CIVIL PROCEDURE

CASES, PROBLEMS, AND EXERCISES

Fourth Edition

ALTERNATIVE CHAPTER 13

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ALTERNATIVE CHAPTER 13

THE EFFECT OF A JUDGMENT

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Chapters 1 to 12 of this book discuss the many steps a party must follow to obtain a judgment. But what exactly does a party *do* with a judgment? If the court has issued a judgment in favor of plaintiff, must plaintiff do anything to make sure defendant complies? If the judgment is for defendant, can defendant be sure that plaintiff will not simply sue her again, either in the same court or in a different one?

At the risk of oversimplification, a judgment has both immediate and long-term effects. The immediate effect is that the court has both resolved the dispute between the parties and (if a claimant wins) granted a remedy. However, in many cases the remedy is not self-executing. Instead, the victorious claimant must take additional steps to reap the benefit of that judgment. Part A of this Chapter briefly addresses how a party enforces a remedy in its favor.

Judgments may also have an impact on later litigation involving the parties. It will probably come as no surprise to learn that if plaintiff loses on a claim after a full trial on the merits, it cannot sue defendant again on that same claim. But what if the court dismisses the case for lack of jurisdiction or venue? Or what if plaintiff brings a different claim stemming from the same facts, or sues again in a different court system? Parts B through E of this Chapter deal with these sorts of questions.

A. ENFORCING JUDGMENTS

Consider a simple plaintiff-defendant case where defendant files no counterclaims. If the court rules for defendant, there is no question of enforcing the judgment, as the court has not granted any remedy. If the court rules for plaintiff, however, it will also grant some sort of remedy. That remedy can be a judgment for damages, an order requiring defendant to stop doing something (a "negative injunction"), or an order requiring defendant to do something (a "mandatory injunction" or, in a contract case, specific performance).

Injunctions, specific performance, and other court orders are self-operative. A defendant who fails to comply with the order can be held in "contempt of court", the penalties for which can include fines and even jail time. All plaintiff needs to do is to inform the court that defendant has not complied with the order.

Judgments for damages are a very different story. Contrary to what many think, a judgment for damages is *not* an order to pay. Instead, the court has merely indicated it agrees with plaintiff that defendant owes money to plaintiff. Nevertheless, even though not self-executing, the money judgment provides a powerful tool to plaintiff; namely, the ability to use the authority of government to help it collect on its judgment. One key difference between damages judgments and court orders is that plaintiff may have to ask government to help it collect.

Various collection devices are available to a plaintiff with a damages judgment. The main two are *garnishment* and *execution*. In both cases, the plaintiff uses a government official (often the sheriff) to take assets away from the defendant, assets that can be used to pay the judgment. In the case of garnishment, the assets are some debt owed to plaintiff, often defendant's bank account or wages. The garnishment procedure involves issuance of a court order requiring the defendant's debtor—the bank or employer, for example—to pay the funds to plaintiff rather than defendant.

Execution involves having a government official seize defendant's non-monetary assets. For example, plaintiff might want to seize defendant's home, factory, car, or the like. As in garnishment, plaintiff obtains a court order (often called a "writ of execution") directing the sheriff or other official to seize the assets. However, the assets are not turned directly over to plaintiff. Instead, the sheriff will hold a sale at which the property is sold to the highest bidder. The proceeds are applied first to any properly perfected prior mortgages or other security interests held by creditors in the asset, then possibly to priority claims (like child support), and the remainder (if any) to the victorious plaintiff. If the proceeds from this sale are greater than the amount of the judgment, the excess is returned to the defendant.

Not all assets are subject to execution. State laws provide that certain property is exempt from execution by judgment creditors.[1] For example, most states provide a partial exemption for a person's primary home, which is called the "homestead exemption." An exemption can be unlimited in amount (for example, many states completely exempt clothing), or have a "cap" (as is often the case with the exemption for a home or an automobile). In addition, federal law limits on the amount of wages that can be garnished.

