Look Before You Leap: Toward a More Cautious Approach to Arbitral Preclusion in Ohio

I. INTRODUCTION

Walk up to a non-lawyer and say the words "res judicata" or "collateral estoppel" and you will receive a blank stare for your trouble. Given the vital role that these two doctrines play within the legal system, it seems incredible that only a select few have ever heard these words and that, within the legal system, only an even more select few know the true meaning of the words and how to manipulate the concepts these words represent. This Comment, however, will not propose to explain definitively res judicata and collateral estoppel since this has been done elsewhere. Instead, this Comment will analyze the effects of res judicata and collateral estoppel as they apply to arbitration within the state of Ohio. Given the ever-increasing caseload of the courts and the growing popularity of arbitration as an alternative means of resolving disputes, it was only a matter of time before a variety of judicial doctrines were applied to streamline further the arbitral process.

In order to fully understand the precise relationship between res judicata or collateral estoppel and arbitration within Ohio, a succinct working knowledge of these doctrines must be established. Part II of this Comment will provide general definitions of res judicata and collateral estoppel, not limited to Ohio. Part II will also examine some of the underlying policies used to justify the use of res judicata and collateral estoppel in the context of judicial litigation. Part III then sets forth the specific Ohio definitions of these doctrines as developed through the case law. Part IV lists many of the common problems that have emerged as Ohio courts have struggled to apply judicial doctrines in the context of arbitration. Part V analyzes the general commentary on the use of res judicata and collateral estoppel in arbitral proceedings, such as the evidentiary, procedural, contractual, and societal problems that arise when these doctrines are employed to augment arbitration. Finally, Part VI presents the author's conclusions on whether the doctrines of res judicata and collateral estoppel have been correctly applied to arbitration in Ohio.

II. THE GENERAL NATURE OF RES JUDICATA AND COLLATERAL ESTOPPEL

A. Res Judicata Defined

Scholars have proposed many different definitions of res judicata and collateral estoppel ranging from the simple to the incredibly complex. "Res judicata" literally means "the thing decided"[1] and is more commonly known to lawyers as "claim preclusion" even though it is often erroneously used to describe preclusion of both claims and issues. Simply put, the doctrine of res judicata ("res judicata" or "claim preclusion") states that "[o]nce a claim or cause of action has been presented for adjudication and a valid and final judgment on the merits has been rendered, the same claim or cause of action cannot be asserted in a subsequent suit."[2] More generally, claim preclusion has been defined as a doctrine which "prevents a defendant from raising any new defense to defeat the enforcement of an earlier judgment."[3] The best way to define claim preclusion is in terms of its component parts: "Among the essential elements of [claim preclusion] are (1) identity of parties; (2) identity of claim or cause of action; (3) validity and finality of judgment, award, or order of the court or tribunal; (4) full opportunity to be heard . . . ."[4] Thus, in traditional judicial terms, when a litigant has received a final, valid judgment on his cause of action against another, that litigant cannot bring the same cause of action in another suit against his former opponent. The original decision of the litigant's claim precludes the litigant from bringing the same claim again.

Traditionally, claim preclusion effectively prevented a "later suit on any claims that were required to be joined in that suit, whether they were or [were] not."[5] While it appears that this view of claim preclusion requires the plaintiff in civil litigation to join all of his claims in one lawsuit, the "plaintiff is not seen as having several claims that must be joined, but rather as having one claim that cannot be split."[6] Therefore, when a party to a lawsuit obtains a valid and final judgment on the merits of a claim, that party cannot bring a later claim that is part and parcel of the original claim.

Though this definition of claim preclusion is deceptively simple and

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[1] BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

[2] ROBERT C. CASAD, RES JUDICATA IN A NUTSHELL 18 (1976).

[3] JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 607 (1985).

[4] WARREN FREEDMAN, RES JUDICATA AND COLLATERAL ESTOPPEL: TOOLS FOR PLAINTIFFS AND DEFENDANTS 12 (1988).

[5] CASAD, *supra* note 2, at 61.

[6] *Id.*

does not examine the problems that arise in applying the elements of claim preclusion, it provides a general understanding of how res judicata works in relation to traditional litigation and will suffice as a background from which to understand the differences in Ohio's definition of claim preclusion and its use in arbitration.

B. Collateral Estoppel Defined

Collateral estoppel ("issue preclusion" or "collateral estoppel") states that "[a]n issue essential to the judgment rendered, which was actually litigated and determined by a court having jurisdiction of subject matter and over the person of the parties, may not be relitigated by the same parties or those in privity with them."[7] It has been written that collateral estoppel "precludes relitigation of any issue, regardless of whether the second action is on the same claim as the first one, if that particular issue actually was contested and decided in the first action."[8] Again, this definition can be broken down into several parts: "In determining the availability of [issue preclusion] courts have taken into consideration such essential elements as (1) identity of parties; (2) identical issues or facts; (3) validity and finality of the judgment or award; (4) full opportunity to be heard . . . ."[9] Note that the issue must be one essential to the judgment of the first suit because a determination of an issue which is "unnecessary or immaterial to the judgment rendered in the case, does not bear sufficient assurance of correctness to warrant giving it issue preclusion effect."[10] While some of these requirements are similar to those needed for res judicata, the difference is quite clear: "Res judicata prevents relitigation of claims; collateral estoppel ends controversy over issues."[11] Other differences exist:

> Res judicata applies regardless of whether there has been an adversary contest on a particular matter; collateral estoppel operates only when an issue has been litigated fully. Res judicata precludes only subsequent suits on the same cause of action; collateral estoppel may preclude relitigation of issues in later suits on any cause of action.[12]

Again, this definition is only illustrative, not comprehensive. With this

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[7] CASAD, *supra* note 2, at 123.

[8] FRIEDENTHAL ET AL., *supra* note 3, at 607.

[9] FREEDMAN, *supra* note 4, at 22.

[10] CASAD, *supra* note 2, at 155.

[11] FRIEDENTHAL ET AL., *supra* note 3, at 613.

[12] *Id.*

general description of res judicata and collateral estoppel, it can be seen how Ohio defines these preclusive doctrines and applies them to arbitration. Before examining how Ohio has refined and applied res judicata and collateral estoppel, common sense necessitates an examination of the underlying policies served by res judicata and collateral estoppel.

