availability of any new evidence; (4) differences in applicable law; and (5) existence of prior inconsistent verdicts.[55]

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not preclude) the claimant's later action against his employer claiming that his employer, Celotex, with knowledge exposed him to hazardous asbestos products and failed to correct the hazardous conditions. Walker v. GAF Corp., No. 88-3380 (6th Cir. Sept. 25, 1989) (LEXIS, GenFed library, USAPP).

51. *See supra* note 39.

52. A further and implicit requirement is that the authority upon which the earlier judgment is grounded should remain viable doctrine in the jurisdiction of the later action. *Cf.* Erebia v. Chrysler Plastic Prods. Corp., 891 F.2d 1212 (6th Cir. 1989) (issue preclusive effect inappropriate where prior judgment upon which lower court relied in barring relitigation of issue was reversed by an appellate court five days prior to lower court judgment).

53. *See* 4 AMERICAN LAW PRODUCTS LIABILITY § 55:12, at 16 (T. Travers, 3d ed. 1987).

54. *Cf.* Smith v. Pinner, 891 F.2d 784 (10th Cir. 1989) (employee's stipulation in earlier workmen's compensation case that employee was ridesharing with supervisor at the time of the accident precluded relitigation of supervisor's "scope of employment" in subsequent vicarious liability action against employer).

For a criticism of granting issue preclusive effect to certain administrative determinations, see *supra* notes 201-218 and accompanying text.

55. Regarding the existence of prior inconsistent verdicts, it is held uniformly that

2. *Issue Identity*

Whether the claimed issue preclusion involves the same parties or their privies, or one or more new parties, the proponent must demonstrate the substantial identity of the present issue with the issue already decided.[56] The court's analysis of what issues were necessarily decided may reference not only the specific findings entered, including any pertinent jury interrogatories, but also plaintiff's own expressions of issues.[57]

Many obstacles are placed in the path of a proponent's proof of issue identity. A paradigm of the proponent's challenge can be found in the litigation following *Borel v. Fibreboard Paper Products Corp.*[58] In *Borel*, the plaintiff, an industrial worker who contracted asbestosis and mesothelioma, brought suit against a number of insulation manufacturers, alleging that the defendants were strictly liable for failing to warn about the dangers of long-term exposure to asbestos. Based on the evidence presented, the jury found the manufacturers were liable because

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divergent decisions reached in earlier actions militate strongly against granting issue preclusive effect to the prior decision advanced by the issue preclusion proponent. *E.g.*, Deviner v. Electrolux Motor, 844 F.2d 769 (11th Cir. 1988):

> In [Nettles v. Electrolux Motor AB, 784 F.2d 1574 (11th Cir. 1986)], the jury decided the question under the Extended Liability Doctrine in favor of the plaintiff Nettles. But in the case at bar the jury to whom that issue was submitted decided in favor of defendants. It would be an unusually ingenious quirk in our system of justice, which attaches special sanctity to jury verdicts, if it permitted appellant to circumvent the unfavorable jury verdict against him by applying via a doctrine of estoppel the verdict of a different jury in a different case.

Id. at 774.

56. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment a (1982):

> *Issues affected.* The rule of this section applies only to preclude relitigation of issues that the party would have been precluded from relitigating with his original adversary. Accordingly, preclusion may be imposed only if, as stated in § 27, the issue was the same as that involved in the present action and was actually litigated and essential to a prior judgment that is valid and final.

Id.

57. *E.g.*, Hurley v. Beech Aircraft Corp., 355 F.2d 517 (7th Cir.), *cert. denied*, 385 U.S. 821 (1966). In *Hurley*, the court affirmed a judgment for the defendant on plaintiff's negligence count (Count II), and found that issues necessarily resolved by the negligence count precluded plaintiff's relitigation of its implied warranty of merchantability counts (Count I). The court reasoned that, "there was an identity of factual allegations between counts I and II. The only substantive difference between the counts lay in their respective theories of action. . . . Proof of the same defect was essential to recovery under either theory of the complaint." *Id.*

58. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

they failed to warn about the foreseeable dangers associated with exposure to asbestos. Ten years later, different plaintiffs brought an action in which they sought to utilize *Borel* to preclude the litigation of the issue of causation. In *Hardy v. Johns-Manville Sales Corp.*,[59] the trial court held that *Borel* established as a matter of law that asbestos is a substance that can produce asbestosis and mesothelioma, and that no warnings were issued by any of the asbestos insulators prior to 1964. As a consequence, the trial court held, "the plaintiff need not prove that defendants either knew or should have known of the dangerous propensities of their products and therefore should have warned consumers of these dangers, defendants being precluded from showing otherwise."[60] The Fifth Circuit reversed, concluding that *Borel* did not necessarily decide the state of manufacturer knowledge as to the dangers of asbestos exposure.[61] Specifically, *Borel* did not resolve as a matter of fact that "all manufacturers of asbestos-containing insulation products had a duty to warn as of 1936, and all failed to warn adequately after 1964."[62] A proponent's failure to demonstrate issue commonality was also evidenced in *Walker v. GAF Corp.*,[63] where claimant's intentional tort action against an employer followed an adverse determination in plaintiff's negligence and strict products liability claims.[64]

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59. 681 F.2d 334 (5th Cir. 1982).

60. *Id.* at 336-37.

61. *Id.* at 345.

62. *Id.* The court further explained that: "[O]ur opinion in *Borel* merely approved of the various ways the jury could have come to a conclusion concerning strict liability for failure to warn. We did not say that any of the specific alternatives that the jury had before it were necessary or essential to its verdict." *Id.*

63. No. 88-3380 (6th Cir. Sept. 25, 1989) (LEXIS, GenFed library, USAPP).

64. *Id.* at 4. The *Walker* court stated:

> We believe the district court improperly granted summary judgment on the basis of collateral estoppel because Walker's bald claim that Celotex, his former employer, committed an intentional tort does not necessarily raise the precise issue of whether or not Walker suffers from asbestosis, which was the issue raised and actually litigated in the prior proceeding . . . .

Id.

For an example highlighting the effect of the context of the earlier litigation upon the court's assessment of the opponent's earlier opportunity and incentive to litigate, see McCarthy v. Johns-Manville Sales Corp., 502 F. Supp. 335 (D. Mass. 1980) (offensive issue preclusion was not applied against defendant manufacturers of asbestos products because they could not have foreseen the advent of mass asbestos litigation at the time

The opponent's argument that new evidence militates against the estoppel effect of a prior judgment has been interpreted to include new evidence in light of increased scientific or medical knowledge of epidemiology or causation. For example, in *Zweig v. E.R. Squibb & Sons*,[65] the defendant, a manufacturer of the anti-miscarriage drug Delalutin, avoided the issue preclusive effect of an adverse prior jury verdict by showing that more recent scientific inquiry and FDA examination "cast doubt" upon prior findings of fact implicating the drug in newborn limb reduction.[66]

In products liability, special issue preclusion questions are raised by the practice of pleading multiple tort and warranty claims arising from the same facts. For example, in products liability actions alleging the seller's negligence, breach of warranty, and strict tort liability, aspects of plaintiff's proof on the negligence count are virtually indistinguishable from what plaintiff must prove in her strict liability count. Thus plaintiff's proof of defect in negligence imports proof that the product was sold in an unsafe and unreasonably dangerous condition.[67] In most

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the prior case was tried); *see also* Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983), *cert. denied*, 467 U.S. 1253 (1984).

Where arguable distinctions exist between the issue previously litigated and the one for which a party seeks preclusion, one factor to be evaluated is whether there exists "a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first." RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment c (1982).

65. 222 N.J. Super. 306, 536 A.2d 1280 (App. Div. 1988).

66. *Id.* at 312, 536 A.2d at 1283. The *Zweig* court noted:

> The record discloses that studies of Delalutin, conducted after the Utah verdict, have absolved the drug of the harmful effects alleged here. There is now biological evidence that the drug cannot cause limb reduction. The FDA, which in 1977 had warned against using Delalutin during the first trimester of pregnancy, is now considering whether to retract that warning in light of a recommendation from its Fertility and Maternal Health Drugs Advisory Committee that Delalutin does not appear to be harmful. Later scientific discoveries that cast doubt on prior findings of scientific facts deprive those earlier findings of collateral estoppel effect.

Id.

67. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 395 (1965):

> [negligence liability for a] manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose

states, proof of defect in strict tort liability requires that the plaintiff prove that the product was sold in a defective and unreasonably dangerous condition.[68] In an implied warranty of merchantability claim, plaintiff must prove that the product was nonmerchantable as sold, without the necessity of showing that the defect rendered the product unreasonably dangerous.[69]

The question of whether judgment adverse to plaintiff in a negligence claim against a manufacturer suffices to estop plaintiff's later claim for breach of the implied warranty of merchantability was before the court in *Hurley v. Beech Aircraft Corp.*[70] There a personal representative's wrongful death action alleged the defective condition of the aircraft's left wing. The plaintiff's original implied warranty claim was dismissed for lack of privity, and judgment was entered for defendant on the negligence count. On appeal, plaintiff's warranty claim was reinstated, the court and the parties agreeing that in Indiana no privity needs be shown for a claim in implied warranty.[71] Nevertheless, the court affirmed defendant's judgment on both claims, concluding that the adverse judgment in negligence precluded plaintiff's claim in implied warranty. The court reasoned that the prior findings of no defect on the negligence claim were equally dispositive of plaintiff's required showing of defect for breach of the implied warranty of merchantability.[72]

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for which it is supplied.

Id.

68. *See id.* at § 402A.

69. *E.g.*, U.C.C. § 2-314 (1978). *See generally* Note, *Strict Liability and Warranty in Consumer Protection: The Broader Protection of the UCC In Cases Involving Economic Loss, Used Goods, and Nondangerous Defective Goods*, 39 WASH. & LEE L. REV. 1347 (1982).