[1] Do not confuse execution with *foreclosure*. When someone buys on credit, he or she often grants the seller, bank, or financing party a mortgage or security interest. If the buyer does not pay, the lender may foreclose on the property to satisfy the debt. Exemptions do not apply to these financing arrangements. If a buyer grants a mortgage in her home, for example, the lender may seize the home even if state law provides a homestead exemption for executions.

B. OVERVIEW OF PRECLUSION

In addition to resolving the dispute at hand, a judgment can also have an effect on later litigation between the parties. Two separate, but related, doctrines can affect later litigation. The first, claim preclusion, prevents a party from asserting a claim that either was, or should have been, asserted in an earlier case. The second, issue preclusion, comes into play when a party brings a claim that is not barred by claim preclusion. Even though the claim itself is not barred, to the extent the claim involves issues that were resolved in the prior proceeding, the party may not be able to relitigate those issues.

Claim and issue preclusion are the modern terms for these two doctrines. Historically, courts called claim preclusion "*res judicata*" (or sometimes "*res adjudicata*"), and issue preclusion "collateral estoppel." Many courts still use these historic terms. To make matters more confusing, *res judicata* is also a general collective term used to refer to all of preclusion.

1. *STARE DECISIS* COMPARED

At first glance, you may find it difficult to distinguish preclusion from *stare decisis*, which you discuss in your other courses. Under *stare decisis*, the decision in an earlier case can carry significant weight in a later dispute. Preclusion, by contrast, is a stronger but narrower obligation. It is stronger because it is mandatory. While a court can sometimes distinguish or even ignore precedent, if claim or issue preclusion applies the court must honor the result in the prior case. However, preclusion is also narrower. *Stare decisis* applies to all later litigants. Preclusion, by contrast, only bars people who were parties to the prior case, or legally related to those parties.

2. FINAL DECISION ON THE MERITS REQUIREMENT

Both claim and issue preclusion come into play only with a final ruling. That ruling can be a judgment entirely resolving the case, or a dismissal or summary judgment. That a judgment or other ruling is currently being appealed ordinarily does not prevent preclusion from applying. However, in these cases it is common for the second court to delay ruling on the claim or issue until the appellate court in the first case has ruled.

While both final and summary judgments are entitled to preclusion, not all dismissals qualify. Jurisdictions differ as to the effect of a particular dismissal. All courts agree that dismissals for lack of jurisdiction or venue have no preclusion effect, except for the narrow issue of whether that court had jurisdiction or venue. Similarly, virtually all states agree that a dismissal based on the statute of limitations does not prevent the party from suing in a different court that has a longer limitations period. Two issues on which jurisdictions differ are dismissals for failure to state a

claim and dismissals for failure to prosecute. While most states do not apply preclusion to dismissals for failure to state a claim, the Supreme Court has held that in federal court, such dismissals do bar the plaintiff from suing again. *Federated Department Stores v. Moitie*, 452 U.S. 394, 399 n. 3 (1981). To ameliorate this harsh rule, federal courts often do not dismiss outright, but give plaintiff leave to amend. By contrast, most courts do apply preclusion to a dismissal for failure to prosecute. As you will see shortly, these dismissals have only claim preclusion effect, not issue preclusion.

When a federal court hears a case under its diversity jurisdiction (see Chapter 4), the effect of a dismissal is governed by reference to *state* law. The court looks to the law of the state in which the first federal court sat.

3. HOW PRECLUSION IS ASSERTED

A summary judgment motion is ordinarily the proper way to assert preclusion. In essence, the movant is claiming that the opposing side cannot win as a matter of law, because either the claim, or an issue essential to that claim, was decided in an earlier case. A motion to dismiss for failure to state a claim will usually not work because the movant must introduce a fact—the prior judgment—not set out in the opposing party's pleadings. However, if the opposing party actually mentions the earlier ruling in his pleadings, a motion to dismiss for failure to state a claim will suffice.

C. CLAIM PRECLUSION

Claim preclusion prevents the parties to a case from relitigating claims that either were, or should have been, litigated in an earlier case involving those same parties. The doctrine essentially requires a plaintiff to join in one case all claims she has arising from the same basic event.