C. The Public Policies Underlying Res Judicata

A variety of reasons can be advanced for the development of preclusion within litigation, but almost every comprehensive list of policy considerations would include the notions of judicial economy, individual economy, and respect for the courts. "The objective of all judicial proceedings, of course, is the rendition of a judgment — an authoritative determination of the legal relations of the parties with respect to some particular matter."[13] How then, do res judicata and collateral estoppel aid in the rendition of a judgment? With regard to res judicata, "[m]odern procedure seeks to maximize the efficiency of judicial proceedings by encouraging the presentation of all claims that can conveniently be tried together in the framework of a single lawsuit."[14] Even more succinctly, the "principles of claim preclusion . . . are aimed at limiting the number of lawsuits that may be brought with respect to the same basic controversy."[15] By using res judicata to preclude duplicitous litigation, the courts can use the time that would have been spent relitigating the same claim to deliberate on cases whose claims are being presented for the first time. Clearly, "judicial resources are finite and the number of cases that can be heard by the court is limited," so res judicata "thus conserves scarce judicial resources and promotes efficiency in the interest of the public at large."[16]

The effects of res judicata are not limited to maximizing the use of judicial resources; res judicata also maximizes the resources of parties to the litigation.[17] By limiting the number of times the same claim can be brought, res judicata conserves resources of the parties, such as money and time. The parties also have other interests served by the application of res judicata to claims:

> Once a final judgment has been rendered, the prevailing party also has an interest in the stability of that judgment. Parties come to the courts in

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[13] CASAD, *supra* note 2, at 1.

[14] *Id.* at 26.

[15] *Id.* at 122.

[16] FRIEDENTHAL ET AL., *supra* note 3, at 615.

[17] FREEDMAN, *supra* note 4, at 11.

> order to resolve controversies; a judgment would be of little use in resolving disputes if the parties were free to ignore it and to litigate the same claims again and again.[18]

As for the losing party, who would like another chance to litigate the issue and gain a judgment in his favor, the risk of judicial error "should be corrected through appeals procedures, not through repeated suits on the same claim."[19] For the parties, res judicata serves not only to conserve a variety of resources, but to channel litigation in the proper direction rather than allowing the parties to misuse the courts again and again on the same claim.

Res judicata also serves a third interest: the public. In certain types of litigation, such as business and land transactions, "everyone should be able to rely on the finality" of the judicial determination of the rights of the parties.[20] The respect that res judicata accords to the finality of court judgments also benefits the public. After all, "to allow relitigation creates the risk of inconsistent results."[21] By providing for a certain measure of finality, res judicata secures public respect for the idea that courts are the proper and final arena for the resolution of disputes. As the Supreme Court has so aptly observed, "[r]es judicata thus encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes."[22]

D. The Public Policies Underlying Collateral Estoppel

Collateral estoppel also furthers an interest in judicial economy: "The underlying rationale of issue preclusion . . . is the idea that the adversary process is as likely to lead to a correct decision on an issue the first time it is presented as it is the second time."[23] After an issue has been fully litigated between the parties, "spending additional time and money repeating this process would be extremely wasteful."[24] Although the possibility exists that the conclusiveness of issues may give rise to more litigation in the first lawsuit,[25] issue preclusion generally "operates to

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[18] FRIEDENTHAL ET AL., *supra* note 3, at 615.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Brown v. Felsen, 442 U.S. 127, 131 (1979).

[23] CASAD, *supra* note 2, at 150.

[24] FRIEDENTHAL ET AL., *supra* note 3, at 658.

[25] *Id.* at 658 n.4.

simplify dispute resolution by considering the original court's determination on specific issues to be binding; any subsequent litigation between the parties, even on different claims, will be limited to only those issues being presented for the first time."[26]

Collateral estoppel, like res judicata and its underlying policies, benefits both the courts and the parties by conserving the resources and time of both. Allowing parties to repeatedly contest already-litigated issues would result in a great waste of time and money. Unlike res judicata, however, collateral estoppel takes judicial and party economy one step further. Assuming arguendo, that a party could bring another claim arising out of the same essential facts of an earlier claim — but not barred by the doctrine of res judicata — as long as an issue presented in the earlier litigation met the requirements for the imposition of collateral estoppel, both parties would be precluded from wasting their resources and the resources of the court in relitigating that issue. So, even when res judicata fails of its essential purpose, collateral estoppel can still conserve party and judicial resources to a more limited extent.

Like res judicata, collateral estoppel creates faith in the role of the courts by preventing "the anomalous situation, so damaging to public faith in the judicial system, of two authoritative but conflicting answers being given to the very same questions."[27] Should the courts be seen as unable to resolve disputes with any degree of finality, public faith in the judicial system would be eroded and the courts would not be seen as an effective or even useful medium for protecting society's interests. At least in regard to the finality of already-litigated issues, collateral estoppel reaffirms the public faith in the judicial system by according finality and certainty — if not necessarily accuracy — to the courts' resolution of litigated issues between parties. Thus, at least in the traditional judicial system, res judicata and collateral estoppel are applied on the basis of sound public policies.

III. THE OHIO CASE LAW DEFINITIONS OF COLLATERAL ESTOPPEL AND RES JUDICATA

Within Ohio, several prominent cases express the requirements needed to gain the preclusive effects of res judicata and collateral estoppel. To understand how the courts in Ohio have struggled to apply res judicata and collateral estoppel to arbitration, the current Ohio judicial treatment of these doctrines must be examined.

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[26] FRIEDENTHAL ET AL., *supra* note 3, at 658 n.4 (footnotes omitted).

[27] CASAD, *supra* note 2, at 123.

A. Hicks v. De La Cruz[28]

In this case, the Ohio Supreme Court examined the appeal of Isaac Hicks, Jr., who, through his mother, Alice Hicks, sued Aurora De La Cruz, a doctor, and the Good Samaritan Hospital, located in Cincinnati, Ohio. The suit also named as defendants the University of Cincinnati, the City of Cincinnati, and the Board of Trustees of the University of Cincinnati, all of them doing business as Cincinnati General Hospital. The defendants ("Cincinnati, et al.") received a summary judgment motion in their favor after they asserted immunity from negligence occurring at the hospital by virtue of their state/governmental status in both the ownership and the operation of the hospital.[29]

On appeal, the Hicks relied heavily upon the case of *Sears v. Cincinnati,*[30] which involved an action to recover personal injury damages from the City of Cincinnati as the operator of the Cincinnati General Hospital. As the Ohio Supreme Court opinion succinctly states in the *Hicks* case:

> Upon appeal, the Court of Appeals ascertained but one real issue: Did the trial court err in thus granting summary judgment under the evidence submitted to it by the movants in support of the motion? The Court of Appeals observed that the factual assertions made by appellees as to the state affiliation of the University of Cincinnati were practically uncontroverted by appellants, whose reliance before both the trial court and appellate court was premised, as here upon *Sears*.[31]

In the *Hicks* case, then, the Ohio Supreme Court dealt with a summary judgment motion concerning the ownership and control of the Cincinnati General Hospital. "In short, this court is now being asked to relitigate the issue of ownership and control of the hospital in the face of Cincinnati's repeated assertions in *Sears* that it owned, operated and controlled the hospital."[32]

This case clearly concerns the use of issue preclusion or collateral estoppel. The Ohio Supreme Court recognized and defined the doctrine of collateral estoppel as follows:

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[28] 369 N.E.2d 776 (Ohio 1977).