70. 355 F.2d 517 (7th Cir.), *cert. denied*, 385 U.S. 821 (1966).

71. 355 F.2d at 519.

72. *Id.* at 520. The court stated:

> Proof of the same defect was essential to recovery under either theory of the complaint.
>
> . . . .
>
> Plaintiff's position is that in trial on the breach of warranty, they would have only to show that there was an in-flight structural failure of a brand new aircraft, that failure being identified as the separation of the wing while the plane was apparently in routine normal flight. This position fails to take into account the findings of fact of the trial court in the negligence action . . . which attribute the structural failure to excessive forces upon the plane and which state that the separation did not occur during the normal flight of the aircraft, but after it had de-

Ordinarily, however, a court will not grant preclusive effect to a prior issue determination upon proponent's simple showing that the issue resolved was within the constellation of claims raised in a multi-count action. For example, it has been held that the voluntary dismissal with prejudice of a contractor's negligence claim against the architect for a municipal project did not purport to resolve issues raised in the contractor's subsequent claim in breach of contract against the municipality.[73] Nonetheless, there is agreement that a party's failure, as a matter of fact or as a matter of law, to prevail on an issue common to more than one of its claims will operate to estop relitigation of the same issue in a subsequent suit, even when the issue pertains to a different claim.[74]

3. *Necessity and Clarity of Valid and Final Order*

Pendency of the losing party's appeal of a judgment does not alter its finality for issue preclusion purposes.[75] Congruently, a subsequent determination that an action was brought and resolved in the wrong forum will not strip the earlier action of preclusive effect.[76]

To be accorded preclusive effect, a judgment must have *necessarily* decided the issue. Accordingly, a reviewing court's later

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scended to 7,000 feet from 11,000 feet in considerably less than a minute. Thus, the fact upon which plaintiffs are compelled to base their entire breach of warranty action, i.e., a defect in the aircraft, is a fact with respect to which the trial court has already made an adverse finding.

Id. at 520-21.

73. Chaney Bldg. Co. v. City of Tucson, 148 Ariz. 571, 573, 716 P.2d 28, 31 (1986). The court noted: "From a review of the record, we believe that [contractor] Chaney was entitled to produce evidence and did produce evidence which showed that the delays in its performance could have been caused by the [city's] plans and not by Chaney without [architect] Kulseth necessarily being negligent as a result." *Id.*

74. *See, e.g., supra* notes 70-72 and accompanying text.

75. *E.g.*, Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) (a judgment is final for purposes of issue preclusion even where an appeal is taken, except in circumstances where the "appeal" actually constitutes a trial de novo); *cf.* Waggoner v. General Motors Corp., 771 P.2d 1195, 1204 (Wyo. 1989) (footnote omitted):

> Here, the fact question of proximate cause, or more precisely "cause in fact," was determined against appellant in the trial of his negligence claim. Although . . . appellant has appealed the negligence determination, we herein have affirmed the district court on that claim and that judgment is now just as conclusive as if it had not been appealed.

76. Lowe v. Norfolk & W. Ry. Co., 753 S.W.2d 891, 893 (Mo. 1988) (en banc).

observation that evidence raised a submissible jury question on a particular matter does not mean that the particular issue was so decided, absent evidence in the judgment or order itself.[77]

Issue preclusive effect will not be given where the prior order is not clear.[78] A court's simple statement granting defendants' motions to dismiss grounded variably on lack of in personam jurisdiction, forum non conveniens, and improper venue has been held not to preclude litigation of the in personam issue against one prevailing defendant where "[s]everal interpretations can be given" to the prior order.[79]

C. *Application to Specific Issues, Proceedings, and Procedural Stages*

1. *Jurisdiction*

Prior determination of in personam jurisdiction is generally found to preclude litigation of jurisdictional questions in a later

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77. For example, in Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982), the court clarified that the import of the *Borel* decision was only that

> the jury could have grounded strict liability on the absence of a warning prior to 1964 or "could have concluded that [post-1964 and post-1966] 'cautions' were not warnings in the sense that they adequately communicated to Borel and other insulation workers knowledge of the dangers to which they were exposed. . . . We did not say that any of the specific alternatives that the jury had before it were necessary or essential to its verdict."

Id. at 345 (quoting Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1104 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974)). Thus, the court concluded:

> [s]ince we cannot say that *Borel* necessarily decided, as a matter of fact, that all manufacturers of asbestos-containing insulation products knew or should have known of the dangers of their particular products at all relevant times, we cannot justify the trial court's collaterally estopping the defendants from presenting evidence as to the state of the art.

Id.

78. Green v. Montgomery Ward & Co., 775 S.W.2d 162 (Mo. Ct. App. 1989).

79. *Id.* at 165. The court hearing the issue preclusion question stated:

> The judge's order is not clear. Several interpretations can be given to the words "Defendants' motion to dismiss on grounds of lack of jurisdiction and lack of venue sustained." Under the facts presented here it is impossible to determine what the court was making reference to in its order. Magna's interpretation, that the dismissal on the grounds of jurisdiction applied only to Magna is misleading and ignores Montgomery Ward's assertion as to jurisdiction and the lack thereof in its initial "Motion to Dismiss" and its later "Motion to Dismiss or Transfer" which specifically states, "This court lacks jurisdiction over the subject matter." Accordingly, collateral estoppel presents no bar in the instant case.

Id.

suit only where the issue of jurisdiction was resolved unambiguously in the prior action and the nonprevailing party on that issue had a full opportunity to litigate the issue.[80] In *Green v. Montgomery Ward & Co.*,[81] the court found that a prior judgment dismissing a retailer's indemnification action against a saw manufacturer did not collaterally estop subsequent judicial evaluation of whether there existed in personam jurisdiction over the manufacturer. The appeal in that action originated in a personal injury suit brought against Montgomery Ward, the retailer, and Magna American Corp., the manufacturer and designer of the Shopsmith V Multipurpose Wood Saw. In the first action, the trial court granted Montgomery Ward's motion to dismiss on the grounds of forum non conveniens and lack of venue, and Magna's motion to dismiss grounded on lack of personal jurisdiction and lack of venue.[82] In a subsequent action filed by the injured plaintiff against Montgomery Ward alone, Montgomery Ward filed a third-party petition against Magna. The trial court dismissed the third-party action on the basis of the certified copy of the prior order.[83]

On appeal, the court referenced the conventional criteria for issue preclusion, adding that "[c]ollateral estoppel only pertains to those issues which were 'necessarily and unambiguously decided.'"[84] The court concluded that the prior dismissal of Magna for want of in personam jurisdiction did not preclude the retailer's current claim that jurisdiction existed in the second action, reasoning that "Montgomery Ward was not accorded a 'full and fair' opportunity to litigate, nor was the issue resolved in an unambiguous fashion by the St. Louis court and no judgment was rendered on the merits of the case."[85] To Magna's argument that the retailer had such an opportunity as it was "allied" with Mr. Green in the original action and "should have contemplated a third-party action or cross claim at a later date," the court

80. *See, e.g.*, Bascom v. Joseph Schlitz Brewing Co., 395 N.W.2d 879, 885 (Iowa 1986) (dismissal for lack of in personam jurisdiction of earlier employee negligence action against employer warranted dismissal of second action on the basis of issue preclusion).

81. 775 S.W.2d 162 (Mo. Ct. App. 1989).

82. *Id.* at 163.

83. *Id.*

84. *Id.* at 164 (citing Burton v. State, 726 S.W.2d 497, 499 (Mo. Ct. App. 1987)).

85. *Id.* at 164-65.

demurred, commenting: "In the initial action both Montgomery and Magna sought to dismiss Green's petition. Montgomery Ward had no reason to oppose Magna's motion to dismiss. Montgomery Ward's position was one of co-defendant and no logical reading of the facts shows it to be allied with Green."[86]

Lack of finality in a prior jurisdictional judgment sufficed for the court in *Eason v. Linden Avionics, Inc.*[87] to deny issue preclusive effect. There, Beech Aircraft Corporation had been a defendant in a prior state court action arising from the same occurrence, where, the court summarized, having "an equally strong incentive to avoid the jurisdiction of the state and federal courts," the manufacturers "had asserted the identical personal jurisdiction defense."[88] Beech argued against granting issue preclusive effect to the state court's interlocutory rejection of its jurisdictional claims on the grounds that under New Jersey law such an interlocutory order denying a motion to dismiss was not "final" for issue preclusion purposes.[89] Conceding that the state trial court's denial of Beech's motion was not "tentative," the federal district court nonetheless observed that as "[a] prior state court ruling on the issue of personal jurisdiction may be upset long after entry of judgment in federal court . . . . [P]reclusion of a provisionally resolved issue would not be appropriate."[90]

2. *Quasi-Judicial Determinations*

It is generally accepted that when an administrative body acts in a judicial or a quasi-judicial capacity, "the decision and findings are entitled to finality under the doctrines of res judicata or collateral estoppel."[91] Arising commonly in the context of workers' compensation proceedings and negligence or products liability suits deriving from the same accident, it has been stated

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86. *Id.* The court added: "It would have been unusual for Montgomery Ward to challenge Magna's status at this point as they too sought dismissal." *Id.*

87. 706 F. Supp. 311 (D.N.J. 1989).

88. *Id.* at 316.

89. *Id.* at 317.

90. *Id.* at 318 (citation omitted).