1. TEST FOR CLAIM PRECLUSION

Claim preclusion involves a two-part analysis. First, the earlier case must have resulted in a final decision resolving the claim on the merits. This issue is discussed above in Part B. Second, the claim being brought in the second action must be one that was either brought in the first action, or one the party should have brought.

Determining whether a claim was actually brought is relatively simple. It merely requires a bit of detective work. The party needs to review the pleadings, motions, and rulings in the prior case to determine what claims were raised and resolved in that case.

The more difficult cases are where the claim in Case #2 is not exactly the same as in Case #1. For example, the party may seek the same recovery, but under a different legal theory. Or the party may seek recovery

for different damages—say emotional distress rather than hospital bills. Courts apply different tests to determine if these variations are claims the party should have brought in the earlier case.

The majority of courts ask whether the claims arise out of the "same transaction or occurrence." If the claim being asserted in the second case arises from the same transaction or occurrence as the claim asserted in the first, the court will refuse to hear the second claim (or, in the parlance of preclusion, the second claim is "barred.") Conceptually, the test is the same as that used in many of the joinder rules discussed in Chapter 2 of this book. In practice, however, many courts apply this test in a somewhat more restricted fashion, so that two claims are slightly less likely to be considered part of the same transaction for purposes of claim preclusion than they would be for purposes of joinder. Most importantly, most courts deciding preclusion issues do not apply the "logical relationship" approach used under the joinder rules.

A minority of courts use a test called the "same cause of action" or "same evidence" test. This analysis is even more restrictive than the same transaction test. The crux of this approach is that the claims must involve a much greater overlap in evidence, so that the evidence required to prove the second claim is by and large the same evidence the party should have presented in the first action. Because the amount of evidentiary overlap must be greater, fewer claims will be barred under this analysis.

A third test is the "same primary right" test, a more formalistic test used only by a small minority of jurisdictions. Under this analysis, two claims should have been litigated together only if they both involve the same primary legally protected right. Under this analysis, for example, a plaintiff's claim for personal injury and property damage suffered in the same automobile accident would involve different primary rights (bodily integrity and property), and accordingly could be litigated separately.

2. PARTICULAR ISSUES

a. Installment Contract

Many contracts call for performance in installments. For example, a lease typically calls for monthly rent payments. For purposes of preclusion, each installment is considered a separate claim. Thus, a landlord who sues a tenant for failure to pay rent in January may sue tenant again in February if tenant fails to pay the February rent.

This basic rule is subject to an important exception, the "Rule of Accumulated Breaches." Under this rule, a party must include in its suit all breaches of an installment contract that have occurred as of the date the case is filed. Therefore, if our landlord in the prior paragraph waits until March to sue tenant for the January breach, it would have to include both the January and February claims (as well as March if it is also

overdue). If any of the claims are omitted, claim preclusion will prevent landlord from asserting them in a later proceeding. Note that the Rule of Accumulated Breaches only applies to claims outstanding at the date the case is *filed*. While a party may be able to add later-accruing claims to the case using a supplemental pleading, it is not required to add those claims.

There is also an exception to the exception. The Rule of Accumulated Breaches does not apply when the installments are evidenced by a series of checks or other negotiable instruments. The rationale for this exception lies in the law of negotiable instruments, which you may study later in law school.

b. Same Claim, Different Parties

As a general matter, claim preclusion only applies when the parties to the second claim are the same as those involved in the first. Thus, claim preclusion does not prevent a plaintiff from suing a different defendant for the same injury, even if the claim asserted is exactly the same as that litigated in the first action. While we will see later that *issue* preclusion may apply in such a case, the claim itself is not barred. Nor may a defendant use claim preclusion to bar a claim by a different plaintiff, even if the underlying event is the same.