[29] *Id.* at 776-77.

[30] 285 N.E.2d 732 (Ohio 1972).

[31] Hicks v. De La Cruz, 369 N.E.2d 776, 777 (Ohio 1977).

[32] *Id.*

> The modern view of res judicata embraces the doctrine of collateral estoppel, which basically states that if an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. A party precluded under this principle from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that issue.[33]

The Ohio Supreme Court makes it clear that Ohio "adheres to the strict doctrine of *mutuality*, whereby a party claiming the benefit of collateral estoppel must be one who would have been bound to his detriment had the earlier judgment gone the other way."[34] In Ohio, collateral estoppel cannot be applied against one who is essentially a stranger to the original litigation (i.e., not one of the named parties or their privies). In the instant case, the Ohio Supreme Court reversed the Court of Appeals' affirmance of the summary judgment motion by finding that Cincinnati, et al. should not be allowed to "relitigate the issue of ownership and control of this hospital" since they were represented parties (or were in actual privity with the represented parties in *Sears*) and had been "accorded a full and fair day in court in that proceeding."[35]

B. Norwood v. McDonald[36]

In this 1943 case, the Ohio Supreme Court examined the doctrine of res judicata. The court had to determine whether James N. Norwood was barred from his current claim — for possession of Ada L. McDannold's (deceased as of 1943) real estate — against the administrator (McDonald, hereinafter "administrator") of Ada L. McDannold's estate by Norwood's earlier action for the same real estate. The original action was brought by Norwood claiming that he was entitled to the property through a trust because he had furnished the purchase money that enabled the acquisition of the property. The subsequent, current action alleged that Norwood was entitled to the real property because of his status as the common-law husband of Ada L. McDannold and because he is her sole heir at law. The administrator claims

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[33] *Hicks*, 369 N.E.2d at 777.

[34] *Id.* at 778 (emphasis added).

[35] *Id.*

[36] 52 N.E.2d 67 (Ohio 1943).

that Norwood is barred from maintaining the current suit because of the doctrine of res judicata.[37]

The Ohio Supreme Court defined res judicata to mean that "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."[38] The court went on to note that a "judgment in a former action does not bar a subsequent action where the cause of action prosecuted is not the same, even though each action relates to the same subject matter."[39] To determine if Norwood's current suit was barred by res judicata, the court had to examine the so-called "identity of the facts" test. This test essentially states that if the same facts or evidence would be used to maintain both actions, "the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action."[40] The court then noted the effect of collateral estoppel to preclude issues, but not claims. It is precisely this distinction between issue preclusion and claim preclusion that the court fails to maintain that obscures the result of the case.

The administrator argued that the issue of title to the property had been litigated in his favor (because the administrator also claimed sole heir status) and precluded any later litigation upon the same issue. The court found that the issue of the administrator's status as sole heir had not been necessary to the determination of the first action because the claim of the first action involved trust issues, not title through inheritance issues. The court then applied the identity of facts test and found that the beneficial trust claim "accrued during the lifetime of Ada L. McDannold and clearly could not be extinguished by her death," whereas the claim of inheritance of the property "arose upon, but not before, the death of Ada L. McDannold."[41] The court concluded that the distinct nature of these rights meant that they could not exist at the same time and therefore could not be a single cause of action. The court found this to be true "even though there [were] some evidential facts which support both claims."[42]

In response to this argument, the administrator claimed that the previous suit was preclusive not only of all claims actually asserted therein, but also of all claims which could have been asserted (hereinafter "'potential

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[37] *Norwood*, 52 N.E.2d 67, 68-69.

[38] *Id.* at 71.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 73.

[42] *Norwood*, 52 N.E.2d at 73.

claim' preclusion"). Addressing this "potential claim" preclusion argument, the supreme court applied instead a "potential issue" preclusion argument: "The rule that a judgment is conclusive, not only as to what was determined in an action but as to all issues of fact which properly might have been determined therein, is limited to cases involving a single cause of action."[43] The court found that the issue of heir-at-law status had not been fully litigated in the previous action and was only asserted for the first time in the subsequent action and thus could not have been necessary to the judgment in the first action, a necessary requirement for issue preclusion to apply. The problem, however, is that the court does not squarely address the question of whether claim preclusion operates to bar all potential claims that might have been brought in the original suit.

The majority opinion resolves this problem by relying on a then-existing statute which provided that the "joinder of several causes of action in one action is permissible but not mandatory."[44] The majority believed that "potential claim" preclusion only applied to a single cause of action and that here there were two separate causes of action. Why, however, should such "potential claim" preclusion be limited to cases involving a single cause of action? Would not "potential claim" preclusion apply more directly to the situation where there are two causes of action that achieve the same recovery? The dissent recognizes this problem in noting that the "recovery sought in both cases was the fee simple title to the same real estate."[45] The dissent did not understand why claim preclusion should not apply where there are two entirely different causes of action which can be brought to achieve the same recovery, yet only one of those causes of action is actually asserted.

In conclusion, this case causes considerable confusion by failing to distinguish properly, at all times, the distinction between claim and issue preclusion. Nonetheless, the case establishes a definition of the elements needed for claim preclusion to apply.

C. Whitehead v. General Telephone Co.[46]

In 1969, the Ohio Supreme Court followed and elaborated somewhat upon the *Norwood* case. In *Whitehead v. General Telephone Co.*, the court had occasion to determine whether a failed action by the parents of an injured minor child against the defendant for medical expenses and loss of

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[43] *Norwood*, 52 N.E.2d at 73.

[44] *Id.*

[45] *Id.* at 78 (Turner, J., dissenting).