91. Brown v. Dow Chemical Co., 875 F.2d 197, 199 (8th Cir. 1989) (Arkansas Workers' Compensation Commission's finding that plaintiff failed to establish causation collaterally estopped his later products liability action).

that "[c]ollateral estoppel operates between judicial and board determinations. . . . [T]he relationship of court to agency [is] 'a statutory-decisional system in which both trial court and workmen's compensation agency are bound to accept the other's prior adjudication . . . .' "[92]

3. *Class Action Certification*

In re A.H. Robbins Co.[93] raised, among other matters, the issue preclusive effect of a prior trial court's denial of a products liability claimant's application for class action certification. In that action, brought by plaintiff against the product manufacturer's insurance carrier as joint tortfeasor, the federal appellate court held that plaintiff's application for class action certification in its negligence and warranty claims for punitive damages were barred by virtue of an earlier California federal court refusal to certify such a class on the grounds that plaintiff's class failed to show the commonality, typicality, and adequate representation requisites of Federal Rule of Civil Procedure 23(a).[94]

4. *Vicarious Liability*

Where a claimant fails to establish liability against an employee tortfeasor, a later vicarious liability action against the employer will be precluded.[95] In other professional relationships, however, judgment for or against one actor will not necessarily

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92. Anderson-Cottonwood Disposal Serv. v. Workers' Compensation Appeals Bd., 135 Cal. App. 3d 326, 332, 185 Cal. Rptr. 336, 339-40 (1982) (citations omitted). For a criticism of granting issue preclusive effect to certain aspects of workers' compensation proceedings, see *infra* notes 201-218 and accompanying text.

93. 880 F.2d 709 (4th Cir. 1989).

94. *Id.*

95. *E.g.*, Staples v. Hoefke, 189 Cal. App. 3d 1397, 235 Cal. Rptr. 165 (1987):

> The pertinent law is as follows: ". . . in actions of tort, if the defendant's responsibility is necessarily dependent upon the culpability of another who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been judged not culpable, the defendant may have the benefit of that judgment as an estoppel . . . ."

Id. at 1415, 235 Cal. Rptr. at 177. (quoting Charles H. Duell, Inc. v. Metro-Goldwyn-Mayer Corp., 128 Cal. App. 376, 383, 17 P.2d 781, 784 (1932)); *see also* Vezina v. Continental Casualty Co., 66 Cal. App. 3d 665, 672, 136 Cal. Rptr. 198, 202 (1977) (plaintiff's action against insurance company for injuries sustained in accident with vehicle operated by carrier's employee barred by finding in earlier personal injury action that employee was not acting within the scope of his employment at the time of the accident).

give rise to an estoppel effect on issues in a later action. For example, in *Chaney Building Co. v. City of Tucson*,[96] the Arizona Supreme Court considered a municipality's claim that a dismissal with prejudice in a contractor's earlier claim against the architect precluded the contractor's subsequent claim against the city for breach of contract. The court stated: "In the current action Tucson was sued for wrongful termination and breach of contract; [the architect] Kulseth for negligence. We do not believe that this was a case where Tucson's liability was simply derivative from any liability of Kulseth."[97]

5. *Discovery*

A prior judgment on a discovery matter will be denied issue preclusive effect where either, the discovery rules governing the earlier and later discovery contests vary or the nature or scope of the later application for discovery differs from the one earlier decided. For example, in *Application of American Tobacco Co.*,[98] the court heard the appeal of a contempt order against nonparty researchers for their failure to comply with subpoenas which requested research data on the hazards of smoking. At issue was a second subpoena issued by the defendants, the first subpoena having been held to pose "an unreasonable burden upon the medical and scientific institutions involved . . . ."[99] The second subpoena sought fewer items than the first, "concentrating primarily on the computer tapes storing the relevant raw data."[100] The trial court rejected the nonparty's motion to quash, based in part upon its interpretation of the issues determined by the court quashing the original subpoena, reasoning further that New York discovery rules differed from their federal counterparts.[101] Observing that principles of issue preclusion "have been applied in federal court to bar an attack on a subpoena," the Second Circuit affirmed, concluding that "[w]here . . . the first subpoena has been quashed as overly

96. 148 Ariz. 571, 716 P.2d 28 (1986).

97. *Id.* at 574, 716 P.2d at 31.

98. 880 F.2d 1520 (2d Cir. 1989).

99. *In re* R.J. Reynolds Tobacco Co., 136 Misc. 2d 282, 287-88, 518 N.Y.S.2d 729, 734 (Sup. Ct. 1987).

100. *See American Tobacco*, 880 F.2d at 1525.

101. *Id.*

broad and a second subpoena is served which is clearly narrower or more specific, New York law does not give preclusive effect to the decision quashing the earlier subpoena."[102]

6. *Arbitration*

In some jurisdictions there exist, by statute, required arbitral processes to which claimants injured in vehicular accidents must first resort.[103] As a general rule, arbitral awards pursuant to a statutory program of arbitration for automobile negligence, even where accepted by the claimant, will have no issue preclusive effect on later claims between and among the same parties.[104] Where, on the other hand, an arbitration forum provides a party with an adversarial forum that is qualitatively, if not formally, similar to that of a court of general jurisdiction, there is authority approving dismissal of a party's later endeavor to relitigate issues decided by the arbitrator.[105]

7. *Consent Judgments, Stipulations, and Settlements*

Prior judgments entered by consent are not ordinarily given issue preclusive effect in a subsequent suit, on the logic that the issues underlying the prior judgment were neither actually litigated nor necessary and essential to the judgment. Like treat-

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102. *Id.* at 1527. The court explained:

> [T]he subpoenas at issue in the present case are plainly narrower than the subpoena's quashed [earlier]. For example, whereas the Page subpoenas requested the raw data in its original form (e.g., interview notes, completed questionnaires, x-rays), the present subpoenas seek only the computer tapes plus such information as is necessary to interpret those tapes. Further, the present subpoenas, unlike the Page subpoenas, do not seek information that pertains to events occurring subsequent to the periods covered by the published articles.
>
> Since the two sets of subpoenas are significantly different, the district court properly rejected the contention that enforcement of the present subpoenas was precluded by the decision in [the earlier case] quashing the broader subpoenas.

Id.

103. *E.g.*, Taha v. DePalma, 214 N.J. Super. 397, 400-01, 519 A.2d 905, 906-07 (1986) (nonbinding, albeit mandatory arbitration proceedings for claims of vehicular negligence not intended to be final adjudications).

104. *Id.* at 400-01, 519 A.2d at 906-07.

105. *E.g.*, Bailey v. Metropolitan Property and Liab. Ins. Co., 24 Mass. App. Ct. 34, 36-37, 505 N.E.2d 908, 911-12 (1987) (plaintiff, a passenger injured in a vehicular accident, proceeded to arbitration against one of the driver's carriers and was awarded damages).

ment is usually accorded settlements.[106] However, in some circumstances, an action settled during the pendency of an appeal may still be vested with preclusive effect.[107]

Stipulations dismissing actions may, however, preclude litigation of issues resolved therein where the language of the dismissal "indicate[s] the parties agreed that [an issue] should be deemed conclusively established . . . ."[108]

The compensatory component of a settlement is, of course, issue preclusive. Defendants settling claims against injured persons may be protected from subsequent third-party claims lodged by defendants in a later action where the settlements were entered in good faith.[109] A court's recognition of issue preclusive effect in a prior settlement will not be vitiated by a later determination that the dismissing court was the wrong forum in which to bring the action.[110]

D. *Nonmutual Issue Preclusion*

1. *Full and Fair Opportunity to Litigate*

Federal law has rejected the requirement of mutuality, i.e., the rule that neither party can enlist a prior judgment to pre-

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106. Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1, 7 (Tex. 1986).

107. *E.g.*, Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 907, 718 P.2d 920, 924, 226 Cal. Rptr. 558, 562 (1986) (the settlement occurring after affirmance on appeal, although prior to expiration of the time for appeals to the state's highest court, provided even greater indicia that the judgment was "the last word" of the rendering court (citing Sandoval v. Superior Court, 140 Cal. App. 3d 932, 936, 190 Cal. Rptr. 29, 31 (1983))).

108. Chaney Bldg. Co. v. City of Tucson, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986). The court held that the absence of such indication in the dismissal obviated the city's reliance upon dismissal to preclude issues in contractor's suit against the city for breach of contract. *Id.* at 573, 716 P.2d at 30.

109. Lowe v. Norfolk & Western Ry. Co., 753 S.W.2d 891, 893 (Mo. 1988).

110. *Id.* at 894.

> The railroad argues that the trial court was in error in concluding that the settlements had been reached in good faith. The Illinois appellate court expressly rejected this contention. It could not be predicted, at the time the settlements were entered into, that the courts of the forum state would ultimately conclude that the case should have been brought someplace else. The settling defendants were confronted with a very substantial trial, and each of them paid a seven figure amount to dispose of the claim against it. The policy underlying the doctrine of collateral estoppel calls for its application here, as to an issue expressly presented to and decided by the Illinois courts.

Id. at 893.

clude litigation of an issue unless both parties were bound by that ruling.[111] While state law provides variable guidance, most states have abandoned the mutuality requirement.[112] Authors of the Restatement (Second) of Judgments reached a conforming conclusion. The current Restatement eliminates the requirement of mutuality, adopting instead "a more flexible rule . . . which emphasize[s] a discretionary weighing of economy against fairness."[113] Additionally, section 29 states that a party precluded from relitigating an issue with an opposing party pursuant to sections 27 and 28 is likewise precluded from doing so with a stranger to the earlier litigation "unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue."[114]

When issue preclusion is asserted by a person not a party to the initial litigation, the decisions and the Restatement both

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111. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); Blonder-Tongue Laboratories, Inc. v. University of Ill. Found., 402 U.S. 313, 332 (1971).

112. *See* Kortenhaus v. Eli Lilly & Co., 228 N.J. Super. 162, 165, 549 A.2d 437, 438 (App. Div. 1988); East Tex. Motor Freight Lines v. Freeman, 289 Ark. 539, 713 S.W.2d 456 (1986):

> [C]ollateral estoppel requires four elements before a determination is conclusive in a subsequent proceeding: 1) the issue sought to be precluded must be the same as that involved in the prior litigation; 2) that issue must have been actually litigated; 3) it must have been determined by a valid and final judgment; and 4) the determination must have been essential to the judgment.