This basic principle is subject to two narrow exceptions. First, a party who is in privity with a party to the first action may be barred by claim preclusion. Privity is a complex doctrine. At its core, it exists when the parties in both cases are litigating the same legal right. Suppose, for example, that in Case #1 Landowner sues a tortfeasor for causing damage to structures on the land. Landowner loses. Landowner then conveys the land and structures to Buyer. Because Buyer holds the same legal right as Landowner, it cannot sue tortfeasor for the harm litigated in Case #1 (although it could sue for later-occurring harms). If you are taking Property law, you may recognize that the concept of something "running with the land" has its roots in preclusion law.

The second exception is the doctrine of control. Sometimes a case will be litigated in the name of one person, but another person will actually control the case, making all pertinent decisions considering litigation strategy. A party who directly controlled the prior case will be barred by preclusion. Note however, that control is rarely applied.

c. Counterclaims and Defenses

Common-law claim preclusion generally applies only to parties who were plaintiffs in the first case. Therefore, the common law rule ordinarily does not prevent a defendant who was sued in an earlier case from bringing a later action against the plaintiff in that case. Even though defendant could have asserted that claim as a counterclaim, it can opt to withhold the claim until later. The only exception—the extremely narrow "common-law

compulsory counterclaim rule"—bars a claim by a previous defendant that seeks relief for a harm caused *by the prior action itself*. The exception does not apply merely because defendant's claim will reduce the amount plaintiff recovered. Very few claims meet this strict standard

Federal Rule 13(a) changes the common-law rule, and precludes far more counterclaims. In the federal courts and state systems that follow the Federal Rules, the compulsory counterclaim provision of Rule 13(a) requires a defendant to assert counterclaims that arise from the same transaction or occurrence as plaintiff's claim. A defendant who fails to assert a compulsory counterclaim cannot later assert that claim against plaintiff (although it may assert the claim against parties not in privity with plaintiff).

Two important caveats apply to Rule 13(a). First, remember that not all counterclaims that arise from the same transaction or occurrence are compulsory. Rule 13(a) has some built-in exceptions, such as cases where jurisdiction is based on *in rem* jurisdiction. Second, Rule 13(a) does not override the common-law compulsory counterclaim rule, under which a narrow set of counterclaims are barred.

3. EXCEPTIONS

Courts have developed several exceptions to the strict doctrine of claim preclusion. While states differ as to what exceptions they recognize, the following are the most common.

a. Parties or Court Agree to Allow Relitigation

In some cases, a court will expressly indicate in its ruling that the decision does not have claim preclusion effect. Similarly, the parties can agree between themselves to allow factually-related claims to be "split" among two or more cases.

b. Suit in a Different Jurisdiction to Collect on a Judgment

As discussed in Part A of this Chapter, a money judgment allows the victorious plaintiff to seize defendant's assets. When those assets are located in the state rendering the judgment, seizure merely involves obtaining an order from the court rendering the judgment, and delivering it to the appropriate official. When the assets are located in a *different* state, however, the process is somewhat more complicated. The victorious plaintiff must obtain a new judgment from the state in which the assets are located, which can then form the basis for execution or garnishment in that state. Many states have adopted a uniform act that allows plaintiff to obtain a new judgment simply by registering the old judgment in the second state. However, if the uniform act does not apply, or the first judgment is from a foreign court, plaintiff must file a new action based on the prior judgment. Claim preclusion does not bar the new action to enforce

the old judgment. In fact, a party can sue on a judgment multiple times if defendant has assets in several different states.

c. First Court Lacked Personal Jurisdiction

As discussed in Chapter 3, a judgment rendered without personal jurisdiction over defendant violates due process. Because such judgments are unconstitutional, they are not entitled to any claim preclusion effect, either in the rendering court or in others. Recall, however, that a defendant who appears in the first case cannot challenge the jurisdiction of that court in later litigation, regardless of whether he failed to challenge personal jurisdiction in that first case, or raised the defense but lost.