[46] 254 N.E.2d 10 (Ohio 1969).

services collaterally estops the injured child from bringing suit against the same defendant to recover personal injury damages. The determinative issues in the case were (1) whether the child in the second suit was considered a party or a real party in interest in the first suit; (2) whether the child was in privity with a named party in the first suit; or (3) whether the child exerted control over the litigation in the first suit.[47]

The Ohio Supreme Court cited and discussed the holding of the *Norwood* case pertaining to res judicata and to collateral estoppel. Of collateral estoppel, the court said that "even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit."[48] The court found that the current case involved a situation where the injury to the child created two "separate and distinct" causes of action: the derivative action by the parents of the child and the personal injury action by the child.[49] The court then discussed the problem of mutuality as it applies in collateral estoppel.

The court stated the traditional view of mutuality:

> Traditionally it has been held that collateral estoppel applies only to situations in which the party seeking to use a prior judgment and the party against whom it is being asserted were both parties in the original action, or were in privity to such parties. Such holdings are based on the requirement that there be mutuality of estoppel.[50]

Even though the appellant (the telephone company) conceded that Ohio only recognizes collateral estoppel when the mutuality requirement is met, appellant argued that collateral estoppel should apply by defining privity "so as to focus on the relationship of the parties to the subject matter of the litigation, thereby lessening the importance of identity of parties."[51] This definition of "privity" would allow collateral estoppel to apply to subsequent suits even though one of the parties in the subsequent suit was not a party or in privity with a party to the earlier suit. The court stated that the adoption of this position meant that:

> [T]he matter of such adequate representation would essentially be a question of whether there was sufficient incentive and opportunity for [the original party upon whom the subsequent non-party wants to rely upon] to

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[47] *Whitehead*, 254 N.E.2d at 11-12.

[48] *Id.* at 12.

[49] *Id.*

[50] *Id.* at 13.

[51] *Id.* at 14.

> adequately litigate the issue in the prior suit in such a manner that [the opposing party in the original suit's] interests were fully and fairly represented.[52]

The court noted Ohio's consistent position regarding the identity of parties requirement for collateral estoppel and proceeded to examine Ohio definitions of "party" and "privity." In Ohio, "parties" are those who (1) have the right to make a defense in a suit; (2) control the litigation; and (3) have a direct interest in the subject matter of the litigation.[53] For a person to be in privity with another in Ohio generally means he "succeeds to an estate or an interest formerly held by another."[54] Despite these definitions, the court noted that there had been a tendency to consider a party connected by interest to litigation and actively involved in that litigation to be bound by the judgment therein.

In this case, the court found no privity between the parents and the child because the derivative suit of the parents, while arising out of the same wrong that gave rise to the child's suit, does not come about by succession to the child's interest. The court also found that the child could not be considered a real party in interest within the parents' suit and that the child had no control over the litigation in the original suit. Thus, the court continued to adhere to the traditional requirement of identity of parties (i.e., "mutuality") to apply properly collateral estoppel in a subsequent suit. In so finding, the court stated the underlying basis for its opinion:

> In our opinion, the existing Ohio requirement that there be an identity of parties or their privies is founded upon the sound principle that all persons are entitled to their day in court. The doctrine of res judicata is a necessary judicial development involving consideration of finality and multiplicity, but it should not be permitted to encroach upon fundamental and imperative rights. It is our opinion that the rule advocated by the appellant could create grave problems in establishing the adequacy of a nonparty's representation in the prior suit and that the case at bar is not one which should result in a departure from present Ohio law.[55]

D. Goodson v. McDonough Power Equipment, Inc.[56]

Perhaps to clarify any possible misconceptions about the principle of

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[52] *Whitehead,* 254 N.E.2d at 14.

[53] *Whitehead,* 254 N.E.2d at 14.

[54] *Id.* at 15 (citation omitted).

[55] *Id.*

[56] 443 N.E.2d 978 (Ohio 1983).

mutuality in Ohio collateral estoppel case law, the Ohio Supreme Court, in 1983, wrote in the syllabus of a now oft-quoted opinion:

> In Ohio, the general rule is that mutuality of parties is a requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. A judgment, in order to preclude either party from relitigating an issue, must be preclusive upon both. A prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action.[57]

The actual facts of this case need not be stated since almost the entire opinion exclusively examines Ohio case law on collateral estoppel and the issue of whether the mutuality principle should be abandoned.

The pertinent part of the opinion begins by recognizing the definitions of res judicata and collateral estoppel already discussed above. After stating the mutuality principle, the court notes that in "recent years there has been much discussion in case law and law journals as to the legal viability of the application of the strict doctrine of mutuality as a requisite to collateral estoppel."[58] The court then recognizes that much of the argument surrounding the requirement of mutuality stems from a specific use of collateral estoppel: offensive collateral estoppel. Offensive collateral estoppel, in a non mutuality setting, essentially means that in a subsequent suit the plaintiff, who was not a party to the prior suit, may assert collateral estoppel against the defendant, who was a party to the prior suit, to preclude the defendant from relitigating an issue that the defendant had a full and fair opportunity to litigate in the prior suit. The United States Supreme Court allows such use of offensive collateral estoppel provided that the party asserting the collateral estoppel meets the burden of establishing that the same issue was litigated in the prior action and must also establish that there was a full and fair opportunity to litigate the issue.[59]

The Ohio Supreme Court cites to the Restatement (Second) of Judgments, which provides specific rules in applying offensive collateral estoppel, and to the rules in various other courts to show how such a use of collateral estoppel requires "time-consuming and costly investigations . . . into collateral issues that may be essentially irrelevant to the actual issues between the parties then present before the court."[60] Such investigation and

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[57] *Goodson*, 443 N.E.2d at 979.

[58] *Id.* at 982.

[59] Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

[60] *Goodson*, 443 N.E.2d at 983.

examination of the record in the prior suit "would often offset any savings derived from collateral estoppel, and may indeed increase the total amount of litigation" thereby depriving the doctrine of collateral estoppel of its primary purpose: "the economy of the judicial process."[61]

The court did find at least one exception to the requirement of mutuality based upon a reading of the *Hicks* case. The *Hicks* opinion did cite to the aforementioned Restatement (Second) of Judgments, but in the instant case, the Ohio Supreme Court read *Hicks* to state that when it can be shown "that the party defendant clearly had his day in court on the specific issue brought into litigation within the later proceeding, the non-party plaintiff [can] rely upon the doctrine of collateral estoppel to preclude the relitigation of that specific issue."[62] The court then proceeded to emphasize how Ohio case law has overwhelmingly adhered to a requirement of mutuality in collateral estoppel. The court also found that:

> [C]ollaterally estopping a party from relitigating an issue previously decided against it violates due process where it could not be foreseen that the issue would subsequently be utilized collaterally, and where the party had little knowledge or incentive to litigate fully and vigorously in the first action due to the procedural and/or factual circumstances presented therein.[63]

The court concluded its discussion of the mutuality issue by finding that mutuality as a requisite to the application of collateral estoppel effectively balances judicial economy with notions of due process and the right to be heard.