289 Ark. at 543, 713 S.W.2d at 459; *cf.* Kearney v. Kansas Pub. Serv. Co., 233 Kan. 492, 512, 665 P.2d 757, 774 (1983). In the earlier action,

> all defendants fully litigated the issues of their respective liability and that case has now been finally determined. *Under the facts of these cases where there were no claims by any defendants in any of the cases that any of the plaintiffs were negligent or at fault and the only issues thereon were among the three codefendants, there existed mutuality and identity of the parties sufficient to invoke collateral estoppel in the later cases.* We are not called upon and do not here decide whether mutuality of estoppel is still a valid requirement for the application of the doctrine of collateral estoppel in other cases.

233 Kan. at 512-13, 665 P.2d at 774-75 (original emphasis).

113. *See Kortenhaus*, 228 N.J. Super. at 165, 549 A.2d at 438.

114. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982); *see, e.g.*, Sucher v. Kutscher's Country Club, 113 A.D.2d 928, 930, 493 N.Y.S.2d 829, 832 (1985) (following the conclusion that the issue sought to be decided in the subsequent litigation is the same, and that it was "necessarily determined" in the earlier action, the court stated that "[t]he second part [of a collateral estoppel analysis] is an inquiry as to whether the party sought to be precluded had a full and fair opportunity to litigate that issue in the prior proceeding.").

grant correspondingly greater weight to the party opponent's "fairness" arguments against granting estoppel effect.[115] Section 29 of the Restatement describes one general and several particular circumstances to be evaluated in addition to those enumerated in section 28.[116] One federal court summarized the "fairness" evaluation by posing these questions:

> (1) Did the party to be estopped have incentive to vigorously litigate the first action;
>
> (2) if there is more than one judgment involved, are they consistent;
>
> (3) does the second action afford some procedural opportunities unavailable in the first action; and finally
>
> (4) would application of issue preclusion otherwise be unfair

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115. RESTATEMENT (SECOND) OF JUDGMENTS § 29 comment b (1982). The qualifications stated in section 28 apply to issue preclusion when it is invoked by a nonparty. When a nonparty invokes issue preclusion, however, greater weight may be given to the factors stated in section 28 and additional considerations may indicate the inappropriateness of imposing preclusion.

See also In re Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1505, 1523 (D. Colo. 1989) (fairness considerations are brought into special focus where "wait and see" claimants in mass tort litigation assert nonmutual offensive issue preclusion).

116. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 comments c-j (1982). These circumstances include consideration of whether:

> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
>
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
>
> (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
>
> (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
>
> (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently were based on a compromise verdict or finding;
>
> (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
>
> (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity to obtain reconsideration of the legal rule upon which it was based;
>
> (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Id. § 29.

to the defendant.[117]

To these questions a New York appellate court added: "availability of new evidence, the use of initiative, the extent of a prior litigation and the competence and experience of counsel . . . ."[118]

The "full and fair" opportunity to litigate inures to the party or the party's privies, and does not extend to the party's counsel. In the context of defensive issue preclusion, one federal trial court rejected a defendant asbestos ceiling tile manufacturer's request that the plaintiff school district be estopped from pursuing its claims for punitive damages against defendant because plaintiff's counsel had earlier litigated and lost a comparable claim on behalf of other plaintiffs.[119]

As in issue preclusion questions where there exists mutuality, proponents of nonmutual issue preclusion have succeeded in vesting preclusive effect in prior administrative determinations where the party against whom preclusion is sought had a full and fair opportunity to litigate the identical issue. For example, in *Martin v. Ring*,[120] the court affirmed the trial court's directed verdict for defendant homeowner in a worker's negligence action arising from injuries suffered while working on the homeowner's porch. The trial court's directed verdict was based on an earlier Industrial Accident Board conclusion that plaintiff's injury was *not* due to the fall from defendant's porch. The appellate court concurred that the cause of plaintiff's back injury was both fully and fairly litigated before the Board, and was essential to its decision.[121]

2. *De Facto Privity*

Where the party against whom preclusion is asserted was not a party to the earlier action or actions, courts have been reluctant to impose issue preclusion merely because the parties to the first action share an identity of interests with the parties in

117. Eason v. Linden Avionics, Inc., 706 F. Supp. 311, 316 (D.N.J. 1989).

118. *See Sucher*, 113 A.D.2d at 930, 493 N.Y.S.2d at 832.

119. Hebron Pub. School Dist. No. 13 v. United States Gypsum Co., 723 F. Supp. 416 (D.N.D. 1989).

120. 401 Mass. 59, 514 N.E.2d 663 (1987).

121. *Id.* at 62-63, 514 N.E.2d at 665.

the second. Claiming that such an analysis "stretches 'privity' beyond meaningful limits," the Fifth Circuit in *Hardy v. Johns-Manville Sales Corp.*[122] identified three settings in which federal courts would recognize virtual or de facto privity. The two settings which are relevant to products liability actions are (1) where the nonparty " 'controlled the original suit' "; and (2) where the nonparty's " 'interests were represented adequately in the original suit.' "[123] The criterion of adequate representation in the prior suit has conventionally been limited to persons "somehow represented" in the earlier litigation,[124] including "survivors, spouses, executors and the like of former parties."[125] An insured and an insurer will be considered to be in privity except where "the interests of the insured and insurer are antagonistic towards each other in an initial tort adjudication."[126]

Consistent with the above, successive products liability actions against different participants in the distributive chain should not be barred by res judicata upon proponent's simple claim that the retailer, wholesaler, and manufacturer are in privity.[127] Courts evaluating the relationship between and among the manufacturer and downstream sellers rely instead upon the "broader concept"[128] of issue preclusion to prevent successive actions against retailers, manufacturers, and other sellers of the same product where plaintiffs raise the same factual issues of

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122. 681 F.2d 334 (5th Cir. 1982).

123. *Id* at 339. (quoting Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 95 (5th Cir. 1977)). The court in *Hardy* explains: "[T]he rationale for these exceptions — all derived from Restatement (Second) of Judgments §§ 30, 31, 34, 39-41 (1982) — is obviously that in these instances the nonparty has in effect had his day in court." *Id.*

124. *See Hebron Pub. School Dist.*, 723 F. Supp. at 419.

125. *Id.*; *see infra* note 133 and accompanying text.

126. Insurance Co. of N. Am. v. Whatley, 558 So. 2d 120, 122 (Fla. Dist. Ct. App. 1990). For a criticism of this rule see *infra* notes 186-190 and accompanying text.

127. Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Super. 225, 233, 464 A.2d 1313, 1317 (1983). The court stated:

> Privity for purposes of res judicata is not established by the mere fact that persons may be interested in the same question or in proving the same facts. The Restatement (Second) of Judgments applies principles of res judicata to different parties where one is vicariously responsible for the conduct of another, such as principal and agent or master and servant. Restatement (Second) of Judgments § 51 (1982). In such cases there is, in an important sense, a single claim.

Id.

128. *Id.* at 235, 464 A.2d at 1318.

defect or hazard that has been litigated previously.[129]

A recurring phenomenon in mass tort actions is the specialization of individual law firms in actions arising from the same allegedly tortious conduct. Whether the subject matter is pharmaceuticals, asbestos contamination, or otherwise, defendants in a contemporary action may find themselves defending against different claimants represented by the attorneys who prosecuted earlier claims on behalf of other plaintiffs. In such circumstances, defendants have sought to bar the later action on the grounds that the repeated presence of the same counsel for claimants constitutes plaintiffs' de facto representation in the earlier litigation. Defendant manufacturer of asbestos ceiling tiles raised this issue preclusion defense in *Hebron Public School District v. United States Gypsum Co.*,[130] where the plaintiffs were represented by counsel who previously represented other plaintiffs who were disappointed in their claim for punitive damages against the same defendant.[131] The North Dakota District Court refused to extend the concept of virtual representation to plaintiffs whose counsel litigated an earlier action, calling it both an unwarranted extension of issue preclusion by earlier de facto representation beyond its conventional precincts[132] and an impermissible limitation upon plaintiffs' choice of counsel.[133]

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129. *E.g.*, Billman v. Nova Prods., 328 So. 2d 244 (Fla. Dist. Ct. App. 1976) (collateral estoppel precludes litigation against manufacturer of issues previously litigated against retailer); Meyer v. Droms, 68 A.D.2d 942, 944, 414 N.Y.S.2d 67, 69 (1979) (the same effect, with the first action brought against the manufacturer and the second against the distributor).

130. 723 F. Supp. 416 (D.N.D. 1989).

131. *Id.* at 418-19.

132. *Id.* at 419. For example, barring claims by survivors, spouses, executors and the like of former parties.

133. *Id.* The court noted:

> It is important to remember that the case is that of the client: a lawyer only serves as that client's advocate. Hebron cannot be bound by previous assertions of its lawyers on cases with which Hebron had no involvement. To allow such a result would only serve to limit the choice of legal aid available to parties. That the choice of counsel is to be left to the discretion of the client is established within our profession.

Id. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-108 (1980) (agreements restricting the practice of a lawyer are prohibited).

3. *New Evidence or Different Evidentiary Rules*

Medical or scientific developments postdating the original action and material to plaintiff's prima facie case of causation, or defendant's response thereto, will suffice to permit a party's relitigation of an issue. In *Zweig v. E.R. Squibb and Sons*,[134] the appellate court held that the prior jury verdict — that a drug used to prevent miscarriages had caused birth defects in the nature of limb reductions — did not collaterally estop the drug manufacturer from denying the same allegation in a new action in view of the new evidence that had developed since the previous litigation. The plaintiff, an infant born with reduced limbs allegedly caused by his mother's ingestion of the drug while she was pregnant, appealed a lower court decision that permitted the defendant to relitigate the issue of causation based on new evidence. Finding the new evidence material, the court held that where there was an absence of mutuality, issue preclusion should be applied "with a lighter hand" and replaced with a "more flexible approach" to limit application of the doctrine.[135] Similarly, plaintiffs in *Vincent v. Thompson*,[136] parents of a child who contracted encephalopathy following administration of defendant manufacturer's drug Quadrigen, defended, on appeal, the trial court's preclusion of the defendant Parke Davis' evidence on the issue of defect on the grounds that a prior suit had affirmed a judgment that a defective condition in the drug caused another plaintiff's illness and consequent brain damage.[137] Among diverse reasons for finding the trial court in error, the New York appellate court included the observation that, following the prior action, medical procedures were developed that permitted conclusive testing for endotoxins which might leach from the dead pertussis bacilli in Quadrigen, providing defendant with expert evidence tending to disprove the presence of endotoxins "in any quantity sufficient to cause an untoward reaction in a human being."[138]

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134. 222 N.J. Super. 306, 536 A.2d 1280 (App. Div. 1988).