A similar rule applies to judgments rendered by a court lacking subject-matter jurisdiction. Again, however, if the defendant challenged jurisdiction and lost, the judgment is entitled to preclusion effect.

d. First Court Lacked Subject-Matter Jurisdiction over Omitted Claims

In some cases, the first court will have subject-matter jurisdiction over some claims plaintiff might want to bring, but not all. For example, plaintiff may sue in state court, but have some claims that fall within the federal courts' exclusive jurisdiction. If plaintiff brings all of the claims in the first action, and the first court dismisses those over which it has no jurisdiction, claim preclusion clearly does not prevent plaintiff from bringing the claims in a subsequent court that has jurisdiction. (Recall that a dismissal for lack of jurisdiction has no claim preclusion effect.)

But what if plaintiff, realizing the futility of filing the claims before the first court, elects to withhold them? Most courts will refuse to apply preclusion in this case too. However, some will hold the claims precluded if there was *some* court that could have heard all the claims together. In the case of claims involving exclusive federal jurisdiction, for example, plaintiff might have been able to file both the exclusive federal claims, as well as the related state claims, in federal court using supplemental jurisdiction.

D. ISSUE PRECLUSION

As its name implies, issue preclusion bars the relitigation of certain factual issues. In many respects, it can be thought of as a "fallback" to claim preclusion. Even when a claim is not barred by claim preclusion, certain issues relevant to that claim may be barred. Both claim and issue preclusion come into play only when there has been a final ruling on the claim or issue, and both can be applied only against a person who was a party in the first action, or someone in privity with that party.

Notwithstanding this similarity, there are important differences between claim and issue preclusion. Most importantly, issue preclusion

only applies to issues that *were actually litigated* in the first case. Courts do not ask whether the issue "should have been" litigated. Second, while only a party to the prior action can take advantage of claim preclusion, non-parties may be able to use issue preclusion against someone who was a party to the prior action.

1. TEST FOR ISSUE PRECLUSION

Many discussions of issue preclusion set out a three-part test. However, it is more useful to apply a four-part test. The third and fourth parts are related, but deal with different situations.

a. Same Issue of Fact

For issue preclusion to apply, the exact same issue of fact must arise in both the first and second cases. Issue preclusion does not apply to pure questions of law, such as what standard of care should apply. It applies only to pure issues of fact (such as the date a contract was signed) and "mixed" questions of law and fact (such as whether the parties entered a contract, or defendant acted negligently).

In many cases, determining whether two cases involve the same issue is relatively straightforward. But sometimes the analysis is more difficult. Consider a case in which Lessee leases an automobile from Dealer. When Lessee fails to make the May lease payment, Dealer sues. Lessee argues she should not have to pay because the automobile has developed an engine problem. Dealer prevails in the first action, with the court finding no evidence of any defect. Lessee then fails to make the December payment, and Dealer sues again (the action is not barred by claim preclusion because it falls under the installment contract rule discussed above with respect to claim preclusion). Lessee again argues the engine is defective. Issue preclusion will not apply, and Lessee is free to litigate the issue. Although the issue on its face is the same, it is actually not: the defect could have developed between May and December. On the other hand, if Lessee had alleged a *design* defect, the issue could be the same.

One problem area in applying the "same issue" element is when the burden of persuasion on the question differs in the two cases. To illustrate, suppose *X*, a contractor, includes a false statement on a bid form submitted to State. State first tries to prosecute *X* for fraud, but loses. State now brings a civil action for misrepresentation, seeking damages. Assume the elements of the crime of fraud and the civil claim of misrepresentation are identical. Claim preclusion will not apply, because the civil claim could not have been included in the criminal case. Nor will issue preclusion apply. The two cases do not involve the same issue because of the difference in burden of persuasion. In the first case, State was required to prove fraud under the criminal standard of beyond a reasonable doubt. The civil case involves a lower standard (either a preponderance or the civil fraud

standard of clear and convincing evidence). Even though State did not have enough evidence to meet the higher standard, it might have had enough to meet the lower standard.

Now reverse the order of the two cases. State loses the first case, in which it alleges civil misrepresentation. In this situation, issue preclusion *would* apply. If State does not have enough evidence to meet the lower standard, it *per se* would not have had enough to meet the higher standard.

b. Actually Litigated

Issue preclusion only applies to issues that actually were litigated in the first case. As a result, default judgments have no issue preclusion effect. Nor do "consent judgments", where the parties agree on an outcome and have the judge issue a ruling evidencing that agreement.