IV. THE MOST COMMON ARBITRAL RES JUDICATA AND COLLATERAL ESTOPPEL PROBLEMS IN OHIO CASE LAW

Having examined how the Supreme Court of Ohio has defined res judicata and collateral estoppel in terms of traditional judicial litigation, we can now focus on how Ohio courts have struggled to apply these judicial doctrines to arbitration proceedings. The real question is whether the results of arbitration proceedings should have the same res judicata and collateral estoppel effects that are given to final judgments in court proceedings. Thus, can one party to an arbitration proceeding collaterally estop another party by claiming that the issue was decided in a previous arbitration

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[61] *Goodson*, 443 N.E.2d at 983-84.

[62] *Id.* at 985.

[63] *Id.* at 986.

proceeding? Will the findings of arbitration have res judicata or collateral estoppel consequences in subsequent judicial litigation? By looking at some of the most common problems that have occurred in Ohio case law on these issues over the years, these and other questions can be answered. It should be noted that the cases discussed below are not meant to be cited as controlling on any given issue; they are merely illustrative of how Ohio courts have approached preclusive doctrines in the context of arbitration.

A. The Need for Final Judgment

In the case of *Mote v. Garrison,*[64] an Ohio Court of Appeals examined the issue of arbitration involving multiple parties and multiple claims. After a complaint was filed, one of the defendants moved to dismiss the claims against it on the basis of an arbitration clause. The trial court dismissed the claims against that party but did not state whether this dismissal was with or without prejudice. After an arbitration awarded damages for breach of contract, the victorious party sought to have the arbitration award confirmed in court. The dismissed party tried to assert res judicata and collateral estoppel, but the trial court "corrected" the entry of dismissal to state that the dismissal was without prejudice. The dismissed party claimed prejudicial error resulting from the "correction."[65] In response, the court of appeals stated that the judgment entry of dismissal "was not a final appealable order" and could be revised since it was not a judgment on the merits of the case.[66] Thus, the party asserting preclusion did so incorrectly because in the absence of a final appealable order on the merits of the case, neither res judicata nor collateral estoppel can be invoked.

Another case, *Jackson v. Republic-Franklin Insurance Co.,*[67] involved an insured party who received damages of $53,000 from a tortfeasor as the result of a trial. Then the insured party requested the insurance company to arbitrate the issue of the tortfeasor's liability in accordance with the policy provisions in an attempt to determine if arbitration would set the amount of liability closer to the limit of the policy: $100,000. The insurance company denied any duty to arbitrate and claimed that the insured party was bound by the previous jury award regarding the amount of damages.[68] The Ohio Court of Appeals in this case held that since the insured party "has already

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[64] No. 10-90-13, 1991 WL 256515 (Ohio Ct. App. Dec. 2, 1991).

[65] *Id.* at *1.

[66] *Id.* at *2.

[67] 584 N.E.2d 52 (Ohio Ct. App. 1990).

[68] *Id.* at 52-53.

had a final judgment entered in her favor against the negligent party"[69] and that because the insurance company had knowledge of the lawsuit, both were "bound by the judgment of the jury" and the doctrine of res judicata could apply.[70] Interestingly enough, this case may fall within the exception to traditional collateral estoppel noted by the *Goodson* court. Technically, the insurance company was not a party to the judicial determination but since it clearly had knowledge of the lawsuit and could have taken steps to protect its rights at that time, the insurance company could be bound by the judgment. Nor does this conflict with the Ohio Supreme Court's recognition of the limited exception because the insured party clearly had the opportunity and incentive to establish liability damages in the first action. In this case, then, the final judgment of the judicial action precluded the initiation of arbitration proceedings based upon the same issue.

The case of *Beghtel v. Harris*[71] raises the question of whether the findings of arbitration can be binding upon subsequent litigation or even subsequent arbitration. After the arbitration that determined that the Harrises had a view easement in favor of their property that required the Beghtels (who owned the lower lot on the hill) to top their trees, the trees continued to grow and the Harrises were forced to institute various actions to enforce the topping of the trees.[72] The Hamilton County Court of Appeals found that the arbitration order was binding for more than just one "topping" and that requiring "a subsequent arbitration of the same disputed matters every two to four years . . . would be unreasonable, expensive, and time-consuming."[73] The court then held that "the original decision of the arbitrators is res judicata."[74]

As these cases illustrate, arbitration can be precluded by a final judgment in litigation and vice versa. Also, a finally decided issue in arbitration can preclude subsequent arbitration. The common thread running throughout these cases is the need for finality in both arbitration awards and judgments. Without such finality, preclusion doctrines will not apply. Ohio courts commonly and constantly explain to litigants asserting res judicata and/or collateral estoppel that without a final judgment or order, such an assertion must fail.

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[69] Jackson, 584 N.E.2d at 54.

[70] *Id.* at 55.

[71] Nos. C-800232, C-800795, C-810188, C-800715, 1981 WL 10010 (Ohio Ct. App. Sept. 23, 1981).

[72] *Id.* at *1.

[73] *Id.* at *2.

[74] *Id.*

B. Full and Fair Opportunity to Litigate

One of the most common problems before Ohio courts arises in cases involving actions by insured motorists recovering judgments against uninsured motorists and then attempting to arbitrate the issue of liability to receive additional compensation within the limits of the policy. The controversy surrounding this issue arose primarily because of the case of *Motorists Mutual Insurance Co. v. Handlovic.*[75] In this case, the Ohio Supreme Court stated in its syllabus that:

> [I]f an insured, in good faith, prosecutes a lawsuit against an underinsured motorist with the knowledge of the insured's insurance company, *generally* both the insured and his insurance company are bound by any final judgment rendered as a result of such lawsuit that determines the liability of the underinsured motorist to the insured.[76]

The court found this to be true "regardless of whether the insurer has consented to the prosecution of the lawsuit."[77] How then, did the supreme court ignore its own requirement of mutuality before the preclusion doctrines can apply? Essentially, the court reasoned that, because the insurance company knew of the earlier proceeding, and because the insured party had already received a full and fair opportunity to litigate the issues of liability and damages, the insured party is estopped from seeking arbitration to relitigate that issue against the insurance company despite the insurance company's non-party status in the first proceeding.[78] Given the preclusive effect of its previous judgment, the supreme court further reasoned that even if arbitration between the insured and his insurer were compelled, the end result would be in vain. For example, if the arbitration proceeding awarded damages higher than the amount awarded in the earlier litigation, the court found that the insurer could invoke the shield of res judicata and would have the right to reinstate the original jury verdict. Thus, even after arbitration, the parties would be in exactly the same position. For this reason, the court allowed the insurance company the option to refuse arbitration of the issue.[79]

In *Wise v. Federal Kemper Insurance Co.*,[80] the Franklin County Court

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[75] 492 N.E.2d 417 (Ohio 1986).