135. *Id.* at 311-12, 536 A.2d at 1282-83.

136. 50 A.D.2d 211, 377 N.Y.S.2d 118 (1975).

137. Tinnerholm v. Parke, Davis & Co., 411 F.2d 48, 50 (2d Cir. 1969).

138. *See Vincent*, 50 A.D.2d 211, 221, 377 N.Y.S.2d 118, 128 (1975). The court further stated:

Even without regard to divergent evidentiary rules, there is authority holding that the court in a subsequent action may deny issue preclusive effect to a prior ruling where the earlier trial court entered evidentiary rulings that the later court considered prejudicial to a party. Significantly, section 29(2) of the Restatement (Second) of Judgments has been interpreted to permit a court in a subsequent action to review evidentiary rulings of the first proceeding and, should it consider earlier rulings both erroneous and material to the outcome, deny the judgment issue preclusive effect. Reference may again be made to *Zweig v. E.R. Squibb & Sons*,[139] where the New Jersey appellate court affirmed a trial court's denial of preclusive effect to an earlier Utah jury's finding that the drug Delalutin caused a child's limb reduction. The New Jersey court concluded that the Utah jury's consideration of "FDA-compelled" package inserts unfairly prejudiced defendant.[140]

4. *Capacity to Join*

As did the Supreme Court in *Parklane*,[141] the Restatement (Second) of Judgments attaches significance to whether the party proposing or opposing "unfavorable preclusion" could have joined the present adversary in the first action by either intervention or joinder.[142] The objective is to deny the advantages of issue preclusion to persons who failed to exercise joinder or intervention in the first action, choosing instead to lay "in wait, hoping to exploit a favorable judgment with no risk of being bound by an unfavorable one."[143] Decisions evaluating this assessment require more than the technical opportunity for joinder or intervention. They require that the opponent show that

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> To allow the doctrine of collateral estoppel to be used to deny to a defendant in a case such as this an opportunity to introduce evidence clearly relevant to a key issue in the case, the absence or existence of a causal relationship between the claimed defect in the product . . . and the injuries for which the plaintiffs are suing, is the use of that doctrine to deny such a defendant a complete and fair opportunity to litigate the very issue upon which its rights depend.

Id. at 221, 377 N.Y.S.2d at 128.

139. 222 N.J. Super. 306, 536 A.2d 1280 (App. Div. 1988).

140. *Id.* at 312, 536 A.2d at 1283.

141. 439 U.S. 322, 329-30 (1979).

142. RESTATEMENT (SECOND) OF JUDGMENTS § 29(3) (1982).

143. Murray v. Feight, 741 P.2d 1148 (Alaska 1987).

joinder or intervention would have been a manifestly reasonable course for proponent. *Murray v. Feight*[144] illustrates that the inquiry should not stop with the characterization of the initial action, but should proceed as well to parse the discrete factual issues decided thereunder.[145] In the appeal, the court rejected plaintiff's claim that the defendants should have brought their tort and contract claims in the original lien priority litigation, agreeing with the lower court that the later tort and contract claims were "entirely foreign to the nature of the original case."[146] As meaningful was the *Murray* court's second rationale for not estopping the proponent's application for issue preclusion: the defendant's personal circumstances at the time of the first action, including the loss of their baby daughter, would make it most extraordinary for them to have begun "major litigation at that time."[147] Likewise, a prior party's failure to lodge a permissive counterclaim in the initial action will not operate to estop its later litigation of a *factum probandum* within the first action.[148]

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144. *Id.* at 1155.

145. *E.g.*, Producers Dairy Delivery Co. v. Sentry Ins. Co., 41 Cal. 3d 903, 718 P.2d 920, 226 Cal. Rptr. 558 (1986). The court held that a prior determination pertinent to the issue of vicarious liability, i.e., whether or not Noyes was an employee of Producers, collaterally estopped a later dispute as to his status as an "employee" within the meaning of an exclusion to the carrier's policy. The court held that the issue of employment status determined in an antecedent tort action was indistinguishable from the interpretation of employment status in the subsequent action alleging the carrier's breach of the duty to defend. *Id.* at 911, 718 P.2d at 924, 226 Cal. Rptr. at 562. The court also commented:

> [T]here is no significant difference in meaning between the term "employee" as used in the third party tort liability context and Sentry's insurance policy. The employment status issue is identical in the two situations. . . .
>
> . . . .
>
> Because all the elements of collateral estoppel were met, we conclude that appellants [herein] are precluded from relitigating the issue of whether Noyes was an employee of Producers.

Id.

146. *See Murray*, 741 P.2d at 1154.

147. *Id.* at 1155.

148. East Tex. Motor Freight Lines v. Freeman, 289 Ark. 539, 713 S.W.2d 456 (1986). In that case, defendant East Texas Motor Freight sought to bar Ms. Freeman's personal injury claims against the carrier because Ms. Freeman had intervened in the original action against a farmer whose field burning created a road hazard and consequent highway accident. Finding that Ms. Freeman was free to press her claims in state court, notwithstanding an earlier federal judgment finding the farmer entirely at fault, the court explained:

5. *Nonmutual Defensive Preclusion*

The doctrine of issue preclusion can be used defensively by a defendant against a plaintiff who had previously "litigated and lost."[149] Acceptance of this doctrine is tied principally to the economies its application achieves, for courts and litigants alike, as defensive issue preclusion will often operate to dispose of an entire action.[150] Courts endorsing nonmutual defensive issue preclusion have required that:

> (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.[151]

For example, in *Johnson v. Eli Lilly & Co.*[152] ["*Johnson II*"], an action against a drug manufacturer for injuries sustained by plaintiff as a result of her mother's ingestion of DES during pregnancy, the court held that the judgment in one of two earlier actions brought by plaintiff against the same manufacturer should have preclusive effect. The court found that the prior action contained the same issue to be decided in the subsequent proceeding, i.e., "whether the decision in *Johnson I* precludes an action brought on the same facts under the New York revivor

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> Here, . . . Mrs. Freeman was joined [in the federal action] only for purposes of contribution. Mrs. Freeman was not obligated to counter-claim against ETMF in the federal action because of her pending state claim. *See* F.R.C.P. 13(a). Moreover, the attempt to consolidate her claims pending in state court with the federal action was rejected by the federal judge. Hence, the issues involving the liability of ETMF for the injuries and property claims of the appellees, [including Mrs. Freeman], had not been litigated prior to the trial in Crittenden County.

Id. at 543, 713 S.W.2d at 459.

149. *See generally* Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 149 (1985).

150. 4 AMERICAN LAW OF PRODUCTS LIABILITY § 55:14 (T. Travers 3d ed. 1987).

151. Johnson v. Eli Lilly & Co., 689 F. Supp. 170 (W.D.N.Y. 1988) (quoting Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986)); *cf.* Fireside Motors v. Nissan Motor Corp., 395 Mass. 366, 372, 479 N.E.2d 1386, 1390 n.6 (1985) (where the supreme judicial court states the general requirement of party mutuality and notes that they have permitted nonmutual application of collateral estoppel where there has been a full and fair opportunity to litigate the issue).

152. 689 F. Supp. 170 (W.D.N.Y. 1988).

statute."[153]

The courts uniformly hold that the issue for which preclusion is sought must be *identical* to that decided in the earlier proceeding. For example, in *Sucher v. Kutscher's Country Club*,[154] an action arising from a club patron's fall from a chair lift, plaintiff brought suit against the country club which, in turn, impleaded the vendor who, in turn, impleaded the manufacturer, American Starr Glider Corporation. The vendor and the manufacturer were granted summary judgment. The country club did not appeal, but filed a new third-party complaint against the manufacturer, alleging the chairlift was "placed . . . 'into the stream of commerce in a defective and dangerous condition.' "[155] American Starr Glider moved to dismiss the complaint on grounds of collateral estoppel, citing the grant of summary judgment in the first action. Noticing that the prior action involved the manufacturer as a fourth party, not brought in by the present plaintiff, the Second Department concluded that the particular issue of unreasonable danger and defective condition had not yet been litigated.[156] In addition, the court noted the club's introduction of new evidence, a design evaluation report not proposed until three months after decision on the earlier summary judgment motion, and held that "on this record, it was an improvident exercise of discretion to apply collateral estoppel to bar the instant complaint."[157]

Defensive issue preclusion will not be applied where the court discerns that its operation would deprive the claimant of a full and fair hearing. In *Lynch v. Merrell-National Laboratories*,[158] the First Circuit, in considering the effect of summary judgment for the manufacturer in a prior federal court decision on a later state court suit, declined to preclude plaintiffs' litigation of the issue because plaintiffs had not had a "fair opportunity to litigate [because] they understood that their withdrawal from the consolidated action would not prejudice them."[159] The

153. *Id.* at 174.
154. 113 A.D.2d 928, 493 N.Y.S.2d 829 (1985).
155. *Id.* at 929, 493 N.Y.S.2d at 831.
156. *Id.* at 931, 493 N.Y.S.2d at 833.
157. *Id.* at 933, 493 N.Y.S.2d at 834.
158. 830 F.2d 1190 (1st Cir. 1987) (a Bendectin action).
159. *Id.* at 1191. In that action, a Massachusetts plaintiff agreed to transfer her case

court stated that plaintiffs' "freedom to withdraw" from the original suit and file the action anew in Boston "was not illusory."[160]

6. *Offensive Nonmutual Preclusion*

The Supreme Court first countenanced offensive nonmutual preclusion in *Parklane Hosiery v. Shore*,[161] a securities fraud case. There the Court adopted a two-prong test to allow plaintiffs in a stockholder class action, who were strangers to the first lawsuit, to estop the defendants from relitigating whether a proxy statement was false and misleading. The Court considered whether the plaintiff could easily have joined in the earlier action and whether any unfairness to the defendant might result before it decided to apply the estoppel. Significantly, the Court stated that the apparent virtues of permitting defensive use of issue preclusion are less evident in its offensive application, giving only "guarded endorsement"[162] to offensive use of issue preclusion due to its vulnerability to plaintiff abuse.[163]

In products liability litigation, nonmutual offensive issue

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to Ohio for consolidated discovery. When given the option, at a later date, to remove the case to Massachusetts, plaintiff opted to do so. The consolidated cases proceeded to trial in Ohio, where the jury found for the defendant. In Massachusetts, defendant then moved for summary judgment based upon issue preclusion. Plaintiff-appellant appealed from the trial court's entry of summary judgment.