As indicated above, issue preclusion has no counterpart to the claim preclusion notion that something "should have been" litigated. Consider again the hypothetical Dealer and Lessee discussed earlier. Assume Lessee sues Dealer for the claimed defect, alleging breach of an implied warranty. Lessee loses. Dealer now sues Lessee for a missed payment. Lessee defends by arguing Dealer intentionally misrepresented the condition of the engine. Lessee's defense is not barred by issue preclusion. Although Lessee could (and probably should) have included this claim in the prior action, the issue was not actually litigated, and accordingly issue preclusion does not apply.

c. Actually Decided

Not only must the parties actually litigate the issue, the court must actually decide it. As with claim preclusion, issue preclusion applies only when the court issues a final ruling on the merits of the issue in question. Application of the "final ruling" requirement can be trickier in issue preclusion. For example, take a summary judgment ruling based on the statute of limitations. That judgment does not prevent plaintiff from filing the exact same claim later. However, if plaintiff files in the same state, issue preclusion will apply . . . on the narrow issue of whether the claim is barred by the limitations period. That issue is the exact same issue decided by the first court. If plaintiff files in any other state, however, the issue is different and issue preclusion will not apply.

Determining whether an issue was actually decided can be very difficult in cases involving a general verdict. A general verdict merely indicates which party wins, and if plaintiff wins what remedy it receives. It does not indicate *why* the party won. If the party sues again, the second court must try to look behind the general verdict to determine what the first court actually decided. The analysis turns on basic logic.

To illustrate, suppose P has a patent on the "Tricycle Lawnmower", a device combining a children's tricycle with a rotary mower between the rear

two wheels, which would allow a buyer to trick his or her children into mowing the lawn.[2] P sues D for selling a similar tricycle mower that P claims infringes the patent. D defends with two arguments. First, D asserts the patent is invalid. Second, D asserts in the alternative that even if the patent is valid, D's device does not infringe the patent. D prevails in a general verdict.

D later makes significant changes to its tricycle. P sues D again. While acknowledging the issue of infringement is different (do you see why?), D argues that issue preclusion prevents P from recovering, because the first court found the patent invalid. Issue preclusion will not apply. The second court does not know how the first court ruled on the issue of patent validity. D could have won on that issue, or because the court found that D's earlier embodiment of the invention did not infringe. The general verdict does not indicate how the court ruled on either issue.

General verdicts do not always fail this part of the test. In the prior example, suppose P *won* the first case. Now issue preclusion will apply to the question of patent validity (although not to the issue of whether D's new product infringes). Logically, once D contested the issue of patent validity, P could win only if the court in the first case found the patent valid. The identical issue arises in P's second suit.

d. Necessary to the Decision

Most jury trials involve general verdicts. However, in some cases the jury is asked to render a verdict with specific findings on particular issues. Similarly, in a bench trial the judge must issue a ruling setting out specific findings. In these cases it is relatively easy to figure out what the factfinder found on a particular issue. However, that does not mean the finding has issue preclusion effect. A finding has issue preclusion effect only if it was necessary to the ultimate resolution of the first case.

The most obvious application of this principle is judicial *dicta*. No matter how much evidence was offered on an issue, if a judge discusses it only in *dicta*, issue preclusion will not apply.

A more difficult situation is when the factfinder offers alternative bases for its holding. Consider the Tricycle Lawnmower example above, except assume there is a bench trial. In the first action, D asserts both patent invalidity and lack of infringement. The court finds for D, issuing a written opinion specifically finding both that the patent is invalid and that D did not infringe. Courts are split as to whether issue preclusion applies in this situation. Roughly half will not apply issue preclusion, under the rationale that there is no way to tell if the ruling on the crucial issue (here,

[2] Truth is stranger than fiction. The Tricycle Lawnmower is an actual invention that was granted a patent (US Patent 4,455,816). If it is any consolation, the patent expired years ago, which means you are free to make and use your own version.

patent validity) was really *dicta*. The other half will afford issue preclusion on all issues.