[76] *Handlovic*, 492 N.E.2d at 417 (emphasis added)(citation omitted).

[77] *Id.* at 419.

[78] *Id.*

[79] *Id.* at 420.

[80] No. 87AP-244, 1987 WL 19561 (Ohio Ct. App. Nov. 5, 1987).

of Appeals attempted to reconcile the *Handlovic* decision with the requirement of mutuality. Here, the uninsured motorists sued by the insured party failed to answer the complaint, and a default judgment was entered. The default judgment was followed by a hearing concerning damages, a hearing about which the insured party's insurance company had no knowledge. The court of appeals, after discussing the requirement of mutuality, noted that this problem arises precisely because "an insurer with a subrogated interest is not joined in a suit as required by [the Ohio Rules of Civil Procedure]."[81] Even if joinder of the insurance company was not mandated, the court of appeals still found *Handlovic* distinguishable because the original liability determination in that case did not trigger operation of the underinsured motorist provision of the insurance company's contract with its insured, since the other driver's insurance company paid all of the damages awarded by the jury.[82]

In the *Wise* case, however, the judgment in the original suit would affect the insurance company's contract, since payment would be made under the uninsured motorist provision of the contract. Given that the other side did not pay any damages, as in *Handlovic*, the insurance company would be obligated to pay if estopped from arbitrating the issues of liability and damages by the judgment in the original suit.[83] The court then discussed the *Goodson* exception based upon the *Hicks* case and noted that the exception should only apply where the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous action. In the instant case, the use of a default judgment and a hearing on damages of which the insurance company was totally unaware meant that the insurance company "had no opportunity to fully and fairly litigate the issue[s] of liability and damages."[84]

In *Wise*, the court found two reasons why an insurance company should not be precluded from arbitrating the issues of liability and damages decided in an earlier court proceeding. The first was a finding that the use of the word "generally" in *Handlovic* prevented Handlovic from establishing an absolute rule in this factual situation.[85] Even more compelling than that finding was the argument that the fact situation clearly established the lack of a full and fair opportunity by the insurance company to litigate the issue in the earlier action.[86]

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[81] *Wise*, No. 87AP-244, 1987 WL 19561 *3

[82] *Id.* at *4.

[83] *Id.* at *5.

[84] *Id.*

[85] *Id.* at *4.

[86] *Wise*, No. 87AP-244, 1987 WL 19561 at *5.

As long as the Supreme Court of Ohio continues to require mutuality while recognizing a limited exception to that requirement, this problem will present itself again. This author believes that the Franklin County Court of Appeals correctly established that the *Handlovic* finding is not a rule to be applied regardless of whether a full and fair opportunity existed to litigate the issue. *Goodson* made it clear that while there may be an exception to mutuality in limited circumstances, such circumstances must indicate that the underlying policies of res judicata and collateral estoppel — fairness and opportunity to litigate — are clearly served.

C. The Effect of Preclusion on Issues Not Raised

Probably the most prevalent problem in the case law on collateral estoppel and res judicata is whether, in the context of arbitration, there can be preclusion of issues that might have been raised in the arbitration but were not. Essentially, this is more of a res judicata issue than a collateral estoppel issue, since issues actually litigated can clearly be precluded even on the basis of arbitral findings. Though there are numerous cases dealing with this issue, this author has included only two to illustrate how Ohio courts have commonly dealt with this problem.

The Belmont County Court of Appeals, in *Kuchinka Chevrolet, Inc. v. Evick Construction, Inc.*,[87] directly questioned whether res judicata applies when there are "multiple causes of action and a judgment is only rendered on some of the issues."[88] In this case, the parties had already arbitrated one issue, and one of the parties sought a second arbitration to examine another issue. The court noted that:

> [I]t would have been obviously more expeditious if all matters were arbitrated at the same time. The question now before us is whether or not there is a statutory prohibition or a legal prohibition preventing the appellant from bringing again an arbitration demand. Unless we, by judicial fiat at this time, carve out such a rule, there is none presently existing in law either by statute or by following the law as it applies to judgments by judicial tribunals. The doctrine . . . [of] res judicata deals specifically with the matters brought before the arbitrators and not additionally what could have been brought to them.[89]

The court found some authority for the proposition that res judicata in

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[87] No. 80-B-37, 1981 WL 4754 (Ohio Ct. App. Aug. 11, 1981).

[88] *Id.* at *1.

[89] *Id.* at *2.

arbitration should be limited to matters actually "litigated," but relied heavily on public policy notions of fairness to the parties:

> It may well be (to avoid prolonged litigation as in this case) that the legislature may want to address this question, but until such time, we conclude that the answer to the issue herein is to let the parties arbitrate on the merits rather than on balance to strike a blow for mandatory and compulsory arbitrations of all the issues at any given time in arbitration, especially as herein where the appellant, a lay person, could not have known of the doctrine of res judicata . . . .[90]

Based on the policy of fairness to the litigants and the questionable status of the law in this area, this court chose to deny preclusion and allow the litigants to arbitrate again issues that could have been — but were not — raised in the first arbitration.

The same issue arose in the case of *Cleveland v. Association of Cleveland Fire Fighters,*[91] except that here the arbitrators in the first arbitration expressly declined to decide certain issues, and a later court claimed that those issues could not be litigated again due to res judicata. The Cuyahoga County Court of Appeals asserted that, for preclusive purposes, arbitration is similar to a court judgment as to matters actually decided.[92] This court, however, chose to rely on the contractual basis for arbitration rather than on notions of fairness: "Since arbitrators derive their authority from limited contractual terms and their decisions are not appealable, they should not have the broader claim-preclusion effect attributed to court cases."[93]

Although Ohio courts have almost unanimously reached the conclusion that the doctrine of res judicata should not preclude the litigation of issues which could have been raised but that were not decided in an earlier arbitration, the courts reach this conclusion by different reasoning. Interestingly enough, the courts have essentially emasculated the doctrine of res judicata in terms of arbitration by limiting preclusion in arbitration to a collateral estoppel effect. Until the legislature or the Ohio Supreme Court addresses the use of res judicata in arbitral proceedings, it still remains possible that a court might find a valid reason for applying the broad doctrine of res judicata to preclude further arbitration of matters that could — or should — have been brought in the earlier arbitration.