160. *Id.* at 1193.

161. 439 U.S. 322 (1979).

162. *See id.* at 328.

163. *Id.* at 329-30. The Court explained:

> [O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. . . . Offensive use of collateral estoppel, [does not create a strong incentive to join all adversaries in the first action, but rather] creates precisely the opposite incentive. Since a plaintiff will be able to rely upon a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

Id. (citations omitted).

In products liability suits, the converse may be more true. Historical judicial parsimony in permitting nonmutual offensive issue preclusion often cannot be reconciled with practical considerations of fairness in many products liability actions. *See* discussion *infra* at Conclusion.

preclusion has bolstered claimants' actions against defendant manufacturers and sellers. In *Aetna Casualty and Surety Co. v. Jeppesen & Co.*,[164] the court allowed insurance companies, which acted as subrogees of an airline that settled actions by the heirs of airline passengers killed in an airline crash, to assert collateral estoppel against the manufacturer of an approach plate used by the pilots even though they were not parties to the first action. The court held the cases involved identical issues of whether the manufacturer produced a faulty approach plate, whether its use by the pilots was the proximate cause of the crash, and whether the pilots were guilty of contributory negligence in their use of the approach plate.

From the general issue preclusion rule requiring an unambiguous prior finding of fact,[165] it follows *a fortiori* that inconsistent prior holdings upon the same issue militates against granting preclusive effect. Consistently, in the appeal of an action in which a manufacturer of DES sought to litigate certain issues, including causation, relating to its liability for injuries allegedly caused to the plaintiff by the use of the drug by the plaintiff's mother, plaintiffs sought to use the doctrine of collateral estoppel to preclude the defendant manufacturer's introduction of evidence on these issues on the grounds they were "fully" litigated at a prior trial. The trial court allowed the preclusion. On appeal, the court in *Kortenhaus v. Eli Lilly & Co.*,[166] held that while collateral estoppel is a rule of efficiency and may be applied in products liability actions, it is fundamental to its use that the earlier decision be reliable and substantially correct.[167] The New Jersey appeals court pointed out that jury verdicts regarding the manufacturer's liability had been inconsistent in prior verdicts, adding that "application of offensive collateral estoppel in the face of inconsistent verdicts is antithetical to the very basis of the rule . . . ."[168]

The Supreme Court in *Parklane* and the Restatement (Second) of Judgments section 29(2) (1982), alike, state that non-

164. 440 F. Supp. 394 (D. Nev. 1977).
165. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).
166. 228 N.J. Super. 162, 549 A.2d 437 (App. Div. 1988).
167. *Id.* at 166, 549 A.2d at 439.
168. *Id.* at 168, 549 A.2d at 440.

mutual offensive issue preclusion may be in appropriate where the opponent can demonstrate that, in the prior forum, it suffered from procedural or evidential disabilities that were outcome determinative in the sense that in the latter forum the opponent might, under different procedure or rule of law, secure a different result.[169] In *United States v. Sandoz Pharmaceuticals Corp.*,[170] an in rem action involving the pharmaceutical manufacturer's product Fiorinal with Codeine, the trial court ruled that the manufacturer was collaterally estopped from litigating the issue of whether the product was a "new drug" within the meaning of the Food, Drug and Cosmetic Act.[171] The court entered a permanent injunction and ordered the product seized and destroyed, and the manufacturer appealed. The Sixth Circuit applied a materiality standard to respondent pharmaceutical manufacturer's argument that the prior New Jersey proceeding failed to provide a full and fair opportunity for it to prove that the product was not a "new drug," concluding that "there is no evidence that the New Jersey forum was more inconvenient than Ohio or that it deprived Sandoz of any procedural opportunities available in Ohio."[172]

E. *Discrete Fairness Questions in Products Liability Issue Preclusion*

The discussion above provides a backdrop for the author's suggestion that the fairness of issue preclusion is particularly questionable in three areas distinctive to tort and products liability litigation.

1. *Claimant Knowledge or Expertise Affecting Degree of Risk*

In both offensive and defensive issue preclusion contexts, fact-specific qualities of the risk to claimant and the cause of claimant's injury often invite the conclusion that preclusive effect should not be granted a prior judgment. For example, in

169. *Parklane*, 439 U.S. at 330-31; RESTATEMENT (SECOND) OF JUDGMENTS § 29(2) (1982).

170. 894 F.2d 825 (6th Cir. 1990).

171. 21 U.S.C. § 321(p) (Supp. 1990).

172. 894 F.2d at 828 (citing *Parklane*, 439 U.S. at 332).

Deviner v. Electrolux Motor,[173] the appellate court reviewed the district court's denial of appellant's motion for a directed verdict based upon issue preclusion, relying upon an earlier decision by the same court upholding a jury finding of defectiveness in the same model of defendant's chain saw.[174] In approving the trial court's denial of a directed verdict, the Eleventh Circuit stated its unwillingness to grant unmeasured expansion of the doctrine of collateral estoppel beyond its original precincts.[175] Regarding chain saw design defect litigation in particular, the court concluded that for such products, factual distinctions in the circumstances giving rise to claimants' injuries compromised the confidence that could be reposed in any single prior verdict. Among other variables, the court mentioned "the skill, experience, conditions in the workplace, objectives to be accomplished in execution of the task at hand, and modus operandi of the chain saw operator in each instance."[176]

Comparable considerations led the Ohio Supreme Court in *Goodson v. McDonough Power Equipment, Inc.*[177] to suggest the unsuitability of nonmutual offensive collateral estoppel on the issue of defective design for mass-produced products "when the injuries arise out of distinct underlying incidents."[178] In *Goodson*, suit was brought on behalf of a four-year-old child who was injured when her foot slipped beneath a riding lawnmower. At trial, plaintiffs moved successfully for summary judgment against the manufacturer on the issue of the manufacturer's design liability, citing an earlier holding involving similar injuries in which a jury found McDonough Power Equipment liable for negligent design in failing to properly guard the mower's rotat-

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173. 844 F.2d 769 (11th Cir. 1988).

174. Nettles v. Electrolux Motor, 784 F.2d 1574 (11th Cir. 1986).

175. *Deviner*, 844 F.2d 769. The court noted:

> The doctrine of collateral estoppel developed in patent cases and is useful in preventing the relitigation of questions once thoroughly canvassed and determined, such as the validity of a patent. It should not be extended indiscriminately to tort cases where the factual circumstances in each case differ and no hard and fast legal standard has emerged from the developing case law.

Id. at 774 (footnotes omitted).

176. *Id.*

177. 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983).

178. *Id.* at 204, 443 N.E.2d at 988.

ing blade.[179] Noting first the general factors a court might consider in determining the suitability of nonmutual offensive issue preclusion,[180] the Ohio Supreme Court stated that a court's difficulties in concluding that "the identical issue was actually decided in the former case"[181] are "multiplied" in design defect litigation "where the issue determined in the first litigation relates to a product's design."[182] At the threshold, differences in the negligence law of Ohio and that of Florida, the forum of the earlier suit would affect "the differing trial techniques and appellate determinations that would have been made by legal counsel . . . ."[183] The Court continued by stating various accident-specific issues that might affect the degree of risk posed by the product, including: "different operators of the equipment with perhaps totally different mechanical capabilities [and] different terrain and weather conditions . . . ."[184]

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179. *Id.* at 194, 443 N.E.2d at 980 (citing Harrison v. McDonough Power Equip., 381 F. Supp. 926 (S.D. Fla. 1974)) (denying motion for judgment n.o.v.).

180. *Id.* at 201, 443 N.E.2d at 986. The court summarized the following "factors" as appropriate for consideration:

> There are the tangible, as well as the intangible, elements which have their meaningful effect upon the result of any cause, the nature of the claim and the claimants, as well as the nature of the defendant; the amount involved in such claim; the manner of the advocacy, often depending upon the amounts involved in such cause; the philosophical elements surrounding the cause; the agreed settlement, if any, in the matter; the vast differences between juries and their determinations of issues of liability and damages; and the unwillingness to appeal a verdict, if such would not be feasible.

Id.

181. *Id.* at 203, 443 N.E.2d at 987 (citing 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4416-17 (1981)).

182. *Id.* The court explains:

> This is due to the nature of the questions and the potentially broad impact of their resolution. These questions are very technical, requiring expert testimony to bring out the specifics. Also, a jury's ultimate determination requires delicate balancing between the design decisions actually made by the manufacturer and those which are postulated as feasible within the industry at any given point in time.

Id.