Note that this problem does not arise when *all* the bases for the prior holding are also contested issues in the second case. In the lawnmower example, if D has made no changes to its product, the court's findings on the questions of both validity and infringement would clearly be entitled to issue preclusion effect.

Many courts merge the "actually decided" and "necessary to the judgment" elements of the test. However, as the foregoing discussion shows, it is useful to treat them as separate elements, as they affect different types of cases. The "actually decided" element is problematic mainly in general verdict cases, while the "necessary to the decision" element is especially an issue in cases involving either dicta or special verdicts and bench trials.

2. MUTUALITY

Claim preclusion applies only when the parties to the claim are the same in both the first and second cases. The only exception is a party in privity with a party to the first action. A party in privity may assert, and is bound by, a prior decision to the same extent as the primary party. Historically, a similar rule applied in issue preclusion. The requirement that the parties be the same in both cases is called "mutuality". Most nations other than the United States still require virtually full mutuality in both claim and issue preclusion.

However, United States courts have increasingly abandoned the mutuality requirement in issue preclusion. These courts allow someone who was *not* a party to the first action to use issue preclusion against someone who *was* a party to that case. It is important to note that the converse is not true: neither claim nor issue preclusion can ever be used *against* someone who was not a party to the first action, or in privity with a party. Use of issue preclusion against someone who has not yet had a chance to litigate her rights or defend herself would deny that person due process of law.

Many courts that have abandoned mutuality distinguish between defensive and offensive use of nonmutual issue preclusion. Defensive use is when the "stranger" to the first case uses issue preclusion to defend herself against a claim brought by someone who was a party. Offensive use is when the stranger uses preclusion to help him recover on a claim he has filed against someone who was a party. While courts generally allow defensive use without any conditions, many will allow offensive use only when the stranger could not easily have joined in the first action, there are no significant procedural benefits available in the second action that were not available in the first, and no inconsistent judgments.

3. EXCEPTIONS

Courts recognize more exceptions to issue preclusion than to claim preclusion. While individual jurisdictions may recognize additional exceptions, § 28 of the *Restatement (Second) of Judgments* lists the most commonly-recognized exceptions. These include:

a. Judgment Could Not Be Reviewed.

Some judgments cannot be appealed. In these cases, most courts will not apply issue preclusion. However, issue preclusion does apply if an appeal was possible, but the losing party neglected to appeal.

b. Intervening Change in Law

If the governing law changed between the first and second actions, issue preclusion will not apply. This exception only applies to mixed questions of law and fact (e.g., the amount of consideration necessary to form a valid contract), not to pure questions of fact (e.g., how much did the party actually pay the other contracting party).

c. Burden of Persuasion Greater in Case Number Two

While most claims in civil actions use the same burden of persuasion—preponderance of the evidence—some actions use a higher burden. In allegations of fraud, for example, the party must prove fraud by clear and convincing evidence. If the party who seeks to use issue preclusion faces a more rigorous burden of persuasion in the second action, issue preclusion does not apply. On the other hand, if the party faces an *easier* burden in the second case, issue preclusion can apply.

d. Procedural Advantages in Case Number Two

In some situations, the party in the first action could not avail itself of procedural tools that would be available in the second action. To the extent the lack of procedural tools hampered the party's ability to litigate its case fully, issue preclusion will not apply. Thus, for example, actions litigated in small claims court generally have no issue preclusion effect, because they do not allow for discovery, and may not allow the party to be represented by an attorney.

Note that many of these rules are not truly exceptions, but instead applications of the basic elements of issue preclusion. For example, changes in the burden of persuasion or in the governing law can also be treated as situations where the two cases do not involve the same issue.

In addition to these specific exceptions, the *Restatement* suggests there is an exception for situations where the application of issue preclusion would run afoul of the public interest. However, few decisions actually apply this exception. For example, the federal courts will not refuse to

apply issue preclusion when the party did not have a right to a jury in the first action, even though there would otherwise be a constitutional right to a jury in the second action.