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[90] *Evick*, No. 80-B-37, 1981 WL 4754 at *3.

[91] 485 N.E.2d 792 (Ohio Ct. App. 1984).

[92] *Id.* at 798.

[93] *Id.*

V. The Argument for Restraint in Arbitral Preclusion: The Relationship Between the Underlying Policies of Preclusion and the Forum Differences

Oddly enough, none of the Ohio cases examining the use of preclusion in arbitration purport to analyze whether preclusion should even be applied to arbitration. In Ohio case law, the courts appear to have presumed that res judicata and collateral estoppel apply to arbitral proceedings as well as judicial proceedings. However, there are several reasons why Ohio courts should exercise more restraint in applying preclusive doctrines to arbitration. The following discussion will emphasize how the underlying policies of preclusion and the differences between arbitral and judicial proceedings favors a more discriminating approach toward arbitral preclusion than currently taken by Ohio courts.

A. The Substantive Procedural Differences Between the Forums

Clearly, there are differences between arbitration and litigation. Arbitration is a means of alternative dispute resolution, a function supplemental to traditional litigation. "While some arbitrations are elaborate, more typically they are less formal than court litigation."[94] There are many differences between arbitration and litigation:

> As a practical matter, discovery is often limited or unavailable. Arbitrators are not bound by the rules of evidence and indeed may draw on their personal knowledge in making awards. Witnesses need not be required to testify under oath. If a written record of a proceeding exists, it need not be as complete as in litigation. Arbitrators are not required to write decisions that disclose the facts or reasons behind their awards, and in fact are often discouraged from doing so.[95]

Furthermore, "arbitrators are legally free to render compromise awards rather than traditional 'all or nothing' decisions," and research has suggested that arbitrators do tend more toward compromise between the parties.[96] Such compromise awards are not findings "with respect to any

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[94] Hiroshi Motomura, *Arbitration and Collateral Estoppel: Using Preclusion to Shape Procedural Choices*, 63 TUL. L. REV. 29, 36 (1988).

[95] *Id.*

[96] G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 633 (1988).

factual issue," but are "merely a solution to a conflict."[97]

As illustrated above, one of the most commonly cited differences between arbitration and litigation concerns the powers of the arbitrator. Unlike arbitration, judicial proceedings operate in a system subject to appellate review, and parties develop the crucial issues and introduce the evidence to an independent fact finder for resolution of the legal and evidentiary conflicts.[98] In arbitration, the final judgment is rendered by the arbitrator, "who need not be a judge or lawyer nor need he possess any legal skills at all."[99] Also, an arbitrator "is more likely to assess the entire relationship between the parties, rather than to confine the inquiry to the particular claim asserted."[100] Though the arbitration may be limited by the terms of the contractual agreement between the parties, in the absence of such guidelines, arbitrators are generally free to exercise broad discretion in resolving the dispute.[101]

Another procedural difference that presents a major problem is the lack of a written record, or if such a record should exist, the vagueness of the record. "[A]rbitration awards are frequently unexplained and difficult to interpret."[102] At present, many arbitrators merely announce an award without furnishing any written opinion to substantiate the findings of the award.[103] "Indeed, arbitration organizations discourage written opinions for fear that such explanations make awards more vulnerable to attack by the losing party."[104] The end result is confusion in the courts about whether preclusion should apply:

> In some cases, courts have refused to apply collateral estoppel to preclude litigation when there is insufficient information in the award to clearly determine which issues were litigated in the arbitration. Thus, where an arbitration award gives no indication of the basis for the award, a court cannot determine which issues were actually litigated and which were

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[97] Shell, *supra* note 96, at 659.

[98] Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 452 (1983).

[99] Melissa Hope Biren, Note, *Res Judicata/Collateral Estoppel Effect of a Court Determination in Subsequent Arbitration*, 45 ALB. L. REV. 1029, 1042 (1981).

[100] Motomura, *supra* note 94, at 38.

[101] Biren, *supra* note 99, at 1042-43.

[102] Shell, *supra* note 96, at 659.

[103] Ranlet Shelden Willingham, Comment, *Securities Arbitration: Issues After* McMahon, 24 WAKE FOREST L. REV. 409, 427 (1989).

[104] Shell, *supra* note 96, at 659-60.

critical and necessary to the award.[105]

At least in the case of arbitration followed by litigation, then, the procedures followed by arbitrators often make it difficult for courts to impose preclusion.

Nowhere is the broad discretion and informality of arbitration more evident than in the type of evidence that can be introduced in an arbitration proceeding. Arbitrators are not bound by substantive law nor by rules of evidence,[106] and, consequently, "arbitrators may conduct the hearing with a commonsense notion of what is important in resolving the case and thus may accept all evidence offered by the parties."[107] It has been noted that "an arbitrator who adopts a liberal admission standard is less likely to have his award overturned by a reviewing court than is one who adopts a restrictive standard."[108] Nevertheless, some schools of thought do encourage arbitrators to follow the rules of evidence and it should be noted that the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* requires arbitrators to "provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence."[109] The fact still remains, however, that arbitrators are not bound by the rules of evidence and are free to consider evidence that might not meet judicial standards, such as rules concerning relevance and hearsay.

B. The Different Goals of Arbitration

These above-mentioned differences are just a few of the procedural differences that almost uniformly exist between arbitration and litigation throughout the United States. These differences do serve a purpose. Arbitration is meant to proceed more quickly than traditional litigation and to provide a less adversarial resolution to disputes. Arbitration proceedings "are not structured with the same goals in mind as those of formal court-like proceedings, especially with regard to issue determinations."[110] Using arbitration, parties can essentially create their own "'system of private law' to meet their individual needs and desires by voluntarily choosing

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[105] Willingham, *supra* note 103, at 430.

[106] Biren, *supra* note 99, at 1043.

[107] MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 3 (2d ed. 1987).

[108] *Id.* at 4.