183. *Id.* at 203-04, 443 N.E.2d at 988.

184. *Id.*

2. *Privity*

a. *The Insurer-Insured Relationship*

In products liability litigation, the actual, as distinct from formal, relationship between an insurance carrier and its insured raises genuine concerns about the presumptive privity relationship between them. The virtues apparent in finding a privity relationship in furtherance of the single recovery rule[185] or the rules governing joinder of parties[186] are altogether absent in a variety of other carrier-insured relationships. Counsel with any significant contact with insurer-insured litigation know that the insured's relationship with the carrier is, in turn, remote and fragile. In the realities of primary litigation against a tortfeasor and insurance declaratory judgment actions alike, the carrier and the insured are in privity only in the technical, contractual sense. In a primary action against the tortfeasor, brought nominally by the insured but actually by the carrier, the insurer enjoys virtually complete authority over the conduct of the litigation, with which the insured trammels only at the risk of having the carrier deem him noncooperative.[187] The sprawling national litigation brought by insured sellers of asbestos, pharmaceuticals and other products against their insurers seeking declaratory judgment as to the carrier's duties to defend and indemnify[188]

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185. *See, e.g.*, Gionfriddo v. Gartenhaus Cafe, 15 Conn. App. 392, 546 A.2d 284 (1988). The court noted: "the present case involves the issues of whether defensive collateral estoppel principles and whether the paramount principle of tort law that a plaintiff may be compensated only once for his injuries should be employed." *Id.* at 396-97 n.5, 546 A.2d at 287 n.5. On appeal, the Connecticut Supreme Court confirmed that satisfaction of the one judgment foreclosed plaintiff from further litigating claims for the same injuries. Gionfriddo v. Gartenhaus Cafe, 211 Conn. 67, 68-70, 557 A.2d 540, 542-44 (1989). *See generally* W. PROSSER & W. KEETON, TORTS § 48, at 330-31 (5th ed. 1984).

186. *E.g.*, Childers v. Eastern Foam Prods., 94 F.R.D. 53 (N.D. Ga. 1982).

187. *E.g.*, Daniel v. Pawtucket Mut. Ins. Co., 506 A.2d 1032 (R.I. 1986). The court found: "Viewing all the evidence in a light most favorable to plaintiff without considering the weight of the evidence or the credibility of the witnesses, the trial justice properly concluded that since plaintiff neither substantially complied with nor cooperated with defendant insurer, she was barred from recovery under the policy." *Id.*

188. *See, e.g.*, Burroughs Wellcome Co. v. Commercial Union Ins. Co., 1986 Fire & Casualty (CCH) 1353 (S.D.N.Y. 1986):

> Plaintiff argues that the Pre-Revision Policies should be interpreted so that coverage would be triggered when "exposure" to DES occurred during a policy period. . . . Defendant contends that those of its policies which provided coverage for product liabilities for "accidents" occurring during a policy year were triggered when

support the argument that a carrier's relationship with its insured is one of privity in only a formal sense.

The chimerical nature of carrier "privity" with insureds or third-party beneficiaries is highlighted in *Costa v. Liberty Mutual Insurance Co.*,[189] a decision laudable in its candor if not its fairness. In *Costa*, plaintiff below, an employee injured while working his employer's "mangle" machine, successfully pursued his workers' compensation remedies and received medical payments, disability payments, rehabilitation services, and a lump sum settlement from Liberty Mutual, the workers' compensation carrier. Liberty Mutual never advised Costa, who consulted no independent lawyer, of his potential remedy in products liability against Morrison Textile Machinery Co., the manufacturers of the "mangle" machine. "Liberty's tepid enthusiasm for pursuing Morrison was understandable," the appeals court later noted, for Liberty Mutual "was also Morrison's insurer."[190]

After learning that his potential claim against the manufacturer was barred by the applicable limitations period, Mr. Costa sued Liberty Mutual, claiming that the carrier breached a duty to advise him of his right to pursue independently a claim against Morrison. Rebuffing the employee's claim, the appeals court stated that the state's workers' compensation scheme "apparently assumed an adversary relationship between the insurer and the employee claimant, rather than a fiduciary relationship," and concluded also that the applicable statute "does not seem to contemplate that the insurer will give tutorial on the subject [of potential independent actions against the manufacturer] to the employee."[191] Putting aside the venality of *Costa*, the limited fact finding objectives of workers' compensation tribunals tacitly discourage employee claimants from preparing and presenting evidence and legal argument that look beyond the findings of the administrative board to their potential preclusive effect upon later independent tort claims.[192] Given its

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an injury manifested itself, not when an insured's drug is used by a claimant. *Id.* at 1354-55.

189. 29 Mass. App. Ct. 176, 558 N.E.2d 999 (1990).

190. *Id.*

191. *Id.*

192. *See infra* notes 202-19 and accompanying text for a discussion of issue preclusion and workers' compensation proceedings.

due, *Costa* cuts further against the argument that a workers' compensation proceeding provides an employee with the opportunity and incentive to fully and fairly litigate claims that might be pursued in any later products liability action.

b. *Spousal Privity and Derivative Claims for Loss of Consortium*

In tort actions, one spouse's personal injury suit against a product seller may be accompanied by the other spouse's claim for loss of consortium.[193] The consortium claim for "loss of conjugal fellowship and sexual relations"[194] is considered derivative of the personal injury claim,[195] and, in most jurisdictions, the consortium loss claimant will be time-barred if the action is not brought within the limitations period applicable to the personal injury claimant.[196]

A conventional recognition of spousal privity in a products liability issue preclusion context is *Johnston v. Allis-Chalmers Corp.*,[197] where a Missouri appellate court held that an adverse jury verdict on a spouse's claim for loss of consortium precluded her direct claim for personal injuries suffered when the defendant's farm implement carrier disengaged from its towing vehicle and struck their car. In the appeal of that action, the appellate court found that the trial court erroneously prevented the jury from hearing the physical injury claim of Mary Johnston,[198] but declined to order a new trial because, in the court's view, the adverse jury verdict on her husband's strict liability claim and

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193. *See generally* Borer v. American Airlines, 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977).

194. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 385, 525 P.2d 669, 670, 115 Cal. Rptr. 765, 766 (1974).

195. *See generally* STEIN, DAMAGES AND RECOVERY, PERSONAL INJURY AND DEATH ACTIONS Ch. 13 (1972).

196. J. LEE & B. LINDAHL, 3 MODERN TORT LAW § 29.17 (1990) ("The same statute of limitations which applies to the impaired spouse's claim may also apply to the deprived spouse's consortium claim." (citing Titze v. Miller, 337 N.W.2d 176 (S.D. 1983))); *cf.* Reichelt v. Johns-Manville Corp., 107 Wash. 2d 761, 733 P.2d 530 (1987) (spouse's claim in loss of consortium accrues when she experiences her compensable loss, not necessarily contemporaneous with the onset of injury of the physically impaired spouse).

197. 736 S.W.2d 544 (Mo. App. 1987).

198. *Id.* at 548 ("[T]here was enough evidence from the surrounding circumstances and the lack of prior medical history to make Mary's claim submissible.").

her "derivative" claim in loss of consortium "foreclosed any right to relief" from either the manufacturer or the distributor of the towing vehicle.[199]

In *Johnston*, both husband and wife suffered *physical* injury. In the setting of a particular litigation, therefore, it was not unreasonable to conclude that, the trial court's error withal, both husband and wife had a full and fair opportunity to litigate the issue of the claimed defective condition of the towing vehicle. Therein resides the logic of binding the wife by the factfinder's conclusion that the husband failed to prove strict liability. As or more frequently, the consortium claimant will *not* have been physically injured in the mishap, and will instead pursue a consortium claim for intangible loss that is secondary[200] to the physical injury claim of the other spouse. In this latter setting, courts should not assume the consortium claimant's virtual representation by the physically injured spouse as a justification for granting preclusive effect to one or more resolutions reached in the first judgment.

In the context of ordinary civil litigation, the consortium party's claim is parasitic to that of the personally injured spouse. Given the consortium claimant's altogether different evidentiary burden in the original action,[201] it would be most unusual for the consortium claimant to introduce evidence of the dangerously defective nature of the product and its causal connection with the other claimant's personal injuries. Taken together with the practical primacy vested in the physical injury claim, these considerations commend reevaluation of any rule binding a consortium claimant by issues determined as to cause or causes of action for physical injury.

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199. *Id.*

200. The term "secondary" is used in its strategic, rather than legal sense. The consortium claim is secondary in that the parties, counsel, and the fact finder ordinarily consider the claim of liability for *physical* injury to be the principal cause of action.

201. The consortium spouse's evidentiary burden is typically that of showing damage to qualities of the marital relationship that have been summarized as including "the loss of love, companionship, society, sexual relations, and household services." Borer v. American Airlines, 19 Cal. 3d 441, 443, 563 P.2d 858, 860, 138 Cal. Rptr. 302, 304 (1977).

3. *Quasi-Judicial Determinations*

The majority of workers' compensation administrative boards are charged with determining whether contested compensation claims involved injury suffered or disease contracted "in the course of and arising out of [the claimant's] employment."[202] The workers' compensation model represents two principal bargained-for exchanges: (1) in exchange for a relatively prompt compensation for actual expenses associated with work-related injuries, the employee forbears any claim in negligence against the employer; and (2) in exchange for immunity from negligence claims brought by injured workers, employers underwrite an essentially no-fault compensation scheme for out-of-pocket costs of work-related injury.[203]

Although workers' compensation boards are court-like "in legal effect,"[204] to accomplish the principal goal of compensation, administrative procedures in workers' compensation make substantial accommodations to economy and celerity. The jurisdiction of the workers' compensation tribunal is limited to findings of fact and conclusions of law pertaining to whether the claim arose "out of and in the course of employment."[205] Explicit limitations are placed upon the appellate review of board findings of

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202. *E.g.*, D.C. CODE § 36-301(12)(Rev. 1988), which provides:

"Injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment.