E. FULL FAITH AND CREDIT

The doctrine of full faith and credit extends both claim and issue preclusion across state lines. In many situations, courts in the United States are obligated to apply preclusion to judgments issued by sister states or the federal courts. This obligation stems from both Article IV of the U.S. Constitution and three important federal statutes: 28 U.S.C. § 1738 (the general full faith and credit obligation), § 1738A (child custody determinations), and § 1738B (child support orders). This section will discuss only the constitution and § 1738, which are essentially the same. You will discuss §§ 1738A and 1738B in a course in Family Law.

The constitutional full faith and credit obligation only requires states to respect judgments issued by other states. § 1738 extends that duty to the federal courts. While nothing in the statute or the Constitution explicitly requires courts to extend full faith and credit to *federal* judgments, it has long been assumed that such a requirement is inherent in the federal nature of the U.S. system.

U.S. courts are not required to extend full faith and credit to *foreign* judgments.[3] However, in most cases there is no good reason not to apply preclusion to such judgments. Under the doctrine of comity, both state and federal courts will give preclusion effect to foreign judgments provided the process used by the court was essentially fair. Process can be fair even if it differs significantly from the process that would have been available in the United States.

Discussions of full faith and credit often use the terminology F1 and F2, to refer respectively to the first and second jurisdictions. When full faith and credit applies, it requires F2 to apply both claim and issue preclusion to the same extent they would have applied if the second action had also been litigated in F1. In short, if the F1 courts would have barred the claim or the issue, F2 must also bar it. Suppose, for example, that Buyer sues Seller in F1 for breach of warranty. Seller wins. Buyer now wants to sue Seller for negligence in F2, based on the same injury. Under F2 law, negligence and breach of warranty could be brought in separate actions, even if they involve the same injury. But F1, not F2, law controls on this issue. Therefore, if F1 would bar the negligence action, F2 must too.

Theoretically, it is possible for an F2 court to apply *more* preclusion effect than the courts of F1. This situation would arise if the preclusion laws discussed in the prior paragraph were reversed. However, courts

[3] Note that the terminology here can sometimes be confusing. It is unfortunately customary for a court to refer to a sister-state judgment as a "foreign" judgment.

ordinarily will not bar claims that would not have been barred in F1, out of a sense of fairness. In the federal courts, this rule is absolute: federal courts will not give more faith and credit to a state-court judgment than that state would have given.

What happens if a court is the *third* to hear a basic dispute, and the courts of F1 and F2 reached different results? The "last in time" rule specifies that only the most recent decision is entitled to full faith and credit. The rule even applies when the case is heard first in F1, then in F2, and then comes back to F1. Although F2 in this situation did not meet its full faith and credit obligation, the solution in such a case is for the parties to appeal the F2 decision, not to attack collaterally in F1.

Because the full faith and credit requirement is a cornerstone of the U.S. federal system, courts apply it strictly. Courts must apply full faith and credit even when F1 clearly made an error in its ruling (again, the remedy is to appeal the earlier judgment). Indeed, full faith and credit even requires F2 to enforce a judgment based on a claim, such as gambling, that is illegal under F2 law.

However, full faith and credit is not absolute, and there are exceptions. The most important exceptions involve jurisdiction. As you saw if you studied personal jurisdiction, a judgment rendered by a court that lacks jurisdiction over the defendant is not entitled to full faith and credit. In fact, *Pennoyer v. Neff*, the landmark 19th century case dealing with personal jurisdiction, involved an application of full faith and credit. Similarly, a court may exercise jurisdiction over property only when the property is situated in the state. This second principle gives rise to the important rule that only the state in which property is located may directly rule on or change the title to that property. While other courts may issues orders requiring the owner of the property to convey it to another, those orders do not themselves effect a change in title. Finally, and also related to jurisdiction, a court has authority to enter a decree in divorce only when one of the parties to the marriage has established a domicile in that state. If neither party is domiciled there, the court lacks jurisdiction over the marriage, and cannot dissolve it.