[109] *Id.*

[110] Perschbacher, *supra* note 98, at 452.

procedures unique to the arbitral process rather than resorting to the courts."[111] The following excerpt discusses the different goals sought by arbitration and litigation and the means used for achieving those goals:

> To the extent that notions of efficiency and reduction of caseloads inevitably conflict with concepts of fairness and substantial justice for the individual litigant, the nature of this conflict differs between judicial forums and administrative or arbitral forums. Justice and fairness in judicial forums are viewed in terms of formal rituals supervised by an impartial and independent judiciary. These rituals are governed by rules of evidence and procedure and by case law. Justice and fairness in administrative and arbitral forums, however, have traditionally been viewed in terms of permitting citizens access to a simplified, expedited and informal dispute resolution system. Indeed, elaborate pre-trial discovery and lengthy evidentiary hearings with technical rules of evidence are often inimical to achieving administrative and arbitral justice.[112]

Given the more informal processes employed by arbitration and the different goals therein, the courts should, at the least, tread cautiously before applying traditional judicial doctrines to arbitration. After all, "[u]nder the present state of the law, the determinations of arbitrators have implications far beyond the case before the arbitrator," since "decisions of arbitrators have far-reaching res judicata and collateral estoppel effects."[113] The goals of quick, effective resolution of disputes in an informal, less adversarial manner, while laudable, may not always coincide with the underlying goals of claim and issue preclusion. To restate this, the goal of efficient solutions to conflicts may not mesh with the goal of a full and fair opportunity to litigate a claim or issue.

VI. RECOMMENDATIONS TO THE OHIO COURTS

In the rush to embrace the benefits of alternative dispute resolution, the Ohio courts should not sacrifice fundamental fairness upon the altar of economy and quickness of resolution. Res judicata and collateral estoppel should not be used to preclude parties from an opportunity to litigate or

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[111] Biren, *supra* note 99, at 1039.

[112] Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?*, 55 FORDHAM L. REV. 63, 87 (1986).

[113] Arthur D. Spatt, *Res Judicata and Collateral Estoppel*, ARB. J., June 1987, at 61, 63.

arbitrate an issue unless the circumstances clearly indicate that the parties received a full and fair opportunity to litigate or arbitrate the issue at a previous proceeding. For Ohio courts to remain in the forefront of developing alternatives to traditional litigation, they should consider several factors before indiscriminately applying the principles of res judicata and collateral estoppel.

First, the courts and arbitrators should look beyond the mere terms of the contract to ascertain the parties' intent. While it can easily be established that a party consented to arbitration, it is not so clear that the same party truly understood the potentially far-reaching effects of such an arbitration. If an arbitrator or judge can clearly establish that a party to an arbitration agreement lacked any knowledge of the potential preclusive effects of the arbitration, then the judge or arbitrator should consider that fact in determining whether preclusion applies. Perhaps the courts could encourage the use of a standard clause in arbitration agreements that require specific notice to each party of the potential preclusive effects of any arbitration proceeding. While not determinative, the intent and/or knowledge of the parties may make the use of res judicata or collateral estoppel fundamentally unfair.

In so doing, Ohio courts would adhere to their stated policies upon which res judicata and collateral estoppel are based. Notions of judicial and party economy should not overcome notions of fairness to the parties. In cases like *Goodson* and *Norwood*, the Supreme Court of Ohio clearly stated that Ohio favors the use of res judicata and collateral estoppel as long as it comports with traditional notions of due process and fairness to the parties. "While res judicata and collateral estoppel play a vital role in protecting the integrity of the judicial system, they should not be applied when to do so would undermine their own usefulness and the utility and essential characteristics of arbitration."[114] The courts, then, should not look just to see if the standard requirements of res judicata and collateral estoppel have been complied with, but also whether applying preclusion produces a result in line with Ohio's particular view of res judicata and collateral estoppel.

The courts should examine more carefully the procedural differences between the forums of litigation and arbitration. After all, "[s]atisfaction of the full and fair opportunity test requires a comparison of the procedural opportunities available to the litigants in the initial and subsequent forums."[115] If, in a certain case, it is easily determinable that the arbitration proceeding lacked some of the basic safeguards of fairness, then preclusion should be denied.

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[114] Biren, *supra* note 99, at 1059.

[115] Carlisle, *supra* note 112, at 68.

The problem with this request is that it results in arbitration that looks suspiciously like litigation. This is so because the only way a later court examining an earlier arbitration can determine if fundamental fairness was achieved is by looking at the record. As noted above, there is a substantial dearth of informative records in arbitration proceedings. One could require that more formal, written records be kept of the arbitration, but this only results in a weakening of some of the basic attributes of arbitration. Keeping more complete records would sacrifice arbitral economy. The arbitration would then "become more formalized and rigid as lawyers import their usual procedures into the process."[116] This is a difficult problem because of the many methods of alternative dispute resolution that exist and the different procedures followed in each. Yet, it would be anomalous to request courts to examine the case for procedural deficiencies without a means for doing so.

Until a better solution is offered, Ohio courts should require either (1) a standard notice, at the beginning of arbitration, to the parties that they may wish to request, at their own expense, a copy of the proceedings due to the possibility of preclusion, or (2) a written record of the proceedings that provides enough information to establish a rebuttable presumption that the proceeding accorded the parties fundamental fairness. Since the Ohio courts already require that the party asserting error in the arbitration provide a transcript of the arbitration, at the party's expense,[117] this rule would not substantially burden the parties any further. The warning requirement has the advantage of ensuring that the party asserting error in the arbitration could not claim prejudice due to the lack of a transcript. Without the warning, the second requirement provides that, in contested cases where neither party requested a transcript, the reviewing court has a modicum of information beyond the award from which to establish whether a party failed to receive due process through the use of improper preclusion.

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[116] REMOVING THE BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION II - 67 (Vermont Law School Dispute Resolution Project ed., 1994).

[117] Cleveland Constr. Interiors, Inc. v. Ruhlin Co., No. 90-L-14-060, 1991 WL 54150, *2 (Ohio Ct. App. Apr. 5, 1991).

Finally, Ohio courts should more carefully examine the use of res judicata and collateral estoppel in arbitral proceedings. Merely because the arbitration allegedly followed certain recognized procedures does not establish that the parties received a full and fair opportunity to litigate their claims or issues. Asking Ohio courts to scrutinize closely the proceeding for fairness and procedural deficiencies imposes no further burden on the courts since, according to Ohio case law, the doctrines of preclusion require that a party be accorded a full and fair opportunity to have his day in court/arbitration. At the least, the courts should be more circumspect in analyzing arbitration because the goals of arbitration do not correspond to the goals of preclusion. Litigating a claim or issue completely may be substantially more difficult when the proceeding itself urges efficiency and compromise. Ohio courts should not accept, at face value, that just because the former proceeding was arbitration, preclusion can easily apply.

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