See generally J. NACKLEY, PRIMER ON WORKERS' COMPENSATION 9-11 (1987).

203. *See, e.g.*, D.C. CODE § 36-304(a), (b) (1988), which provides in pertinent part:

(a) The liability of an employer . . . shall be exclusive and in place of all liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(b) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer . . . for any illness, injury, or death arising out of and in the course of his employment . . . .

See generally J. HENDERSON & R. PEARSON, THE TORTS PROCESS Ch. 9 (1987).

204. 2B A. LARSON, WORKMEN'S COMPENSATION LAW § 77A.26 at 15-17 (1988) (quoting Frement Indem. Corp. v. Workers' Comp. App. Bd., 153 Cal. App. 3d 965, 200 Cal. Rptr. 762 (1984)).

205. *Cf.* NACKLEY, *supra* note 202, at 59 ("The power of a state workers' compensation agency to hear disputes is limited by the terms of the applicable state statute and by due process of law and other constitutional restrictions.").

fact.[206] In the proceedings themselves, a "rule of informality" obtains, and thus, compared with proceedings before courts of general jurisdiction, workers' compensation boards employ generally relaxed rules of notice and pleading.[207]

Hearsay and even incompetent evidence is admissible,[208] and indeed, the rules of evidence are so relaxed that workers' compensation findings are more likely to be reversed for failure to admit evidence than for denying admission to evidence.[209] Employee claimants frequently appear on their own behalf, without counsel.[210]

The specialized role of workers' compensation as a compensation system administered by agencies in a quasi-judicial capacity should disable any issue preclusive effect of such judgments in later tort actions against the manufacturer or other third parties. Agency findings and appellate affirmations that an injury was, or was not, sustained in the course of employment, merit conclusive effect, as ceding to compensation panels finality in deciding *this* issue is integral to the bargained-for exchange between employee and employer to forego tort remedies in return for expedited compensation for work-related injuries. However, grave fairness questions arise from giving preclusive effect to any other holdings a board may consider within its ancillary jurisdiction.[211] In deciding the work-relatedness of an injury, for example, a board may have to reach conclusions on issues such as identification of the product or instrumentality causing claimant's injury, or the claimant's incautious conduct short of inten-

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206. NACKLEY, *supra* note 202, at 7, 77-78 ("[A]ppealable issues are often limited to allowance of claims or of medical conditions.").

207. *See* LARSON, *supra* note 204, § 77A.00, at 15-1 ("Compensation procedure is generally as summary and informal as is compatible with an orderly investigation of the merits.").

208. *Id.* § 79.11, at 15-426.33 to 15-426.36 (incompetent evidence admissible).

209. *Id.* § 79.12, at 15-426.42 ("Ordinarily the only way in which a mistake on admissibility as such could amount to reversible error would be by the exclusion of admissible evidence, rather than by the admission of incompetent evidence.").

210. *See, e.g.*, Fisher v. Industrial Comm'n, 20 Ariz. App. 155, 510 P.2d 1060 (1973) (claimant's self-representation not grounds for reversal).

211. It is accepted generally that a compensation panel may decide issues ancillary to its findings concerning work-relatedness where such findings are necessary to support its rationale. *See* NACKLEY, *supra* note 202, at 59 ("[r]esolution of issues that are necessary incidents to other powers granted . . . will be upheld as 'clearly implied,' even if such power was not expressly granted by statute.").

tional misconduct.[212] It does not, however, follow that findings on such ancillary matters should be accorded preclusive effect in later tort actions, for given the primary purpose, the limited parties, and the informality of workers' compensation proceedings, it would be quite unlikely for a claimant to anticipate and assert or defend fact issues solely because of the potential relevance of such issues in a later tort action against third parties.

The indefensible nature of such an approach is illustrated in *Brown v. Dow Chemical Co.*,[213] a tort action in which plaintiff claimed that his workplace exposure to the chemical compound dibromochlorpropane (DBCP) rendered him sterile.[214] In his preceding claim for workers' compensation, Brown prevailed before the Administrative Law Judge, only to have the Arkansas Workers' Compensation Commission reverse, on the grounds that, in the underlying trial-type proceeding, Brown had failed to establish "a causal connection between his exposure to the DBCP and his lowered fertility."[215] Upon appeal to the Arkansas Court of Appeals, the Compensation Commission's reversal was undisturbed.[216] Thereafter, Brown and his wife sued Dow Chemical Company, co-holder of the patent for the chemical, in strict liability and negligence. Dow moved successfully for summary judgment, with the federal trial court agreeing that Brown was collaterally estopped from relitigating the issue of Dow's causal contribution to his injury. On appeal, the Eighth Circuit affirmed, finding that the Compensation Commission "made a conclusive finding as to the causation issue."[217]

The unfairness of binding Brown by the Commission's observations on "causation" is betrayed by simple review of the

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212. In most jurisdictions compensation may be denied to claimants whose conduct is intentional or willful. *E.g.*, D.C. CODE § 36-303(d) (1981) ("Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another.").

213. 875 F.2d 197 (8th Cir. 1989).

214. Within the first year of taking employment at Velsico Chemical's El Dorado, Arkansas facility, Brown was advised that "exposure to DBCP might lead to sterility." *Id.* at 198.

215. *Id.* at 199 (quoting the Commission's judgment).

216. *Id.* at 198.

217. *Id.* at 199. The appellate court added that even if, for the sake of argument, "the administrative order were not entitled to preclusive effect, the reviewing court's [the Arkansas Court of Appeals] decision would be." *Id.*

means by which the employee pressed his claim before the agency. Brown's solitary proffer of expert evidence on the causation issue was a written "Summary Report" from a Dr. Meyer, Director of the Occupational Health Clinic at the University of Cincinnati Medical School. In the Report, Dr. Meyer stated that Brown's sterility "occurred directly as a result of [his exposure] to high concentrations of DBCP" at his place of employment.[218] Before the Board, Brown's proof was arguably well-suited as evidence sufficient to support a finding in a workers' compensation proceeding, and indeed, the Administrative Law Judge ruled in Brown's favor. However, his evidence scarcely resembled, in either quality or quantum, what a toxic tort plaintiff would present in a products liability suit. The deduction is inescapable that in the agency proceeding Brown did not anticipate the potential issue preclusive effect of the agency's holding. Nor, for that matter, should he reasonably have been expected to.

In its seeming invitation for full-regalia litigation of complex causation issues in workers' compensation proceedings, the implications of *Brown* loom large. The better rule would be to confine the issue preclusive effect of workers' compensation decisions to issues *necessary* to the boards' objectives, i.e., determinations of jurisdiction, existence of the employment relation, character of the employment, the employer's insured status, and the work-relatedness of the injury or disease.[219]

III. Conclusion

Nonmutual defensive issue preclusion is more likely than its offensive counterpart to trench upon plaintiff's right to pursue tort or warranty remedies for personal injury or property loss. Conversely, nonmutual offensive issue preclusion should enjoy expanded application, and can do so in harmony with the recognized objectives of judicial economy and fairness to the litigants.

These propositions are based primarily upon recognition that individual products liability claimants are rarely equally circumstanced with defendants. The individual plaintiff and his counsel, or even carrier counsel, is more likely to approach the

218. *Id.* at 198.

219. *See* LARSON, *supra* note 204, § 15-426.272(65)-(80).

initial action with the laudable, but limited, objective of obtaining compensation for plaintiff's injuries. In prominent mass claims against sellers of notoriously hazardous products, lead counsel may have developed the resources and expertise to fashion a litigation strategy that will advantage present and future claimants alike. In most suits, however, the transitory involvement of plaintiff's counsel with the product-specific subject matter makes it unlikely that decisions as to claims, evidence, settlement or appeals will contemplate the effect of the original action upon claims and issues advanced by claimants in later actions. Conversely, it would be rare for the defense counsel of a national manufacturer or marketer to fail to review every litigation decision with an eye towards the effect upon later and similar lawsuits that may be anticipated from any systemic product problem.

Whether or not one accepts these observations, application of the related doctrines of res judicata and issue preclusion operate effectively to limit litigation time and expense to that necessary to afford justice to the parties. The contribution of issue preclusion to the objectives of judicial economy and fairness to the parties would be enhanced by the express recognition of certain qualities unique to products liability litigation.

As discussed above, products liability-specific questions affecting the appropriateness of precluding issue relitigation arise most frequently in two contexts. First, issue resolution in design defect or failure to warn actions in which the knowledge, expertise or conduct of the particular claimant affect the degree of risk posed by the product is less suited to application of issue preclusion than is issue resolution in actions where the product risk is uniform, rendering the individual claimant's knowledge or circumspection irrelevant. It follows that neither offensive nor defensive issue preclusion is ordinarily appropriate where plaintiff knowledge or conduct operates to enlarge or diminish the risk of product use.

Second, application of orthodox privity criteria to bar subsequent issue litigation by parties technically, but not operatively, in privity with parties to earlier suits, beclouds consideration of the estopped party's actual earlier opportunity and incentive to litigate. Any presumption of the alignment of a spousal consortium claimant's litigation strategy with that of the

physically injured spouse is based more upon the common law fiction of the husband and wife as a legal unity than upon practical analysis of contemporary personal injury litigation. In addition, the Potemkin village quality of carrier-insured privity militates against automatically binding an insured by an issue previously resolved against a carrier. Where issue preclusion against an insured is predicated upon determinations made in earlier litigation controlled and conducted by the carrier, renewed litigation of issues should only be barred upon the court's specific finding that the insured's motive and opportunity to contest the issue previously concluded was, in the context of the particular suit, coextensive with that of the carrier. Lastly, to the extent that workers' compensation findings purport to decide issues of design or formulation defect, warning adequacy, degree of risk, or product identification, such findings should not be given issue preclusive effect in later products liability or toxic tort claims against a manufacturer or seller.